

# HARNESSING THE BENEFITS OF DYNAMIC FEDERALISM IN ENVIRONMENTAL LAW

Kirsten H. Engel\*

## INTRODUCTION

Despite exhortations to the contrary,<sup>1</sup> the federal government continues to address issues of purely local effect while the states continue to address issues of national—and even international—effect.<sup>2</sup> To take a well-publicized example, when Congress enacted the No Child Left Behind Act of 2001,<sup>3</sup> it imposed detailed requirements relating to teacher qualification, student performance, and reporting upon states in primary and secondary education, what might be considered the quintessential object of state and local control.<sup>4</sup> Examples of federal and state overreach also abound in the environmental area,

---

\* Professor of Law, University of Arizona James E. Rogers College of Law. The author wishes to thank Marc Miller, William Buzbee, and the other participants in the *Emory Law Journal* 2006 Randolph W. Throuser Symposium. The author also wishes to thank the members of the *Emory Law Journal*, especially Sara Tindall Ghazal and Shirley Brener for making my own participation in the Symposium so rewarding. I wish to thank the James E. Rogers College of Law and the University of Arizona Law College Association for their generous financial support in the preparation of this Article.

<sup>1</sup> See, e.g., Jonathan H. Adler, *Jurisdictional Mismatch in Environmental Federalism*, 14 N.Y.U. ENVTL. L.J. 130, 157 (2005) (arguing that the division of authority and responsibility in environmental law is inefficient, at times “environmentally harmful,” and does not comport with an analytical framework that reserves issues of national scope to the federal government and issues of local effect to state governments); Henry N. Butler & Jonathan R. Macey, *Externalities and the Matching Principle: The Case for Reallocation Environmental Regulatory Authority*, 14 YALE L. & POL’Y REV. 23, 25 (Symposium Issue 1996) (suggesting a “matching principle” according to which “the size of the geographic area affected by a specific pollution source would determine the appropriate governmental level for responding to the pollution . . . . There is no need for the regulating jurisdiction to be larger than the regulated activity.”); Daniel C. Esty, *Revitalizing Environmental Federalism*, 95 MICH. L. REV. 570, 587 (1996) (“Whenever the scope of an environmental harm does not match the regulator’s jurisdiction, the cost-benefit calculus will be skewed and either too little or too much environmental protection will be provided.”); Richard O. Zerbe, *Optimal Environmental Jurisdictions*, 4 ECOLOGY L.Q. 193, 245 (1974) (The case for local jurisdiction over environmental regulation is strong with important exceptions for “where there is undue political influence at local levels, where there is sufficient interjurisdictional pollution, and where technological considerations give substantially greater efficiency to larger jurisdictions in either providing technical information or in carrying out control responsibilities.”).

<sup>2</sup> See Robert A. Schapiro, *Toward a Theory of Interactive Federalism*, 91 IOWA L. REV. 243, 250 (2005).

<sup>3</sup> Pub. L. No. 107-110, 115 Stat. 1425 (codified in scattered sections of 20 U.S.C.).

<sup>4</sup> Note, *No Child Left Behind and the Political Safeguards of Federalism*, 119 HARV. L. REV. 885, 888 (2006).

the subject matter of this Article. Objects of federal regulation include municipal solid waste landfills, drinking water, and underground storage tanks, even though leaking municipal dumps, contaminated tap water and polluted aquifers beneath neighborhood gasoline stations affect only the local population and seldom affect persons or businesses out of state.<sup>5</sup> What others have termed the “jurisdictional mismatch”<sup>6</sup> is true in the opposite direction as well. For example, it is the states and local governments—not the federal government—that are taking the lead in addressing climate change in the United States.<sup>7</sup> Yet because climate change is the result, at least in part, of human-induced greenhouse gas emissions from around the globe, climate change is widely regarded as the textbook example of an environmental issue best addressed at the national and international levels.<sup>8</sup>

The states’ failure to restrict their regulatory authority to issues impacting only their own jurisdictions, and the federal government’s failure to regulate only when the states’ ability to address an issue effectively is hobbled by

---

<sup>5</sup> Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6941–49a (2000) (regulating municipal solid waste landfills); § 6991(1) (regulating underground storage tanks); Safe Drinking Water Act, 42 U.S.C. § 300g to g-9 (regulating public drinking water systems). These contamination problems, although regulated by federal laws, are in many senses local issues. *See, e.g.*, Beth Jones, *Resident Requests Water Line Extension*, ROANOKE TIMES, July 11, 2006, at B2 (resident requests city water line extension due to leaking contamination to groundwater from old city landfill); Debbie LaPlaca, *Charlton Water Plan Hits a Snag*, WORCESTER TELEGRAM & GAZETTE, Aug. 2, 2006, at B1 (challenges facing city water system); Brian Nearing, *Landfill Focus of Lawsuits*, TIMES UNION (Albany, N.Y.), June 10, 2006, at B1 (controversy over leak from city landfill).

<sup>6</sup> Adler, *supra* note 1, at 157; William W. Buzbee, *Recognizing the Regulatory Commons: A Theory of Regulatory Gaps*, 89 IOWA L. REV. 1, 23 (2003) (identifying several types of “jurisdictional mismatch[es],” including those where the states and the federal government share authority to address a given environmental problem but neither has “regulatory primacy” over the problem and concluding, in contrast to Jonathan Adler, that such mismatches leads to under, not over, regulation).

<sup>7</sup> California’s recent regulatory actions provide excellent examples of this. Just recently, California enacted legislation to cap the amount of emissions generated by the state with a goal towards reducing emissions to the State’s 1990 emission levels by 2020, a reduction of twenty-five percent. Felicity Barringer, *Officials Reach California Deal to Cut Emissions*, N.Y. TIMES, Aug. 31, 2006, at A1. California has also used its special status under the Clean Air Act as the only state with the authority under the Clean Air Act to regulate vehicle emissions differently than the EPA. *See infra* note 58 and accompanying text. Importantly, California is not alone. States as diverse as Arizona, Massachusetts and Nebraska are taking action—or planning to take action—to reduce greenhouse gas emissions. For ongoing updates of state climate change initiatives, see the Pew Center on Global Climate Change, <http://www.pewclimate.org>. *See generally* BARRY G. RABE, STATEHOUSE AND GREENHOUSE: THE EMERGING POLITICS OF AMERICAN CLIMATE CHANGE POLICY (2004); Margaret Kriz, *Warm-Up Drills*, 37 NAT’L J. 906 (2005); Andrew C. Revkin & Jennifer 8. Lee, *White House Attacked for Letting States Lead on Climate*, N.Y. TIMES, Dec. 11, 2003, at A32.

<sup>8</sup> DANIEL A. FARBER ET AL., CASES AND MATERIALS ON ENVIRONMENTAL LAW 47 (7th ed. 2006) (“Perhaps the most striking example of a commons problem is climate change, since everyone on the planet has a stake and nearly everyone’s activities contribute to the problem.”).

collective action problems, are inconsistent with the policy implications of the scholarly debate over environmental federalism, in which scholars have supported a particular allocation of at least primary regulatory authority between the states and the federal government.<sup>9</sup> The purpose of this Article is not to reengage in the long-running debate over whether, and when, the federal or the state governments are the more appropriate environmental regulators.<sup>10</sup> Rather, the purpose is to question the fundamental assumption underlying the debate: that regulatory authority to address environmental ills should be allocated to one or the other level of government with minimal overlap. This Article argues first that a static allocation of authority between the state and federal government is inconsistent with the process of policymaking in our federal system, in which multiple levels of government interact in the regulatory process. Absent constitutional changes that would lock in a specific allocation of authority, broad, overlapping authority between levels of government may be essential to prompting regulatory activity at the preferred level of government. This Article further argues that a static allocation of authority deprives citizens of the benefits of overlapping jurisdiction, such as a built-in check upon interest group capture, greater opportunities for regulatory innovation and refinement, and relief for the courts from the often futile and confusing task of jurisdictional line-drawing. Part I.A of this Article critiques the scholarly adherence to a generally rigid separation between state and

---

<sup>9</sup> See, e.g., Adler, *supra* note 1, at 131; Butler & Macey, *supra* note 1, at 28. An important exception to this viewpoint is expressed by Richard Stewart, who argues that environmental quality is considered by many Americans to be a national good and hence that “environmental programs should presumptively be federal unless ‘centralization failure’ dictates decentralization.” Richard B. Stewart, *Environmental Quality as a National Good in a Federal State*, 1997 U. CHI. LEGAL F. 199, 213.

<sup>10</sup> Beginning from the assumption that environmental issues concern land use and thus are presumptively the province of state and local governments, scholars have long debated the rationale for federal environmental regulation. See, e.g., Kirsten H. Engel, *State Environmental Standard-Setting: Is There a “Race” and Is It “To the Bottom”?*, 48 HASTINGS L.J. 271 (1997) (contending that game theoretic assumptions are more appropriate for interstate competition for mobile industry than neoclassical economic models and that, in the absence of federal regulation, interstate competition for industry appears to decrease rather than enhance welfare); Richard L. Revesz, *Federalism and Environmental Regulation: A Public Choice Analysis*, 115 HARV. L. REV. 553 (2001) [hereinafter Revesz, *Federalism and Environmental Regulation*] (challenging the assumption that public choice pathologies will have a greater presence in federal, as opposed to state, environmental regulation); Richard L. Revesz, *Rehabilitating Interstate Competition: Rethinking the “Race-to-the-Bottom” Rationale for Federal Environmental Regulation*, 67 N.Y.U. L. REV. 1210, 1211–12 (1992) [hereinafter Revesz, *Rehabilitating Interstate Competition*]; Richard B. Stewart, *Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy*, 86 YALE L.J. 1196, 1211–12 (1977) (setting forth rationales for federal environmental regulation, including interstate spillovers, the likelihood of a welfare-reducing race to the bottom in state environmental standard setting, and the greater ability of federal legislation to muster the “pyramids of sacrifice” necessary to address environmental problems).

federal jurisdiction, which I argue is rooted in the dominance of economic models in the environmental federalism debates. In Part I.B, I contrast the scholarly preoccupation with the separation of federal and state power with environmental federalism in practice, which is marked by a large degree of jurisdictional overlap and interaction between the states and the federal government. Part II of this Article sets forth an alternative vision of environmental federalism, drawing upon recent scholarship that conceives the states and the federal government as alternative—not mutually exclusive—sources of regulatory authority. Such a conception views the interaction between the two levels of government as a means of improving the quality and responsiveness of regulation.

