

**LET FIFTY FLOWERS BLOOM:  
TRANSFORMING THE STATES INTO LABORATORIES OF  
ENVIRONMENTAL POLICY**

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Competitive federalism attempts to mimic, in the political arena, the dynamics of a well-functioning economic market. It differs not only from centralized, monopolistic regulation but also from mere “devolution”—that is, the state administration of federally designed and funded programs. Compared to a centralized system, competition among states offers the benefit of diversity, which makes it possible to satisfy the preferences of a larger number of citizen-consumers. Unlike “states’ rights” federalism, competitive federalism seeks to discipline (rather than empower) state governments. The prospect that productive citizens and enterprises might sort themselves into more hospitable jurisdictions restrains state governments and acts as a spur to policy innovation.

Competitive federalism’s advantages pertain not only to economic matters but to moral and social issues as well. Especially beneficial with regard to intensely controversial issues (such as drug and marriage laws), federalism provides a sensible, efficient, and tolerant means of sorting out our differences.

The benefits of government competition can be observed at all levels. Locally, homebuyers and parents routinely sort themselves into jurisdictions that provide favorable packages of government services at acceptable prices. At the state level, successful experiments with airline deregulation, welfare reform, and school choice (among many other examples) have generated public support for innovative policies and reformed rigid, ossified national institutions. On the international scale, the dramatically increased mobility of capital (and to some extent labor) has constrained national governments’ ability to administer inflationary experiments.

While competitive federalism’s attractions are readily apparent, its practical details and political implementation present considerable difficulties. Spillover effects (such as transboundary air pollution), economies of scale, or “network” externalities may in some instances render a central, harmonizing solution preferable to state-by-state variation. Moreover, efficient competition among states, much like economic competition among private market participants, depends on complex rules and institutional arrangements. For example, states must be precluded from “exporting” the costs of their regulatory regimes into foreign jurisdictions. In an interdependent economy, even that relatively simple ground rule can pose vexing problems.

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## EXECUTIVE SUMMARY

The environmental regulatory system in the United States is broken and needs repair. Federal environmental programs exhibit most of the failings of Soviet-style command-and-control systems: excessive rigidity, inefficiency, diminishing marginal returns, poor prioritization, and so on. Planning for environmental protection encompasses all the intricacy and specialized information required for economic planning on top of the need for site-specific information related to particular environmental concerns. The local or regional nature of many environmental problems means that local knowledge and expertise are necessary to develop proper solutions. Such localized knowledge is simply beyond the reach of even the most intrepid federal regulators.

The most essential reforms of environmental policy would decentralize decision-making authority and responsibility. Decentralization can enhance the efficiency and effectiveness of environmental controls. Returning much environmental authority to the states would foster innovation and focus greater attention on local environmental concerns and conditions, while enhancing accountability for environmental outcomes. Indeed, states are already on the frontlines of developing new and innovative approaches to environmental protection.

This paper outlines a reform proposal designed to reopen the states as laboratories of environmental policy. The proposal, called “ecological forbearance,” would create a formal mechanism that offers states the opportunity to experiment and innovate in environmental policy. Under this proposal, states would petition the Environmental Protection Agency (EPA) seeking the forbearance of any standard or requirement imposed by or pursuant to an environmental statute. State petitions could seek waivers of legal requirements that waste resources or impede environmental progress. EPA would review forbearance petitions in a notice and comment rulemaking. In effect, ecological forbearance would grant EPA the formal legal authority to allow state-level experimentation and innovation in environmental protection.

While there is broad support for environmental reform, not all commentators advocate dramatic decentralization of environmental regulation. Some argue that

interjurisdictional competition or the presence of interstate externalities are reasons to maintain federal preeminence in environmental policy-making. These arguments against decentralization are often overstated, however, and do not undermine the case for ecological forbearance or another means of decentralizing environmental decision-making. There is little evidence of a “race-to-the-bottom” in environmental policy. The existence of environmental “public goods” may justify federal involvement, but cannot justify federal regulation, as such. While pollution problems can spill over state boundaries, few existing federal regulations address such concerns, and there are many environmental problems for which such spillover concerns are relatively inconsequential. If the environmental progress of the past 30 years is to continue, new approaches must be adopted. Yet until new approaches are tried, many aspects of what constitutes the “ideal” approach to environmental protection--or simply the nature of the trade-offs that we face--will be obscured. If we are to make our way out of the environmental policy morass in which we find ourselves, we need to discover more about environmental problems and their solutions. Allowing interjurisdictional competition is the surest, and safest, means to achieve that end.

## I. THE STATE OF ENVIRONMENTAL PROTECTION

The environmental regulatory system in the United States is broken and needs repair. The existing regulatory architecture is over two decades old and has not aged particularly well. Whether or not federal regulations deserve credit for the environmental successes of the past three decades, they are no longer capable of delivering environmental progress at an acceptable cost. “The current system, consisting mainly of end-of-pipe, technology-based regulations, is inadequate for the challenges ahead,” observes Karl Hausker, director of the Enterprise for the Environment project.<sup>1</sup> The most recent report on environmental policy from the National Academy of Public Administration, *Environment.Gov*, concurred: “The regulatory programs in place in this country simply cannot address [current environmental] problems at a price America can

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<sup>1</sup> Karl Hausker, *Reinventing Environmental Regulation: The Only Path to a Sustainable Future*, 29 ENVTL. L. REP. 10148, 10148 (Mar. 1999).

afford.”<sup>2</sup> A recent top-to-bottom review of environmental regulation by Resources for the Future reached similar conclusions, finding the existing system of pollution control fragmented and inefficient, overly rigid and unnecessarily complex.<sup>3</sup> This report found that many existing regulations impose excessive costs to generate meager returns, and that such problems are often due to inadequate information and poor prioritization.

These are hardly exceptional views. The United States Advisory Commission on Intergovernmental Relations reports that “[f]ederal rules and procedures governing decision-making for protecting the environment often are complex, conflicting, difficult to apply, adversarial, costly, inflexible and uncertain.”<sup>4</sup> The Environmental Protection Agency (EPA) alone accounts for nearly 10 percent of the federal government’s regulatory activity; approximately one in five new EPA regulations are expected to cost more than \$100 million each to implement.<sup>5</sup> All told, federal environmental rules cost an estimated \$148 billion.<sup>6</sup> Yet EPA regulations are substantially less cost-effective, in terms of dollars expended per life saved, than those of other agencies, in some cases by orders of magnitude.<sup>7</sup> Moreover, EPA does a poor job of establishing priorities in accordance with independent evaluations of public health risks and environmental needs.<sup>8</sup> When it comes to environmental regulations, Americans pay too much and get too little.

Criticisms of current approaches to environmental policy span the ideological spectrum. Analysts at the Progressive Policy Institute, a think tank affiliated with the

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<sup>2</sup> NATIONAL ACADEMY OF PUBLIC ADMINISTRATION, ENVIRONMENT.GOV: TRANSFORMING ENVIRONMENTAL PROTECTION FOR THE 21<sup>ST</sup> CENTURY, 11 (2000).

<sup>3</sup> J. CLARENCE DAVIES AND JAN MAZUREK, REGULATING POLLUTION: DOES THE U.S. SYSTEM WORK? (RFF, 1997).

<sup>4</sup> U.S. ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, INTERGOVERNMENTAL DECISIONMAKING FOR ENVIRONMENTAL FOR ENVIRONMENTAL PROTECTION AND PUBLIC WORKS 1 (1992).

<sup>5</sup> In October 2000, there were 4,699 entries in the *Unified Agenda of Federal Regulations*. Of these, 462 were for the EPA. Of those rule-makings listed in the October 2000 *Unified Agenda*, 158 were expected to cost more than \$100 million per year. Thirty-one of these were EPA rulemakings, more than any other agency or department. Clyde Wayne Crews, Jr., *Ten Thousand Commandments: An Annual Policymaker’s Snapshot of the Federal Regulatory State, 2001 Edition*, 17, 19 (Competitive Enterprise Institute, March 2001).

<sup>6</sup> U.S. GENERAL ACCOUNTING OFFICE, MAJOR MANAGEMENT CHALLENGES AND PROGRAM RISKS – ENVIRONMENTAL PROTECTION AGENCY, GAO-01-257 (January 17, 2001) (“GAO EPA REPORT”).

<sup>7</sup> See, e.g., Robert W. Hahn, *Regulatory Reform: What do the Government’s Numbers Tell Us? in RISKS, COSTS, AND LIVES SAVED: GETTING BETTER RESULTS FROM REGULATION* 228-235 (R. Hahn ed., AEI Press, 1996).

<sup>8</sup> See, e.g., MARC K. LANDY, MARC J. ROBERTS AND STEPHEN R. THOMAS, *THE ENVIRONMENTAL PROTECTION AGENCY: ASKING THE WRONG QUESTIONS – FROM NIXON TO CLINTON*, 2ND ED. (Oxford University Press, 1994).



Democratic Leadership Council, note that existing environmental regulations “are increasingly inefficient in a fast-paced economy and too rigid” to address modern environmental concerns.<sup>9</sup> The Clinton-Gore Administration similarly acknowledged the need to modernize existing regulatory programs. The *Reinventing Environmental Regulation* report found,

Prescriptive regulations can be inflexible, resulting in costly actions that defy common sense by requiring greater costs for smaller returns. This approach can discourage technological innovation that can lower the costs of regulation or achieve environmental benefits beyond compliance.<sup>10</sup>

Critics from the political right present similar analyses, albeit in somewhat starker terms.

One problem of particular concern is that existing federal environmental regulations often impede environmental progress. Hazardous waste regulations can discourage waste reduction and recycling.<sup>11</sup> Superfund liability rules discourage cleanup and redevelopment in impoverished areas.<sup>12</sup> Federal land-use controls under the Endangered Species Act penalize habitat conservation.<sup>13</sup> Prescriptive technology mandates lock in older, less efficient technologies and chill environmental innovation.<sup>14</sup> While environmental regulatory requirements have increased, investment in new environmental technologies has fallen.<sup>15</sup>

It is no longer “anti-environmental” to criticize existing regulatory programs or call for radical reforms. Supporting clean water does not mean supporting the Clean Water Act (CWA). Saving endangered species does not require saving the Endangered

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<sup>9</sup> Debra S. Knopman & Marc K. Landy, *A New Model of Governance*, BLUEPRINT (Fall 2000), <http://www.ppionline.org/ndol> (visited December, 2001).

<sup>10</sup> William J. Clinton & Albert Gore, *Reinventing Environmental Regulation*, NAT'L PERFORMANCE REV., Mar. 1995, at 2.

<sup>11</sup> See Jonathan H. Adler, *The Hazards of Hazardous Waste Regulation*, REG., Spring 1993, at 13-15.

<sup>12</sup> See Dana Joel Gattuso, *Revitalizing Urban America: Cleaning Up Brownfields* (CEI, July 2000).

<sup>13</sup> See Dean Lueck, *The Law and Politics of Federal Wildlife Preservation*, in POLITICAL ENVIRONMENTALISM: GOING BEHIND THE GREEN CURTAIN 107-10 (Terry L. Anderson ed., 2000); Dean Lueck & Jeffrey A. Michael, “Preemptive Habitat Destruction under the Endangered Species Act,” working paper, Montana State University, March 2000 (indicating that timber companies have shortened their cutting rotations in response to habitat regulations, resulting in long-term reductions in species habitat).

<sup>14</sup> *Barriers to Environmental Technology Innovation and Use* (Washington, D.C.: Environmental Law Institute, January 1998).

<sup>15</sup> See Kurt Stephenson & Leonard Shabman, *The Trouble with Implementing TMDLs*, REGULATION, Spring 2001, at 28, 30 (reporting that “venture capital financing for environmental innovation fell from \$200 million in 1990 to \$30 million in 1996).

Species Act (ESA). Today there is an opportunity to reconsider some of the premises on which current environmental programs are founded and move environmental policymaking in new directions. Innovation in environmental protection could produce substantial environmental gains, without the waste and inefficiency of first-generation environmental controls.

Prescriptions for environmental reform vary. Nonetheless, most recognize excessive centralization as a fundamental problem with the existing regulatory regime. Current environmental programs exhibit most of the failings of Soviet-style command-and-control systems: excessive rigidity, inefficiency, diminishing marginal returns, poor prioritization, and so on. Given these problems, the most essential reforms of environmental policy would decentralize decision-making authority and responsibility. Decentralization can enhance the efficiency and effectiveness of environmental controls. No less important, decentralization can allow for experimentation with alternative approaches to environmental protection with which there is relatively little practical experience. Reforms that merely “reinvent” environmental policy without breaking Washington, D.C.’s vice grip on environmental policy are deckchair exercises that are destined to fail.

Decentralization can be achieved in various ways, ranging from the transfer of greater authority to state and local governments to the expansion of market institutions in the ecological sphere. This paper outlines a reform proposal designed to reopen the states as laboratories of environmental policy. State regulators are on the front lines for the enforcement of much environmental regulation. Nonetheless, key priority-setting and decision-making authority remains centralized in Washington, D.C. What little interest the Environmental Protection Agency shows in reform is hampered by the rigidity and complexity of its own statutory mandates. Centralized authority in the hands of EPA and other federal agencies is itself the source of substantial “inflexibility and inertia.”<sup>16</sup> Genuine ecological experimentation, starting at the state and local level, is required to bring about the next generation of environmental reforms.

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<sup>16</sup> HENRY N. BUTLER & JONATHAN R. MACEY, USING FEDERALISM TO IMPROVE ENVIRONMENTAL POLICY 1 (1996).

Part II of this paper fleshes out the argument for decentralization, highlighting why vesting primary authority for most pollution control problems in the hands of state and local governments is preferable to maintaining control in Washington, D.C. Part III discusses some of the “reinvention” and decentralization efforts to date, and how they have failed to foster sufficient innovation to address current environmental needs. These failures suggest the need for more dramatic reform than has been considered to date. Part IV outlines a specific policy proposal: ecological forbearance. This proposal, modeled on the flexibility-enhancing provisions of the Communications Act, would provide states a means of obtaining legal authority to develop and implement new environmental policy ideas and set new environmental priorities. Part V discusses the dominant critiques of devolving regulatory authority to the states and how, if at all, these criticisms should affect the forbearance proposal.

