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National Power, State Resource Sovereignty and Federalism in the 1980's: Scaling America's Magic Mountain

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NATIONAL POWER, STATE RESOURCE SOVEREIGNTY AND FEDERALISM IN THE 1980'S: SCALING AMERICA'S MAGIC MOUNTAIN*

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Wisconsin voters overwhelmingly rejected establishment of any high level radioactive waste dump in a statewide referendum that was the first of its kind in the nation.[1]

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[1] Chicago Tribune, Apr. 6, 1983, at 5, col. 1.

INTRODUCTION

Wisconsin's attempt to veto the inclusion of the state on a future federal list of possible high level nuclear waste disposal sites[2] is a dramatic, but not isolated, example of a federal-state natural resources allocation conflict. In recent years, differences between the states and the national government over energy and environmental issues have added a new dimension to the usual pattern of federal-state resource allocation conflicts.

Historically, these conflicts occurred primarily in the West. During the "conservation era" the national government switched from a policy of disposition of all of the public domain to one of simultaneous disposition and retention. Ultimately, government policy became one of retention and rational management.[3] The national government's public land retention was contrary to the efforts of many states to end their *de facto* colonial status through the rapid settlement of the public domain and the exploitation of the commodities to be found on it.[4] Conflict over control of the use of western public lands is a long running show, as the most recent Sagebrush Rebellion and other efforts by the western states to influence national public land policy illustrate.[5] Modern federal-state resource allocation conflicts, however, go beyond the traditional problems of the public lands states. These conflicts are now likely to arise when any state attempts to manage natural resources found within their borders or to protect citizens from interstate environmental insults.

Congressional legislation dealing with air and water emissions standards, nuclear energy policy, surface mined land reclamation requirements, migratory

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[2] Nuclear Waste Policy Act of Jan. 7, 1983, Pub. L. No. 97-425, 96 Stat. 2201 (to be codified at 42 U.S.C. §§ 10101-10226) requires the federal government to designate safe high level nuclear waste disposal sites after an enhanced state participation process. Both houses of Congress must approve a site if the host state objects. The Department of Energy is evaluating seven salt rock formations for the first site. Wisconsin is on a list of 17 states with potentially acceptable crystalline rock formations. *DOE continues with Selection Process for High-Level Radioactive Waste Site*, 13 ENV'T. REP. (BNA) 2346 (Apr. 22, 1983). *See generally* G. ROCHILIN, PLUTONIUM, POWER AND POLITICS (1979).

[3] *See generally* Clawson, *The Federal Land Policy and Management Act of 1976 in a Broad Historical Perspective*, 21 ARIZ. L. REV. 585 (1979) (a brief overview of the evolution of federal public land policy).

[4] Many of the initial conflicts arose out of the assertion of a national interest in forest conservation. Forest management emerged as a public issue in the 1870's, but Congress did not begin to close the forests to entry until the General Revision Act of 1891. There was little initial western opposition to the creation of the forest reserves. Subsequent reservations created by President Grover Cleveland, and President Theodore Roosevelt's enthusiastic support of Gifford Pinchot's efforts to apply principles of scientific management to the reserves, though, triggered increased hostility among a diverse coalition of western interests. J. PETULLA, AMERICAN ENVIRONMENTAL HISTORY: THE EXPLOITATION AND CONSERVATION OF NATURAL RESOURCES (1977). Petulla summarizes the conflict:

> In spite of all the land it set aside in reservations, the federal authority didn't amount to much until the Roosevelt administration. Congressmen, state legislators, and editorialists were shocked that Cleveland and later Presidents continued to set aside forest reserves, land that the states customarily had regulated. Convinced that state governments necessarily bowed to moneyed interests and that waste and destruction of the public lands were inevitable unless strong federal action was taken, Bureau and Department officials, particularly under Roosevelt, adopted an aggressive posture in the preservation and utilization of the public lands. Westerners were as dismayed over the loss of political power—that they were not consulted in decisions regarding their lands—as they were over the actual reservations and management of the forests.

Id. at 267.

