CONTEXTUAL ENVIRONMENTAL FEDERALISM

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INTRODUCTION

Environmental policy analysts sometimes make broad claims about federal and state environmental roles based on isolated, anecdotal examples. This essay suggests that policy analysts should seek to distinguish events that are the result of particular historical opportunities and context, from propensities and incentives that are more stable and predictable under current forms of environmental federalism. Greater attention should be paid to the array of regulatory actors and regulatory modalities. Activity by one actor in one modality does not necessarily reveal much about "the state's" proclivities. This essay suggests that recent state enforcement activism proves little about inherent state environmentalism, but instead reflects political opportunities created by a shift on the federal level towards a more anti-environmental position. Rather than seeing recent state actions as providing support for the elimination or reduction of the federal environmental role, this essay argues that these recent state actions reveal once again the benefits of regulatory overlap, cooperative federalism structures, and redundant enforcement mechanisms. These aspects of the American system of environmental federalism reduce the risk of regulatory underkill that can result from failures to address environmental ills, as well as failures adequately to fund, implement and enforce written laws and regulations.[1]

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[1] *See generally* William W. Buzbee, *Regulatory Underkill in an Era of Anti-Environmental Majorities*, *in* STRATEGIES FOR ENVIRONMENTAL SUCCESS IN AN UNCERTAIN JUDICIAL CLIMATE (Michael Allan Wolf ed., 2005) (further exploring of the meaning and implications of "regulatory underkill").

This essay starts in Part I by examining common modes of argument and purported proof in scholarly debates about environmental federalism. It then turns in Part II to suggest the factors that should be considered in undertaking the sort of "contextual environmental federalism" analysis I advocate. Using a simple diagrammatic model, I suggest factors that will influence the incentives faced by political actors when considering a protective environmental regulatory activity. Those incentives will differ depending on the contexts and modalities of regulatory action and, especially, the particular historical, environmental, and political context in which an environmental regulatory debate arises. In Part III, I identify common propensities or incentives of state and federal actors under the forms of federalism reflected in current environmental laws. In addition, I discuss the benefits and risks of the pervasive overlap of regulatory responsibility that is the hallmark of our system. Risks of failures to act exist in part due to "regulatory commons" settings of shared or often uncertain regulatory turfs, where no one regulator has chief responsibility. Most American environmental laws, however, not only involve regulatory overlaps, but also delineate state and federal roles. This delineation reduces incentives for regulatory commons inattention, increasing the chance of actual implementation and enforcement of such laws.[2]

I. MODES OF ENVIRONMENTAL FEDERALISM ARGUMENT

The "contextual environmental federalism" analysis that I call for stands in contrast to many other scholars' approaches to environmental federalism. In articulating how environmental regulation should be designed, an array of modes of argument and forms of proof are commonly used to support particular preferred mixes of federal, state and local roles. Much of this debate over environmental federalism seeks to resolve these issues through:

- constitutional argument,
- semi-historical normative arguments,
- historical examples,
- empirical data, or
- theoretical analysis.

[2] *See generally* William W. Buzbee, *Recognizing the Regulatory Commons: A Theory of Regulatory Gaps*, 89 IOWA L. REV. 1 (2003) (providing an analysis of "regulatory commons" dynamics).

The question typically boils down to whether federal environmental regulation, or sometimes federal environmental primacy, is appropriate or necessary. These various approaches reach a few somewhat predictable conclusions. While few argue that the federal environmental role is unconstitutional, one common strain among scholars and policymakers is the idea that, due either to constitutional presumptions or the diversity of circumstances among the states, the regulatory norm should be a limited federal role unless some compelling alternative rationale justifies federal leadership. Sometimes these arguments rely on a mix of theory and anecdotally based empiricism,[3] but more often this is offered as an argument from first principles. No federal role is called for, unless a compelling justification is found.[4]

This argument is often rooted in what is sometimes referred to as the "matching principle" or "subsidiarity" conceptions. Under this logic, matching the level of government most commensurate with the regulatory ill is the best way to ensure the correct amount and form of regulation. Typically, people espousing this position emphasize the geographical dimensions of an environmental ill to argue that it counsels for a primary state or local regulatory role.[5] As I explored in a recent work on the implications of the "regulatory commons," and will discuss more fully below, this literature in the environmental area makes fundamental conceptual errors in failing to consider the several dimensions in which

[3] *See, e.g.*, Richard L. Revesz, *Rehabilitating Interstate Competition: Rethinking the "Race to the Bottom" Rationale for Federal Environmental Regulation*, 67 N.Y.U. L. REV. 1210, 1224–27, 1229–33 (1992) (using both the example of the Clean Air Act and a game theoretic model to construct an argument against the "race-to-the-bottom" logic).

[4] *See, e.g.*, Richard L. Revesz, *The Race to the Bottom and Federal Environmental Regulation: A Response to Critics*, 82 MINN. L. REV. 535, 536 (1997) (articulating a "rebuttable presumption in favor of decentralization" rather than reliance on federal standard setting); *cf.* Michael S. Greve, *Against Cooperative Federalism*, 70 MISS. L.J. 557, 608 (2000) (criticizing cooperative federalism structures which allow programs to be shared by different levels of government and suggesting constitutionally based "federalism norms" which would require that government programs belong entirely to the states or to the federal government as a basis for revising current approaches to federalism).