## II. THE NEED FOR DECENTRALIZATION

Decentralizing authority and responsibility for environmental policy is the single most important step toward addressing the inadequacy of existing environmental regulations. Current programs fail to allow state and local governments sufficient flexibility to tailor their programs to local needs. State experimentation occurs only along the margins of environmental policy. The central decisions in environmental policy, such as what constitutes a “safe” exposure or “clean” site, are still made in Washington, D.C. State and local officials increasingly complain that federal laws and regulations force them to implement environmental programs that make little sense in their part of the country, diverting resources from more pressing concerns. As a Columbus, Ohio, health official complained in the 1990s, “The new rules coming out of Washington are taking money from decent programs and making me waste them on less important problems.”<sup>17</sup>

State environmental agencies must follow federal dictates governing minute details of regulatory programs—even where such dictates serve no pollution control purpose. Federal regulations require states to provide for the requisite amount of public

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<sup>17</sup> Quoted in Keith Schneider, *How a Rebellion over Environmental Rules Grew from a Patch of Weeds*, NY TIMES (March 24, 1993).

participation, facilitate litigation by activist groups, and even ensure that permitting programs meet EPA's standards for environmental justice. Although the Clean Water Act speaks of preserving and protecting the states' primary role in pollution control, "under the present scheme of the Act, the states generally have a choice between acquiescing to federal proscriptions or ultimately facing the prospect of federal preemption."<sup>18</sup> States can seek "waivers" or "variances" under some environmental statutes, but only if they meet detailed conditions. Though generally described as "cooperative federalism," the relationship between the states and federal government in environmental policy often resembles that between a feudal lord and his serf.<sup>19</sup> It should thus be no surprise that state officials "resent what they believe to be an overly prescriptive federal orientation toward state programs, especially in light of stable or decreasing grant awards."<sup>20</sup>

The Environmental Council of the States (ECOS), an association of state environmental agencies, calls for "the long overdue transfer of power in the state-federal partnership."<sup>21</sup> They are not alone. In 1995, and again in 1997, the National Academy of Public Administration concluded that "EPA and Congress need to hand more responsibility and decision-making authority over to the states."<sup>22</sup> David Schoenbrod, a former attorney with the Natural Resources Defense Council concludes, "The popular desire for a clean environment can be realized with far more common sense by returning control to local government."<sup>23</sup>

These calls for decentralization of environmental policy are well founded. The current, overly centralized, rigid and inefficient environmental regime fails to take advantage of the efficiencies inherent in the federalist system. Returning much

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<sup>18</sup> Mark T. Pifher, *The Clean Water Act: Cooperative Federalism?* NATURAL RESOURCES & ENV'T 12 (Summer 1997) at 34.

<sup>19</sup> For a broader discussion of cooperative federalism in the context of environmental policy, see Jonathan H. Adler, Comment, *The Green Aspects of Printz: The Revival of Federalism and Its Implications for Environmental Law*, 6 GEO. MASON L. REV. 573, 575-582, 616-625 (1998).

<sup>20</sup> DENISE SCHEBERLE, FEDERALISM AND ENVIRONMENTAL POLICY: TRUST AND THE POLITICS OF IMPLEMENTATION 186 (1997).

<sup>21</sup> Mary A. Gade, *When the States Come Marching In*, NATURAL RESOURCES & ENV'T 10 (Winter 1996) at 3.

<sup>22</sup> NATIONAL ACADEMY OF PUBLIC ADMINISTRATION, SETTING PRIORITIES, GETTING RESULTS: A NEW DIRECTION FOR THE ENVIRONMENTAL PROTECTION AGENCY (1995), cited in NATIONAL ACADEMY OF PUBLIC ADMINISTRATION, RESOLVING THE PARADOX OF ENVIRONMENTAL PROTECTION 5 (1997) ("NAPA REPORT").

<sup>23</sup> David Schoenbrod, *Time for the Federal Aristocracy to Give Up Power*, Policy Study No. 144 (St. Louis, Center for the Study of American Business, February 1998), at 2.

environmental authority to the states would foster innovation and focus greater attention on local environmental concerns and conditions, while enhancing accountability for environmental outcomes, particularly where environmental concerns are local in nature. Indeed, there are several reasons for moving toward a more “federalist” environmental policy.

A. *The “Knowledge Problem”*

Almost 25 years ago, Richard Stewart noted the “sobering fact . . . that environmental quality involves too many intricate, geographically variegated physical and institutional interrelations to be dictated from Washington.”<sup>24</sup> If anything, this “sobering fact” is even more well established today as environmental problems have become more variable and complex. Economic central planning fails because it is impossible for centralized planners to have command of enough time- and place-specific information to make efficient choices. As Nobel-winning economist F. A. Hayek explained,

The knowledge of the circumstances of which we must make use never exists in concentrated or integrated form but solely as the dispersed bits of incomplete and frequently contradictory knowledge which all the separate individuals possess. The economic problem of society is not merely a problem of how to allocate “given” resources—if “given” is taken to mean given to a single mind which deliberately solves the problem set by these “data.” It is rather a problem of how to secure the best use of resources known to any of the members of society, for ends whose relative importance only these individuals know. Or, to put it briefly, it is a problem of the utilization of knowledge which is not given to anyone in its totality.<sup>25</sup>

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<sup>24</sup> Richard B. Stewart, *Pyramids of Sacrifice?: Problems of Federalism in Mandating State Implementation of National Environmental Policy*, 86 YALE L.J. 1196, 1266 (1977).

<sup>25</sup> F. A. Hayek, *The Use of Knowledge in Society*, 35 AMER. ECON. REV. 519, 519-20 (1945). Hayek later elaborated on this point, noting that “[t]he chief reason why we cannot hope by central direction to achieve anything like the efficiency in the use of resources which the market makes possible is that the economic order of any large society rests on a utilization of the knowledge of particular circumstances widely dispersed among thousands of individuals.” Hayek, *The New Confusion About Planning*, in NEW STUDIES IN PHILOSOPHY, POLITICS, ECONOMICS AND THE HISTORY OF IDEAS 236 (1978).

This “knowledge problem” is greatly magnified in the context of environmental policy because of the inherent complexity of environmental concerns. Planning for environmental protection encompasses all the intricacy and specialized information required for economic planning on top of the need for site-specific information related to particular environmental concerns. The local or regional nature of many environmental problems means that local knowledge and expertise is necessary to develop proper solutions. Such localized knowledge is simply beyond the reach of even the most intrepid federal regulators. “Federal regulators never have been and never will be able to acquire and assimilate the enormous amount of information necessary to make optimal regulatory judgments that reflect the technical requirements of particular locations and pollution sources.”<sup>26</sup>

Consider the case of air pollution, where arguments for federal regulation may well be their strongest.<sup>27</sup> The most effective and equitable strategy for controlling ozone precursors will vary from city to city depending on the local mix of stationary and mobile sources, the relative age of the automobile fleet, and dominant meteorological conditions. As ozone (“smog”) formation is dependent on various factors, including the ratio of various emissions in the ambient air, controlling ozone may call for reducing hydrocarbon emissions in one city, while limiting nitrogen oxide in another. The wrong emission control strategy can actually *increase* regional pollution.<sup>28</sup> Maricopa County, Arizona, has one of the oldest automobile fleets of any major city and few industrial sources of emissions. Attaining a given air quality standard there will require a different set of measures than those required in Atlanta, Trenton, or Los Angeles. Each metropolitan area produces a different mix of smog-forming emissions from a different mix of sources. Intimate knowledge of these variables is “necessary to administer any air pollution control program” and yet such information “can be found only at the local level.”<sup>29</sup>

Over the past three decades, the knowledge problem in environmental policy has only gotten worse. The first wave of environmental regulations addressed large, obvious

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<sup>26</sup> BUTLER & MACEY, *supra* note 16 at 27.

<sup>27</sup> See *infra* Part V.C.

<sup>28</sup> See, e.g., NATIONAL ACADEMY OF SCIENCES, RETHINKING THE OZONE PROBLEM IN URBAN AND REGIONAL AIR POLLUTION, 12 (1992).

<sup>29</sup> John P. Dwyer, *The Practice of Federalism Under the Clean Air Act*, 54 MD. L. REV. 1183, 1218 (1995).

environmental problems that affected most parts of the country, such as lead in gasoline and raw sewage in rivers and streams. Addressing such low-hanging fruit did not require particularly efficient regulation, nor did it require much knowledge about local ecological conditions. Unlike the “easy” environmental problems of yesterday, today’s environmental concerns often require attention to local conditions. Reducing arsenic levels in drinking water to 10 parts per billion (ppb) may make sense in many parts of the country. In some states, such as New Mexico, however, a 10ppb standard will dramatically increase household water costs and could actually *increase* risks to public health.<sup>30</sup> While the federal government may have a comparative advantage in funding basic environmental research, this isolated advantage does not translate into superior knowledge about local problems and potential solutions.

#### *B. Fostering Innovation*

Justice Brandeis noted in 1932 that “[i]t is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”<sup>31</sup> Insofar as changing times and new technologies demand new approaches to environmental policy, a federalist system enables states to try new things and reap the benefits should they succeed in developing a better mousetrap. Interjurisdictional competition is a key element in this process, as the prospect of competition from other states for residents (taxpayers) and capital investment encourages jurisdictions to find new ways of maximizing their appeal.

Centralizing environmental decision-making and subjecting states to substantial federal oversight limits the potential for innovation in environmental policy. As regulatory requirements proliferate, opportunities for experimentation dwindle.

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<sup>30</sup> See Floyd Frost, *Poisonous Decision: A Low Arsenic Standard Carries a High Cost*, WASH. POST, Sept. 16, 2001, at B5.

<sup>31</sup> *New State Ice Co. v Liebmann*, 285 US 262, 311 (1932) (Brandeis, J., dissenting).

Nonetheless, states are seeking out opportunities to lessen the costs and improve the performance of environmental systems. Consider just a few examples:<sup>32</sup>

- Missouri's Department of Natural Resources instituted a "Special Area Land Treatment" program to provide financial incentives for landowners to adopt conservation measures and non-point source pollution controls voluntarily. In the first decade of the program, the "SALT" program funded some 200 projects covering over 2 million watershed acres.
- In 1995, Pennsylvania's Department of Environmental Protection implemented a "money-back guarantee" for over 100 separate environmental permitting programs. Under this program, DEP is required to make a decision on submitted permit applications within a specified time period. If DEP does not meet the deadline, it is required to refund the permit application fee, and the permit applicant may demand a decision within 30 days on the then-existing application record. In the policy's first two years, DEP processed some 5,000 permit applications in covered programs without missing a single deadline.
- Numerous states are innovating with the permitting process itself. The Texas Natural Resource Conservation Commission has begun issuing "flexible" permits that establish facility-wide emission limits. A facility with flexible permits is still required to meet applicable emission limits, but has the flexibility to determine where to make the necessary emission reductions within the permitted facility. The Florida Department of Environmental Protection has adopted a "team permitting" program as an alternative to the traditional permitting regime as a means of streamlining the process.
- Michigan Governor John Engler issued an executive order in 1995 to streamline the state's regulatory office and require cost-benefit analysis for new regulation. In the first two years under the rule, Michigan's regulatory process became more efficient and responsive. Under the executive order, the average time it took for Michigan's Department of Environmental Quality to issue a new rule dropped

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<sup>32</sup> These and other examples can be found on the website of the Environmental Council of the States. *See, e.g.*, <http://www.sso.org/ecos/publications/oldinno.htm> (visited December, 2001).



from two years to only seven months. At the same time, the mandated review of existing regulations identified some 100 rules that were obsolete and should be eliminated.

From brownfield redevelopment plans and audit privilege rules to property-based water management and unified, multimedia permitting systems, states are trying to find ways to maximize the return on investments in environmental policy.<sup>33</sup> One state may adopt multimedia facility permitting, while another develops mitigation banking for wetlands, while yet another creates a nonpoint source emission trading system. Even advocates of a strong federal role in environmental protection acknowledge that “[s]ome of the most innovative environmental protection legislation has been the product of state initiatives.”<sup>34</sup>

### C. *Satisfying Preferences*

Many environmental policy questions are matters of subjective value preferences. Whether to maintain a particular vista, preserve a given stand of trees, or maintain a river in its “natural” or historic state are questions of value preferences that will vary from place to place and over time. Much the same can be said of matters of risk. Whether it is worth investing additional public resources to reduce a cancer risk from 0.8 in a million to 0.7 in a million is a question of values that science cannot answer. When such policy choices are made, value choices are made as well.

Attention to local risk trade-offs is particularly important when environmental concerns must be balanced against one another. Groundwater contamination from an abandoned waste site may pose a measurable health threat to a local neighborhood, but conventional cleanup of the site may actually increase risks by disturbing soils and opening exposure pathways. Soil erosion can be a real environmental concern, as can pesticide exposure. Yet some tilling practices that greatly reduce soil erosion require

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<sup>33</sup> For additional examples of state-level experimentation, see Alexander Volokh et al., *Race to the Top: The Innovative Face of State Environmental Management*, POLICY STUDY 239 (Reason Public Policy Institute, February 1998).

<sup>34</sup> Robert V. Percival, *Environmental Federalism: Historical Roots and Contemporary Models*, 54 MD. L. REV. 1141, 1148, 1172 (1995).

more intensive use of agricultural chemicals. When environmental concerns weigh against each other, there is no single “right” environmental answer, making it that much more important to consider local tastes, needs, and preferences.

As a pure matter of satisfying as many people as possible, it is near axiomatic that federalist systems with decentralized authority outperform centralized systems. Decentralized decision-making allows for a closer fit between policies and local preferences and gives individuals the option to sort themselves among jurisdictions based on which offers the most appealing mix of policies and amenities. As a result, more people are satisfied with the priorities and policies under which they live.<sup>35</sup> Another consequence of decentralization, of course, is greater diversity in policy offerings. A decentralized approach to environmental policy would necessarily be a more varied one.<sup>36</sup> “One-size-fits-all” approaches tend not to fit any area particularly well. Therefore, allowing for policy variation increases the likelihood that environmental controls in a given area will match local needs and concerns.

#### D. *Ensuring Accountability*

In a related fashion, decentralization will lead to greater accountability in environmental policy. As Henry Butler and Jonathan Macey observe, “Allocation to local governments of regulatory authority over local externalities allows decisions to be made by the representatives of the citizens who benefit the most and pay the most for higher environmental quality.”<sup>37</sup> If local residents are dissatisfied with the balance struck by their own elected representatives and regulatory officials, they have the ability to seek redress. Their freedom to alter environmental policies to fit their needs will be less subject to those who do not share the costs and benefits of the policy decision or understand local values and concerns.