[5] *See* Leshy, *Unravelling the Sagebrush Rebellion: Law, Politics and Federal Lands*, 14 U.C.D.L. REV. 317 (1980); Wilkinson, *Cross-Jurisdictional Conflicts: An Analysis of Legitimate State Interests on Federal and Indian Lands*, 2 U.C.L.A. J. ENVTL. L. & POL. 145 (1983). *See also* Babbitt, *Federalism and the Environment: An Intergovernmental Perspective of the Sagebrush Rebellion*, 12 ENVTL. L. 847 (1982).

bird protection measures, and state public utility rate regulation policies has produced direct resource allocation conflicts between national and state interests in recent years. The national interest in resource allocation has also been indirectly asserted through law suits arguing that the negative commerce clause and related constitutional doctrines limit state severance tax rates, hazardous and nuclear waste management options and water allocation policies.

Most federal-state conflicts are debated and resolved in administrative, judicial and legislative forums in the name of "federalism." What is significant about the whole range of current federal-state resource allocation conflicts from public lands issues to nuclear power is that many of the judicial and legislative solutions being suggested challenge longstanding assumptions about the balance of interests that is represented by the open-ended and indiscriminately used idea of "federalism." Like Thomas Mann's Magic Mountain, the debate over federalism has been so wordy, so serious, so inconclusive and so full of extravagant poses. In this century, the Hamilton-Marshall vision of a strong national government protected by an aggressive federal judiciary has been the dominant model of federalism, despite much talk to the contrary. The original meaning of federalism contained in the Federalist Papers suggests a less nation-centered theory, but until recently any doctrine that expresses respect for state autonomy has been relegated to one of the unenforceable parts of the constitution.

Today, widespread criticisms of the performance of the federal government, all premised on the assumption that there are inherent limits to the effectiveness of centralized authority, have sparked a renewed interest in theories of federalism that recognize two separate and strong, but of necessity unequal, centers of authority. This debate is now spilling over into natural resources management questions.

This article examines the possible lessons that the reexamination of the idea of federalism has for both judicial doctrines and for legislation that structures the allocation of natural resources. It argues that there is good reason to question the blanket subordination of state to national interests that drives many, but not all, recent Supreme Court opinions dealing with these conflicts. Too often judicial attempts to resolve natural resources allocation conflicts fail to appreciate the merits of non-judicial methods of remedying the perceived problem and produce a solution inferior to a legislative or other political accomodation of national and state interests. Resource allocation issues are generally regionally-based and are thus geographically diverse.[6] In contrast to issues such as economic security and racial equality that properly transcend all state boundaries, there is less likely to be a well-defined, overriding national interest in many resource allocation issues. The national interest will vary according to the strength of relevant state interests.

Many judicial assertions of the national interest in resource allocation litigation are abstract and insensitive to the strength of competing state interests. Such assertions of the national interests are also often premature because they are raised only by self-interested private litigants. Further, courts must of necessity assume that there is a single national interest when in fact there may be many national interests. Component parts of executive and federal agencies assert na-

[6] *See* Stewart, *Interstate Resource Conflicts: The Role of Federal Courts*, 6 HARV. ENVTL. L. REV. 241 (1982).

tional interests and may take different, even conflicting, positions on a single issue. As a result, legislative or interstate cooperative solutions are likely to be more responsive to a fuller range of relevant interests and thus strike a better balance between state and national interests than judicial decisions that apply existing doctrines of constitutional law.[7]

There are also lessons to be learned about legislative resolutions of national-state conflicts from the growing debate over federalism. Generalization about legislative solutions is hazardous because of conflicting Congressional actions; at times Congress has made the state interest subordinate to the national interest, as it did in state conservation of oil and gas; at other times Congress has subordinated (in whole or in part) the national to state interests, as it did in reclamation law.[8] In recent years, however, Congress has moved away from simple solutions to problems of federalism, such as blanket preemption or general disclaimers of an intent to change laws, thus relegating these problems to the judiciary. Instead, Congress has shifted toward statutes that provide elaborate procedures for the resolution of national-state conflicts or that use much more selective federal preemption.

The evolution of the coal slurry pipeline legislation is an example of the responsiveness of Congress to the varying strength of state interest in resource management. To overcome the opposition of western railroads (who control rights of ways because of 19th century land grants), pipeline companies sought a federal right of eminent domain. Many western states prohibit or inhibit the export of water for use in slurry pipelines. Consequently, issues regarding state control over water resources quickly arose.[9] After much debate, Congress chose to bifurcate the question of a federal right of eminent domain from state water issues. In return for a regulation as common carriers, the pipeline companies would receive a federal right of eminent domain but would still be subject to state water law.[10] Legislative resolutions of resource allocation conflicts are inevitably more truly federal than judicial resolutions, because diverse interests are weighed more sensitively than in litigation. Of course, legislation is never a complete shield against subsequent litigation.