Instead of attempting to define, distinguish, and cabin federal and state authority, Part II argues that policymakers, courts, and scholars should seek ways to harness and channel the political motivations that lead to jurisdictional overlap to minimize its downsides (e.g., redundancy, lack of finality and accountability) and enhance its upsides. For policymakers, this means seeking federal legislative solutions that allow states to innovate within the bounds of federal ground rules while providing a flexible framework for interaction between the federal and state players. For instance, where national uniformity is desired, Congress might allow for the development of a single standard by the states themselves, as opposed to the imposition of a standard by the federal government. Congress did something similar to this with the Clean Air Act, which allows California—a state that has repeatedly demonstrated its commitment to environmental policy—to establish vehicle air pollution emission standards; all other states are given the opportunity to adopt California's standards or to remain subject to the federal standards developed by the Environmental Protection Agency.

The courts are important players in any federalism construct, and thus, a reconceived theory of environmental federalism must be clear on the role the courts will play in policing the inevitable conflicts that will arise between federal and state regulatory actors. In such conflicts, the federal government holds the upper hand by virtue of the constitutionally granted powers to preempt state law under the Supremacy Clause<sup>11</sup> and to invalidate state laws under the dormant Commerce Clause.<sup>12</sup> Because the benefits of dynamic federalism that Part II envisions flow from the existence of states as alternative

---

<sup>11</sup> U.S. CONST. art. VI, § 2.

<sup>12</sup> *Id.* art I, § 8.

regulators and from the advantages of a regulatory dialogue between the two levels of government, it is paramount that states are given relatively free reign to develop policy solutions. This means that federal courts should employ their power to invalidate state laws under the Supremacy Clause and the dormant Commerce Clause sparingly. This prescription is particularly important because in completely eliminating the lawmaking powers of a level of government, judicially sanctioned preemption destroys states' ability to present alternative regulatory solutions and to "check" the interest group capture of policymakers at the federal level. Preemption, then, is the real boogeyman of public interest lawmaking because it prevents the political process from policing itself. A conception of federalism, such as the one I advance in Part II, that limits the degree to which preemption destroys the advantages of a dual system of government is not only good government, but is more true to the process of policymaking that our constitutional structure contemplates.

## I. ENVIRONMENTAL FEDERALISM THEORY VS. PRACTICE

### A. *The Static Assumptions Underlying the Scholarly Debates*

The debate over environmental federalism theory is dominated by references to static economic models used to justify a preferred allocation of regulatory authority between the states and the federal government.<sup>13</sup> Though scholars recognize state-to-state interactions—specifically the prospect for interstate competition for mobile industry—little attention has been devoted to the prospect for, and implications of, interaction between the states and the federal government. The end result of this scholarly approach is to omit a large fraction of the actual practice of environmental federalism from the debate. Values other than economic efficiency that may be achieved through a dynamic approach to the allocation of state and federal authority are also left out of the academic discussion.

Much of the modern scholarly debate over environmental federalism seeks to determine the proper allocation of regulatory authority between the states and the federal government with respect to specific environmental problems. As such, it proceeds according to an assumption that regulatory authority should reside more or less exclusively in one level of government with respect

---

<sup>13</sup> See *supra* note 9 and accompanying text.

to particular types of environmental issues, though levels of government may split the tasks of setting standards, on the one hand, and implementing and enforcing those standards on the other.<sup>14</sup> The debate over the proper allocation of environmental regulatory authority is largely traceable to an influential 1977 article by Professor Richard Stewart that advanced the argument that federal regulation was economically superior to state regulation with respect to certain environmental issues.<sup>15</sup> Among other justifications for federal, as opposed to state environmental regulation, Stewart argued that federal regulation would prevent a welfare-reducing race to the bottom in state environmental programs as states compete with each other to attract or maintain mobile industry, save environmental groups the expense of lobbying fifty separate legislatures, exploit environmentalists' allegedly greater influence at the national level, and stymie interstate pollution spillovers.<sup>16</sup> According to the latter theory, in the absence of federal regulation, states will generate an excessive amount of pollution because they are able to externalize the costs of pollution while retaining the economic benefits (e.g., jobs, tax revenues) of the activities that produce the pollution.<sup>17</sup>

Stewart's economic argument proved enormously influential, setting the stage for subsequent debates over federalism in environmental regulation. In a series of articles, Professor Richard Revesz critiqued several of Stewart's arguments, contending that they did not support a preference for federal over state environmental regulation.<sup>18</sup> For example, using a neoclassical economic model, Revesz argued that, rather than triggering a welfare-reducing race to the bottom, interstate competition in state environmental standard-setting markets would increase social welfare.<sup>19</sup> Revesz concluded that minimum federal environmental standards, preempting less stringent state environmental

---

<sup>14</sup> "Cooperative federalism" is the best known example of such a split between standard setting, which is left to the federal government, and implementation and enforcement, which is left to the states. See Robert V. Percival, *Environmental Federalism: Historical Roots and Contemporary Models*, 54 MD. L. REV. 1141, 1174 (1995).

<sup>15</sup> Stewart, *supra* note 10.

<sup>16</sup> *Id.* at 1211–19. Stewart's argument also relied upon a noneconomic factor: the greater ability of national mechanisms of government to achieve commitments entailing material sacrifice needed by environmental regulation. *Id.* at 1217–19.

<sup>17</sup> *Id.* at 1215–16.

<sup>18</sup> See Richard L. Revesz, *Federalism and Interstate Environmental Externalities*, 144 U. PA. L. REV. 2341 (1996); Revesz, *Rehabilitating Interstate Competition*, *supra* note 10.

<sup>19</sup> Revesz, *Rehabilitating Interstate Competition*, *supra* note 10. Revesz reached this result by relying upon an economic model that assumes that interstate competition in state environmental standard setting is a perfectly competitive market, as opposed to the imperfect model assumed by Stewart and other "race to the bottom" theorists. *Id.* at 1238–42.

standards, would actually prevent states from adopting optimal standards in response to interstate competition.<sup>20</sup> Revesz has also challenged the interstate spillovers rationale for federal environmental law, contending that while the national government's authority over environmental regulation is theoretically justified, it has been exercised inefficiently.<sup>21</sup> Finally, Revesz has challenged the notion that federal regulators are more impervious to public choice pathologies than state regulators.<sup>22</sup>

While Revesz chipped away at Stewart's rationales for federal environmental law, others drew upon Revesz's critique to develop a more comprehensive theory for the allocation of state and federal environmental regulatory authority. In a 1996 article, Professors Henry Butler and Jonathan Macey argued that because the goal of government regulation is achieving an optimal allocation of resources, such regulation should be limited to eliminating externalities—effects of activities whose costs (or benefits) are not priced in the market system.<sup>23</sup> If the costs and benefits of an environmental problem are fully contained, or internalized, within the geographic boundaries of a particular jurisdiction, there is no externality to eliminate, and thus, according to Butler and Macey, no need for federal involvement.<sup>24</sup> Even when costs of environmental problems are *not* entirely contained within a jurisdiction, the authors would limit the federal government's role to defining property rights so as to allow the states involved to bargain between themselves to reach an efficient solution.<sup>25</sup> Butler and Macey argue that the allocation of environmental regulatory authority should follow a "matching principle" according to which regulatory authority should, in general, "go to the political jurisdiction that comes closest to matching the geographic area affected by a particular externality."<sup>26</sup> According to this analysis, overlapping federal and state authority is wasteful because it may result in the development of inefficient standards, both through the introduction of regulatory goals other

---

<sup>20</sup> *Id.* at 1245. Revesz's article spawned a host of critiques, questioning his reliance upon a neoclassical economic model and the appropriateness of this model to interstate competition in environmental standard setting. See, e.g., Engel, *supra* note 10; Joshua D. Sarnoff, *The Continuing Imperative (But Only from a National Perspective) for Federal Environmental Regulation*, 7 DUKE ENVTL. L. & POL'Y F. 225 (1997); Peter P. Swire, *The Race to Laxity and the Race to Undesirability: Explaining Failures in Competition Among Jurisdictions in Environmental Law*, 14 YALE L. & POL'Y REV. 67 (Symposium Issue 1996).

<sup>21</sup> Revesz, *supra* note 18, at 2346.

<sup>22</sup> Revesz, *Rehabilitating Interstate Competition*, *supra* note 10, at 1254.

<sup>23</sup> Butler & Macey, *supra* note 1, at 25.

<sup>24</sup> *Id.* at 53.

<sup>25</sup> *Id.* at 29–37.

<sup>26</sup> *Id.* at 53.

than externality elimination, and through interference with the free movement of firms through government overappropriation of fixed capital assets.<sup>27</sup>

The scholars discussed above do not explicitly address the issue of overlapping environmental jurisdiction. However, in advocating optimal efficiency through allocation of regulatory authority between the state and the federal government, they presuppose nonoverlapping roles.