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<sup>35</sup> See, e.g., Michael W. McConnell, *Federalism: Evaluating the Founder’s Design*, 54 U. CHI. L. REV. 1484, 1494 (1987).

<sup>36</sup> See Marc K. Landy, *Local Government and Environmental Policy*, in *DILEMMAS OF SCALE IN AMERICA’S FEDERAL DEMOCRACY* 233 (M. Derthick ed., 1999). Of course, a more varied policy landscape is, in turn, a less equal one.

<sup>37</sup> BUTLER & MACEY, *supra* note 16, at 7.

When policies are nationalized, addressing the concerns of those communities that suffer disproportionately from policy errors or omissions becomes difficult. Local environmental concerns must compete against national political priorities. A small town that needs to devote resources to improving the quality of its drinking water must compete for federal funds and attention with whatever environmental concern is on the evening news. Federal agencies and national politicians are less responsive to local needs than local institutions and officials. “States are closest to their constituents and problems, bringing a necessary sensitivity and perspective to local environmental issues that even EPA’s 10 regional offices, often many hundreds of miles away, can’t have.”<sup>38</sup>

As David Schoenbrod notes, regulating the nation’s environment from Washington, D.C., is such a massive undertaking that it forces Congress to engage in wide-scale delegation of responsibilities to federal agencies, particularly the EPA.<sup>39</sup> Consequently, key decisions about national environmental policy are made by bureaucrats within regulatory agencies, rather than legislators. While such agencies are under the control of the executive—a political branch—political accountability is attenuated at best. Regulatory officials are not directly accountable to voters, and the regulatory process is not as transparent or easy to follow as the legislative process. The arcana of regulatory dictates are easily obscured amidst a pile of notice and comment rulemakings, interpretative rules, guidance documents, negotiated rulemakings, and technical amendments.

The lack of accountability is actually compounded by the “cooperative” structure of many environmental regulations. Because the federal government enacts mandates that state and local governments must implement and enforce, the source of regulatory obligations becomes obscured. In practice, cooperative federalism diffuses responsibility and creates opportunities for state and federal officials to engage in blame-shifting and

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<sup>38</sup> Gade *supra* note 21, at 4.

<sup>39</sup> See David Schoenbrod, *Why States, Not EPA, Should Set Pollution Standards*, in ENVIRONMENTAL FEDERALISM 264 (T. Anderson & P.J. Hill eds., 1997). Many other agencies are delegated environmental regulatory responsibilities of course, including the Fish and Wildlife Service, the U.S. Army Corps of Engineers, the Natural Resource Conservation Service, and APHIS among others. In addition, there are the various federal land management agencies, which include the National Park Service, Bureau of Land Management, and U.S. Forest Service.

credit-taking.<sup>40</sup> For a citizen dissatisfied with the existing regime, it is less clear whether redress lies in the state or the federal government.

As environmental programs become more complex, the lines of accountability become attenuated, and it is easier to divert environmental policies toward other ends, such as economic rent-seeking. Environmental rules can be used to stifle competition or lock-up national product markets. Thus, ethanol producers seek to manipulate the federal definition of “oxygenated fuel,”<sup>41</sup> while hazardous waste management firms seek to commandeer greater portions of the waste stream.<sup>42</sup> As the costs of environmental regulations increase, so do the potential gains from manipulating environmental regulations for pecuniary advantage. Seeking regulatory policies that will carve out niche markets or inhibit competitors becomes an increasingly profitable investment of time, money and other resources, all the while undermining the effectiveness of environmental regulations to achieve environmental goals.<sup>43</sup> While such rent-seeking can certainly occur at the state level as well, rent-seekers have less to gain from such efforts, and the cost imposed on the nation by their successful efforts is less as well.

### *E. Ecologies of Scale*

Daniel Esty suggests injecting U.S. environmental policy with the principle of “subsidiarity.” That is, each environmental problem should be dealt with by the level of government—local, state, national, international—best positioned to address that particular concern; “the challenge is to find the best fit possible between environmental problems and regulatory responses—not to pick a single level of government for all problems.”<sup>44</sup> Rigorously applied, this principle suggests substantial devolution of environmental policy, as states and localities are capable of addressing most environmental problems, ranging from site cleanup and drinking water testing to waste

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<sup>40</sup> Michael Greve, *REAL FEDERALISM: WHY IT MATTERS, HOW IT COULD HAPPEN* 56-57 (1999).

<sup>41</sup> See Jonathan H. Adler, *Clean Fuels, Dirty Air*, in *ENVIRONMENTAL POLITICS: PUBLIC COSTS, PRIVATE REWARDS* 19-45 (Michael Greve & Fred Smith eds., 1992).

<sup>42</sup> See W. John Moore, *Golden Rules*, *NAT’L J.*, May 14, 1994, at 1124-28.

<sup>43</sup> For a survey of environmental rent-seeking, see Jonathan H. Adler, *Clean Politics, Dirty Profits*, in *POLITICAL ENVIRONMENTALISM: GOING BEHIND THE GREEN CURTAIN* 1-30 (Terry L. Anderson ed., 2000).

<sup>44</sup> Daniel C. Esty, *Revitalizing Environmental Federalism*, 95 *MICH. L. REV.* 570, 574 (1996) (citation omitted).

disposal and urban air quality. In each instance, state policymakers are in a better position to acquire and utilize knowledge about environmental problems, develop place-specific policies, and make policy trade-offs in accordance with local needs and desires.

Defenders of environmental centralization suggest that states are incapable of playing a substantial leadership role in environmental policy. Economies of scale are said to favor placing most responsibility in the hands of a single, expert agency that operates at the federal level. This view is difficult to defend on both theoretical and empirical grounds. As Butler and Macey conclude, “whatever the economies of scale associated with the centralization of environmental policy, they are surely overwhelmed by the diseconomies of scale in centralized administration.”<sup>45</sup> Concerns about tapping localized knowledge, fostering innovation and accountability, and satisfying preferences all counsel greater decentralization. The federal government may well enjoy a comparative advantage in the funding and support of scientific research, or in “developing the scientific and technical foundation for regulation,”<sup>46</sup> but this does not necessarily extend to policy choice and design.

At one time it could perhaps be argued that states lacked the resources to address environmental problems, and therefore an overarching federal presence was required. It is hard to make that case anymore, as states play the dominant role in implementing environmental policies, even if they are relegated to a marginal role in priority-setting and the administration of environmental policy.<sup>47</sup> While federal environmental enforcement efforts get most of the attention, most environmental enforcement and monitoring are done at the state level. States are responsible for over 85 percent of enforcement actions.<sup>48</sup> Texas alone routinely performs twice as many inspections as the EPA.<sup>49</sup> Nationwide, it is estimated that states are responsible for up to 90 percent of all facility inspections and environmental enforcement actions.<sup>50</sup> State agencies “have the

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<sup>45</sup> BUTLER AND MACEY, *supra* note 16, at 27.

<sup>46</sup> Rena I. Steinzor, *EPA and Its Sisters at 30: Devolution, Revolution, or Reform?*, 31 ENVTL. L. REP. 11086, 11091 (2001).

<sup>47</sup> See NAPA, SETTING PRIORITIES, GETTING RESULTS: A NEW DIRECTION FOR EPA 72 (1995).

<sup>48</sup> Robert E. Roberts, letter, *States Are Doing a Good Job Fighting Pollution*, N.Y. TIMES, December 23, 1996 (citing EPA statistics).

<sup>49</sup> See statistics in Jonathan H. Adler, *Bean Counting for a Better Earth*, REG., Spring 1998, at 40, 43.

<sup>50</sup> David L. Markell, *The Role of Deterrence-Based Enforcement in a ‘Reinvented’ State/Federal Relationship: The Divide between Theory and Reality*, 24 HARV. ENVTL L. REV. 1, 32 (2000).

resources, the sophistication, the expertise and the commitment to run every environmental program in the country,” Barry McBee, then-Chairman of the TNRCC told *National Journal*.<sup>51</sup>

Critics of devolution point to press accounts suggesting state officials are not up to the demands of environmental protection. Several recent assessments of environmental enforcement criticized state enforcement efforts.<sup>52</sup> Yet the actual reports in question placed much of the blame on EPA management and oversight of state efforts. In August 2001, for example, EPA’s Office of Inspector General issued a report, *State Enforcement of Clean Water Act Dischargers Can Be More Effective*.<sup>53</sup> This report specifically concluded, among other things, that “states cannot be fully effective until [EPA] allows states more latitude in the redirection of their resources.”<sup>54</sup> State enforcement records are not perfect, of course, but EPA’s record is worse. In states where the EPA administers water pollution permit programs under the Clean Water Act, the rate of expired permits is substantially higher than in those states where permits are administered by state agencies.<sup>55</sup> Whatever the faults of state agencies, they maintain a comparative advantage in policy-making and implementation.

“The inadequacy of federal resources in comparison to the magnitude of environmental problems inevitably results in federal dependence on state and local authorities,” notes Richard Stewart.<sup>56</sup> The question is not whether they will play a role, it is the nature of that role. State and local governments can be confined largely to implementing national programs embodying national political preferences—as is the case under most current environmental laws—or they can be entrusted to actually administer programs, making trade-offs and setting priorities for themselves. In other words, the question is whether states will follow or lead. “The federal government . . . is dependent upon state and local authorities to implement these policies because of the nation’s size

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<sup>51</sup> Quoted in Margaret Kriz, *Feuding with the Feds*, NATL. J., Aug. 7, 1997, at 1599.

<sup>52</sup> See, e.g., Eric Pianin, *GAO Issues Warning on EPA Enforcement*, WASH. POST, Aug. 23, 2001, at A23; *State Enforcers Are Missing Many Water Polluters*, ENVIRONMENTAL NEWS NETWORK, Aug. 29, 2001, available at <http://www.enn.com/extras/printer-friendly.asp?storyid=44779> (visited December, 2001).

<sup>53</sup> OFFICE OF INSPECTOR GENERAL, STATE ENFORCEMENT OF CLEAN WATER ACT DISCHARGERS CAN BE MORE EFFECTIVE, Report No. 2001-P-00013 (August 2001).

<sup>54</sup> *Id.* at ii.

<sup>55</sup> U.S. EPA permit backlog data cited in Steinzor, *supra* note 46, at 11090.

<sup>56</sup> See Stewart *supra* note 24, at 1201.

and geographic diversity, the close interrelation between environmental controls and local land use decisions, and federal officials' limited implementation and enforcement resources.”<sup>57</sup>

### **III. THE FAILURE OF “REINVENTION” TO DECENTRALIZE ENVIRONMENTAL POLICY**

Despite the widespread call for “reinvention” of environmental policy, there has been very little progress. EPA’s efforts have only been “operating at the margin,” according to the National Academy of Public Administration, and are “far from impressive.”<sup>58</sup> There have been numerous press releases, speeches, and conferences about new initiatives and efforts to encourage environmental innovation, but little to show for all of the talk. The mandates proliferate, yet the key policy decisions are made in Washington, D.C. In the end, “nearly all recent efforts to reinvent environmental regulation in the United States have come to little more than a tinkering with specific elements of a highly complex system.”<sup>59</sup>

#### *A. Project XL*

The highest profile effort to “reinvent” environmental policy under the Clinton Administration was “Project XL.” Announced in 1995, Project XL was supposed to encourage “excellence and leadership” in environmental policy. To accomplish this goal, companies and communities were given the opportunity to substitute compliance with existing environmental regulations with alternatives provided that the regulated entities could demonstrate that they were achieving “superior” environmental performance. Project XL aimed to foster experimental approaches to environmental protection as well as to accommodate situations in which the application of general environmental

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<sup>57</sup> *Id.* at 1196.

<sup>58</sup> NAPA REPORT, *supra* note 22, at 1, 35.

<sup>59</sup> Dennis J. Fiorino, *Rethinking Environmental Regulation: Perspectives on Law and Governance*, 23 HARV. ENVTL L. REV. 441, 442 (1999).

requirements produced inefficient results. Initially hailed as a model for the next generation of environmental policy, Project XL failed to produce any significant results.<sup>60</sup>

EPA styled Project XL as a “laboratory” approach to environmental reinvention that would authorize up to 50 pilot projects nationwide. In each case, EPA would grant additional regulatory flexibility in return for “superior environmental performance.” These projects would then provide models for broader environmental reforms. In reviewing potential projects, EPA considered eight principles: 1) superior environmental performance; 2) cost savings and paperwork reduction; 2) stakeholder support; 4) multimedia pollution prevention; 5) transferability to other facilities; 6) administrative feasibility; 7) information generation; and 8) no increase or shift in environmental risks.<sup>61</sup> EPA would use these principles to identify companies willing to go “beyond compliance” in return for flexibility.

From the start Project XL was hobbled by a lack of statutory authorization. EPA purported to offer companies relief from existing regulatory requirements, including paperwork and monitoring burdens, without any legal authority to do so.<sup>62</sup> Waiver provisions in existing environmental statutes were simply too narrow or restrictive to accommodate XL proposals.<sup>63</sup> The lack of formal authorization made “stakeholder” participation a paramount concern. Most environmental laws contain broad citizen suit provisions that enable any dissatisfied group to challenge agency decisions that do not strictly comply with all applicable legal requirements. Therefore, insofar as Project XL sought to free companies and communities from needless legal requirements, the success of any XL initiative could be held hostage by an outside interest group threatening to sue.<sup>64</sup> This threat made corporate executives skittish about pushing too far and

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<sup>60</sup> See Thomas E. Caballero, *Project XL: Making It Legal, Making It Work*, 17 STAN. ENVTL. L.J. 390, 401 (1998) (“Despite much fanfare heralding Project XL’s objectives, and despite apparent industry enthusiasm for regulatory flexibility, the program has not produced any significant results.”).

<sup>61</sup> See 60 Fed. Reg. 27282 (May 23, 1995).

<sup>62</sup> EPA staff are said to have remarked that “If it isn’t illegal, it isn’t XL.” See Rena I. Steinzor, *Regulatory Reinvention and Project XL: Does the Emperor Have Any Clothes?*, 26 ENVTL L. REP. 19527 (1996).

<sup>63</sup> See 62 Fed. Reg. 19,872, 19,876 (Apr. 23, 1997) (noting “the flexibility tools needed for many projects will not be found within the range of discretion afforded by existing federal and state regulatory mechanisms”). See also, Dennis D. Hirsch, *Bill and Al’s XL-ent Adventure: An Analysis of the EPA’s Legal Authority to Implement the Clinton Administration’s Project XL*, 1998 U. ILL. L. REV. 129, 153 (1998).