[5] *See, e.g.*, Henry N. Butler & Jonathan R. Macey, *Externalities and the Matching Principle: The Case for Reallocating Environmental Regulatory Authority*, 14 YALE L. & POL'Y REV. (SYMPOSIUM ISSUE) 23, 25 (1996); Jonathan H. Adler, *Jurisdictional Mismatch in Environmental Federalism*, 14 N.Y.U. ENVTL. L.J. 130, 133, 158–60 (2005).

regulatory challenges and effective regulatory responses exist.[6]

Others see the federal government, at least since 1970 and the explosion of federal environmental legislation, as the most innovative and primary protector of the environment and are wary of federal surrender of that role.[7] As with arguments for state and local primacy, proponents of federal environmental leadership also utilize theoretical political-economy arguments in support of a substantial, often primary, federal role. They note several reasons to be wary of significant or primary state environmental standard setting. They point to race-to-the-bottom risks, where jurisdictions competing for business and jobs and eager to keep taxes low will be tempted to sacrifice softer environmental concerns for the more immediate, tangible, monetary benefits of under-regulation.[8] Even where two competing states share a preference for a clean and safe environment, interstate competition may lead both to sacrifice environmental protectiveness. Professor Engel's work provides a powerful empirical and theoretical refutation of Dean Revesz's contention that although interjurisdictional competition for business may sacrifice environmental protection, it will nevertheless enhance social welfare.[9]

Critics of any reflexive allocation of regulatory power to states also point out that many environmental risks far outstrip any state or local government's reach.[10] This problem of scale links to

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[6] Buzbee, *supra* note 2. For further exploration of how regulatory fragmentation can create incentives for inaction or arguable excessive government action in different settings, see William W. Buzbee, *The Regulatory Fragmentation Continuum, Westway, and the Challenges of Regional Growth*, 21 J. L. & POL. (forthcoming 2005).

[7] An array of scholars analyze and critique this assertion. *See*, *e.g.*, Daniel C. Esty, *Revitalizing Environmental Federalism*, 95 MICH. L. REV. 570, 574 (1996); Richard B. Stewart, *Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy*, 86 YALE L.J. 1196, 1196–97 (1977).

[8] *See* 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. (SYMPOSIUM ISSUE) 67, 68 (1996); Kirsten H. Engel, *State Environmental Standard Setting: Is There a "Race" and Is It "To the Bottom"?*, 48 HASTINGS L.J. 271, 274 (1997).

[9] *See* Engel, *supra* note 8, at 315, 359; Kirsten H. Engel & Scott R. Saleska, *"Facts are Stubborn Things": An Empirical Reality Check in the Theoretical Debate Over the Race to the Bottom in State Environmental Standard Setting*, 8 CORNELL J.L. & PUB. POL'Y 55, 88 (1998).

[10] *See* Esty, *supra* note 7, at 614, 623–24 (noting that identification of environmental problems may be best done on a centralized level and that while

the argument that economies of scale inherent in gathering environmental data and deriving effective pollution control techniques justify the current level of federal involvement.[11] Furthermore, it has been argued that since larger units of government are less susceptible to regulatory surrender, the interest group dynamics and skewed resources at play in environmental regulation require federal level control.[12] Some make the modest and less controversial point that if one desires a cleaner environment, then one may prefer a leading federal role because that is the level of government where environmental advocates have been most successful over the last thirty years of the environmental movement.[13]

All of these perspectives and modes of argument serve to illuminate facets of environmental federalism, but most of these approaches give inadequate heed to how the time element, or changing historical circumstances, will modify regulatory capabilities and behavior. I reject overly deterministic or "snapshot" analyses of environmental federalism. The arguments summarized above for federal or state primacy are sometimes presented as though protective or unprotective policies are largely determined by the state or federal actor's identity. Such assumptions about static proclivities make little sense. Not only are state and federal interactions dynamic at any point in time, with regulators interacting in myriad ways, but they each will change in response to the actions of the other, to changing environmental circumstances and, especially, to the ever-changing political climate.

Environmental problems and regulatory responses must be examined with attention to their historical context, their political environment, and realities of what really are, at most, regulatory propensities and incentives. Those propensities and incentives, and the regulatory responses they are likely to elicit, are substantially dependent on the modality of the potential regulatory action. Such modalities include legislating to address a new risk,

enforcement must ultimately be local, some harms and some sources of harm are too big for local government to handle effectively).

[11] *See id.* at 614–15.

[12] *See* Stewart, *supra* note 7, at 1210–19.

[13] *See, e.g.*, Engel, *supra* note 8, at 345 (discussing empirical data regarding standard setting, including concessions of state regulators that federal standards are a "major reason" why states do not relax their standards to attract business).

setting environmental standards in legislation or a regulation, tailoring regulatory requirements to a particular setting, or taking enforcement actions against law violators.

The political and regulatory actions of each player will influence the incentives of others to take a particular action. Particular moments of political zeal or innovation may reveal little. Recent occasional state and local activism during a period of Republican ascendancy and arguable environmental retrenchment cannot establish that a federal environmental role is unnecessary. Nor does federal retrenchment in the setting of regulatory implementation and enforcement establish that the federal government will no longer act to protect the environment. Recent state enforcement activism proves little about inherent state environmentalism but instead reflects political opportunities opened up by a more anti-environmental shift in federal policy. As long as our country at all levels is ruled by a system of elected government, then the degree of environmental fervor at each level will inevitably fluctuate.