As will be discussed in Part II, the scholarly preoccupation with a rigid allocation of state and federal environmental regulatory authority is misguided for a number of reasons. Most importantly, it ignores the manner in which policy leadership shifts between levels of government in a federal system, and hence how policy may start at one level of government before shifting to the level that might be considered optimal. In addition, the environmental federalism debate ignores the benefits of overlapping jurisdiction for the quality of policy development.

### *B. The Dynamic Nature of Environmental Federalism in Practice*

As one commentator openly admits, “the division of authority and responsibility in environmental policy does not comport with the analytical framework” that has dominated the scholarly environmental federalism debate.<sup>28</sup> Researchers have found a substantial degree of overlap in the types of environmental issues actually addressed by the states and the federal government.<sup>29</sup> Moreover, it appears that jurisdictional overlap is the norm, not the exception.<sup>30</sup> The federal government has been quite active on issues that might be considered local in nature, while the states frequently plunge into areas with national, and even international, effects.<sup>31</sup> Finally, researchers have found not only that the states and the federal government tarry far from their supposed area of expertise, but that they do not always do their own “job” very well.<sup>32</sup> This section describes some of these jurisdictional mismatches while the next suggests some possible explanations.

---

<sup>27</sup> *Id.* at 32.

<sup>28</sup> Adler, *supra* note 1, at 157.

<sup>29</sup> *Id.*; see also William W. Buzbee, *Contextual Environmental Federalism*, 14 N.Y.U. ENVTL. L.J. 108, 118–19 (2005).

<sup>30</sup> See *infra* Parts I.B.1–2.

<sup>31</sup> See *infra* Part I.B.2.

<sup>32</sup> See *infra* Parts I.B.1–2.

### 1. *The Federal Government*

The federal government is legendary for poaching on state and local governments' territory by addressing issues that some may argue are purely local. The Safe Drinking Water Act sets minimum standards for drinking water quality through the establishment of maximum contaminant levels for public water supplies.<sup>33</sup> The public water authorities regulated by the Act provide drinking water to local residents—a local, intrastate activity.<sup>34</sup> The Resource Conservation and Recovery Act provides for federal regulation of solid waste disposal in *municipal* waste dumps.<sup>35</sup> The Surface Mining Control and Reclamation Act requires mine operators to restore the land affected to conditions capable of supporting the same or higher and better uses than the land was capable of supporting prior to mining, thus governing the traditionally local function of controlling land use.<sup>36</sup>

At the same time, the federal government often neglects environmental issues posing interstate externalities, for which federal involvement would seem to be most easily justified. For instance, the federal government has done a poor job of cracking down on interstate pollution spillovers, including those that seem clearly intentional.<sup>37</sup> Similarly, the federal government has often failed at filling in the gaps in scientific research on environmental issues.<sup>38</sup> Yet, given the greater resources of the federal government vis-à-vis the states, and the economies of scale that are realized through federal research as opposed to state research efforts, this would appear to be an area where the federal government might be expected to shine. As discussed below, there are numerous examples of the federal government's failure to establish standards for nationally distributed products that affect the environment despite the

---

<sup>33</sup> 42 U.S.C. § 300g-1(b)(1)(A) (2000).

<sup>34</sup> Indeed, Nebraska challenged the constitutionality of standards promulgated by the EPA for maximum levels of arsenic contamination in public water systems, arguing that the regulations exceeded EPA's powers under the Commerce Clause because they regulated the intrastate sale and distribution of drinking water. *Nebraska v. EPA*, 331 F.3d 995, 998 (D.C. Cir. 2003). Based upon evidence that a number of water utilities sell a substantial volume of drinking water across state lines, the U.S. Court of Appeals for the District of Columbia rejected Nebraska's challenge. *Id.*

<sup>35</sup> 42 U.S.C. §§ 6901-08 (2000).

<sup>36</sup> 30 U.S.C. §§ 1265 (2000); *see Hodel v. Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 284 (1981) (rejecting Commerce Clause challenge to the Surface Mining Control and Reclamation Act).

<sup>37</sup> *See generally* Revesz, *supra* note 18; Adler, *supra* note 1.

<sup>38</sup> *See, e.g.,* John Carey, *Dark Days for Energy Efficiency: Federal Funding for Research Aimed at Cutting Energy Use Faces the Knife*, BUS. WK., May 1, 2006, at 84, 84 (citing recent cuts in federal energy efficiency research funding).

efficiency gains that could be achieved through moving from fifty separate product standards to a single, nationally applicable standard.<sup>39</sup>

## 2. *The States*

Just as the federal government has failed to resist poking its nose into local environmental issues, the states have found it difficult not to extend their reach to national, and even international, issues. Perhaps the most radical example of this is the recent surge in state and local government initiatives addressing climate change. As a global problem resulting in part from the cumulative emissions of greenhouse gases around the world, the externalities of the activities producing greenhouse gases cannot be internalized within the boundaries of a single state, much less a metropolitan area.<sup>40</sup> According to the “matching principle” discussed in Part I.A, state and local regulation of greenhouse gas emissions is inefficient because greenhouse gases are a national and international problem against which state and local regulation is powerless.<sup>41</sup> While many of the state and local initiatives addressing greenhouse gases have localized economic and environmental benefits other than those that might accompany a reduction in the risks of climate change, and thus may be justified on the sole basis of those local benefits, others have few local benefits other than to perhaps give local industries a leg up in future carbon regulation regimes.<sup>42</sup>

---

<sup>39</sup> See *infra* Parts II.B.2–3.

<sup>40</sup> See generally Roeyem J. Heintz & Richard S. J. Tol, *Joint Implementation and Uniform Mixing*, 23 ENERGY POL’Y 911 (1995) (discussing the implications for policy of the uniform mixing of carbon dioxide, from whatever source, in the atmosphere).

<sup>41</sup> Most of the scholarly attention on this point focuses on the inefficiency of unilateral national action on a global problem such as climate change. See, e.g., Robert N. Stavins, *Policy Instruments for Climate Change: How Can National Governments Address a Global Problem?*, 1997 U. CHI. LEGAL F. 293, 323 (The prospect of free riding and leakage render unilateral national action on greenhouse gas reductions highly inefficient; “any domestic program requires an effective international agreement.”). Of course, according to this perspective, state and local action are even *more* inefficient. An exception is Adler, *supra* note 1, at 176 (“Setting aside the question of whether regulatory action to control greenhouse gases is worthwhile, it should be clear that any such action is best undertaken at the national (if not international) level, rather than by state and local governments.”).

<sup>42</sup> For example, the primary purpose of greenhouse gas registries is to ease the transition into a carbon-regulated world by enabling sources of greenhouse gases to establish baselines against which a future emissions reduction requirement can be measured. See Robert B. McKinstry, Jr., *Laboratories for Local Solutions for Global Problems: State, Local and Private Leadership in Developing Strategies to Mitigate the Causes and Effects of Climate Change*, 12 PENN ST. ENVTL. L. REV. 15, 46–47 (2004) (discussing this as a purpose of California’s greenhouse gas registry).

States, with California in the lead, frequently impose standards upon nationally distributed products to address an environmental health or safety problem.<sup>43</sup> A recent example concerns California's ban of bromated flame retardants ("BFRs"), which are widely used in household products to slow the spread of fire.<sup>44</sup> Because California is the largest U.S. consumer of products containing BFRs, California's action "has effectively shut down the market in BFR-containing products in all states."<sup>45</sup> Indeed, as others have noted, the state common law tort liability system functions as a means of regulating national product markets.<sup>46</sup>

Environmental regulation is not the only example of state regulation that has a national, and even an international scope; the states have recently become quite active in immigration enforcement in the wake of federal retrenchment.<sup>47</sup> Some in Congress appear to have acquiesced to this new state role, as proposed federal legislation would provide states with incentives for state and local law enforcement officers to assume increased responsibility in enforcing federal immigration laws.<sup>48</sup> Another area is international human rights, where cities and states have attempted to enforce human rights norms through trade relationships and through domestic laws. Local human rights laws range from requiring compliance with human rights standards found in international agreements to which the United States is not a party<sup>49</sup> to restrictions upon local businesses that may have been involved with human rights abuses.<sup>50</sup>

---

<sup>43</sup> See, e.g., CAL. CODE REGS. tit. 13, § 2262.6 (2006) ("Prohibition of MTBE and Oxygenates Other Than Ethanol in California Gasoline Starting December 31, 2002"); see also CAL. HEALTH & SAFETY CODE § 124172 (2006) (banning mercury-containing vaccines for pregnant women and children under three years of age).

<sup>44</sup> A.B. 302, 2003–04 Reg. Sess. (Cal. 2003).

<sup>45</sup> See Tracy Daub, Note, *California—Rogue State or National Leader in Environmental Regulation?: An Analysis of California's Ban of Bromated Flame Retardants*, 14 S. CAL. INTERDISC. L.J. 345, 346 (2005).

<sup>46</sup> See, e.g., John C. Moorhouse, Andrew P. Morriss & Robert Whaples, *Law & Economics and Tort Law: A Survey of Scholarly Opinion*, 62 ALB. L. REV. 667, 682–85 (1998) (comparing the regulatory capacity of state tort liability systems with that of a federal product liability system).

<sup>47</sup> See, e.g., HOUSE RESEARCH ORG., TEX. HOUSE OF REPRESENTATIVES, THE ROLE OF STATES IN IMMIGRATION ENFORCEMENT (2006), <http://www.capitol.state.tx.us/hrofr/focus/immigration79-12.pdf>; see also James Jay Carafano & Laura Keith, *The Solution for Immigration Enforcement at the State and Local Level*, WEB MEMO (Heritage Found., Wash., D.C.), May 25, 2006, at 1, 1, available at <http://www.heritage.org/Research/HomelandDefense/wm1096.cfm>.