<sup>64</sup> Caballero, *supra* note 60, at 422.



discouraged more innovative steps.<sup>65</sup> It also amplified other problems in the initiative, such as how to define what constituted “superior environmental performance” or whether EPA or local regulators had greater authority to direct given projects.

Early enthusiasm from regulated industries and state officials for the program quickly soured.<sup>66</sup> Efforts by Intel and 3M were initially praised as potential landmarks in the evolution of environmental policy. Yet in the end, 3M withdrew before the project’s completion, and Intel’s project entailed minimal changes in existing rules. EPA revised the XL guidelines in 1997 to eliminate some of the ambiguities and give companies greater certainty.<sup>67</sup> This revision generated little in the way of results. Absent statutory authorization, there was only so much XL could accomplish.<sup>68</sup>

#### B. *Federal-State Environmental Partnerships*

Project XL sought to engage all parties involved in environmental policy, including corporations, environmental groups, and state and local officials. Other reinvention efforts focused solely on the federal-state relationship. As noted earlier, most federal environmental programs adopt a model of cooperative federalism—the federal government designs a given regulatory program while state governments are encouraged to implement it. State implementation is typically subject to federal approval and may receive limited federal funding.<sup>69</sup> While each state may tailor its program at the margins to meet its particular needs, all states must operate within the constraints of federal regulation. Historically, this has meant that states are afforded little flexibility in program administration.

Among EPA reinvention efforts was the development of a new “partnership” between EPA and state environmental agencies, specifically the creation of the National Environmental Performance Partnership System (NEPPS) in 1995. Under NEPPS, EPA

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<sup>65</sup> NAPA REPORT, *supra* note 22, at 15.

<sup>66</sup> David W. Riggs and Christopher A. Hartwell, *Environmental Flexibility in Action: A Minnesota Case Study*, Policy Study No. 265 (RPPI, January 2000).

<sup>67</sup> 62 Fed. Reg. 19872 (April 23, 1997).

<sup>68</sup> NAPA REPORT, *supra* note 22, at 37.

<sup>69</sup> In recent years, the federal government provided approximately one-fifth of the funding for state implementation of federal programs. John H. Cushman, Jr., *Clinton Backs Environmental Power-Sharing*, N.Y. TIMES, Jan. 31, 1999.

and the various state environmental agencies pledged to seek clarification of their respective roles, develop new means of measuring environmental performance, and allow greater state input into priority-setting. EPA and individual state agencies could enter into “Performance Partnership Agreements” to set new enforcement priorities and focus enforcement resources where they would be most effective. While some 38 states have entered into such agreements, the results have been limited. As the General Accounting Office found, the NEPPS has produced modest benefits.<sup>70</sup> Among the reasons for NEPPS’s failure to date are existing statutory and regulatory requirements that limit innovation, “reluctance by EPA regulators to reduce oversight,” and “the inherent difficulty in ‘letting go’ on the part of some regulators.”<sup>71</sup> Other analysts agree that despite modest success in some areas, NEPPS “appears to be languishing—essentially from a lack of not only clarity but commitment.”<sup>72</sup>

Encouraged by the formation of NEPPS, but desiring greater flexibility, ECOS sought to negotiate an agreement that would provide for greater state flexibility. In late 1996, EPA Administrator Carol Browner suggested that EPA would be open to such an agreement. After several months of negotiations, EPA and ECOS issued a draft plan stressing “the need to experiment with new approaches to improve our nation’s environment.”<sup>73</sup> It was not to be. Just a few weeks after the draft agreement was issued, EPA rescinded its agreement. EPA Deputy Administrator Fred Hansen declared that states would only be allowed to implement “minor, and I stress minor, changes to interpretations, clarification and issues of consistency in programs.”<sup>74</sup> State flexibility would only be contingent on “superior environmental performance.”

State officials were outraged by EPA’s apparent about-face and unwillingness to grant states greater flexibility in program administration, so they met with EPA and tried

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<sup>70</sup> U.S. GENERAL ACCOUNTING OFFICE, COLLABORATIVE EPA-STATE EFFORT NEEDED TO IMPROVE NEW PARTNERSHIP SYSTEM, GAO/RCED-99-171 at 7 (June 1999).

<sup>71</sup> *Id.* at 4. See also Joyce M. Martin and Kristina Kern, *The Seesaw of Environmental Power from EPA to the States: National Environmental Performance Plans*, 9 VILL. ENVTL. L.J. 1, 23-26 (1998) (stressing statutory and regulatory obstacles to innovation under NEPPS).

<sup>72</sup> Mark Stoughton and Jennifer Sullivan, *Mixed Results*, ENVTL. F., May/June 2001, at 45. See also JEANNE HERB ET AL., THE NATIONAL ENVIRONMENTAL PERFORMANCE SYSTEM: MAKING GOOD ON ITS PROMISE? (Nat'l. Acad. of Public Admn., 2000).

<sup>73</sup> John H. Cushman, Jr., *EPA Withdraws Plan to Empower States*, N.Y. TIMES, Mar. 2, 1997.

<sup>74</sup> *Hansen Withdraws Draft Agreement Aimed at Giving Flexibility to States*, AIR/WATER POLLUTION REPORT’S ENV’T WEEK, Mar. 10, 1997.

again. A new agreement between EPA and ECOS was developed. The agreement purported to provide a framework for state flexibility and innovation, but like XL it lacked any statutory authorization and gave states no basis to believe that EPA would show any greater flexibility than it had in the past.

Under this new “Regulatory Innovation Agreement,” EPA committed to support “efforts to promote and test new ideas” in environmental policy. Under the agreement, states can submit proposals for EPA’s approval. Yet as with NEPPS, the results have been limited, in part due to lack of statutory authorization. The only “innovation” that is allowed is that which fits within existing regulatory restraints. What sort of “flexibility” does this allow? The first “innovation” approved pursuant to the agreement allowed the TNRCC to reduce the required number of inspectors with opacity certification, reducing the number of TNRCC man-hours spent on certification and training and freeing up man-hours for actual facility inspections.<sup>75</sup> This may well improve the cost-effectiveness of TNRCC’s enforcement efforts, but it is hardly a ground-breaking “innovation” in environmental policy. The lack of statutory authorization and modest scope of NEPPS projects limited NEPPS’ potential to produce meaningful reform.

### *C. State-Federal Enforcement Opposition*

EPA’s institutional incentives are an additional obstacle to environmental reinvention efforts. EPA is reluctant to relinquish power to state and local governments and has resisted modest efforts at environmental innovation. Conflicts between EPA and state agencies have erupted over environmental enforcement, as many states have sought to implement enforcement policies that emphasize pollution reductions over penalties and the other enforcement measures traditionally emphasized by EPA.

Consider the EPA-state feud over environmental audit privilege laws. In the early 1990s, close to two-dozen states enacted audit privilege laws. These laws, in one fashion or another, provided regulated entities with a degree of “privilege” or amnesty for conducting facility audits and self-reporting newly discovered violations, provided that

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<sup>75</sup> See Testimony of Robert W. Varney, Commissioner, New Hampshire Department of Environmental Services and Past-President, Environmental Council of the States, before the Senate Committee on Environment and Public Works, May 2, 2000.

violations were fixed and companies operated in good faith. Audit privilege laws are based on the notion that firms are less likely to search for potential regulatory violations and environmental problems at their facilities if their discovery could lead to civil or even criminal prosecution. “If the threat of prosecution prevents a company from taking action that would improve the environment, then making the enforcers’ jobs tougher in those cases may be a good idea,” notes Alexander Volokh of the Reason Public Policy Institute.<sup>76</sup> In Texas, some 100 facility audits resulted in the voluntary disclosure of previously undiscovered violations.<sup>77</sup> Audit privilege laws are popular with corporations and many state officials because they encourage a more cooperative relationship between regulators and the regulated and place environmental performance above punitive sanctions and controls.

EPA has not shared this bullish perspective on audit privilege laws. EPA threatened several states, including Colorado, Michigan, Texas, Utah and Wyoming, with sanctions if they did not modify their audit privilege programs. EPA’s primary objections were that state audit laws prevent the imposition of “appropriate” penalties, and that privileging audit information could discourage prosecutions. EPA insisted that, even if violations are uncovered in a voluntary audit, the violator be fined at least as much as is necessary to “compensate” for whatever economic benefit the violation provided. This policy reduces the incentive to conduct audits in the first place. While state audit privilege laws have been a popular environmental innovation, EPA opposed them because they entail departures from EPA’s enforcement priorities.

EPA came up with “incentives to voluntarily comply with environmental requirements,” including an environmental audit policy under which a private firm can obtain reduced penalties and criminal liability for identifying, disclosing, and remedying pollution violations.<sup>78</sup> Like XL and other programs, however, the federal policy produced little. Regulated entities found few incentives to conduct audits and found that EPA’s policy conflicted with state efforts. For one, most qualifying firms can be assured that

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<sup>76</sup> Alexander Volokh, *Carrots Over Sticks: The Case for Environmental Self-audits*, WASHINGTON MONTHLY (June 1997).

<sup>77</sup> Barry R. McBee, Chairman, Texas Natural Resources Conservation Commission, Testimony before the Senate Environment and Public Works Committee, October 30, 1997.

<sup>78</sup> U.S. EPA, OFFICE OF ENFORCEMENT AND COMPLIANCE ASSURANCE, FY95 ACCOMPLISHMENTS Report, 4-1 (1996).

EPA will not refer a case to the Department of Justice, but EPA will not guarantee that Justice will not prosecute on its own and adamantly opposed granting such audit immunity.<sup>79</sup> Moreover, EPA's policy was purely discretionary. There were no guarantees that companies would receive any benefit for their audit efforts, and given the "bean-counting" mindset, there is clearly an incentive to use the information generated in an audit report for an easy enforcement score.<sup>80</sup>

#### D. *Unfunded Mandates Reform*

Congress's reinvention record is no more impressive than that of EPA. With the exception of the Safe Drinking Water Act, none of the major environmental statutes that impose substantial obligations on the states has been reformed in the past decade.<sup>81</sup> Despite numerous proposals to "fix" Superfund, the Endangered Species Act, and the Clean Water Act, reform efforts have stalled. Legislation was enacted, however, to address "unfunded mandates."

Relief from unfunded mandates was one of the rallying cries in both the 103<sup>rd</sup> and 104<sup>th</sup> Congresses. Before the Republican takeover of Congress in 1994, there was substantial support for a simple "no money, no mandate" rule that would prevent the federal government from imposing mandates upon states without also appropriating the money to pay for it. At the time, *Governing* magazine reported that "at least 400 separate subsections of the Code of Federal Regulations involving environmental matters apply to local governments; another 400 require local governments to enforce federal environmental requirements."<sup>82</sup> The total annual cost of such rules for state and local governments was expected to hit \$50 billion by the end of the decade.<sup>83</sup>

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<sup>79</sup> Paul J. Curran and Gregory J. Wallance, *The New EPA 'Interim Policy,' Which Is Meant to Encourage Companies to Report Violations, May Have the Opposite Effect*, NATL L. J. (July 31, 1995), at B4.

<sup>80</sup> For more on EPA's "bean-counting" mindset, see Adler, *Bean Counting*, *supra* note 49. Among EPA's problems is the tendency to focus on quantifiable measures of agency activity, even where such measures are not accurate measures of environmental improvement.

<sup>81</sup> The Food Quality Protection Act, which modified pesticide regulation, was enacted in 1996, but this legislation had little impact on the federalism balance. As this paper is written, Congress is also considering legislation to address "brownfields" and other problems generated by federal hazardous waste cleanup regulations, but this too would only affect the state-federal regulatory balance at the margin.

<sup>82</sup> Tom Arrandale, *A Guide to Environmental Mandates*, GOVERNING, Mar. 1994, at 77.

<sup>83</sup> *Id.*

In 1995, Congress enacted a watered-down Unfunded Mandates Reform Act (UMRA).<sup>84</sup> The legislation, however, was more symbolic than substantive. UMRA did nothing to limit or reduce preexisting unfunded mandates. Instead it merely established new reporting and procedural requirements for enactments that would produce substantial *new* unfunded mandates and created minimal procedural hurdles for the promulgation of regulatory mandates pursuant to pre-existing laws.<sup>85</sup> Yet even this reform has been of modest benefit, as courts have given agencies a wide berth to determine whether UMRA's requirements apply.<sup>86</sup> Congress could take credit for enacting unfunded mandate "reform," even though nothing had been done about the existing unfunded mandate burden.

UMRA may increase accountability by preventing Congress from completely shirking its responsibility to make legislative policy decisions, but it does nothing to address the extant failures of the current regulatory system. New unfunded mandates, authorized by existing statutes, continue to proliferate. The controversial arsenic standard withdrawn by the Bush Administration is but one example. The new standard, if implemented, could cost in the neighborhood of \$200 million nationwide, increasing water bills in some communities by as much as \$325 per household.<sup>87</sup> The same criticism can be made of the Congressional Review Act. CRA provides a window for expedited legislative review and repeal of new regulations, but does nothing to address the failings of the existing regulatory regime. Not only does true reform require legislative action, it requires far-reaching proposals that have the potential to change the status quo. The patient needs surgery; it is not enough to stop the bleeding.

#### **IV. ECOLOGICAL FORBEARANCE -- A PROPOSAL FOR REFORM**

Continued environmental progress at the very least requires dramatic decentralization of environmental policy. Yet no matter how important such change may be, it will not—indeed cannot—be achieved overnight. Former Natural Resources

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<sup>84</sup> Pub. L. No. 104-4, 109 Stat. 48 (1995).

<sup>85</sup> For a critical overview of UMRA, see Angela Antonelli, *Promises Unfulfilled: Unfunded Mandates Reform Act of 1995*, REG., Spring 1996, at 44.

<sup>86</sup> See, e.g., *American Trucking Ass'ns v. U.S. EPA*, 175 F.3d 1027, 1043 (D.C. Cir. 1999).

<sup>87</sup> See 66 Fed. Reg. 6976, 7010 (Jan. 22, 2001). The per household costs are in Table III.E-2.

Defense Council attorney David Schoenbrod argues that EPA's role in environmental policy should be relegated to that of a technical advisor, controller of interstate externalities, and little else.<sup>88</sup> The experience to date suggests that his prescription is warranted. The question remains how to get there from here. Schoenbrod makes a powerful case, but such reform is scarcely viable in the current or foreseeable political environment. A complete legislative overhaul of environmental policy is unlikely, to say the least. At the same time, administrative reforms alone will be insufficient to accomplish anything approaching the needed level of reform. Positive change therefore requires intermediate legislative measures that can facilitate further experimentation and decentralization.