This paper takes issue with semi-historical, somewhat deterministic approaches. "Contextual environmental federalism" analysis of the sort described in the next section is far too often missing from such political and scholarly argument. The contextual environmental federalism approach suggested here obviously shares attributes with the work of others, especially the "microanalysis of institutions" advocated by Edward Rubin,[14] David Esty's federalism work,[15] and recent scholarship of Kirsten Engel,[16] but the underlying starting point differs in that changing roles and incentives are assumed. Leaving to other papers and other analysts the more detailed political and historical exegesis that is needed to understand particular bodies of regulation, this paper suggests factors that should be studied and considered in evaluating the efficacy of particular environmental federalism regulatory structures.[17]

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[14] *See* Edward L. Rubin, *The New Legal Process, the Synthesis of Discourse, and the Microanalysis of Institutions*, 109 HARV. L. REV. 1393, 1433–37 (1996).

[15] *See, e.g.*, Esty, *supra* note 7.

[16] *See, e.g.*, Engel, *supra* note 8; Engel & Salenska, *supra* note 9.

[17] For a few such efforts by this author regarding hazardous waste cleanup policies, see William W. Buzbee, *Brownfields, Environmental Federalism, and Institutional Determinism*, 21 WM. & MARY ENVTL. L. & POL'Y REV. 1 (1997) [hereinafter Buzbee, *Brownfields*]; William W. Buzbee, *Remembering Repose: Voluntary Contamination Cleanup Approvals, Incentives, and the Costs of*

II. CONTEXTUAL ENVIRONMENTAL FEDERALISM DYNAMICS AND ANALYSIS

The contextual environmental federalism analysis that I advocate requires, as a starting assumption, that circumstances are dynamic and ever-changing, that no one actor is inherently optimal for all regulatory activities, and that attention to context is essential to understand incentives of all players as to both the content and enforced reality of environmental regulation. Contextual federalism analysis requires close attention to at least the following three variables: political incentives, environmental ills and their contexts, and regulatory history. Analysis of all three of these variables requires close attention to changing circumstances.

A. *Analysis of Political Incentives: A Diagrammatic Illustration*

Every environmental law, regulation, implementation and enforcement decision is influenced by the political incentives of regulatory stakeholders. Because no political stakeholders share the same set of goals, the same constituency, or the same set of capabilities and constraints, each will face different incentives. The same regulatory proposal presented at a different time will surely encounter a different fate. One must think about the incentives of those potentially supplying regulation (the "supply side"), as well as the incentives of those advocating or opposing a regulatory action (the "demand" side).[18]

This attention to political incentives can be illuminated by a simple diagram, based on recent political and legal developments relevant to environmental law. The assumption here is that regulatory responses to an environmental problem result from the interaction of demand and supply incentives of industry,

Interminable Liability, 80 MINN. L. REV. 35 (1995) [hereinafter Buzbee, *Remembering Repose*]; and regarding urban sprawl's roots and responsive policies, see William W. Buzbee, *Urban Sprawl, Federalism, and the Problem of Institutional Complexity*, 68 FORDHAM L. REV. 57 (1999). *See also* William W. Buzbee, *Sprawl's Political Economy and the Case for a Metropolitan Green Space Initiative*, 32 URB. LAW. 367 (2000) (exploring incentives and prospects for green space initiatives as an antidote to sprawl ills given current urban forms and transportation incentives).

[18] For an exemplary analysis of how a jurisdiction's interests (roughly analogous to those "demanding" regulation) and the interests of elected representatives (those "supplying" it) can clash, see Engel & Saleska, *supra* note 9, at 78–84.

environmentalists, and local, state and federal regulators (be they legislators, agency officials, or enforcers of the law). They, in turn, are each influenced by the work of judges and political views of executive branch leaders such as the president and governors. Due to the diverse incentives of these actors, the advocacy of each will invariably change in response to shifts in political majorities and relevant median voter preferences, both at the federal level and in individual states. Each such shift will create new opportunities and incentives for political and regulatory action. Due to their different constituencies and institutional constraints, each actor will weigh different considerations in choosing a position.

A separately elected state attorney general, for example, may be more interested in challenging federal regulatory actions or pursuing polluters under federal law than the governor or the current President of the United States. Under such conditions, a state attorney general's activism, or a state air protection division's actions, cannot alone justify broad claims about the environmental zeal of "a state" or "the states." Legislating, standard setting, implementing regulatory schemes and enforcing the law against violators are different regulatory modalities undertaken by different institutional actors.

It is a common view that during the past five years the environmental zeal of the federal executive branch has waned, resulting in fewer new or strengthened laws, fewer strengthened regulations, and less federal enforcement than one would have expected in a more pro-environment administration.[19] Some may dispute that characterization, but for the sake of explaining this analytical framework and the following diagram, I will assume that it is true. I also assume that all laws provide some latitude allowing them to be implemented and enforced in a manner that results in varying degrees of environmental stringency or laxity. To put it differently, the same law can be implemented and enforced to create a more rigorous or more relaxed regulatory environment.[20] Therefore, when federal environmental action

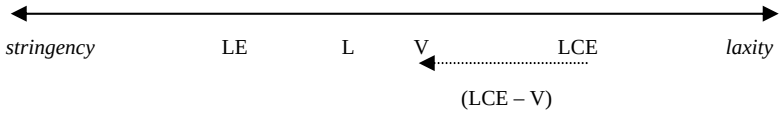
[19] *See, e.g.*, Joel A. Mintz, *"Treading Water": A Preliminary Assessment of EPA Enforcement During the Bush II Administration*, 34 ENVTL. L. REP. 10912, 10912 (2004) (finding "decreased levels of enforcement activities in various categories" of environmental regulation since the beginning of the Bush Administration's control at EPA).