<sup>48</sup> See Daniel Booth, Note, *Federalism on ICE: State and Local Enforcement of Federal Immigration Law*, 29 HARV. J.L. & PUB. POL'Y 1063, 1064 (2006).

<sup>49</sup> For instance, San Francisco had adopted the United Nations Convention on the Elimination of All Forms of Discrimination Against Women and made it enforceable under city and county laws. S.F., Cal., Ordinance 128-98 (Apr. 13, 1998).

<sup>50</sup> Generally, these have not fared as well. See *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 425 (2003) (striking down a California law requiring insurance companies doing business within the state to disclose

### 3. “Dynamic Interaction” Between Federal and State Regulators

Yet another aspect of real-world environmental federalism is the existence of interaction and dialogue between federal and state regulators. In some instances, this interaction may appear much like runners on a relay team passing a baton; states (or the federal government) may take the initial lead on an issue, only to have the issue taken up by the federal government (or the states).<sup>51</sup> There are countless examples of this phenomenon.<sup>52</sup> For instance, the Clean Air Act of 1965 was enacted after California took the lead in establishing automobile tailpipe standards and other states were working toward their own vehicle emission standards.<sup>53</sup> Similarly, the federal government’s involvement in establishing energy efficiency standards for consumer appliances occurred only after a movement had already occurred in the states to establish efficiency standards.<sup>54</sup> The acid rain provisions of the Federal Clean Air Act, imposing controls upon sulfur dioxide emissions of power plants across the country, were added only after New Hampshire and other northeastern states imposed aggressive sulfur dioxide controls upon their own power plants.<sup>55</sup> The Environmental Protection Agency’s (EPA’s) effort to reduce mercury emissions from coal-fired utility plants nationwide occurred only after the New England governors and the Eastern Canadian premiers had made mercury reductions a regional priority.<sup>56</sup> Finally, only after some states

---

information about all policies sold in Europe between 1920 and 1945); *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 388 (2000) (striking down, as preempted under federal laws relating to economic sanctions against Myanmar, a Massachusetts law prohibiting Massachusetts and its agencies from purchasing goods or services from companies doing business with Myanmar).

<sup>51</sup> See William W. Buzbee, *Brownfields, Environmental Federalism, and Institutional Determinism*, 21 WM. & MARY ENVTL. L. & POL’Y REV. 1, 65–66 (1997). Buzbee highlights the shifting nature of environmental federalism and cautions against reading very much into the fact that one or the other level of government may be taking the lead on a given environmental issue since environmental regulatory leadership is highly contextual in nature and may merely be the product of the regulatory history on that particular issue. *Id.* Thus, for example, Buzbee cautions against letting recent state activism in environmental regulation lull us into thinking that federal incentives and oversight are no longer necessary. *Id.*

<sup>52</sup> I refer to the development of policies on the federal level after substantial state-level policymaking on the same issue as the “domino effect.” See generally Kirsten H. Engel & Scott R. Saleska, *Subglobal Regulation of the Global Commons: The Case of Climate Change*, 32 ECOLOGY L.Q. 183 (2005).

<sup>53</sup> See Cal. Air Res. Bd., California’s Air Quality History of Key Events, <http://www.arb.ca.gov/html/brochure/history.htm> (last visited Aug. 5, 2006).

<sup>54</sup> See S. REP. NO. 100-06, at 3–4 (1987), as reprinted in 1987 U.S.C.C.A.N. 52, 54–55.

<sup>55</sup> N.H. DEP’T OF ENVTL. SERVS., NEW HAMPSHIRE CLEAN POWER STRATEGY: AN INTEGRATED STRATEGY TO REDUCE EMISSIONS OF MULTIPLE POLLUTANTS FROM NEW HAMPSHIRE’S ELECTRIC POWER PLANTS 94 (2001), available at <http://www.des.state.nh.us/ARD/pdf/NHCPSPdf>.

<sup>56</sup> *Id.*

began to control hazardous air pollutants did Congress amend the Clean Air Act to add a separate title specifically addressing toxic air emissions.<sup>57</sup>

Interaction between the federal and state governments can lead either, or both, parties to adopt policy positions significantly different from the positions they would have adopted had they been regulating in a vacuum. An excellent example of this is again found with respect to automobile emission standards. As discussed above, under the Clean Air Act, California alone, among all fifty states, is permitted to establish its own tailpipe standards that are different from those established by the EPA.<sup>58</sup> Also, under the 1977 Amendments to the Clean Air Act, states other than California can choose which of the two available standards will apply in their state: the EPA's uniform federal standards or California's standards.<sup>59</sup> Using the authority under the Act, beginning in the 1990s, California established the California Low Emission Vehicle ("Cal LEV") standards, phasing in four categories of progressively lower emitting vehicles.<sup>60</sup> The standards included a "ZEV sales mandate" that a certain proportion of the total number of cars sold by a given manufacturer in California be zero-emission vehicles (i.e., battery-operated).<sup>61</sup> When the thirteen (mostly eastern seaboard) state members of the Ozone Transport Commission proposed to adopt Cal LEV as a means to resolve their significant problems with meeting the national ozone standards, the automobile industry reacted swiftly and negatively, fearing the spread of the stringent California car standards. Soon afterward, the EPA brokered a compromise whereby the automobile industry would produce cars meeting standards more stringent than those currently required under the nationally uniform standards, but less stringent than Cal LEV.<sup>62</sup> Dubbed "NLEV" for nationally low emission vehicles, states could adopt NLEV or Cal LEV, but not both.<sup>63</sup>

The Cal LEV-NLEV saga contains important lessons for students of environmental federalism. Most importantly, it demonstrates that where both

---

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

<sup>58</sup> Clean Air Act, S.B. 177, Reg. Sess. § 209 (Cal. 1999). California must receive what is known as a "waiver" from the nationally uniform standards promulgated by EPA. EPA must find that California's standards "will be, in the aggregate, at least as protective of public health and welfare as applicable Federal standards." § 209(b).

<sup>59</sup> § 207.

<sup>60</sup> See Cal. Air Res. Bd., Res. 90-58 (Sept. 28, 1990).

<sup>61</sup> CAL. CODE REGS. tit. 13, § 1960.1(g)(2) (2006).

<sup>62</sup> See Danielle F. Fern, Comment, *The Crafting of the National Low-Emission Vehicle Program: A Private Contract Theory of Public Rulemaking*, 16 UCLA J. ENVTL. L. & POL'Y 227 (1997/98).

<sup>63</sup> See Control of Air Pollution from New Motor Vehicles and New Motor Vehicle Engines: Voluntary Standards for Light-Duty Vehicles, 62 Fed. Reg. 31,192 (June 6, 1997).

the federal government and the states are allowed to address the same environmental problem, the result can be a dynamic interaction during which the parties' respective regulatory postures evolve. The EPA began with national uniform standards and moved to the proposal for the more stringent NLEV only after a movement began in the states toward adopting the most stringent Cal LEV standards.<sup>64</sup>

Another example of the positive results of dynamic interaction between federal and state governments in the environmental arena is brownfield legislation. Brownfield sites are properties—often abandoned urban industrial facilities—contaminated with hazardous substances that, although desirable for development, lie unused due to potential developers' concerns over the magnitude of liability for cleanup of the contamination.<sup>65</sup> Liability for cleanup costs at such sites is governed by the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) which purposely casts a broad net of liability for cleanup costs in an effort to ensure that such costs are borne by the parties that profited from the use of hazardous substances, as opposed to the general public.<sup>66</sup> During the 1990s, many argued, however, that the broad scope of CERCLA liability and the EPA's strict cleanup standards were largely responsible for the continued abandonment of brownfields; instead of forcing polluters to absorb the costs of their own pollution, CERCLA standards were scaring off developers who might have otherwise been willing to invest in the redevelopment of such properties.<sup>67</sup> To remedy this, the EPA started implementing a multi-part program to encourage the redevelopment of brownfields consisting of (1) a federal grants program to fund brownfield cleanups, (2) EPA guidance on the issuance of federal covenants not to sue prospective purchasers of brownfields property, and (3) the development of a new policy whereby the EPA would issue a prospective purchaser a "comfort letter" containing various degrees of assurances that the agency would not

---

<sup>64</sup> See Notice of Data Availability Concerning Supplemental Rulemaking on Ozone Transport Commission; Emission Vehicle Program for the Northeast Ozone Transport Region, 59 Fed. Reg. 53,396 (Oct. 24, 1994).

<sup>65</sup> See 42 U.S.C. § 9601(39) (2000) (defining a "brownfield site" as "real property, the expansion, redevelopment, or reuse of which may be complicated by the presence or potential presence of a hazardous substance, pollutant, or contaminant"). The "complication" is, of course, potential liability for cleanup costs attributable to the presence of such hazardous substances under CERCLA itself or under state hazardous waste cleanup laws.

<sup>66</sup> Pub. L. No. 96-510, 94 Stat. 2767 (1980) (codified as amended at 42 U.S.C. §§ 9601-75 (2000)).