Section I of this article sets out the evolution of the concept of federalism from

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[7] As always, this idea is not new. *See, e.g.*, 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), which outlines the problems with judicially defined models of federalism.

[8] *See* California v. United States, 438 U.S. 645 (1978).

[9] *See* Comment, *Do State Restrictions on Water Use by Slurry Pipelines Violate the Commerce Clause*, 53 U. COLO. L. REV. 653 (1982).

[10] S. 267, 98th Cong., 1st Sess. (1983). On September 27, 1983 the House refused to pass legislation giving pipeline companies a federal power of eminent domain by a 235 to 181 vote.

> Railroad and farming interests, as well as numerous environmental organizations lobbied strenuously against the bill, claiming it would cause unemployment in the railroad industry and would misuse scarce western water supplies. Although 91 amendments were pending on a compromise substitute bil (H.R. 3857) by Reps. Morris Udall and James Howard, only one was offered on the House floor. The so-called sister-state check-off amendment would have prohibited any state from selling water from an interstate souce for export, except under an interstate compact and with unanimous member state approval. It was defeated 256-161. Rep. Udall, Chairman of the Interior and Insular Affairs Committee, said, "I'm unhappy. It's a new technology. Its time will come, but apparently not yet. I really thought that this time we made a case in the country." Udall added, "There is no natural constituency for coal slurry. I don't know where we go from here."

Western States Water, No. 489, Sept. 30, 1983 at 1.

the Constitution to the present and briefly describes the impact that various concepts have had on current Supreme Court doctrines. Section II summarizes the current debate over the proper meaning and application of federalism. Section III compares traditional state and national interests in resource allocation to determine the extent to which these interests clash. Section IV analyzes the major recent Supreme Court opinions that deal with resource federalism under the negative commerce clause and preemption and the rationales for them. Section V offers an alternative judicial approach to natural resource federalism issues that would decrease judicial responsibility for determining when state and national interests conflict.

I. THE ORIGINAL MEANING OF FEDERALISM

A. The Original Understanding

Commentators have asserted that the term federalism lacks any operative significance except as a formal description of the division of power among constituent units of government.[11] The argument is that the drafters of the Constitution held inconsistent theories of government and that the Constitution reflects a compromise among different models. The federalism concept should be seen as a dynamic one that has evolved and should evolve in response to changed conditions. There is, of course, merit to this argument. No contemporary discussion of federalism can be divorced from the entire fabric of our history. A tradition of balances—angles of repose—among competing national and state interests has been struck over time, constraining any future accommodations.[12] Still, overreliance on the evolutionary model of federalism, premised on the lack of content in the concept, causes one to lose sight of the enduring principles of the Constitution and to miss the significance of a structure of government embedded in it that is perhaps different from the current one.

Government, as the drafters of the Constitution conceived it, was an experiment in mankind's ability to take positive action to enhance individual dignity and welfare.[13] To this end, the drafters infused the separation of powers throughout the Constitution. Federalism, which precludes the centralization of power in a unitary government, furthers this high purpose.[14] The drafters of the Constitution invisioned the nation as a compound republic, rather than as a federal republic.[15] In the compound republic "[e]ach regime, state and national, was designed to have a will of its own and substantial independence."[16] This formulation leaves unanswered the crucial questions of the scope of each regime's power and the means for resolving intolerable conflicts. However, the focus on

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[11] K. WHEARE, FEDERAL GOVERNMENT 11 (3d ed. 1983).

[12] The phrase is borrowed from Wallace Stegner's masterpiece ANGLE OF REPOSE (1971).

[13] *See* Huffman, *Governing America's Resources: Federalism in the 1980's*, 12 ENVTL. L. 863 (1982).

[14] Frohnmayer, *A New Look at Federalism: The Theory and Implications of "Dual Sovereignty,"* 12 ENVTL. L. 903, 911-12 (1982).