[20] This is perhaps the basic lesson of the *Chevron* case. *See* Chevron U.S.A., Inc v. NRDC, 467 U.S. 837, 843–45 (1984) (allocating most responsibility for

appears to be "underkill" of what written laws and regulations have historically allowed or required, it creates opportunities for environmentally oriented citizen and state actors (such as state attorneys general) to supplement federal enforcement or challenge the legal adequacy of the newly relaxed regulatory environment. These actors will have incentives to move the implemented and enforced reality in the direction that responds to the relevant median voter's preferences. Which median voter will matter depends on the relevant level of government, the environmental issue, the particular aspirations of individual actors and perhaps internal divisions within the actor's political party.

This setting can be conceived of with a variant on a common sort of diagram in political economy scholarship:

L = law today—current enacted federal law
LE = federal law as previously enforced
LCE = federal law as currently enforced
V = current median voter preferences[21]
(LCE – V) = enforcement gap opportunity for state attorneys general or citizen/environmental groups



Under this diagram, arguably representing current circumstances, laxity in the regulatory environment will create incentives for an independently elected state attorney general to take steps to move the enforced reality towards or perhaps somewhat past V, the median voter's preference. This gap

resolving statutory gaps and ambiguities to executive agencies due to their political accountability).

[21] For purposes of this model, I assume a median or swing voter important to a state attorney general's political future, but different stakeholders would of course respond to different constituencies' interests. For example, federal electoral and party politics might make the LCE (law as currently enforced) level of regulatory laxity optimal for the current president, while environmental groups might have constituencies interested in stringency far more rigorous than ever actually implemented or enforced.

between LCE and V presents a political opportunity.

Implicit in this observation and prediction is that the same attorney general might in a different setting, such as when the law was previously implemented and enforced with greater rigor (LE), take no actions because there would be no benefit. Similarly, other key state actors such as the state legislature, the governor, or even state court judges (who may be electorally accountable), all would face different incentives in evaluating whether to support a more rigorous state law, or favor more enforcement, than would the state attorney general. While a state law enforcer's efforts to ensure that federal standards are met by rigorously enforcing existing federal pollution controls might create publicity and be viewed with favor by many, a legislative initiative to impose more rigorous in-state pollution controls might cause political rebellion.[22] Generalizing about what "the states" will do without attention to the modality of the action, the environmental problem at issue, and the particular actor, will lead to unsupportable and overly broad conclusions.

B. *Close Analysis of Environmental Ills and Their Contexts*

The contextual environmental federalism analysis I suggest must also pay close attention to the particular nature of an environmental problem and potential regulatory responses. Environmental ills and regulatory responses are not all created equal. For example, even if one accepts the general desirability of matching a problem with the smallest unit of government that can effectively respond to it, exactly what should be measured in assessing such a match varies wildly. Many different forms of regulatory mismatch can create what I have called the "*regulatory commons*" problem.[23] The geographical location of an environmental ill may tell us little about an optimal regulatory response.[24]

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[22] *Cf.*, Jerome M. Organ, *Limitations on State Agency Authority to Adopt Environmental Standards More Stringent Than Federal Standards: Policy Considerations and Interpretive Problems*, 54 MD. L. REV. 1373, 1387–93 (1995) (discussing reasons for and implications of numerous state laws prohibiting state regulators from promulgating more stringent environmental standards than provided by federal regulation).

[23] *See* Buzbee, *supra* note 2, at 22–33.

[24] *See* Daniel C. Esty, *Toward Optimal Environmental Governance*, 74 N.Y.U. L. REV. 1495, 1496–500 (1999) (suggesting that inordinate focus on "where" regulatory power is located neglects more important attributes of effective regulatory responses to environmental ills that typically will call for

For example, as I have previously explored, a cause of harm may be within a single jurisdiction, but the harm itself may be dispersed more broadly over several jurisdictions.[25] Business dynamics leading to harms may be national, even if the manifested harm is unmoving once created. The scientific research needed to eliminate the harm may be too expensive for any but the largest regulatory actor, even if few states are harmed by that particular problem. Finally, the political capability to address externalized harms may exist in only one area due to vagaries of federal, state or local politics. Benefits of initiating regulatory action may accrue not only to the actor undertaking the innovative action, but also to others.[26] Hence, standard setting, land protection, transportation policy development, and the implementation or enforcement of laws, might each require different regulatory leadership and roles. The more an environmental ill in its causes, harms or regulatory responses fails to clearly match any particular regulator's turf, the less likely it is that anyone will act, even where the harm is widespread. Hence, generalities about federal or state proclivities or capabilities, or effective regulatory design, are worth little without close attention to the particular nature and circumstances of an environmental harm.

C. *Close Analysis of Regulatory Histories*

Before assuming that a state initiative reveals the lack of need for a federal role, or the converse, close analysis of that area of regulation and its history is necessary. Some advocates of increased state environmental primacy might, for example, point to recent state clean air activism in initiating New Source Review ("NSR") litigation or litigation over green house gases as evidence that the federal role should be reduced. Close examination of total state activity, however, suggests that little new state standard setting is going on.[27] Instead, this examination most frequently reveals state litigation challenging federal actions as contrary to federal law, state litigation against polluters alleging violations of

mixed allocations of regulatory duties to all levels of government).

[25] For a fuller analysis of this issue, see Buzbee, *supra* note 2, at 17–29.

[26] *See id.* at 29–36.

[27] However, recent news reports do indicate some potential substantive regulatory actions akin to more rigorous standard setting, despite the absence of any discernible federal pressure. *See* Anthony DePalma, *9 States in Plan to Cut Emissions by Power Plants*, N.Y. TIMES, Aug. 24, 2005, at A1.

federal law, and litigation and negotiations with out-of-state polluters and other states that may be contributing to in-state pollution.