<sup>67</sup> See, e.g., Daniel A. Schenck, Note, *The Next Step for Brownfields: Government Reinsurance of Environmental "Cleanup" Policies*, 10 CONN. INS. L.J. 401, 404 (2004).

pursue the developer should additional cleanup at the site be required.<sup>68</sup> Many states, however, went further. Because oversight of the cleanup of most brownfield sites is left to states under state hazardous waste cleanup laws,<sup>69</sup> states were able to address the liability fears of would-be brownfield developers through special state legislation that relieves developers of liability at the conclusion of a voluntary cleanup of the site.<sup>70</sup> Measures adopted in some states even surpassed federal levels of environmental protection.<sup>71</sup> The response from the federal government was a beefed up federal brownfields program under the newly enacted Small Business Liability Relief and Brownfields Revitalization Act of 2002<sup>72</sup> and a new federal willingness to forego jurisdiction at sites cleaned up under state brownfields programs.<sup>73</sup>

### C. *Explanations for the Practice of Environmental Federalism*

Jurisdictional overlap is a direct by-product of the compound nature of our federal government structure, a history of expansive interpretations of federal power, and an increasingly thick web of state and federal level interest groups and politicians who freely use the opportunities provided by a compound system to their respective advantage.<sup>74</sup> Jurisdictional overlap in the environmental area is consistent with recent reconceptualizations of federalism as a dynamic interaction between two sovereigns. It has important benefits in terms of developing quality, responsive regulation, and spreading regulatory innovations. To elaborate on the last point, interest groups spread innovation when they move between levels of government in an effort to find policymakers receptive to their agenda. Ambitious politicians at one level of government also spread innovation when they adopt an issue neglected by the other level of government and call attention to it in an effort to distinguish themselves in bids for higher office.

---

<sup>68</sup> Frona M. Powell, *Amending CERCLA to Encourage the Redevelopment of Brownfields: Issues, Concerns and Recommendations*, 53 WASH. U. J. URB. & CONTEMP. L. 113, 126–27 (1998).

<sup>69</sup> See David Dana, *State Brownfields Programs as Laboratories of Democracy?*, 14 N.Y.U. ENVTL. L.J. 86, 92 (2005).

<sup>70</sup> Buzbee, *supra* note 51, at 15–16.

<sup>71</sup> *Id.* at 39.

<sup>72</sup> Pub. L. No. 107-118, 115 Stat. 2356 (codified as amended in scattered sections of 42 U.S.C.). Among other provisions, this Act provides protection from CERCLA liability to developers who qualify as “bona fide prospective purchasers” of contaminated property. 42 U.S.C. § 9607(r) (Supp. II 2002).

<sup>73</sup> § 9628(b).

<sup>74</sup> See Buzbee, *supra* note 29, at 117.

## II. DYNAMIC FEDERALISM

The disconnect between the actual practice of environmental federalism and theories advocating a nonoverlapping allocation of environmental regulatory authority between the states and the federal government should give federalism scholars pause. Those seeking a more rigid separation of state and federal power are going against the grain of the political dynamics at work in our federal structure.<sup>75</sup> The task of fitting the unruly nature of the actual allocation of authority to that advocated in theory would require the courts to assume a far more active federalism-policing role. For example, to discourage federal regulation of primarily state and local environmental issues for which the justification for federal involvement is weak, the courts would have to assume a narrower interpretation of Congress's powers under the Commerce Clause, the enumerated power under which most environmental laws are enacted. Similarly, to discourage state and local regulation of environmental problems having national and international externalities, the courts would have to adopt a more aggressive approach to the dormant Commerce Clause and the Supremacy Clause, both of which empower the courts to strike down state and local environmental regulation. Doubts regarding the courts' ability to police the contours of federalism under these doctrines led in part to Henry Wechsler's famous suggestion that the political process itself contained sufficient safeguards for the continued viability of the states and the "process federalism" movement.<sup>76</sup> Even those that bemoan the current mismatch between the allocation of state and federal authority in environmental law recognize that the courts are unlikely to force wholesale revisions in existing environmental regulation, nor is there much interest on behalf of the legislative and executive branches for "revisiting the basic structure of federal environmental law."<sup>77</sup>

Considering the costs involved in imposing a more rigid allocation of state and federal authority, something of a reevaluation of the need for such a reallocation is necessary. The following section proceeds to such a reevaluation, comparing the costs of a federalism framework marked by

---

<sup>75</sup> See *supra* Part I.B.

<sup>76</sup> Henry Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954). Wechsler's ideas have been expanded and refined, most notably by Jesse Choper. JESSE H. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS* (1980).

<sup>77</sup> Adler, *supra* note 1, at 177.

overlapping state and federal jurisdiction to the benefits gained under such an arrangement.

### A. *Reconceiving Federalism*

For much of the nineteenth and early twentieth centuries, the Supreme Court attempted to maintain a framework in which the states and the federal government inhabited mutually exclusive spheres of power.<sup>78</sup> Such separation was thought necessary to achieve the presumed benefits of federalism: responsive governance, governmental competition, innovation, participatory democracy, and resistance to tyranny.<sup>79</sup> This conception of dual federalism was never accurately reflected in the division of authority between the states and the federal government, and most serious attempts to maintain that it did ended with the New Deal.<sup>80</sup> Nevertheless, some scholars maintain that the ghost of dualism continues to haunt modern conceptions of federalism.<sup>81</sup> Much of the Court's more modern jurisprudence has concerned alternative approaches to protecting the states from what is conceived of as the overwhelming power of the federal government.<sup>82</sup> For example, the Court has limited federal regulation that undercuts political accountability<sup>83</sup> or exceeds the federal government's authority under the Commerce Clause.<sup>84</sup>

Discussion of dual federalism may seem like old history. To many, dual federalism has been dead for some time; scholars have been busy proposing alternative conceptions of federalism not reliant upon a rigid separation of state and federal power.<sup>85</sup> Others have usefully summarized and insightfully critiqued these alternative conceptions.<sup>86</sup> The focus of this Article is on what

---

<sup>78</sup> See, e.g., *Nat'l League of Cities v. Usery*, 426 U.S. 833, 852 (1976), *overruled by* *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985); see also Edward S. Corwin, *The Passing of Dual Federalism*, 36 VA. L. REV. 1, 17 (1950); Schapiro, *supra* note 2, at 250.

<sup>79</sup> Schapiro, *supra* note 2, at 248.

<sup>80</sup> *Id.* at 250.

<sup>81</sup> *Id.* at 265–66 (dual federalism continues to influence federalism by informing assumptions on which level of government—the federal government or the states—is the presumptive regulator in a particular policy area).

<sup>82</sup> *Id.* at 263–65.

<sup>83</sup> *New York v. United States*, 505 U.S. 144 (1992).

<sup>84</sup> *United States v. Lopez*, 514 U.S. 549 (1995).

<sup>85</sup> See, e.g., Erwin Chemerinsky, *Empowering States When It Matters: A Different Approach to Preemption*, 69 BROOK. L. REV. 1313 (2004) [hereinafter Chemerinsky, *A Different Approach to Preemption*]; Erwin Chemerinsky, *Federalism Not as Limits, but as Empowerment*, 45 U. KAN. L. REV. 1219 (1997) [hereinafter Chemerinsky, *Federalism Not as Limits*]; Renee M. Jones, *Dynamic Federalism: Competition, Cooperation and Securities Enforcement*, 11 CONN. INS. L.J. 107 (2004); Schapiro, *supra* note 2.

<sup>86</sup> Schapiro, *supra* note 2, at 274–78.

appears to be one of the more promising reconceptions of federalism: the recognition, and even celebration, of the real-world overlap and dynamic relationship between state and federal authority. Alternatively named “empowerment federalism,”<sup>87</sup> “polyphonic federalism,”<sup>88</sup> “interactive federalism,”<sup>89</sup> “dynamic federalism,”<sup>90</sup> and even “vertical regulatory competition,”<sup>91</sup> this reconceptualization has come in the form of a cluster of theoretical proposals, all rejecting dual federalism and all emphasizing the benefits of overlapping federal and state power.

“Dynamic federalism”—the label I will use to refer to all of the theories above—rejects any conception of federalism that separates federal and state authority under the dualist notion that the states need a sphere of authority protected from the influence of the federal government.<sup>92</sup> Instead, according to dynamic federalism, federal and state governments function as alternative centers of power and any matter is presumptively within the authority of both the federal and the state governments. Dynamic federalism rests upon and supports judicial doctrines that affirm the existence of the states and their independent lawmaking powers,<sup>93</sup> but otherwise calls for a passive approach on the part of the courts, leaving the states to their own devices in terms of fending off attempts by the federal government to defeat state regulation.<sup>94</sup>

Dynamic federalism and dual federalism protect many of the same values, but the former encompasses values beyond the scope of traditional dual federalism. Professor Robert Schapiro argues that dynamic federalism (which he labels “polyphonic” federalism) supports the values of plurality, dialogue, and redundancy over the dualist values of choice, self-governance, and the prevention of tyranny.<sup>95</sup> To this list, other scholars have added the benefits

---

<sup>87</sup> See Erwin Chemerinsky, *Empowering States: The Need to Limit Federal Preemption*, 33 PEPP. L. REV. 69 (2005); Chemerinsky, *A Different Approach to Preemption*, *supra* note 85.

<sup>88</sup> See Robert A. Schapiro, *Polyphonic Federalism: State Constitutions in the Federal Courts*, 87 CAL. L. REV. 1409, 1411–13 (1999); *see also* Schapiro, *supra* note 2.

<sup>89</sup> Robert A. Schapiro, *Justice Stevens's Theory of Interactive Federalism*, 74 FORDHAM L. REV. 2133 (2006).

<sup>90</sup> See Jones, *supra* note 85.

<sup>91</sup> *Id.* at 109.

<sup>92</sup> Schapiro, *supra* note 2, at 246.

<sup>93</sup> Such independent lawmaking powers are affirmed by the Court's “anti-commandeering” precedents in which it barred Congress from compelling regulatory action by the states. *See* *Printz v. United States* 521 U.S. 898 (1997); *New York v. United States*, 505 U.S. 144 (1992).

<sup>94</sup> Schapiro, *supra* note 2, at 287; *see also* Chemerinsky, *A Different Approach to Preemption*, *supra* note 85, at 1326–28 (limiting preemption to situations of express preemption and where state and federal law are mutually exclusive).