Unleashing environmental innovation requires a formal mechanism that offers states the opportunity to experiment and innovate in environmental policy, largely free of federal restraint. From a policy standpoint, this will allow for the development of the next generation of environmental policies. States must have the freedom to fail if they are to have any chance to succeed; trial and error cannot occur without the risk of error.<sup>89</sup> Politically, however, it is necessary that states begin to demonstrate their ability to address environmental concerns before there will be widespread public support for the wholesale devolution of environmental programs.

Welfare reform experienced a similar dynamic. Waivers from federal requirements allowed states to experiment with different policies. The widespread dissatisfaction with the existing welfare system was channeled into state-level efforts to develop better means of helping those in need without fostering dependency and despair. As some state efforts met with success, other states followed suit. State officials could learn from mistakes made in competing jurisdictions. Momentum built over time, leading to larger, nationwide reforms.

An ecological waiver regime could unleash a similar dynamic. Successful state experiments could become models for reform in other areas and demonstrate that environmental reform does not mean environmental rollback. Where experiments fail, other states could learn how to avoid such mistakes in their own reform efforts. EPA,

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<sup>88</sup> Schoenbrod, *supra* note 39, at 268.

<sup>89</sup> See generally, Aaron Wildavsky, *Trial and Error versus Trial Without Error*, in *RETHINKING RISK AND THE PRECAUTIONARY PRINCIPLE* (J. Morris ed., 2000).

NAPA, ECOS, the National Governors' Association and other groups could popularize successful efforts without imposing one-size-fits-all solutions from Washington, D.C.

*A. A Model of Forbearance*

A potential model for waiver legislation can be found in Section 160 of the Telecommunications Act of 1996.<sup>90</sup> Congress revised the Act in 1996 with the express purpose of promoting competition and reducing regulation of telecommunications services to encourage lower prices and more rapid technological development. In an uncharacteristic moment of humility, Congress recognized that it would be nearly impossible to draft a single piece of legislation that could accomplish these goals while providing for an orderly transition from the existing regime of dominant carrier regulation to more open markets without unduly tilting the playing field to one portion of the industry or inadvertently locking in one generation of technology. Given the rate of technological change, a new legislative scheme risked becoming obsolete moments after it was signed into law.

Section 160 creates a mechanism through which the Federal Communications Commission can respond to changes in technology or market conditions by unilaterally removing regulatory controls on industry upon receiving an application from a regulated firm. The provision operates to allow for regulatory evolution to keep pace with market changes, but only in the direction of less government interference in the marketplace. In effect, the forbearance provision enables the FCC to remove regulatory controls as technological changes or other developments make the existing regulatory regime obsolete.

Specifically, Section 160(a) provides that “the Commission shall forbear from applying any regulation or any provision” of the Communications Act to a telecommunications company or service (or class thereof) “in any or some of its or their geographic markets” if the FCC determines that (a) “enforcement of such regulation or provision is not necessary” to ensure that rates “are just and reasonable and are not unreasonably discriminatory”; (b) “enforcement of such regulation or provision is not

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<sup>90</sup> 46 U.S.C. § 160.



necessary for the protection of consumers”; and (c) “forbearance from applying such provision or regulation is consistent with the public interest.”<sup>91</sup> In making this determination, the FCC is further instructed to consider the impact on “competitive market conditions” and is explicitly permitted to equate an increase in competition among service providers with the public interest.<sup>92</sup>

Any telecommunications company (or class thereof) is permitted to petition the FCC for such forbearance.<sup>93</sup> In practice, this means submitting a request for forbearance supplemented with evidence sufficient to support a conclusion that such relief is warranted. Upon receiving a petition, the FCC is required to respond within one year, or the petition is deemed granted.<sup>94</sup> “The Commission may grant or deny a petition in whole or in part and shall explain its decision in writing.”<sup>95</sup> FCC decisions to grant or deny forbearance decisions are final agency actions subject to judicial review under the Administrative Procedure Act, so the FCC must justify its decisions with reasoned decision-making.<sup>96</sup> This means that the FCC is not required to grant forbearance proposals, but it is required to explain the basis for its decisions in a manner that is consistent with longstanding FCC practice and the statutory mandate of the Communications Act. A few select provisions of the Telecommunications Act are exempted from the forbearance provisions, but by and large it applies to all FCC regulation of telecommunications companies.<sup>97</sup> The purpose is to facilitate the gradual evolution of the regulatory structure so that it may keep pace with technological developments and changes in the marketplace.<sup>98</sup>

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<sup>91</sup> *Id.* at § 160(a).

<sup>92</sup> *Id.* at § 160(b).

<sup>93</sup> *Id.* at § 160(c).

<sup>94</sup> The FCC is authorized to extend this period by an additional 90 days, once, if necessary for the FCC to conduct the required analysis. *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> This need not be a rubber-stamp in the courts. *See AT&T Corp. v. FCC*, 236 F.3d 729 (D.C. Cir. 2001) (remanding FCC denial of forbearance petition for failure to explain basis for petition denial).

<sup>97</sup> Specifically, the FCC may not forbear from applying the requirements contained in section 251(c) and section 271 “until it determines that those requirements have been fully implemented.” 46 U.S.C. § 160(d).

<sup>98</sup> To date, the FCC has resisted granting forbearance petitions. Over time, however, this is likely to change due to turnover in the composition of the Commission and increased pressure for regulatory changes to accommodate technological advance and shifts in market dynamics.

## *B. Ecological Forbearance*

The ecological forbearance proposal seeks to replicate Section 160(a) in the context of environmental policy. The formal mechanism would be the same, substituting state governments as the entities that would seek regulatory relief. Whereas the FCC is required to consider whether a given forbearance proposal advances the statutory mandate of the Communications Act (just and reasonable rates, consumer protection, and “the public interest”), EPA would assess whether granting states additional leeway would further the protection of public health and environmental values. Essentially, ecological forbearance would grant EPA the formal legal authority to allow state-level experimentation and innovation in environmental protection.

Under this proposal, states would petition the EPA Administrator seeking the forbearance of any standard or requirement imposed by or pursuant to an environmental statute administered by EPA. The forbearance petition would specify which jurisdictions within the state would be subject to the proposal and what conditions, if any, the state would accept on the forbearance. One state might seek permission to adopt a different approach to facility permitting statewide. Another state might propose to end testing for a contaminant never found in its water supply. Still another might wish to stop enforcing one set of pollution control requirements, such as point-source water pollution controls or the latest EPA national ambient air quality standard, in a given region or metropolitan area so that it could devote resources to a greater concern, such as non-point source water pollution or indoor air quality. The state would be expected to submit supporting material detailing the basis for the request and explain why the state believes that freedom from an existing requirement would serve the ends of environmental protection. Petitioning states would likely highlight the expected environmental or other benefits from the proposal. Some might even enact conditional legislation to make clear what protections would replace federal regulation were forbearance to be granted.

Upon receipt of a petition, the EPA Administrator would be required to provide notice and seek public comment, as in any other rulemaking. This requirement would allow other states, “public interest” groups, and other affected parties to assess the proposal and raise concerns before the agency. As under the Communications Act, the

EPA Administrator would be required to respond within a set time period and explain the basis for her decision. Failure to respond to a petition would result in approval of the petition. An ecological forbearance statute paralleling Section 160 of the Communications Act would require the Administrator to assess whether forbearance would advance public health and environmental protection. Because the Administrator's decision would be subject to judicial review, her decision would require reasoned explanation. No matter how reasonable her position, bare "conclusory statements" would be insufficient.<sup>99</sup> Under well-established principles of administrative law, "a court is not to substitute its judgment for that of the agency. Nevertheless, the agency must "examine the relevant data and articulate a satisfactory explanation for its action."<sup>100</sup>

Once made, the decision would be final. Effectively, the Administrator, when petitioned, would have the authority to amend existing regulations and statutory requirements on a case-by-case basis in order to respond to changing conditions and allow states more freedom in managing their environmental affairs. While subject to judicial review, as mentioned above, forbearance decisions could not be challenged on the grounds that they are inconsistent with the underlying regulatory controls. Once granted, the terms of a forbearance petition would supercede conflicting regulatory requirements. In this fashion, the forbearance mechanism would enable the environmental regulatory system to evolve with environmental needs, bypassing some of the traditional choke points that prevent policy change.

One obvious consequence of such a mechanism is that the "entitlement" aspect of federal environmental law would be eliminated.<sup>101</sup> A state's obligation to meet a particular environmental standard or impose a given regulatory system would be no more than a default requirement. The grant of a forbearance petition would change a state's legal obligations under the relevant environmental statute (or, as the case may be, the conditions upon which the state receives funding for administering federal environmental programs). Although such a provision is likely to be controversial, it would be the most

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<sup>99</sup> See, *AT&T Corp.*, 236 F.3d at 737 ("No matter how reasonable the FCC's position . . . , the FCC's conclusory statements cannot substitute for the reasoned explanation that is wanting in this decision." (internal quotation omitted)).

<sup>100</sup> *Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto. Insur. Co.*, 463 U.S. 29, 43 (1983).

<sup>101</sup> See generally, R. Shep Melnick, *The Courts, Congress and Programmatic Rights, in REMAKING AMERICAN POLITICS* 188-212 (R.A. Harris and S.M. Milkis eds., 1989).

important. For forbearance to be successful, states must see the prospect of freedom from existing regulatory constraints that stifle innovation and experimentation. States must have the ability to set firm requirements not subject to revocation on EPA's whim or a change in administration. Therefore, the legal obligations contained in a forbearance petition must displace existing obligations once the petition is approved. In order to be worthwhile, forbearance must not be another futile exercise in XL-style consensus building, but an institutional mechanism that provides a legal process for reform.

*C. Application – The Clean Air Act*

To see how the ecological forbearance proposal might work in practice, consider how it would apply to the implementation of the Clean Air Act (CAA), particularly those provisions designed to control ambient levels of ozone (a.k.a. “smog”). The CAA theoretically imposes a “cooperative” federalism structure. The EPA Administrator sets a National Ambient Air Quality Standard (NAAQS) for ozone that all of the nation must achieve. Failure to achieve the standard within a suitable time frame can result in draconian sanctions, such as the imposition of direct federal controls and the loss of highway funds.

At present, several dozen metropolitan areas have yet to attain the federal ozone standard.<sup>102</sup> Ozone “nonattainment” areas are given one of five classifications—marginal, moderate, serious, severe or extreme—based on how much a given area exceeds the NAAQS. States with “nonattainment” areas must submit State Implementation Plans (SIPs) to the EPA detailing the measures that the state will take to come into attainment with the NAAQS. In theory, the EPA sets the standard, and states have substantial leeway to identify the mix of pollution control measures on which it will rely. In practice it is quite different. Federal law dictates many of the specific steps that states must take to achieve compliance. Among other things, an adequate SIP must include “enforceable emission limitations . . . as well as schedules and timetables for compliance,”<sup>103</sup>

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<sup>102</sup> Moreover, at the time of this writing, the EPA's proposal to tighten the ozone standard is still in litigation before the U.S. Court of Appeals for the D.C. Circuit.

<sup>103</sup> 42 U.S.C. § 7410 (a)(2)(A).

monitoring systems,<sup>104</sup> a fee-based permitting system for stationary sources,<sup>105</sup> an enforcement program,<sup>106</sup> and provide for sufficient public participation in the SIP process.<sup>107</sup> Additional requirements are imposed based on a nonattainment area's classification. For instance, areas designated "marginal" ozone nonattainment regions must impose "reasonably available control technology" (RACT)—as defined by EPA—for sources in nine specified industrial categories. "Moderate" areas are further required to adopt an automobile inspection and maintenance program that conforms to EPA's requirements and mandate gasoline vapor recovery systems at gas stations. "Serious" areas must do all of the above, as well as adopt a more stringent automobile testing system and regulations encouraging the use of "clean fuels." And so on.

At each stage, state flexibility to design and implement a SIP that meets local needs is hampered by EPA regulations that flesh out and define the requirements enumerated in the Act. For instance, what qualifies as an "enhanced" automobile inspection and maintenance program is defined by EPA. States that seek to adopt differing inspection devices or testing protocols do not necessarily receive credit for their efforts. EPA's flexibility is also limited because citizen suit provisions enable private groups to sue EPA if they believe it is insufficiently strict.

The practical effect of this regulatory structure is that states are unable to determine the nature and extent of their own air pollution control efforts, even where there is no likelihood of an interstate spillover effect. The mix of activities giving rise to air pollution concerns will vary from place to place. Accordingly, the mix of controls that will achieve reductions from place to place will vary as well. Yet under current law, the same pollution control architecture is imposed in every city with a given nonattainment status. This blanket policy not only inhibits innovation, but it often forces states to impose federally approved pollution control measures, such as reformulated gasoline or low emission vehicle standards, when alternative policies would be more effective.<sup>108</sup> Worse, federally mandated measures can produce unintended and environmentally

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<sup>104</sup> *Id.* at § 7410 (a)(2)(B).

<sup>105</sup> *Id.* at § 7410 (a)(2)(L).

<sup>106</sup> *Id.* at §§ 7410 (a)(2)(C), (E).

<sup>107</sup> States must provide "reasonable notice" and public hearings on SIPs and consult with affected local entities. *Id.* at §§ 7410 (a)(2), (a)(2)(M).

<sup>108</sup> *See, e.g.,* Kenneth Green and Lisa Skumatz, *Clearing the Air in Houston: Innovative Strategies for Ozone Control and Air Quality*, Policy Study No. 273 (RPPI, November 2000).

harmful consequences, such as when oxygen content requirements for fuel lead to widespread water pollution<sup>109</sup> or measures that reduce ozone levels in some cities increase ozone levels somewhere else.<sup>110</sup> One-size-fits-all air pollution policy is really one-size fits nobody.

Flexibility is important not only in selection of air pollution control measures, but also in determining air pollution control *goals*. With the imposition of the NAAQS for ozone, the federal government has preemptively defined how clean is clean for every region in the country. There is little reason to believe that the federal standard—whether one considers the long-standing 0.12ppm standard or the much-litigated 0.08ppm 8-hour standard—strikes the optimal balance between air quality and other goals. For years, EPA has classified areas based on the fourth-highest one-hour ozone measurement in a three-year period. It is simply impossible to maintain that this reading is clearly superior to the second highest reading, the seventh highest reading, or even the sixteenth. The trade-offs and sacrifices for each are different *and* will vary from place to place.