For example, Dean Revesz highlights several of southern California's innovative clean air efforts to buttress arguments that states are supposedly "implementing innovative protective measures that go well beyond what the federal government requires."[28] He relatedly looks at other states' decisions to adopt California's more stringent mobile source strategies to support this claim.[29] Certainly creative regulatory actions deserve applause, but the Los Angeles region's struggles to meet federal National Ambient Clean Air Standards are a better explanation for California's rigorous enforcement efforts than is the belief that the state chose to act in this way solely on its own. It might have acted in the absence of federal standards, given citizen support for a cleaner environment in California, but rigorous historical research into cause and effect is necessary before claims of autonomous state environmental zeal are made. Similarly, little is revealed about state environmental attitudes based on other states adopting California's automobile standards. With many jurisdictions struggling to find sources to regulate to comply with federal National Ambient Air Quality Standards to avoid or surmount onerous "nonattainment" status, more efficient California vehicles are an attractive strategy to achieve overall emissions reductions.

Similarly, but with far more mixed evidence, arguments are sometimes made about state activism dealing with hazardous sites and brownfields.[30] Several states, in particular New Jersey, have been innovative in designing regimes to prompt cleanups of hazardous waste sites.[31] Some Midwestern states have also shown creativity in developing regimes to prompt cleanup of brownfield sites.[32] It is far from clear, however, how these states would have

[28] *See* Richard L. Revesz, *Federalism and Environmental Regulation: A Public Choice Analysis*, 115 HARV. L. REV. 553, 585–93 (2001).

[29] *Id.* at 585–93.

[30] *See, e.g.*, *id.* at 594–608.

[31] For a description of New Jersey's brownfields program, see U.S. EPA, STATE BROWNFIELDS AND VOLUNTARY RESPONSE PROGRAMS: AN UPDATE FROM THE STATES 28 (2005), *available at* http://www.epa.gov/swerosps/bf/pubs/st_res_prog_report.htm.

[32] *See* Buzbee, *Brownfields*, *supra* note 17, at 41–42.

acted had federal Comprehensive Environmental Response Compensation and Liability Act ("CERCLA") liability risks not been threatened. State cleanup approval regimes did solve a flaw in CERCLA, which failed to create incentives for voluntary cleanups, but most such cleanup regimes followed the enactment of CERCLA.[33] Recent amendments to CERCLA to facilitate brownfield cleanups have, in turn, picked up on some of the regulatory design elements of the state regimes.[34] Looked at in context, the history creates mixed messages about the federal and state interactions. Federal leadership has often prompted state imitation and innovation, but the federal government has in turn profited from state creativity.

If analysts simply point to an area of federal or state activity without looking to see what previous actions and regulatory requirements might have influenced those actions, they risk reaching erroneous conclusions. Little in the anecdotal histories of recent regulatory activities of states provides adequate support for the broad claims of some scholars that "states have taken the lead, particularly in the 1990s, in attacking by various means a number of important environmental problems."[35] Instead one finds a far more complex and historically contingent series of actions and reactions, with federal regulatory pressures most consistently prompting state innovation, but with some state innovation also prompting federal regulatory improvements.

III. BENEFITS, RISKS AND TRENDS CREATED BY OVERLAPPING ENVIRONMENTAL FEDERALISM STRUCTURES

Despite contextual factors that lead to the waxing and waning of federal and state activism, environmental protection efforts will always be largely dependent on the more consistent trends and

[33] *See* ENVTL. LAW INST., AN ANALYSIS OF STATE SUPERFUND PROGRAMS: 50-STATE STUDY, 2001 UPDATE 110–14 (2002), *available at* http://www.elistore.org/reports_detail.asp?ID=10746 (follow "CLICK HERE to Download this report for free" hyperlink).

[34] For example, prior to 2002, several states had created regulatory schemes designed to give innocent cleanup volunteers reassurance that they would not be subject to future onerous liabilities. *See* Buzbee, *Brownfields*, *supra* note 17, at 15–16; Buzbee, *Remembering Repose*, *supra* note 17, at 107–10. The 2002 federal amendments mimicked and arguably expanded on several of those innovations in creating the new "bona fide prospective purchaser" provisions. *See* 42 U.S.C. §§ 9601(40), 9607(r).

[35] Revesz, *supra* note 28, at 558.

incentives attributable to environmental federalism structures themselves. Some of these trends and incentives are not easily categorized as benefits or harms, but environmental federalism's contemporary structures that provide for regulatory overlap and interaction do create some clear benefits, with some associated costs. Historically contingent factors can, of course, trump these more consistent structurally created propensities, but they are nevertheless important factors to consider in assessing how environmental federalism operates.

A. *Associated Regulatory Propensities*

State and local governments, due to tax and employment goals, will be more growth oriented than federal policymakers. Lacking the large fiscal benefits of a substantial income tax, and constrained in tax policies by the ability of citizens and businesses to move to other jurisdictions, state and especially local governments end up being what Paul Peterson calls "growth machines."[36] The federal government is also interested in economic vitality, but is relatively less dependent on growth to finance its actions. It will therefore be relatively more willing to impose regulatory burdens or sanctions on polluters.[37]

Inherent inertial forces and interest group pressures will often lead to failures of political actors to take the steps required to give full force to written laws, regardless of who has regulatory primacy. Given this prevalent tendency or temptation to fail to implement and enforce laws and regulations, overlapping structures that call on federal, state and citizen actors to be involved in enforcement can serve to check "underkill" pressures.