<sup>95</sup> Schapiro, *supra* note 2, at 288.

that flow from greater regulatory competition, policy innovation, and resistance to monopolization and interest group capture.<sup>96</sup> These values will be explored further below in a discussion of the application of dynamic federalism to environmental issues.<sup>97</sup>

### *B. Application to Environmental Federalism*

The discussion above demonstrates that dynamic federalism more closely tracks the reality of environmental policymaking. The following section is intended to show the benefits of overlapping jurisdiction over a static allocation of regulatory authority, especially with respect to environmental issues.

#### *1. Triggering and Optimal Jurisdictions*

A conception of federalism that provides for overlapping jurisdiction between federal and state regulators recognizes that regulatory activity at one level—state or federal—may be a stepping stone to regulation at the governing level that dual federalism proponents label “optimal.” Thus, to achieve regulation at the level of government considered optimal, policymaking may need to begin at a different level of government. An illustration of this point is federal regulation of motor vehicle pollution, which occurred only after—and largely because—the problem was first regulated by individual states.<sup>98</sup> Given the economies of scale achieved through a single federal standard for a nationally distributed product, regulation at the federal level is more optimal than regulation at the state level. Why did the federal government act only after the states had already begun to act? Many scholars attribute this to the automobile industry’s realization that it would be cheaper to manufacture vehicles to comply with a single federal emission standard than fifty state standards, a realization that could only occur after there were state standards already on the books.<sup>99</sup>

Thus, overlapping jurisdiction may be pivotal to encouraging the more appropriate level of government to respond to a given problem.<sup>100</sup> The logical

---

<sup>96</sup> See Chemerinsky, *supra* note 87, at 74.

<sup>97</sup> See *infra* Part II.B.

<sup>98</sup> See *supra* note 7.

<sup>99</sup> States can take their cues from the federal government as well. Problems left unaddressed by states can suddenly make their way onto state priority lists as a result of federal efforts to address the same problem.

<sup>100</sup> See Engel & Saleska, *supra* note 52, at 223 (suggesting that the regulatory actions of state and local governments to address climate change, while suboptimal in and of themselves, may be means of triggering

question is not whether to have overlapping jurisdiction in the first place, but whether both levels of government should continue to have authority over the problem after regulation at the “optimal” level has been achieved.<sup>101</sup> Because overlapping jurisdiction may be critical to maintaining pressure on the jurisdiction capable of optimal regulation, it would be a mistake to eliminate the authority of the jurisdiction that triggered the optimal jurisdiction to act.<sup>102</sup>

## 2. *Regulatory Safety Net*

Overlapping jurisdictions also empower government to better address social ills through the combined application of state *and* federal law and resources to a particular social, economic, political, or environmental problem. Professor Erwin Chemerinsky said: “The genius in having multiple levels of government is that if one fails to act, another can step in to solve the problem.”<sup>103</sup> Using an environmental example, Chemerinsky explains that “[i]f one level of government fails to clean up nuclear waste, another is there to make sure that it is done.”<sup>104</sup>

Jurisdictional overlap is also a system for combating the excessive influence of particular interest groups upon elected politicians which can prevent effective regulation by one level of government. If interest groups succeed in negatively influencing a policy initiative at the federal level, under a dynamic system of federalism, the states still have a shot at correcting the

---

regulation by levels of government encompassing a larger geographic area, such as the national government, and, in doing so, achieving optimal regulation).

<sup>101</sup> Butler & Macey, *supra* note 1, at 24 (“Nevertheless, there appears to be a one-way ratchet in the federal system—once a federal issue, always a federal issue.”).

<sup>102</sup> An example of the continuing importance of the regulatory authority of the “triggering” jurisdiction is provided by efforts to control acid rain. After northeastern states started to control sulfur dioxide emissions from their own power plants in an effort to prevent acidification of lakes and streams, especially in the northeast, the federal government stepped in to regulate sulfur dioxide from power plants nationally. See 42 U.S.C. §§ 7651–51o (2000); NEW HAMPSHIRE DEPARTMENT OF ENVIRONMENTAL SERVICES, *supra* note 55, at 94. Given that acid rain is created by sulfur emissions from utilities across the country, and not just from the northeast, national regulation of sulfur dioxide emissions is clearly optimal. The fact that we now have regulation from the level of government most capable of issuing optimal regulations for the problem of acid rain, however, should not be read as a license to stop the states from continuing to address acid rain themselves. To the extent they were successful in pushing the federal government to address acid rain, such efforts may be necessary again, as northeastern ecosystems have not recovered as quickly as hoped and thus it appears that more stringent sulfur controls may be necessary. NEW HAMPSHIRE DEPARTMENT OF ENVIRONMENTAL SERVICES, *supra* note 55, at 94. The New England states are already working on such controls, which may serve to prompt the federal government to similarly tighten its sulfur dioxide regulations to prevent acid rain damage to human health and the environment.

<sup>103</sup> Chemerinsky, *supra* note 87, at 74.

<sup>104</sup> *Id.*

ultimate policy result. The regulatory safety net created by jurisdictional overlap is a logical and efficient way of combating excessive interest group influence, particularly because excluding such influence altogether has proved particularly difficult in light of the Court's interpretation of campaign contributions and spending as issues implicating the First Amendment.<sup>105</sup> If interest group influence cannot be controlled effectively through limits upon groups' monetary influence on elections, ensuring that venues exist for opposing groups to advance their respective agendas may be critical to reducing the disproportionate impact of any one, or set of, interest groups.<sup>106</sup>

The value of the checks and balances provided by jurisdictional overlap is particularly important with respect to environmental issues where the costs of underregulation are high. Environmental protection is different than many other areas of regulation in that it often concerns nonrenewable and irreplaceable resources. Measures taken to protect wildlife habitats are often taken to ensure the survival of a species. Restrictions upon development prevent destruction of unique resources that cannot be regenerated, such as coral reefs or tall grass prairies.

The history of environmental protection validates the benefits of the regulatory safety net provided by overlapping state and federal jurisdiction. In comparison to the states, the federal government has been generally considered a fairly reliable environmental regulator.<sup>107</sup> While recently challenged by some commentators,<sup>108</sup> the conventional wisdom is that the states, intent upon capturing and maintaining mobile industry, dragged their feet in enacting environmental standards until a worsening environmental crisis marked by burning rivers and smog-filled cities prompted a federal response.<sup>109</sup> The

---

<sup>105</sup> See *Randall v. Sorrell*, 126 S. Ct. 2479 (2006) (striking down Vermont's campaign contribution and expenditure limitations on First Amendment grounds).

<sup>106</sup> See Robert M. Cover, *The Uses of Jurisdictional Redundancy: Interest, Ideology, and Innovation*, 22 WM. & MARY L. REV. 639, 661 (1981).

It is the suspicion of corruption, so often unprovable, that leads a litigant to invoke a parallel forum. Even if *one* of the litigants expects to benefit from corruption and opts for the corrupt forum, the potential of a system of concurrency for synchronic redundancy inhibits the operation of corruption.

*Id.*

<sup>107</sup> See, e.g., Daniel C. Esty, *Revitalizing Environmental Federalism*, 95 MICH. L. REV. 570, 573–74 (1996).

<sup>108</sup> See Revesz, *Federalism and Environmental Regulation*, *supra* note 10, at 578–83 (summarizing and adding to recent scholarship questioning the conventional wisdom that states were dragging their feet on environmental protection prior to the federal government's earnest involvement in the early 1970s).

<sup>109</sup> See, e.g., Esty, *supra*, note 107, at 600–01.

federal government stepped into the void left by the states and enacted comprehensive environmental regulations for air, water, and hazardous and solid waste.<sup>110</sup> Under the federal program, EPA established minimum environmental standards that served as national baselines below which state standards could not drop.<sup>111</sup> The federal government would allow the states to implement and enforce the federal program, but only so long as (1) the states have in place standards at least as stringent as the federal minimums,<sup>112</sup> (2) the federal government retains the authority to enforce the law within states (under federal standards still in effect despite delegation of the program to the states),<sup>113</sup> and (3) the federal government retains the option of taking back the program if necessary due to state nonfeasance.<sup>114</sup> Conventional wisdom holds that the need for the strong federal role in this division of authority—termed “cooperative federalism”—continued through the 1980s and early 1990s as the comprehensive environmental statutes were revised and new federal environmental laws were enacted.

Today, however, in view of the federal government’s deregulatory and passive approach toward environmental regulation<sup>115</sup> and the environmental leadership being demonstrated by many states, the assumptions underlying the cooperative federalism framework are being questioned.<sup>116</sup> It seems the tables have turned; the states (or at least many of them) are the environmental leaders while the federal government is bringing up the rear. In addition to what is

---

<sup>110</sup> See, e.g., National Environmental Policy Act, Pub. L. No. 91-190, 83 Stat. 852 (1970) (codified as amended at 42 U.S.C. §§ 4321–70f (2000)); Federal Water Pollution Control Act Amendments of 1972 (Clean Water Act), Pub. L. No. 92-500, 86 Stat. 816 (codified as amended at 33 U.S.C. §§ 1251–387 (2000)); Clean Air Act Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1676 (codified as amended at 42 U.S.C. §§ 7401–671q (2000)); Solid Waste Disposal Act, Pub. L. No. 89-272, 79 Stat. 992 (1965) (codified as amended at 42 U.S.C. §§ 6901–92k (2000)).

<sup>111</sup> Federal environmental laws generally preserve state regulatory authority to enact standards more stringent than the federal requirements, but preempt all state laws less stringent than, or inconsistent with, the federal minimum standards. See 42 U.S.C. § 1370 (2000) (preempting state authority to adopt effluent limitations and pretreatment standards less stringent than those promulgated by EPA); § 7416 (preempting less stringent air pollution emission control and abatement regulations); § 6929 (preempting less stringent state disposal regulations); 30 U.S.C. § 1254(g) (preempting state standards that interfere with federal standards).