[15] Diamond, *The Federalist on Federalism: Neither a National Nor a Federal Constitution, But a Composition of Both*, 86 YALE L.J. 1273 (1977) [hereinafter cited as *The Federalist on Federalism*] argues that the terms federal, "confederal," "national," or "unitary" do not accurately express the founder's theory of a compound republic. *See also* Diamond, *The Ends of Federalism*, 3 PUBLICUS 133 (1973).

[16] V. OSTROM, THE POLITICAL THEORY OF A COMPOUND REPUBLIC 71 (1971). *See* H. STORING, 1 THE COMPLETE ANTI-FEDERALIST (1981), another important effort to revive the theory of a compound republic as a means of preventing the arbitrary exercise of power and of promoting individual dignity and welfare.

the original conception of the republic does yield a fresh perspective on the current federalism debate. It also suggests that the principles of enumerated national power and state sovereignty have considerable moral and intellectual force.

The major lesson is that the theory of the compound republic is a theory of political decisionmaking superior to all of the definitions of federalism that have claimed a place on the political agenda since the mid-19th century. All the modern theories of federalism emphasize either the national or the state element of the compound republic to the detriment of the legitimate countervailing interests that require a balance among the constituent units of the federal system.[17] As Professor Sally K. Fairfax has observed, "American politics remains thoroughly federal. Concentrating on budgets obscures, without assessing or enlightening, that durable reality."[18]

B. The Evolution of the Meaning of Federalism

Federalism is conventionally described as having evolved through six phases.[19] The first two represent polar opposites, and the last four phases are merely variations on the two ideal models. Alexander Hamilton and Chief Justice Marshall first advanced a theory of nation-centered federalism that posited a strong national government supported by an aggressive judiciary. Nation-centered federalism begat a dialectical reaction, John C. Calhoun's theory of state-centered federalism. The Civil War settled the question of whether the Constitution contained the principle of a concurrent majority, but state-centered federalism survived the War. The theory of a concurrent majority was modified to a theory of dual federalism that sharply delineated national and state spheres of authority and accorded great but not conclusive weight to state interests. Within their respective spheres of authority, the national and state governments enjoyed equal power. Justice Holmes captured well the essence of dual federalism in his opinion in *Georgia v. Tennessee Copper Co.*,[20] holding that a state could sue a polluter in another state for maintaining a nuisance:

> The State owns very little of the territory alleged to be affected, and the damage to it capable of estimate in money, possibly, at least, is small. This is a suit by a State for an injury to it in its capacity of *quasi*-sovereign. In that capacity the State has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain. It has the last word as to whether its mountains shall be stripped of their forests and its inhabitants shall breathe pure air. It might have to pay individuals before it could utter that word, but with it remains the final power. . . . When the States by their union made the forcible abatement of outside nuisances impossible to each, they did not thereby agree to submit to whatever might be done. They did not renounce the possibility of making reasonable demands on the ground of their still remaining *quasi*-sovereign interests; and the alternative to force is a suit in this

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[17] *See The Federalist on Federalism, supra* note 14, at 1282-83.

[18] Fairfax, *Old Recipes for New Federalism*, 12 ENVTL. L. 945, 965 (1982).

[19] *See* R. LEACH, AMERICAN FEDERALISM 10-17 (1970) for a standard discussion of the stages to 1970.

[20] 206 U.S. 230 (1907). In holding that a state could sue *parens patriae* to abate nuisance that injured land within its borders, Justice Holmes wrote "[t]he states by entering the Union did not sink to the position of private owners subject to one system of private law." *Id.* at 237-38.

court.[21]

Dual federalism proved unable to cope with the demands for government intervention in the economy both to promote efficiency and to distribute better resources.[22] National government power grew from the late nineteenth century onward to the point that during the New Deal Howard Laski pronounced the states dead. Whatever the practice, however, the theory of a *de facto* unitary government never became widely accepted. Post-World War II theories of federalism inconsistently attempted both to defend the enhanced role of the national government and to find an acceptable but non-intrusive role for the states. As a result, the federalism debate was reduced to an arid one about the merits of various public administration theories.[23]

At least up to 1980, the debate over the meaning of federalism was a debate about marginal improvements in public administration strategies for the implementation of grant-in-aid programs. Students of government organization have assumed that a strong, dominant national government is necessary to cope with most important economic and social problems, especially racial equality and social welfare. With this assumption, the issue becomes one of carving out an appropriate administrative role for the states and local units of government. From the 1930's to the 1950's, the model was "cooperative federalism."[24] Cooperative federalism posited that all levels of government had blended into a "marble cake" through intergovernmental cooperation in the performance of public functions. In his Harvard Godkin lectures, then Governor Nelson Rockefeller extended cooperative federalism to stress intergovernmental cooperation among the national, state and local governments and private institutions.[25] This broader theory of federalism was labeled "creative federalism," but it simply described a richer marble cake.