Pollution control strategies can come at the expense of other local priorities, ranging from other environmental concerns to education and health care, or even higher levels of disposable income that families and individuals could use to finance a wide range of life-enhancing goods and activities. Some cities may be wealthy enough that an increase in car or fuel prices may not seem important. In other areas, natural conditions may make emission reductions beyond a certain level so expensive that individuals would rather focus on other matters. At times, one environmental goal will be sacrificed or postponed in favor of another. Air pollution controls are among the most costly environmental requirements, but in many cities it will make more sense to focus on the control of indoor air pollution, which poses far greater health risks than moderate ozone levels in the ambient air.

Given these realities, it would seem reasonable to allow communities to decide for themselves what level of air quality is sufficient, just as states and communities determine local levels of funding for education, crime prevention, and the like. The

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<sup>109</sup> See Ben Lieberman, *Running on MTBE: Closing the Pumps on the Oxygen Content Requirement*, CEI ON POINT No. 50, available at <http://www.cei.org/OnPointReader.asp?ID=833> (visited December, 2001).

<sup>110</sup> See, e.g., Kay H. Jones and Ben Lieberman, *EPA's New Rules Will Worsen Smog*, CEI ONPOINT (November 1999).

federal government, and EPA in particular, may have a comparative advantage in conducting basic research into the causes and consequences of air pollution, and in detailing potential pollution control policies, but if such determinations were advisory rather than binding, each state could determine whether EPA's preferences match its own. At least under the forbearance proposal, a state would have the opportunity to make the case for change.

Under the forbearance scheme outlined above, the existing statutory and regulatory framework would remain the default approach to air pollution. Absent state initiative—and EPA's concurrence—the existing menu of pollution control requirements and deadlines would apply. But a state would also be able to petition EPA for relief from one or more portions of CAA's regulatory scheme. In other words, the EPA would still provide information on pollution levels, scientific assessments of potential public health concerns, and policy recommendations, but states and regions would be able to evaluate the appropriateness of EPA judgments for their own areas. Should they determine that EPA's priorities did not match their own, they would have a mechanism through which they could seek relief. The legal requirements approved in a forbearance petition would displace those in the CAA from which forbearance was sought.

In the near term, many states might not demand substantial relief. Early forbearance petitions would likely focus on specific regulatory requirements that are particularly inappropriate or cost-ineffective in a particular region. Arizona, might seek relief from the vehicle emission inspection and maintenance program for Maricopa County. Michigan might seek to forego use of reformulated gasoline with ethanol or methyl tertiary butyl ether (MTBE).<sup>111</sup> Eventually some states may seek greater relief—perhaps relief from the NAAQS deadlines altogether. Georgia, for example, may determine that two or three additional days exceeding the standard in Atlanta over a three-year period is acceptable, particularly if it facilitates the reallocation of resources to other concerns, whether indoor air pollution, traffic safety, or something else. If Georgia officials believe this to be the case, they could plead their case in a forbearance petition to EPA. In the process, state officials would expose themselves and their proposal to public

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<sup>111</sup> Some states are already seeking to end the use of oxygenates in reformulated gasoline. See Geoffrey Mohan, *State Sues EPA Over Gasoline additives*, L.A. TIMES, Aug. 13, 2001, at B1.

scrutiny and potential criticism from local and national environmental groups, industry associations, and political leaders.

The broader the petition, the greater likelihood that it would spark controversy. Were Georgia to seek relief from the NAAQS itself, Georgia policymakers would have to explain that decision to Georgia voters—and bear the consequences. If efforts to meet the NAAQS were the source of substantial hardship for local residents and diverted resources from other pressing environmental or public health concerns, such a petition might move ahead. Were it merely the wishes of a powerful local constituency that wanted a particular favor, local officials might think twice before requesting such significant relief. No politician wants to be viewed as “anti-environmental.”

Political considerations would also come into play in review of a petition at EPA. Whether a petition is accepted or denied, the Administrator would be forced to explain the decision. If EPA prevented a state from adopting a more efficient and equitable approach to local air pollution, the Administrator would have to articulate the reasons. By the same token, if EPA rejected concerns raised by environmental groups during the administrative proceedings, it would have to offer a sufficient explanation. In either case, a controversial forbearance decision could provoke public criticism or Congressional oversight, if not both. Where a state is able to put forward a compelling brief for forbearance, EPA would have to weigh the consequences, political and otherwise, of denying the petition. At the same time, approving a poorly defended forbearance petition would expose the agency to criticism from environmental groups and the media. This pressure, in combination with the prospect of judicial review, would help discipline EPA’s use of its forbearance authority.

## **V. OBJECTIONS TO ECOLOGICAL DECENTRALIZATION**

While there is broad support for environmental reform, not all commentators advocate dramatic decentralization of environmental policy. Some fear that interjurisdictional competition in environmental policy could lead to the under-protection of environmental resources. Others point to the existence of environmental



“externalities,” in particular the spillover of pollution across state lines, as a reason to maintain federal preeminence in environmental policy-making. These arguments against decentralization are often overstated, however, and do not undermine the case for ecological forbearance or another means of decentralizing environmental decision-making.

A. *Race-to-the-Bottom*

The most common, and perhaps most erroneous, argument against the transfer of responsibility for environmental protection to the states is that it will produce a “race-to-the-bottom.” Under this theory, when states are faced with the prospect of competition from other states for corporate investment, they will lower their environmental standards to sub-optimal levels. States then face a prisoner’s dilemma: The failure to reduce the burden of environmental regulation could drive investment to other states that have loosened their environmental controls. “If each locality reasons the same way, all will adopt lower standards of environmental quality than they would prefer if there were some binding mechanism that enabled them simultaneously to enact higher standards, thus eliminating the threatened loss of industry or development.”<sup>112</sup>

In support of the race-to-the-bottom theory, some commentators point to the record of state and local governments prior to the enactment of federal environmental regulations and anecdotal evidence suggesting that state and local governments are sufficiently afraid of losing corporate investment that they modify their policies accordingly. One study, for example, purports to prove that states engage in a race to laxity in environmental regulation with survey data showing that state officials consider relaxing regulatory burdens to attract or retain investment.<sup>113</sup>

The race-to-the-bottom argument is intuitively appealing. Nevertheless, its fundamental premises are demonstrably wrong. The race-to-the-bottom theory presumes

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<sup>112</sup> Stewart, *supra* note 24, at 1212.

<sup>113</sup> See Kirsten H. Engel, *State Environmental Standard-Setting: Is There a “Race” and Is It “to the Bottom”?*, 48 *Hastings L.J.* 271 (1997). This study does not, however, purport to document declines in environmental quality resulting from such interjurisdictional competition. Rather, it assumes that when states reduce the stringency of environmental regulation this inevitably compromises environmental protection.

that reducing the economic burden of environmental regulation on business inherently reduces the level of environmental protection. This assumption is simply not the case. Not all environmental control regimes are equally efficient. Some pollution control regimes impose far greater costs for a given amount of environmental protection than others.<sup>114</sup> This observation has somehow escaped most discussions of environmental federalism. That this argument has been overlooked is particularly ironic because those who defend federal environmental regulation often claim that the costs of such regulation are overblown. If so, then there would be no fear that interjurisdictional competition would lead to more relaxed environmental regulation.

Consider this: It is well accepted that performance standards can be more cost-effective than technology-based mandates. It is also well accepted that tradable permits schemes can be more cost-effective than firm-specific performance standards. One regulatory measure may reduce emissions at a cost of X dollars per unit, while another may reduce emissions at 2X or 0.7X per unit. Regulation itself, at least in some instances, can also be a barrier to improved environmental performance. From these facts, it ineluctably follows that when a state moves to reduce the economic burden imposed by an existing set of environmental regulations, one *cannot* assume that environmental protection will be sacrificed in the process. Yet the race-to-the-bottom theory presumes—indeed relies upon—this very assumption.

Empirical evidence confirms this theoretical critique. A review of EPA regulations imposed on refineries found that 97 percent of the emission reductions achieved by existing regulatory requirements could be achieved for 25 percent of the cost.<sup>115</sup> Therefore, reducing the cost of environmental compliance in order to create a more favorable climate for business investment need not reduce the level of environmental protection. Indeed, due to the relative inefficiency of existing environmental controls, it should be possible to increase the level of protection and reduce the costs of compliance simultaneously. Former EPA official J. Winston Porter's research demonstrates that many states are cleaning up hazardous waste sites faster and

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<sup>114</sup> This argument is made in greater detail in Jonathan H. Adler, *The Ducks Stop Here? The Environmental Challenge to Federalism*, 9 SUP. CT. ECON. REV. 205, 226-27 (2001).

<sup>115</sup> See HOWARD KLEE, JR. & MAHESH PODAR, AMOCO/U.S. EPA POLLUTION PREVENTION PROJECT: EXECUTIVE SUMMARY (Rev. ed., May 1992).

less expensively than the federal government. It typically costs \$25 million to \$30 million to clean up a single site in the federal Superfund program, and the average cleanup time is about 10 years. By comparison, Minnesota is cleaning up sites for less than \$5 million each and completing cleanups in only a few years.<sup>116</sup> Minnesota's program is both less costly *and* more environmentally protective in that it mitigates the risks of exposure to hazardous material in substantially less time than the federal Superfund program. In other words, reducing the burden of environmental regulation does not inherently entail a sacrifice in environmental quality.

Richard Revesz of New York University Law School argues compellingly that “contrary to prevailing assumptions, competition among states for industry should not be expected to lead to a race that decreases social welfare; indeed, as in other areas, such competition can be expected to produce an efficient allocation of industrial activity among the states.”<sup>117</sup> In practice, states that under-protect the environment are as likely to lose out from interstate competition as those that over-protect the environment. Federal regulation is unlikely to produce a more favorable result. This argument is true, in part, because if states compete by seeking to enact policies more favorable to corporate interests, federal environmental standards do not prevent interjurisdictional competition from occurring; they simply shift the competition into other policy realms. If a federal standard prevents competition in environmental policy, states could still compete in other policy areas that are not similarly restrained.

Another reason that federal regulation is unlikely to produce an optimal result is that states are not only competing for industry, but for taxpayers and workers as well. As incomes rise, demand for environmental goods follows.<sup>118</sup> States that fail to maintain a high level of environmental protection risk driving away residents to other states. Insofar as a highly educated and well-trained (or trainable) workforce affects corporate siting decisions, states that fail to ensure a minimum level of environmental protection may lose

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<sup>116</sup> J. Winston Porter, *Cleaning up Superfund: The Case for State Environmental Leadership*, REASON FOUNDATION POLICY STUDY 195 (Los Angeles, CA: Reason Foundation, 1995).

<sup>117</sup> Richard Revesz, *Rehabilitating Interstate Competition: Rethinking the 'Race-to-the-Bottom' Rationale for Federal Environmental Regulation*, 67 NYU L. REV. 1210, 1211-12 (December 1992).

<sup>118</sup> See Seth W. Norton, *Property Rights, the Environment, and Economic Well-Being*, in WHO OWNS THE ENVIRONMENT? 45 (Peter J. Hill & Roger Meiners eds., 1998).

out to those that do. In sum, there is no reason to believe the interstate competition, on balance, produces substantial downward pressure on environmental protection.

The race-to-the-bottom theory is also undermined by the historical record. Many states were taking action to control pollution and preserve environmental resources prior to the enactment of federal regulation. Indeed, as discussed below, preempting such state efforts was a driving force behind at least some environmental regulation. Fairly comprehensive research by Indur Goklany shows that prior to the enactment of federal air quality measures “air quality was improving for the deadliest pollutants in the areas where they were known to be problems.”<sup>119</sup> The onset of federal regulation did not accelerate the rate of improvement; if anything, progress in air quality slowed.<sup>120</sup> States were supposed to be laggards in pollution control. Yet, ironically, when federal regulators got into the act, the initial measures were modeled on those *already imposed* in California. Indeed, one of the driving forces behind the first federal air quality legislation was a fear that states would regulate too much, too soon, not too little, too late.<sup>121</sup>

The history of wetlands regulation uncovers similar weaknesses in the race-to-the-bottom hypothesis. Prior to the 1960s, there was relatively little interest in protecting wetlands. Hunting groups and recreationists sought to maintain waterfowl habitat, but the other ecological functions performed by wetlands were generally ignored. Indeed, for much of the 20<sup>th</sup> century, the federal government actively encouraged wetland destruction through various subsidy programs.

Federal regulation to prevent wetland development was not imposed until 1975, when a federal court decided that the Clean Water Act’s prohibition on filling “navigable waters” applied to wetlands. To this day, Congress has never affirmatively enacted a regulatory program explicitly limiting the development of wetlands.<sup>122</sup> By that time, however, numerous states and localities had enacted legislation to protect wetlands,

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<sup>119</sup> INDUR M. GOKLANY, *CLEARING THE AIR: THE REAL STORY OF THE WAR ON AIR POLLUTION* 126 (1999).

<sup>120</sup> *See id.* at 111-124.

<sup>121</sup> *See, e.g.*, E. Donald Elliott, Bruce A. Ackerman, and John C. Millian, *Toward a Theory of Statutory Evolution: The Federalization of Environmental Law*, 1 J.L. ECON & ORG. 313, 326-29 (1985).

<sup>122</sup> In 1977 Congress considered amendments to the Clean Water Act that would have an impact on federal regulatory authority, but such provisions did not pass. Congress has also enacted programs that provide incentives for wetland conservation or limit subsidy payments to discourage wetland development.

beginning with Massachusetts in 1963.<sup>123</sup> The Massachusetts law required a state permit for filling or dredging coastal wetlands.<sup>124</sup> Regulatory protections for inland wetlands were added two years later, shortly followed by floodplain protections.<sup>125</sup>

The pattern of state regulatory efforts to protect wetlands further undermines the race-to-the-bottom thesis that “the larger a state’s wetland inventory, the more important it is to the nation, but the less important saving it may appear to the state itself—indeed, the more onerous the burden of protecting it will appear.”<sup>126</sup> The reasoning is simple: The greater the proportion of a state’s land that constitutes wetlands, the greater the economic burden and competitive disadvantage a state will suffer by limiting wetland development. At the same time, the greater the proportion of a state’s land that constitutes wetlands, the lower the marginal value of each wetland acre will be. Thus, under the race-to-the-bottom theory, those states with the most wetlands should have regulated last and least. *Yet exactly the opposite occurred.* Of the 15 states that have more than 10 percent of their land area in wetlands, according to the National Wetland Inventory,<sup>127</sup> all save Alaska enacted their first wetland protection statutes prior to 1975.<sup>128</sup> As noted in a recent review of state efforts, “most of the states with the largest wetland acreages have adopted wetland regulatory efforts for all or a portion of their wetlands.”<sup>129</sup>

The historical record also supports the theoretical case for decentralizing responsibility for environmental protection. Presumably, the reason that states with the most wetlands regulated first is that these states were the first to recognize the economic and ecological benefits of wetlands, which range from water filtration to flood mitigation to species conservation. One could presume that these benefits were most apparent to local citizens and to those industries that are dependent on the ecosystem benefits

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<sup>123</sup> Alexandra D. Dawson, *Massachusetts’ Experience in Regulating Wetlands*, in WETLAND PROTECTION: STRENGTHENING THE ROLE OF THE STATES (Association of State Wetland Managers, 1985), at 255.