Similarly, parallel, overlapping, and cooperative regulatory federalism structures can offer opportunities for innovation, copying of regulatory "templates," incremental improvement, and

[36] *See* PAUL E. PETERSON, CITY LIMITS 69 (1981) (developing hypothesis that local governments, and to a lesser extent state governments, have economic growth as their prime focus).

[37] *Cf.*, Alison D. Morantz, *Has Regulatory Devolution Injured American Workers? A Comparison of State and Federal Enforcement of Construction Safety Regulations* (Stanford Law School John M. Olin Program in Law and Economics, Working Paper No. 308), *available at* http://ssrn.com/abstract=755026 (providing empirical data demonstrating less rigorous and less effective enforcement by states of delegated federal occupational safety regulations than provided by federal officials where states have not taken over the federal program).

local tailoring of national goals. Current environmental federalism structures, especially under "cooperative federalism" schemes, such as delegated programs where states presumptively assume chief implementation and enforcement responsibilities, allocate functions to different levels of government based on their relative capabilities. This desire to tailor programs to local realities and to allow room for innovation counsels against technology mandates, or regulatory goals that cannot be adjusted to fit regulatory environments. Fortunately, for these reasons, such rigid strategies are rarities in the law. Nevertheless, in the current era of funding cutbacks, budget deficits, and a general lack of will to enforce existing law, regulatory designers must take into account the likelihood that more nuanced regulatory strategies will not be implemented or policed. The technology-based standards that pervade federal anti-pollution legislation may be crude, but they likely work far better than tailored approaches that threaten to be poorly implemented unless there is a substantial recommitment to funding of environmental agencies.[38]

B. *Benefits of Regulatory Overlap and Interaction*

The mixed roles of federal, state and local environmental regulators can provide several notable benefits. There are benefits to what my colleague Robert Schapiro, calls "polyphonic" or "interactive" federalism–with numerous regulatory voices, all can benefit.[39] This section briefly reviews benefits created by the overlapping and interactive structures that pervade current federal environmental laws, with their substantial reliance on tiered implementation and enforcement roles involving all levels of government, as well as citizens.

A first benefit of the current structure is what I call the *learning function.* Federal and state actors learn from each other. Similar, but often slightly varied legal regimes, allow for some experimentation in implementation and enforcement, as well as

[38] *See* Wendy E. Wagner, *The Triumph of Technology-Based Standards*, 2000 U. ILL. L. REV. 83, 100–03 (2000).

[39] Robert A. Schapiro, *Polyphonic Federalism: State Constitutions in the Federal Courts*, 87 CAL. L. REV. 1409, 1467 (1999). Professor Schapiro further develops this theme, explored in the context of analyzing federal and state court interactions, in Robert A. Schapiro, *Towards a Theory of Interactive Federalism*, 91 IOWA L. REV. (forthcoming 2006), *available at* http://papers.ssrn.com/abstract=734644.

mimicking of successes. Were the number of regulatory actors reduced, this learning function would diminish. This opportunity for learning through overlap reduces the risks inherent in new regulatory initiatives. For example, innovative federal environmental laws such as the National Environmental Policy Act and, later, CERCLA, spawned many state imitators. States were able to look at federal law, observe the public's reaction to such laws and also the effectiveness (or ineffectiveness) of the federal scheme. They then passed similar state laws, often including improvements or tailoring of the regime to a state's distinctive environment. Similarly, state and federal actors can learn from one state's innovative actions. A track record of success and political popularity accompanying a regulatory innovation reduces the risk to other potential regulators of undertaking similar actions.[40]

A good example of interactive learning and interchange, as well as an example of the different capabilities and incentives of different regulatory actors over time, is evident in recent enforcement and regulatory actions prompted by alleged industry evasion of the Clean Air Act NSR requirements.[41] The NSR story reveals how particular historically contingent circumstances, combined with more predictable structural incentives, will together create a complex reality of mixed regulatory roles.

Although NSR provisions in the Clean Air Act had long been in the law, only in the 1980s did federal enforcers begin to investigate industry compliance and initiate actions against apparent violators. In the mid-1990s, federal enforcers began to think about the deregulation of power plants and potential linkages to their pollution. When investigators looked at power plant files for permit applications reflecting plant upgrades, modifications, and expansions (the statutory trigger for more stringent NSR controls) they found nothing. After one EPA region, Region III, began to look at particular plants' actions and trade press articles reporting plant improvements never reflected in permit files, a broader national investigation began. An embattled EPA during the mid-years of the Clinton administration was, however, seldom

[40] Of course, imitation may have diminishing returns if political constituencies will give the imitator little credit for the resulting initiative.

[41] For a succinct explanation of NSR requirements and a partial chronology of recent enforcement efforts, see ROBERT V. PERCIVAL ET AL., ENVIRONMENTAL REGULATION: LAW, SCIENCE, AND POLICY 532–36 (4th ed. 2003).