Under both Republican and Democratic administrations in the 1970's, there was an attempt to limit the national presence at the state and local level. President Richard M. Nixon tried to implement a "new federalism" which promised to return both power and the basis of power, revenue, to the states.[26] President Reagan's short-lived newer federalism promised to increase state power by "returning" previously national functions to the states but failed to provide the money to fund them.[27] Despite attempts to state a new theory of national-state relations that upgraded the authority of the states and units of local government, programs in the environmental and natural resources field created in the name of "new" federalism continued, at least in the short-run, to subordinate the role of

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[21] *Id.* at 237 (citation omitted).

[22] Professor Corwin traced the idea of equality between the national and state governments, from the Virginia and Kentucky Resolutions, to Chief Justice Taney's theory that the Tenth Amendment conferred those sovereign powers on the states that the Supreme Court decided were limitations on national power, to its demise. Corwin, *The Passing of Dual Federalism*, 36 VA. L. REV. 15-17 (1950). *See generally* E. CORWIN, THE COMMERCE POWER VERSUS STATES RIGHTS (1936).

[23] Scheiber, *Federalism and Legal Process: Historical and Contemporary Analysis of the American System*, 14 LAW & SOC'Y REV. 663 (1980) is a trenchent criticism of the post-World War II theories of federalism for their failure to ignore the whole of American history.

[24] The leading works are D. Elazar, *The American Partnership* and Grodzins, *The Federal System*, in PRESIDENT'S COMMISSION ON NATIONAL GOALS, GOALS FOR AMERICANS (1965).

[25] N. ROCKEFELLER, CREATIVE FEDERALISM (1962).

[26] The centerpiece was the General Revenue Sharing Act. 31 U.S.C. § 1221 (1976 & Supp. IV 1980). *See* O. STOTZ, REVENUE SHARING: LEGAL AND POLICY ANALYSIS (1974).

[27] Lyons, *Federalism and Resource Development: A New Role for States*, 12 ENVTL. L. 931, 938 (1982).

the states to the national government. In practice the "new federalism" is top-down managerial federalism. The national government sets basic policy and the states enforce this policy by administering permits systems. In his famous book, *The Administrative Process*, James Landis argued that the best model for the administrative state is the large corporation.[28] Managerial federalism is the triumph of the corporate model.[29]

Federal environmental regulation illustrates corporate or managerial federalism. Corporate headquarters, Congress and the federal Environmental Protection Agency, establish national effluent or emission limitation standards, stationary and mobile source reduction strategies, surface mined land reclamation standards, hazardous waste management requirements and the levels of technology necessary to achieve these policies. Decentralized units of the system, the states, are charged with the implementation of corporate policy, but have little direct voice in the formulation of the policy. States generally have three choices: to run a federally qualified permit program that implements substantive federal standards, to refuse to meet federal standards and to lose both federal funds and any control over the problem or to run a federal program and to impose higher (but not lower) standards on polluters.

C. Current Supreme Court Doctrine

Supreme Court jurisprudence attempts to be responsive to these broader theories of federalism, but recent applications of federalism principles generally lack both coherence and an appreciation for the deeper meaning of the concept contained in the Constitution. The Court is currently split between advocates for the Hamilton-Marshall theory of nation-centered federalism and supporters for the dual federalism once pronounced dead by Professor Corwin, but revived by Justices Burger, O'Connor and Rehnquist. Both formulations are abstract, rigid and do nothing to develop a theory of federalism that better accommodates contemporary national and state interests. The latest tenth amendment case, *Equal Employment Opportunity Commission v. Wyoming*[30] illustrates the current division. The five to four opinion holds that the tenth amendment does not bar Congress from applying the Age Discrimination Employment Act[31] to state employees. Justice Stevens' concurring opinion states the pure Hamilton-Marshall theory of the relation of the commerce clause to the tenth amendment:

> In the final analysis, we are construing the scope of the power granted to Congress by the Commerce Clause of the Constitution. It is important to remember that this clause was the Framers' response to the central problem that gave rise to the Constitution itself.
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> . . .
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> Congress may not, of course, transcend specific limitations on its exer-

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[28] J. LANDIS, THE ADMINISTRATIVE PROCESS (1936).