<sup>112</sup> See, e.g., 42 U.S.C. §§ 7410, 7502(b) (2000) (permit program); 33 U.S.C. § 1342(c)(2).

<sup>113</sup> *United States v. Smithfield Foods, Inc.*, 191 F.3d 516 (4th Cir. 1999).

<sup>114</sup> See, e.g., 42 U.S.C. § 7410(c) (2000) (providing EPA with authority to promulgate a plan for a state that fails to develop an adequate state implementation program); 33 U.S.C. § 1342(c)(3) (providing EPA with the authority to issue permits if it deemed the state permit program inadequate).

<sup>115</sup> See, e.g., Joel A. Mintz, “*Treading Water*”: A Preliminary Assessment of EPA Enforcement During the Bush II Administration, 34 ENVTL L. REP. 10933, 10933 (2004) (finding lower levels of environmental enforcement under the Bush Administration).

<sup>116</sup> See Michael S. Greve, *Against Cooperative Federalism*, 70 MISS. L.J. 557, 567 (2000).

widely considered backpedaling on environmental standard setting,<sup>117</sup> the federal government is being accused of preventing the states from enacting more stringent environmental standards through legislative and administrative preemption.<sup>118</sup>

The current situation points to the danger of charging any one level of government with environmental protection and closing the door to the policy-making efforts of other levels of government. Both the federal government and the states are subject to interest group pressures. The potential for pendulum swings in environmental protectiveness between the federal and the state government highlights the importance of having a compound system of government and calls into question the wisdom of more static allocations of power between the states and the federal government. When one level of government is captured by one set of policy proponents, opposing interest groups can always seek policy gains at the other level of government.<sup>119</sup> While most groups will prefer policy at the federal level in order to avoid the costs of lobbying in all fifty states,<sup>120</sup> recourse to the states may be necessary in the face of an unresponsive federal government. According to this view, one benefit of the compound nature of our federal system of government is that it is self-policing; by enabling policymaking on either level of government, it contains a built-in antidote to interest group capture.

---

<sup>117</sup> The EPA's regulations for air pollution from major stationary sources, as well as its mercury standards, have been widely criticized as too lax. See Editorial, *A Victory for Cleaner Air*, N.Y. TIMES, Aug. 22, 2006, at A18 (lauding appeals court decisions striking down EPA regulations, weakening regulations implementing the Clean Air Act's new source review program); Michael Janofsky, *Inspector General Says E.P.A. Rule Aids Polluters*, N.Y. TIMES, Oct. 1, 2004, at A12 (inspector general of EPA criticized EPA regulations, stating that they will help industry avoid the installation of pollution-reducing technologies); *Senators Fault Mercury Pollution Proposal*, N.Y. TIMES, Apr. 2, 2004, at A15 (forty-five U.S. senators and ten state attorneys general asked EPA to withdraw its mercury rule because it does not do enough to protect children's health).

<sup>118</sup> As will be discussed in more detail *infra*, in a recent proposed rulemaking on average fuel economy standards for light trucks, the National Highway Transportation Safety Administration, an agency within the U.S. Department of Transportation, preempted California's recent emissions standards for carbon dioxide. Average Fuel Economy Standards for Light Trucks; Model Years 2008–2011, 70 Fed. Reg. 51,414 (Aug. 30, 2005). Another example of federal preemption is a House bill blocking state laws that regulate persistent toxic chemicals that are covered by the Stockholm Convention on Persistent Organic Pollutants. Stockholm and Rotterdam Toxics Treaty Act of 2005, H.R. 4591, § 6, 109th Congress (amending the Toxic Substances Control Act to prohibit states from regulating any chemical or chemical mixture after the international chemical treaty has entered into force in the United States).

<sup>119</sup> See Cover, *supra* note 106; Robert M. Cover & T. Alexander Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 YALE L.J. 1035, 1042–46 (1977); Martin Landau, *Federalism, Redundancy and System Reliability*, 3 PUBLIUS 173, 188–89 (1973).

<sup>120</sup> See *supra* note 16 and accompanying text.

### 3. *Regulatory Testing, Innovation, and Refinement*

Regulatory innovation is especially important with respect to environmental law where the actual object of regulation—the environment—is continually changing, in response to myriad factors, including the effects of regulation itself.<sup>121</sup> For example, strategies that are appropriate for a badly polluted resource may no longer be appropriate when the quality of the resource improves.<sup>122</sup> The pressure on resources changes with social patterns.<sup>123</sup> With respect to plant and wildlife species, nonanthropogenic agents, disease, and losses in genetic variability can cause changes.<sup>124</sup> Traditionally, environmental law has relied upon technology to prevent environmental harm.<sup>125</sup> In this situation, where the object of the regulatory regime and the tools of regulation are themselves variable, the best institutional structure is one that adapts and continually incorporates new approaches.

A fundamental rationale for a decentralized political system is that it promotes regulatory innovation. Consequently, dynamic federalism accords with the idea that states function as “laboratories of democracy,” an idea made famous by Justice Brandeis.<sup>126</sup> In Justice Brandeis’s oft-quoted words, “[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>127</sup> Justice Brandeis did not elaborate upon whether state laboratories were important only for what might be termed “horizontal” policy

---

<sup>121</sup> Sandra McElwaine, *Chief Climate Change Scientist*, WASH. POST, Aug. 6, 2006, at M05 (profile of a senior scientist for World Wildlife Fund who seeks to “redesign conservation strategies in order to meet the needs of an ever changing environment”).

<sup>122</sup> See, e.g., 42 U.S.C. §§ 7470–79 (2000); 33 U.S.C. § 1342(o) (providing for the nondegradation of airsheds and water bodies that are cleaner than the federal minimum environmental quality standards).

<sup>123</sup> See, e.g., Maureen Fan, *Chinese Impose Rules for Water Use*, WASH. POST, Aug. 2, 2006, at A09 (“China’s tremendous economic growth and industrial development . . . have fueled the demand for natural resources.”); CITY OF TUCSON WATER DEP’T, WATER PLAN: 2000–2050, at 2-1 (2004), available at <http://www.ci.tucson.az.us/water/docs/waterplan.pdf> (community’s increasing demand for ground water has changed the local environment).

<sup>124</sup> Mark Derr, *Acrobatic Ape in Java Is in High-Wire Survival Struggle*, N.Y. TIMES, Feb. 5, 2002, at F2 (“Where groups are isolated in dangerously low numbers from other members of their species, the loss of genetic variability through inbreeding becomes a major threat to survival . . .”).

<sup>125</sup> See generally Natalie M. Derzko, *Using Intellectual Property Law and Regulatory Processes to Foster the Innovation and Diffusion of Environmental Technologies*, 20 HARV. ENVTL. L. REV. 3, 3–6 (1996).

<sup>126</sup> *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (“Environmental technologies provide needed pollution control, but because, in the real world, production demands and hence pollution levels are continuing to increase, new environmental technologies have to be developed continuously.”).

<sup>127</sup> *Id.*

innovation—the spread of new ideas across states—or whether they could also foster “vertical” policy innovation—the spread of policy ideas from the federal government to the states and vice versa. While the context of Justice Brandeis’s comment seems to argue for the horizontal interpretation, there is nothing inherent in Justice Brandeis’s dissent that limits the laboratory idea to the horizontal context, and many commentators have assumed that it applies just as vigorously to vertical policy dissemination.<sup>128</sup> In fact, it seems that our compound federal system is a marvelous machine for the dissemination of policy ideas and that the most efficient method of spreading innovation is through the federal government—the central node connecting all of the states.

#### 4. *Policing Federalism Based on Inconclusive Line Drawing*

Dynamic federalism gets the courts out of the business of distinguishing between regulatory matters that are left to the states and those that fall within Congress’s jurisdictional reach. This line-drawing exercise has plagued the Court in a variety of contexts, but the line-drawing criteria that it has recently adopted have proven particularly problematic with respect to environmental issues. One example is the test used by the Court to distinguish issues subject to Congress’s Commerce Clause power—matters that have significant economic effects upon interstate commerce. This is known as the “commercial–noncommercial” distinction.<sup>129</sup> Although a commercial connection may not be hard to find, many activities that harm the environment, and hence are candidates for federal regulation, are not purely commercial in nature.<sup>130</sup> Because it refused to extend the reach of the Clean Water Act to the filling of isolated wetlands on statutory grounds,<sup>131</sup> the Supreme Court did not address the question of whether such an activity is commercial in nature. Nevertheless, while the activity can be characterized as commercial, with a substantial impact upon interstate commerce from a variety of perspectives, the characterization is forced and, frankly, beside the point. The requirement for

---

<sup>128</sup> See, e.g., David A. Dana, *The Case for Unfunded Environmental Mandates*, 69 S. CAL. L. REV. 1, 44–45 (1995) (citing federal legislation as examples of experimentation in state and local “laboratories of democracy”); Robert R. Kuehn, *The Limits of Devolving Enforcement of Federal Environmental Laws*, 70 TUL. L. REV. 2373, 2383 (1996) (citing the many federal environmental laws that were originally based upon state legislation as an example of the success of Justice Brandeis’s laboratories of democracy idea).

<sup>129</sup> *United States v. Morrison*, 529 U.S. 598, 610 (2000); *United States v. Lopez*, 514 U.S. 549, 566 (1995).

<sup>130</sup> Examples of such activities are littering and driving a car in state.

<sup>131</sup> *Solid Waste Agency v. U.S. Army Corps. of Eng’rs*, 531 U.S. 159 (2001).

such line drawing forces the Court into making superficial distinctions of little relevance to the issue of whether federal regulation is truly appropriate.