"gung ho" regarding enforcement.[42] Federal air enforcers such as Bruce Buckheit, then the Director of EPA's Air Enforcement Division, realized that they would need outside support. He and some enforcement officials in state attorney general's offices, as well as environmental groups, began to talk together about how NSR cases could be investigated and successfully pursued. At that point, federal enforcers, state attorneys general, and environmental groups such as the Natural Resources Defense Council ("NRDC"), all began to build potential cases. After both the private environmental groups and several state attorneys general initiated litigation against alleged NSR violators, the Clinton Administration Department of Justice, with the EPA's involvement, itself initiated litigation against an array of power companies alleged to have violated new source "modification" obligations.[43]

When the current Bush Administration came into office, enforcers continued to pursue their actions, but environmental regulators at the Environmental Protection Agency ("EPA") proposed new regulations that would arguably weaken NSR requirements. These new and proposed NSR regulations would, if finalized without a successful challenge, render legal many of the modifications currently being challenged in court as inconsistent with federal law. EPA's own inspector general issued a report explaining how these proposed changes have undercut NSR enforcement actions.[44]

In this sequence of enforcement actions and regulatory responses, one sees how initiatives breed imitators, each modifying the others' incentives for action. Recent federal efforts to weaken Clean Air Act regulatory obligations while enforcement actions

[42] Telephone interview with Bruce C. Buckheit, former Director, Air Enforcement Division, U.S. EPA, Washington, D.C. (Sept. 13, 2005). Much of the NSR history recounted here is from the Buckheit interview. *See also*, *Clearing the Air: An Oversight Hearing on the Administration's Clean Air Enforcement Program Before the Democratic Policy Commission*, 108th Cong. (Feb. 6, 2004) (testimony of Bruce C. Buckheit), *available at* http://democrats.senate.gov/dpc/hearings/hearing11/buckheit.pdf; Bruce Barcott, *Changing All the Rules*, N.Y. TIMES MAG., Apr. 4, 2004, at 38. For further related discussion, see Mintz, *supra* note 19, at 10916–19, 10925

[43] *See* sources cited *supra* note 42.

[44] *See* OFFICE OF THE INSPECTOR GEN., U.S. EPA, REPT. NO. 2004-P-00034, NEW SOURCE REVIEW RULE CHANGE HARMS EPA'S ABILITY TO ENFORCE AGAINST COAL-FIRED UTILITIES (2004), *available at* http://www.epa.gov/oigearth/reports/2004/20040930-2004-P-00034.pdf.

continued reveals the possibility that different actors will take contradictory actions that allow each to claim credit with different constituencies based on their divergent goals. Without the sort of overlapping and potentially duplicative regimes in current environmental federalism structures, there likely would have been fewer such actions and less public awareness of power plant pollution and the New Source "modification" issue. In this complicated, context-dependent chronology, champions of state, federal or citizen environmental roles can all find support for their arguments. Without long established federal statutory and regulatory provisions, however, citizen groups and state attorneys general could not have acted. However, in their litigation against polluters and later the Bush Administration's EPA for its new NSR regulations, several state attorneys general more consistently sought stringency than did federal actors.

Overlap and interaction also provide structural and enforcement benefits. A federal minimum required level of protection, or bottom, allows states to resist race-to-the-bottom temptations. As Dean Revesz has demonstrated, this undoubtedly constrains some states that would prefer not to trade off other amenities or regulatory protections in their quest for economic vitality.[45] However, for those states concerned with environmental degradation, federal standards create a benefit. During periods of lax implementation and enforcement, overlapping roles also keep the law meaningful and discourage wholesale legal disobedience.

Furthermore, a significant citizen role in the implementation and enforcement process has been protected under federal laws and imposed on states through delegated programs. The pervasive citizen role serves to facilitate enforcement and prod implementation by often reluctant regulators, be they local, state or federal. The citizen role also reduces the ability of regulated industries, which have strong monetary incentives to derail implementation and enforcement, to co-opt or capture regulators. Unlike agencies, which are at least indirectly susceptible to such political pressures, citizens cannot effectively be targeted for capture. While citizens are themselves not politically accountable, their ability to influence or take enforcement actions is contingent on their acting in accordance with democratic priorities set through legislation, rulemaking, and permits or plans that are themselves

[45] *See* Revesz, *supra* note 4, at 1210, 1232, 1245–47.

subject to public participation and court challenge.[46]

The overlap and interaction that pervades environmental law regimes reduces the risk of the regulatory commons problem of inattention or inaction, although the complexity that results from the overlap can create jurisdictional confusion. As briefly discussed earlier, regulatory commons problems arise when no single actor has clear responsibility for an environmental ill, or can take credit for regulatory action to alleviate the problem. Far from being a rare situation, pervasive thorny environmental challenges, such as greenhouse gas emissions and global warming, or the potential harms of aquaculture and bioengineered foods and species, can often be attributed in part to regulatory commons dynamics. In some situations, no one regulatory actor is seen as the responsible regulator by those suffering a harm, or regulatory action would address harms or causes that are outside the jurisdiction. Relatedly, in such regulatory commons settings, the benefits of regulatory action would not accrue just to the actor, but might inure to others outside the jurisdiction. In such regulatory commons settings, both those who might supply regulation and those who would demand it will fail to appreciate the full scale of the harms or the benefits of such action. Therefore, undersupply of efforts to cure unaddressed risks can be anticipated.

Overlap of regulatory turfs can exacerbate such a problem of regulatory inaction, but also can provide a valuable antidote to inaction incentives. With numerous potential regulators, plus a citizen role under most laws, those most concerned about an environmental ill can assess which level of government might be best suited to take a desired action. As one regulatory actor becomes associated with a particular problem, that problem will lose its regulatory commons attributes as "ownership" accrues.