<sup>124</sup> *Id.* at 255.

<sup>125</sup> *Id.*

<sup>126</sup> Oliver A. Houck and Michael Rolland, *Federalism in Wetlands Regulation: A Consideration of Delegation of Clean Water Act Section 404 and Related Programs to the States*, 54 MD. L. REV. 1242, 1253 (1995).

<sup>127</sup> See Jon. A. Kusler et al., *State Wetland Regulation: Status of Programs and Emerging Trends* 5-8, Table 1 (Association of State Wetland Managers, 1994). These states are Alabama, Alaska, Delaware, Florida, Georgia, Louisiana, Maine, Massachusetts, Michigan, Minnesota, Mississippi, New Jersey, North Carolina, South Carolina, and Wisconsin.

<sup>128</sup> These data are summarized in Adler, *Wetlands, Waterfowl, and the Menace of Mr. Wilson: Commerce Clause Jurisprudence and the Limits of Federal Wetland Regulation*, 29 ENVTL. L. 1, 41-54 (1999).

<sup>129</sup> Kusler et al., *State Wetland Regulation*, *supra* note 127, at 3.

provided by wetlands. At a time when federal policy still subsidized swamp destruction in the name of economic development, those who lived nearest to wetlands began to realize what losing them could mean. They had site-specific knowledge—and the ability to act on it through state and local measures—that federal policymakers lacked.

Current developments in wetland protection policy further suggest that the race-to-the-bottom argument is overstated. As federal courts have restricted federal regulatory jurisdiction over wetlands, states have begun to expand their wetland protection efforts.<sup>130</sup> In January 2001, the Supreme Court held that, at least under current law, isolated wetlands were beyond the regulatory reach of the U.S. Army Corps of Engineers.<sup>131</sup> This followed several lower court decisions that also reined in federal regulatory authority.<sup>132</sup> As of this writing, however, several states have already begun to fill the void and protect those wetlands no longer subject to federal regulation.<sup>133</sup>

The bottom line is that the race-to-the-bottom theory cannot provide justification for continued federal preeminence in environmental regulation. Insofar as states compete for corporate investment, there is no reason to believe that interjurisdictional competition in the environmental context is any more severe than in any other. Indeed, there are compelling reasons to question whether interjurisdictional competition generates net welfare losses in environmental policy at all. While there would be nothing to prevent an EPA Administrator from considering the potential for negative interjurisdictional competition in evaluating forbearance petitions, the potential for such competition provides no reason to limit or refrain from using such a mechanism.

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<sup>130</sup> See, e.g., Caleb A. Jaffe, Note, *Tragedy of the Wetlands Commons: What the Virginia Nontidal Wetlands Resources Act Says about the Future of Environmental Regulation*, 20 VA. ENVTL. L.J. 329 (2001) (chronicling the passage of the Virginia Nontidal Wetlands Resources Act in response to court decisions restricting the federal government's regulatory authority).

<sup>131</sup> See *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Engineers*, 121 S.Ct. 675 (2001).

<sup>132</sup> See, *United States v. Wilson*, 133 F.3d 251 (4<sup>th</sup> Cir. 1997); *National Mining Ass'n v. U.S. Army Corps of Engineers*, 145 F.3d 1399 (D.C. Cir. 1998).

<sup>133</sup> See Jaffe, *supra* note 130. Michael Gerhardt reports that, since the Supreme Court's *SWANCC* decision: at least 19 states have responded to the decision by either enacting or recommending the enactment of laws to fill the void left by the Court's decision. These states include, inter alia, California, Connecticut, Illinois, New Jersey, North Carolina, Ohio, Oregon, South Carolina, Virginia, and Wisconsin. These reactions are a clear illustration of environmental federalism in action.

Michael J. Gerhardt, *The Curious Flight of the Migratory Bird Rule*, 31 ENVTL. L. REP. 11079, 11085 (2001).

B. *National Environmental Goods*

A second argument against devolving environmental responsibility to the states is that some environmental resources have the characteristics of “public goods” and therefore will be insufficiently protected by state governments. There are some environmental goods, such as drinking water quality, for which state or local residents might well receive most of the benefits. There are others, such as habitat for migratory species, for which the benefits are dispersed. A state that protects species habitat for the benefit of local residents is also benefiting individuals in other states—other states can “free ride” on the expenditures of the initial state. While such “free riding” is unlikely to discourage all habitat protection, it certainly could lead to sub-optimal levels of habitat protection. Just as private firms in a competitive market normally will undersupply goods that produce benefits for which they cannot charge, states in a federalist system would be expected to under-produce goods the benefits of which taxpayers in other states enjoy.

Accepting that the public good characteristic of at least some environmental resources requires federal intervention, it does not justify federal *regulation*. In other words, the public good nature of some environmental resources does not provide any reason to qualify or limit the environmental forbearance proposal outlined above. The traditional solution to public-good problems is not to have government regulation mandate the private provision of such goods. Rather, it is for the government to use its taxing and spending authority to raise the necessary funds to provide the good in question, or to give private actors the incentive to provide it. Such an exercise of the federal government’s spending power is sufficient to provide for national defense, the ultimate public good, and it should be sufficient to provide for environmental public goods as well.

There are already significant federal efforts to provide for environmental public goods. First, the federal government often acquires lands deemed sensitive so that they may be protected.<sup>134</sup> Second, several programs in the Interior and Agriculture Departments already provide landowners with economic incentives to restore and protect

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<sup>134</sup> Whether federal ownership and management results in protection is, however, another question altogether.

wetland and waterfowl habitat. Third, the federal government has programs, such as those under the Coastal Zone Management Act (CZMA), through which it subsidizes qualifying state programs. If these various programs are insufficient, the proper response would be to expand them or develop alternatives. There is no analytical basis, however, upon which to argue that the presence of environmental public goods counsels against the devolution of environmental regulatory authority to state governments. If the federal government has a comparative advantage in the provision of such goods, it should focus its efforts accordingly. Assuming, as argued by some, that the federal government has a comparative advantage in scientific and technical research, for example, due to the presence of substantial economies of scale, then a strong case can be made for federal support of such research and the dissemination of such information to environmental regulators. It does not follow, however, that federal *regulatory* involvement is required.

A related argument is that there are some environmental resources of such overriding national importance that they must be protected at the federal level: the Grand Canyon, Yellowstone, Yosemite, and so on. Protecting such places is important to America as a nation. Yet the existence of environmental resources of national significance, like the presence of “public goods,” does not justify the continued use of federal *regulatory* authority over environmental matters. Insofar as federal intervention is required to protect environmental resources of national importance, there are many means short of federal regulation that can be utilized. The federal government can subsidize the protection of critical resources or even acquire and manage such resources itself. There is no reason that reduction in federal *regulatory* authority should put such resources at any greater risk than they are already. Even granting the need for regulatory controls to address pollution of special places does not justify the maintenance of a broader regulatory regime. The need to control haze in the Grand Canyon cannot justify regulation of perchloroethylene emissions from dry cleaners in Orlando or St. Paul.

Some may nonetheless claim that “national moral ideals” require federal environmental regulation to maintain some particular baseline or level of environmental quality.<sup>135</sup> This argument is highly questionable because it assumes that *federal* regulation is an appropriate means of forcing one segment of society to pay for goods—in

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<sup>135</sup> See, e.g., Stewart, *supra* note 24, at 1217-19.



this case particular aspects of environmental quality—for which they have no particular desire or gain no particular benefit. It is one thing to say that decisions about environmental concerns that are *truly* national in scope should be made at the national level. But insofar as most environmental concerns are actually local or regional, decisions should be made at that level.

What passes for setting national policy to embody national values is often rent-seeking or economic redistribution in disguise. Regions with one set of preferences or interests can use environmental regulation—or any other form of regulation for that matter—to impose their preferences on the nation as a whole. Northeasterners that like the idea of wide, undeveloped expanses can impose the costs of their preferences on the residents of the states where such policies will be enacted. Urban dwellers who prefer to see rolling fields and idle farmland can seek regulation locking up the use of land in more rural states.

Economic interests can also be advanced through environmental regulation. As documented by Bruce Ackerman and William Hassler in *Clean Coal, Dirty Air*,<sup>136</sup> eastern coal producers joined with environmentalists to support technology-based emission control standards when the Clean Air Act was revised in 1977 to gain a leg up on western coal producers. Eastern coal is cheaper, but dirtier due to a higher sulfur content. Their lobbying in Washington paid off as the 1977 Clean Air Act amendments contained “new-source-performance standards” (NSPS) that forced facilities to attain a “percentage reduction in emissions.” In other words, no matter how clean coal was, a new facility would still be required to install scrubbers. This requirement destroyed low-sulfur coal’s cost advantage. If all new facilities had scrubbers, then there was no need to transport low-sulfur coal across the country. Less-expensive, high-sulfur coal from the East would work just as well, even if it produced greater emissions.

This is hardly an isolated example. In recent years federal environmental regulation has been used to benefit other regional interests, such as ethanol producers.<sup>137</sup> Environmental regulation has also been used by national firms to squelch regional

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<sup>136</sup> Bruce Ackerman and William Hassler in *Clean Coal, Dirty Air* (1981).

<sup>137</sup> Adler, *Clean Fuels, Dirty Air*, *supra* note 41.

competitors.<sup>138</sup> This sort of regional rent-seeking is only possible through a system of federal environmental regulation. Thus, even if national environmental values were a compelling justification for federal environmental regulation, the benefits of such regulation would have to be weighed against the costs of such rent-seeking efforts.

### C. *Interstate Spillovers and Transboundary Pollution*

A more compelling argument for continued federal environmental regulation, at least in some contexts, is the potential for interstate spillover effects, such as transboundary pollution.<sup>139</sup> If State A can pollute State B without fear of retribution, it has no incentive to control such effects. States may have substantial incentive to control pollution within their borders, but little inherent incentive to control pollution that extends beyond. Politicians do not want to pollute their own electorate, but are unlikely to care about polluting someone else's. Absent some external controls or dispute resolution system, this situation can lead to significant environmental harm, particularly in those cases in which the environmental impacts of a given activity are disproportionately "downstream," as can occur with tall-stack air emissions or polluting activities that occur on or near jurisdictional borders. Even where polluting activity imposes substantial environmental costs within the source state, the externalization of a portion of the harm on another state lessens the incentive to act, and therefore lessens the extent of control that is likely to result.

While interstate pollution is a real concern in the federalism context, interstate environmental problems remain the exception, not the norm. Most environmental problems are local or regional. Indeed, there are local, regional, and perhaps even global environmental problems, but few (if any) pollution problems are truly national in their

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<sup>138</sup> See, for example, Jonathan Adler, *Watching Paint Dry*, REG., Fall 1995, at 23 (national paint manufacturers seek national evaporative emission standards that will hurt regional, specialty paint manufacturers), and K.H. Jones and Jonathan Adler, *Time to Reopen the Clean Air Act: Clearing Away the Regulatory Smog*, 1995 CATO INST. POLICY ANALYSIS 233, at 23-5 (national auto manufacturers seek imposition of low-emission vehicle standard in all states except California as alternative to a regional standard imposed in the northeastern United States).

<sup>139</sup> See, e.g., Thomas W. Merrill, *Golden Rules for Transboundary Pollution*, 44 Duke L.J. 931 932 (1997) ("Given the inherent difficulties in regulation by any single state, transboundary pollution would seem to present a clear case for shifting regulatory authority from local to more centralized levels of governance.").

scope.<sup>140</sup> Drinking water systems serve the local communities in which they are based. Hazardous waste sites only threaten local communities. Phoenix's failure to meet the National Ambient Air Quality Standard for ozone does not affect Baton Rouge, let alone Philadelphia. Even the existence of regional problems, such as ozone transport in the Northeast, are not nationwide in scope. Yet the environmental portions of the U.S. Code contain relatively few provisions that address interstate concerns.

Landfills, incinerators, and the like are generally considered "locally undesirable land-uses" (LULUs) and can generate fierce local opposition. Local groups often adopt a "Not-In-My-Backyard" (NIMBY) stance toward such developments. The strength of these local responses would suggest that federal intervention is unnecessary to address such concerns—particularly because the impacts of pollution are generally most acute at or near the source. Therefore, most states and localities will act to address significant environmental problems before they generate substantial spillovers.<sup>141</sup> In addition, merely because transboundary pollution exists does not mean that federal intervention will solve the problem. "It is quite possible to be better off suffering unregulated externalities than to labor under a grasping, inept, or apathetic regulator," observes economist David Haddock.<sup>142</sup>

While there certainly are transboundary pollution problems, most are still rather localized in scope. Ozone-forming emissions in Philadelphia certainly affect air quality in southern New Jersey, but not in Tacoma, Washington. Such *regional* problems do not inherently justify *national* regulation. Water pollution problems often affect an entire watershed, but again this type of impact cannot justify the existing federal regulatory regime. Relatively few provisions of existing federal environmental laws address interstate pollution concerns, and those that do are rarely invoked.<sup>143</sup> Only recently has EPA invoked its authority under the Clean Air Act to control emissions from upwind

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<sup>140</sup> Comments of Bruce Yandle in *The Common Law Approach to Pollution Prevention: A Roundtable Discussion* (Center for Private Conservation, March 1998), at 11.

<sup>141</sup> Merrill, *supra* note 139, at 976-77.

<sup>142</sup> David D. Haddock, *Federal Systems: Origin, Decline, Prospects*, in ENVIRONMENTAL FEDERALISM, at 15.