*C. Preemption as the Real Threat to Federalism, and What to Do About It*

From the vantage point of dynamic federalism, the real concern is not overlapping jurisdiction, but federal preemption. As others have recognized, federal preemption cuts short the lawmaking process and products of an entire level of democratic government.<sup>132</sup> It leaves the responsibility of generating policy ideas to the federal government alone. Federal preemption is of course explicitly provided for under the Supremacy Clause and is furthermore an expected product of a political process that provides essentially unfettered access to interest groups. Nevertheless, the courts can and should control the relative ease with which state law is preempted under federal statutes and regulations by requiring strong evidence of congressional intent to preempt state law.

Federal preemption can be considered an unpleasant by-product of interest group lawmaking. Moreover, once viewed in this manner, federal preemption is less appealing than it might be if considered as purely the effect of a conflict between federal and state regulatory schemes. Statutory language either expressly or implicitly preempting state law would seem to be the prize sought by interest groups successful in advancing their policy preferences at the federal level. Consistent with the idea that our dual system provides multiple points of entry to persons and groups, groups will generally favor federal regulation and will likely seek to prevent subsequent policymaking on the same topic at the state level out of a fear that the state level will be dominated by opposing interest groups. The best tool for preventing subsequent policymaking at the state level is, of course, federal preemption.

The historical trends in environmental law preemption are consistent with this interest group interpretation. The major comprehensive environmental legislation enacted in the 1970s contained for the most part only “floor” preemption, or the preemption of state standards that were less stringent than the federal standards.<sup>133</sup> This followed from the fact that the 1970s laws were

---

<sup>132</sup> S. Candice Hoke, *Preemption Pathologies and Civic Republican Values*, 71 B.U. L. REV. 685, 694 (1991).

<sup>133</sup> Federal Water Pollution Control Act Amendments of 1972, § 510, 86 Stat. 816, 893 (codified at 33 U.S.C. § 1370 (2000)).

mainly a victory of environmentalists; stringent state standards were not a threat from the environmentalists' viewpoint.

Today the tables have turned. Business and industry groups exert influence at the federal level and, consistent with this switch in the identity of the interest groups dominant at the federal level, the nature of preemption found in federal laws has changed. Rather than merely "floor" preemption, many recent pieces of federal legislation contain "ceilings," forbidding states from enacting any laws covering the same ground. This approach means that states cannot elect to impose environmental regulation that is either less stringent, or more stringent, than the federal law. For instance, one bill advanced in the last Congress would override state and local government zoning authority with respect to the siting and permitting of oil refineries and other utilities.<sup>134</sup> Another bill would waive all forms of liability for industries involved in the production and sale of antifreeze and coolants containing the agent denatonium benzoate, even if the agent's use causes groundwater contamination, personal injury, property damage, or even death.<sup>135</sup> An amendment to a 2005 appropriations bill prohibits states from opting into California's more protective emission standards for small- and mid-sized spark-ignition engines, such as those found in lawn and garden equipment, forklifts, and recreational boats.<sup>136</sup> A federal regulation preempts California's regulation of greenhouse gases from motor vehicles.<sup>137</sup>

Federal preemption, then, may not be the simple application of federal law to an issue where states have already regulated, but instead, part and parcel of an interest group plan to limit the venues where less powerful groups can lobby with competing agendas. Because preemption shuts down a valuable source of competing policies, it should be applied sparingly by the courts. The courts should reduce preemption in both the short term and the long term by refusing to countenance arguments for implied preemption. Currently, the courts apply a confusing array of statutory interpretative rules—including "conflict" and "field" preemption—that permit much broader interpretations of preemption than would otherwise be allowed under an express preemption regime.<sup>138</sup>

---

<sup>134</sup> Gasoline for America's Security Act of 2005, H.R. 3893, 109th Cong. § 102(b)(1) (2005).

<sup>135</sup> Engine Coolant and Antifreeze Bittering Agent Act of 2005, S. 1110, 109th Cong. § 25(c)(1) (2005).

<sup>136</sup> Juliet Eilperin, *Lawnmower Smog Rule Delayed*, WASH. POST, June 10, 2005, at A21. Several top air quality officials believe that the EPA will nationalize the stringent California standard. Zachary Coile, *Approval Near for Control of Small Engines' Emissions*, S.F. CHRON., June 30, 2006, at A4.

<sup>137</sup> See *supra* note 118.

<sup>138</sup> See generally April McKenzie, Commentary, *A Nation of Immigrants or a Nation of Suspects? State and Local Enforcement of Federal Immigration Laws Since 9/11*, 55 ALA. L. REV. 1149, 1151–52 (2004).

Studies indicate the presence of a strong predominance of decisions preempting state or local regulations under the current legal standards.<sup>139</sup> This is despite the alleged continued viability of the “presumption against preemption” exemplified in the Supreme Court’s 1947 decision in *Rice v. Santa Fe Elevator Corp.*<sup>140</sup> The disparity between the Court’s professed adherence to states’ rights and the willingness with which it has approached preemption challenges has led several scholars to argue that the Court’s preemption jurisprudence is politically motivated. Because preemption cases tend to arise in a challenge to a more stringent state law, a decision in favor of preemption is generally a decision in favor of deregulation.<sup>141</sup>

In the long term, a narrowing of judicial interpretations of preemption should reduce the incidence of preemption. While majorities in Congress can always insert an express preemption provision in federal law, the costs of such a provision are high. It is easier to enact language that implies, rather than expressly creates, preemption. Nevertheless, if such preemption attempts are turned down by the courts, their frequency should be reduced.

A reduction in preemption should also result in more federal legislation embodying federalism “compromises.” Such compromises might consist of

---

There are two types of implied preemption: field preemption and conflict preemption. Field preemption exists when “the federal regulatory scheme is so pervasive as to create the inference that Congress meant to leave no room for the states to supplement it.” Conflict preemption occurs when “compliance with both state and federal law is impossible” and state law hinders the objectives of Congress.

*Id.* (quoting *United States v. Vasquez-Alvarez*, 176 F.3d 1294, 1297 & n.3 (10th Cir. 1999)).

<sup>139</sup> David B. Spence & Paula Murray, *The Law, Economics, and Politics of Federal Preemption Jurisprudence: A Quantitative Analysis*, 87 CAL. L. REV. 1125, 1159, 161 tbl.1 (1999).

<sup>140</sup> 331 U.S. 218 (1947).

<sup>141</sup> See Frank B. Cross, *Realism About Federalism*, 74 N.Y.U. L. REV. 1304, 1309–10 (1999).

Experience with federalism doctrine in particular similarly demonstrates that judges invoke the doctrine selectively to promote policy objectives. The success of state governments appearing before the Supreme Court correlates with the ideological pattern of the case and the justices. . . . Perhaps most remarkably, conservative justices blithely strike down state legislative regulation of business in preemption cases, with scarcely a nod to the interests of federalism. Liberals, conversely, may “cry federalism” in these contexts but disregard the concept when voting to strike conservative state legislation.

*Id.*; see also Erwin Chemerinsky, *Empowering States: A Rebuttal to Dr. Greve*, 33 PEPP. L. REV. 91, 92 (2005) (“Overall, the Rehnquist Court has been very sympathetic to states’ rights when it has been a challenge to a federal law, and not at all sympathetic to states’ rights when there has been a preemption issue.”). There appears to be some empirical support for this conclusion. See Spence & Murray, *supra* note 139, at 1130 (concluding, based upon an empirical study, that in preemption cases judges adhere to preexisting ideological preferences, though within constraints imposed by the legal and factual context of the cases).

partial preemption regimes. These partial regimes might resemble the Clean Air Act's mobile source requirements, which as described above, provide that any state can choose between EPA's nationally uniform emission standards and the more stringent standards of California.<sup>142</sup> Historically, this exception to the Act's preemptive uniform standards has been the source of dynamic innovation as California's adoption of new and more stringent standards has prompted more stringent standards on the federal level.<sup>143</sup> Because California is itself a large automobile market, the existence of two car markets—one for California, and all the states adopting its emissions standards, and a second for the rest of the nation—has not resulted in undue hardship for the automobile industry.<sup>144</sup>

### CONCLUSION

This Article deals with only one of the many tough issues addressed in environmental federalism scholarship: the value of maintaining overlapping jurisdiction by the states and the federal government over the same environmental issues as opposed to an allocation of authority that precludes overlap. This Article argues that regardless of the assumptions one imposes (either in favor of a preference for federal or for state environmental regulation), overlapping regulatory jurisdiction, which would allow either the states or the federal government to regulate, is not only consistent with the actual practice of environmental policymaking, but provides important advantages over a nonoverlapping, static allocation of regulatory authority between the states and the federal government. These benefits include the potential for achieving better regulatory solutions due to the ability to jumpstart policymaking at multiple levels of government. Overlapping jurisdiction provides more opportunities for a diverse set of players in the policy-making process, and thus fewer opportunities for regulatory capture by interest groups. Finally, overlapping jurisdiction should provide for the development of more innovative regulatory approaches. Assuming all of these advantages to be the case, the public interest is best served by a narrow application of the preemption doctrine so as to preserve the positive lawmaking

---

<sup>142</sup> See *supra* note 59 and accompanying text.

<sup>143</sup> See *supra* note 7 and accompanying text.

<sup>144</sup> Danny Hakim, *Battle Lines Set as New York Acts to Cut Emissions*, N.Y. TIMES, Nov. 26, 2005, at A1 (noting that ten states have adopted or will adopt the California standard, and that these states represent nearly one third of the automobile market).

dynamics afforded by the existence of two alternative regulatory authorities: the states and the federal government.