C. *Risks of Overlap and Responses*

This essay is certainly not suggesting that the current situation is perfect. Contemporary environmental federalism structures come with imperfections and risks. For those concerned with

[46] For exploration of citizen enforcement and how it must comport with democratically determined priorities, see William W. Buzbee, *The Story of Laidlaw: Standing and Citizen Enforcement*, *in* ENVIRONMENTAL LAW STORIES 201, 203–04 (Richard J. Lazarus & Oliver A. Houck eds., 2005).

environmental protection, federal setting of mandatory high pollution floors could preclude states from taking more protective action. Thus far, however, such preemptive laxity has been uncommon.[47] Unduly stringent federal pollution floors will hurt jurisdictions that would prefer to protect other amenities. Determining optimal levels of stringency and the allocation of regulatory duties requires ongoing assessment and adjustment. Overlap and interaction also create the risk of excessive, scattered or duplicative enforcement. Unnecessarily high enforcement and compliance costs can distort markets and increase product prices. The theory and history of the implementation and enforcement of environmental law, however, provides little reason to expect excessive, actual protection of the environment.[48]

What are appropriate responses to these probably unavoidable risks? Preemption of more protective state standards or preclusion of more rigorous enforcement should be a rarity. We should seek to avoid imposing preemptive, lax standards, as is a risk under our system. Indeed, looking at current laws, one can find areas where, as predicted by economist George Stigler, regulation serves primarily to advantage those ostensibly regulated.[49] If federal approaches preclude different regulatory designs or restrictions, then even a layered regulatory structure involving federal, state and local governments in implementation and enforcement actions

[47] One recent unusual provision in the Energy Policy Act of 2005 appears to be such a rare federal provision. *See* Energy Policy Act of 2005, Pub. L. No. 109–58, §§ 311, 313, 199 Stat. 594 (2005). The new provision for siting of Liquid Natural Gas terminal sites in essence preempts more protective state or local action by taking such siting choices away from state or local bodies and delegating them to a federal commission that will act following a process involving state officials. *See* Fed. Energy Regulatory Comm'n, States' Rights in Authorization LNG Facilities, http://www.ferc.gov/industries/lng/gen-info/laws-regs/state-rights.asp (last visited Oct. 31, 2005). States may still have veto rights under other federal laws that might be violated, but their usual primacy over land use siting is now preempted. *See id.*

[48] Professor Sunstein posits that excessively stringent regulations can result from demands of citizens responding to common cognitive errors, *see, e.g.*, Cass R. Sunstein, *The Arithmetic of Arsenic*, 90 GEO. L.J. 2255, 2262-63 (2003), but critics question not only Sunstein's risk perception claims, but also his reliance on questionable calculations of exorbitant regulatory costs. *See, e.g.*, Lisa Heinzerling, *Regulatory Costs of Mythic Proportions*, 107 YALE L.J. 1981, 1983, 2067 (1998); Thomas O. McGarity, *Professor Sunstein's Fuzzy Math*, 90 GEO. L.J. 2341 (2002).

[49] George Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3 (1971). For a few environmental examples of such regulation, see Revesz, *supra* note 28, at 571–76.

could still leave environmental ills poorly addressed.

De facto or de jure cooperative schemes, like those that tend to exist in reality, are a powerful means to avoid the potential costs of regulatory overlap. For example, in the area of hazardous waste law, parallel state and federal regimes are often officially unrelated. But long before recent federal brownfield amendments, presumptions of federal noninterference with local and state cleanup actions allowed for a practical division of regulatory obligations that both regulators and those regulated came to expect.[50] Better still are statutorily delegated programs that officially allocate regulatory duties and make clear which level of government is chiefly responsible for each action. Preserving multiple actors with power to enforce permits and regulatory commitments serves to counteract tendencies of regulators to fail to police compliance and punish violators.

Too seldom under current regulatory regimes does one find retrospective analysis of what approaches or regulatory actions actually work to improve the environment, and at what cost. Instead, environmental impact statement laws, assessments of costs and benefits, and regulatory standard setting rely on advance predictions of what might occur. The contextual environmental federalism analysis advocated in this essay would benefit tremendously if a body of data were collected to establish with real qualitative or quantitative data which regulatory structures and regulators have proved effective. Numerically, there are far more state and local officials than federal officials undertaking environmental regulatory activities. Perhaps these state and local officials engage in more activity than commonly believed. Similarly, although federal overfiling of lawsuits following lax state enforcement gets publicity, empirical enforcement data and observation of regulatory behavior might establish that more frequent federal exhortation and informal oversight are of great importance to state regulators.

Environmental law design and scholarship would benefit from an environmentally focused variant on the Administrative Conference of the United States ("ACUS"), which for decades studied and reported on actual administrative agency actions. Relatedly, laws should mandate greater utilization of information sharing and benchmarking of best practices. Quasi-historical

[50] *See, e.g.*, Buzbee, *Remembering Repose*, *supra* note 17, at 107–10.

analysis that does not actually dig deeply to understand the roots of regulatory actions tells us little. With greater information, far better substantiated conclusions about appropriate federal, state and local environmental roles could be made.

CONCLUSION

Analysts of environmental federalism should engage in more historically rigorous contextual analysis of the subject. Deterministic assumptions about federal, state or local governmental behavior should be replaced with analysis that accounts for the persistent structurally induced propensities of each, but acknowledges how different context-specific variables will lead to changing incentives and changed actions over time. The starting assumption should be that actual incentives and actions under environmental laws are in constant flux. Pervasive risks of regulatory underkill, however, counsel against reliance on federal regulatory approaches that preempt more protective state or local actions or preclude enforcement by all levels of government and citizens. Recent state activism, mostly by state attorneys general, does not and cannot, without far more rigorous analysis, establish broad claims about state readiness to supplant federal environmental leadership. Analysts must pay close attention to regulatory history, the nature of an environmental challenge, the diversity of regulatory actors, and the multiplicity of regulatory modalities. Only with attention to these diverse contextual factors can one make even tentative claims about federal and state roles.