<sup>143</sup> As one defender of an aggressive federal presence in environmental regulatory authority acknowledges, "EPA has not done a very good job of addressing transboundary pollution." Steinzor, *supra* note 46, at 11092.

states that contribute to downwind nonattainment of federal air quality standards.<sup>144</sup> For over two decades, EPA made no significant effort to address such concerns, focusing instead on air quality in urban centers. The existing reliance on widescale federal environmental regulation “must be defended, if it can be defended at all, on the basis that Washington should regulate *local* pollution.”<sup>145</sup>

Federal regulation has actually interfered with interstate pollution control. Long before the passage of the first federal pollution control statutes, the U.S. Supreme Court recognized the ability of downstream jurisdictions to bring common law nuisance actions against jurisdictions in other states that failed to control upstream pollution. In 1907, for example, the Court granted the state of Georgia an injunction against a copper smelter in Tennessee.<sup>146</sup> Similarly, in 1931 New Jersey obtained an injunction barring New York City from dumping garbage into the ocean that would wash up on New Jersey beaches.<sup>147</sup> Causation was difficult to prove in those days, but interstate nuisance claims were nonetheless viable at a time when the political branches of the federal government had little interest in addressing pollution concerns. Today, of course, demonstrating causation and tracing pollution to its source is much easier.

While the potential for interstate spillovers is trotted out as a justification for federal environmental regulation, the enactment of federal environmental laws largely preempted federal common law nuisance actions against interstate pollution. Prior to passage of the Clean Water Act in 1972, the Supreme Court still recognized common law nuisance suits for interstate water pollution.<sup>148</sup> After passage of the CWA, however, the Court held that such suits under federal common law were preempted by the Act.<sup>149</sup> Given how rarely federal environmental regulation is used to address these sorts of spillover concerns, one might well conclude that returning to a reliance on common law actions would do more to address interstate spillover effects than continued reliance on

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<sup>144</sup> See *Michigan v. EPA*, 213 F.3d 663 (D.C. Cir. 2000); *Appalachian Power Co. v. EPA*, 249 F.3d 1032 (D.C. Cir. 2001).

<sup>145</sup> Schoenbrod, *supra* note 39, at 261.

<sup>146</sup> *Georgia v. Tennessee Copper Co.*, 206 U.S. 230 (1907).

<sup>147</sup> *New Jersey v. City of New York*, 284 U.S. 585 (1931).

<sup>148</sup> Prior to passage of the CWA, the Supreme Court recognized common law nuisance suits for interstate water pollution. See *Illinois v. City of Milwaukee*, 406 US 91 (1972).

<sup>149</sup> See *City of Milwaukee v. Illinois*, 451 U.S. 304 (1981).

the existing regulatory regime.<sup>150</sup> This conclusion is particularly true when one considers the potential for other institutional arrangements, including interstate compacts, to address at least some interstate pollution concerns.<sup>151</sup>

Nonetheless, transboundary pollution problems are real. Unlike fears of a race-to-the-bottom or concerns about environmental “public goods,” the potential for interstate spillover effects merits consideration in the environmental forbearance process. While states should be given the opportunity to develop their own environmental priorities and programs absent federal interference, one state should not be allowed to impinge upon another state’s freedom to make its own choices. Where forbearance of an existing environmental requirement would result in downstream impacts, the Administrator should not approve the forbearance petition, at least not absent provisions to address potential spillover effects.

The potential for interstate spillovers could be addressed in several ways. First, just as the Communications Act forbearance provisions exempt certain provisions of the Act, an environmental forbearance statute could categorically exempt the handful of statutory provisions that target interstate environmental problems directly. Second, the Administrator could be required to assess potential interstate spillover effects and conclude that forbearance would not produce significant or uncompensated transboundary pollution before granting a petition. Because downstream states would have the opportunity to comment on pending petitions, and forbearance decisions would be subject to judicial review, the Administrator would be forced to explain this conclusion and could not summarily disregard concerns from states that fear environmental harm from a given forbearance proposal.

A third alternative is suggested by the work of Thomas Merrill.<sup>152</sup> Merrill advocates a “golden rule” for addressing transboundary pollution similar to that implicit in many of

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<sup>150</sup> See, e.g., *THE COMMON LAW AND THE ENVIRONMENT: RETHINKING THE STATUTORY BASIS FOR MODERN ENVIRONMENTAL LAW* (Roger E. Meiners & Andrew P. Morris eds., 2000); Roger Meiners & Bruce Yandle, *Common Law Environmentalism*, 94 *PUB. CHOICE* 99 (1998); Roger Meiners & Bruce Yandle, *Common Law and the Conceit of Modern Environmental Policy*, 7 *GEO. MASON L. REV.* 923 (1999).

<sup>151</sup> For instance, Congress authorized the Tahoe Regional Planning Compact between California and Nevada in 1969 which created the Tahoe Regional Planning Agency which oversees the Lake Tahoe basin. Pub L. No. 96-551, 94 Stat. 3234 (1969). See also the discussion of the Ohio River Sanitation Commission (ORANSCO), in BRUCE YANDLE, *COMMON SENSE AND COMMON LAW FOR THE ENVIRONMENT* 27, 57 (1997).

the federal common law decisions concerning interstate nuisance. Under Merrill's proposal

the affected state is entitled to be treated by the source state in the same way as the affected state treats its own citizens. Under such a rule, the critical question . . . becomes whether the affected state has been exposed to pollution to a degree that would give rise to a regulatory response if the pollution had been introduced by a private citizen in the affected state.<sup>153</sup>

In other words, a downstream state could not object to upstream pollution unless it is in excess of what the downstream state is willing to tolerate from its own sources. Where, however, a downstream source controls given sources of pollution, thereby adopting a particular environmental policy preference, action to prevent such upstream pollution would be justified.

This principle could be incorporated into the forbearance process by allowing downstream jurisdictions to object to a petition that threatens transboundary pollution. Such objections, properly raised, could even be presumed controlling. That is, the burden would be on the Administrator to demonstrate why such a claim should be rejected. Standing to raise such an objection, however, could be based on the downstream jurisdiction's having policies that address the sort of pollution at issue. In other words, were New Jersey to obtain forbearance from controlling perchloroethylene emissions from dry cleaners, it would no longer have standing to object to Pennsylvania obtaining similar relief—at least absent a showing that such emissions from Pennsylvania would impose a disproportionate environmental burden on New Jersey. Were New Jersey to maintain its controls on dry cleaners, however, it would have standing to object. Under such a system, downstream states would be able to seek redress for upstream pollution without resort to a national standard or program. States would also be able to prioritize what sorts of transboundary problems are sufficiently serious to justify taking action, and which are ephemeral or inconsequential. After all, not every detectable or measurable transboundary effect will cause significant harm. Natural systems are tremendously

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<sup>152</sup> See Merrill, *supra* note 139.

<sup>153</sup> *Id.* at 936.

resilient and robust, and in many cases local officials may well conclude that the costs of certain transboundary effects do not justify the effort required to seek relief.<sup>154</sup>

One of the benefits of this third approach to interstate pollution concerns is that it limits the potential for competing jurisdictions to oppose forbearance for fear of being placed at a competitive disadvantage. Rather, it would effectively require a threshold showing of environmental concern for such an objection to be considered. Such an approach would enable downstream states to voice legitimate concerns, but limit the potential for rent-seeking in the process.

To summarize, even though an environmental forbearance process should take the potential for transboundary pollution into account, the mere existence of such externalities does not justify maintenance of the status quo regulatory regime. Relatively few existing environmental regulations address interstate pollution problems. Therefore, little of the existing regulatory regime can be justified on the grounds of controlling spillover effects.

#### *D. Economies of Scale and Industry Preference*

Not all arguments against decentralization of environmental policy are “environmental.” Large segments of the corporate community are ambivalent about devolving greater authority to state regulatory officials. Many corporate officials fear that different states will adopt different regulatory standards, replacing a national regulatory system with an uneven patchwork of state and local standards. Large corporations that market products nationwide are particularly concerned that environmental devolution will mean multiple state or regional standards for products sold in national markets.

Corporate ambivalence to environmental federalism is nothing new. While Naderite and environmentalist groups argued for greater federal regulation of air quality because state and local regulation was insufficient, there is substantial evidence that state and local governments, as well as broader economic changes, were already ameliorating

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<sup>154</sup> For a discussion of ecological “robustness” in the context of environmental federalism, see Landy, *Local Government and Environmental Policy*, *supra* note 36, at 255-56.

the nation's worst air quality problems.<sup>155</sup> Indeed, one of the key drivers behind federal usurpation of pollution control policy was corporate concern that some states were doing too much, too quickly.<sup>156</sup> In the early 1960s, Lloyd Cutler reportedly recommended that national auto manufacturers support granting the federal government authority to set national vehicle emission standards to preempt state standards. "He reasoned that the companies would be able to keep the secretary [of Health Education and Welfare] from imposing expensive pollution reduction measures . . ." <sup>157</sup> Congress authorized federal automobile standards in 1965 and preempted state standards in 1967. At the same time, it adopted a regulatory scheme designed to frustrate and delay regulation of emissions from electric utilities.<sup>158</sup>

Many in the corporate community see national environmental standard-setting as a deal. In exchange for federal standards, national corporations are assured that single national standards will preempt state rules of varying stringency, allowing standardization and preventing the balkanization of national markets. A single, albeit higher, standard replaces a patchwork of variable standards. While this may seem like an appealing trade for corporate officials, I would suggest that the business community does not actually receive such a bargain.

First, national standards have not really created all that much standardization. Federal standards for air and water quality have required states to enact particular regulatory regimes, but they have not created a purely standardized process. The existence of an overarching federal regulatory regime may have prevented a polyglot of 50 state standards, but it has not ensured uniform national standards for products such as automobiles and gasoline. Site-specific permitting continues, despite the reams of federal permitting requirements. Moreover, some aspects of environmental regulation, such as land-use control, will remain localized irrespective of whether Congress or the EPA imposes national rules. Thus, when it is time to site a new industrial facility, national standards do little more than add a layer of regulatory requirements on top of those already in place.

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<sup>155</sup> See INDUR M. GOKLANY, *CLEARING THE AIR: THE REAL STORY OF THE WAR ON AIR POLLUTION* (1999).

<sup>156</sup> See, e.g., Elliott et al., *supra* note 121, at 326-9.

<sup>157</sup> Schoenbord, *supra* note 39, at 261.

<sup>158</sup> *Id.*



Second, it is doubtful that many corporate compliance officials see federal environmental regulation as the source of a stable and predictable regulatory regime. The complexity and arbitrariness of many environmental rules makes compliance immensely difficult. Once a new federal regulation is promulgated, its application often remains unsettled until after years of wrangling and litigation. Guidance documents, interpretive rules and the like further shift the sands of regulatory requirements.

Third, actual federal preemption of state and local standards is relatively rare in the environmental context. Not every state is allowed to develop its own automobile standards, but the combination of federal and California low emission vehicle rules requires either the construction of multiple automobile lines or adoption of the lowest common denominator. Thus, despite the existence of a federal regulatory scheme, automakers are still required to design, produce, and market more than one line of cars. In other areas, preemption is minimal, and corporations that seek to design, produce and sell products for a unified, national market still face the potential of variable local rules. Because federal preemption of state and local environmental standards is largely honored in the breach, it's not clear whether ecological forbearance presents a serious threat of balkanizing national product markets.

These arguments notwithstanding, concerns about a potential patchwork of state product standards are reasonable—at least for some industries. Automobiles are no longer the only consumer product covered by environmental regulations. Environmental rules now cover everything from gasoline and paint to leaf-blowers and hair spray. Thus, when it comes to consumer products, there is a legitimate concern that different states could require the sale of goods with different characteristics. For companies that rely on only a handful of production facilities to serve a national market—a setup that can have its own environmental benefits due to economies of scale—catering to multiple markets with specific, perhaps even contradictory, requirements could impose substantial costs.

This concern can be accommodated in the context of forbearance in one of three ways. First and foremost, it could simply be left to the corporate community to make its case to the EPA Administrator should a state seek forbearance from an existing federal product standard or preemptive rule. Second, the forbearance statute could exempt preemptive federal rules from its scope. That is, where Congress has explicitly preempted

state action, forbearance could be barred absent congressional action. This approach would have the drawback of foreclosing forbearance proposals that might produce significant environmental gains. Third, the Administrator could be required to address the potential for product market balkanization in assessing specific proposals. This requirement would not give corporations all of the protection that they seek, but it would ensure that their concerns are on the table and addressed in the rulemaking process when forbearance is proposed.

## CONCLUSION

As noted at the outset, there is greater consensus about the failings of the existing environmental regime than there is about how to fix it. The conventional wisdom suggests that flexibility and the use of market mechanisms can rehabilitate the existing environmental control regime. Others believe that better use of science and economic analysis will result in more sensible priorities and policy outcomes. For some, greater “stakeholder” participation and a reduction of corporate influence are the keys to restoring the American system of environmental protection. Still others, this author included, are less sanguine about anything short of the wholesale re-orientation of environmental protection away from government regulation and toward the creation of property rights and markets in ecological resources.<sup>159</sup>

Whatever side one takes in these debates, one is forced to argue absent conclusive information. Modern environmental policy is essentially three decades old, and there has been relatively little experimentation. History is only a partial guide. Prior to the onset of federal regulation there was relatively little concern for environmental matters, and therefore few efforts to protect environmental resources. While we all may have ideas about how to fix environmental policy, many policy questions are unanswerable with any certainty—and will remain that way until alternatives are tried and hypotheses tested.

This, in the end, is perhaps the greatest argument for freeing the states to become laboratories of environmental policy. If the environmental progress of the past 30 years is

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<sup>159</sup> See, e.g., Jonathan H. Adler, *Free & Green: A New Approach to Environmental Protection*, 24 HARV. J.L. & PUB. POL’Y 653 (2001); ECOLOGY, LIBERTY & PROPERTY: A FREE MARKET ENVIRONMENTAL READER (Jonathan H. Adler ed., 2000).

to continue, new approaches must be adopted. Yet until new approaches are tried, many aspects of what constitutes the “ideal” approach to environmental protection—or simply the nature of the trade-offs that we face—will be obscured. Market competition is, above all else, a discovery process. The constant interaction and feedback generates information about what works and what does not. If we are to make our way out of the environmental policy morass in which we find ourselves, we need to discover more about environmental problems and their solutions. Allowing interjurisdictional competition is the surest, and safest, means to achieve that end.

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