[29] Leman and Nelson, *The Rise of Managerial Federalism: An Assessment of Benefits and Costs*, 12 ENVTL. L. 981 (1982). One finds in the literature the same complaints voiced by corporations about branch offices: "Recent analysis of federal programs have shown that weaknesses in local political systems can create obstacles to the effective use of federal funds. The New Federalism cannot abolish the problem of local political capacity." EXECUTIVE OFFICE OF THE PRESIDENT, STRENGTHENING PUBLIC MANAGEMENT IN THE INTERGOVERNMENTAL SYSTEM (1975).

[30] 103 S. Ct. 1054 (1983).

[31] 29 U.S.C. §§ 621-34 (1976 & Supp. IV 1980).

> cise of the commerce power that are imposed by other provisions of the Constitution. But there is no limitation in the text of the Constitution that is even arguably applicable to this case. The only basis for questioning the federal statute at issue here is the pure judicial fiat found in this Court's opinion in *National League of Cities v. Usery*. Neither the Tenth Amendment, nor any other provision of the Constitution, affords any support for that judicially constructed limitation on the scope of the federal power granted to Congress by the Commerce Clause. In my opinion, that decision must be placed in the same category as *E.C. Knight, Hammer v. Dagenhart*, and *Carter v. Carter Coal*—cases whose subsequent rejection is now universally regarded as proper. I think it so plain that *National League of Cities* not only was incorrectly decided, but also is inconsistent with the central purpose of the Constitution itself . . .[32]

Justice Powell's dissenting opinion emphasized that removing trade barriers was only "*one* of the Constitution's purposes" and that "[t]he system of checks and balances . . . is far more central to the larger perspective than any single power conferred on any branch." A federal system with the reserved powers of the states limiting the delegated power of the national government was central to the system of checks and balances embedded in the structure of the Constitution. For this reason Justice Powell disagreed with Justice Stevens' concurrence:

> One would never know from the concurring opinion that the Constitution formed a federal system, comprising a national government with delegated powers and state governments that retained a significant measure of sovereign authority. This is clear from the Constitution itself, from the debates surrounding its adoption and ratification, from the early history of our constitutional development, and from the decisions of this Court. It is impossible to believe that the Constitution would have been recommended by the Convention, much less ratified, if it had been understood that the Commerce Clause embodied the national government's "central mission," a mission to be accomplished even at the expense of regulating the personnel practices of state and local governments.[33]

Chief Justice Burger, in a separate dissenting opinion, added:

> The reserved powers of the states and Justice Brandeis' classic conception of the states as laboratories, *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting), are turned on their heads when national rather than state governments assert the authority to make decisions on the age standard of state law enforcement officers. Flexibility for experimentation not only permits each state to find the best solutions to its own problems, it is the means by which each state may profit from the experiences and activities of all the rest. Nothing in the Constitution permits Congress to force the states into a Procrustean national mold that takes no account of local needs and conditions. That is the antithesis of what the authors of the Constitution contemplated for our federal system.[34]

The *National League of Cities*[35] dramatic attempt to use the tenth amendment to strike a new federal-state balance illustrates the limitations of the Court's current attempts to articulate operative principles of federalism. Justice Stevens' opinion

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[32] 103 S. Ct. at 1065.
[33] *Id.* at 1077.
[34] *Id.* at 1075.
[35] National League of Cities v. Usery, 426 U.S. 833 (1976).

in *EEOC v. Wyoming* fails to give due weight to the Founders' conceptions that the states were to be more than branch offices of the federal government. Justice Powell's dissent ignores the crucial ambiguities in the Founders' notion of the relationship between state and national power and the simple fact that the Constitution created a national government where none existed before.[36] The poses struck by the justices have failed to articulate anything close to neutral principles to explain *National League of Cities*. Subsequent decisions, such as *Hodel v. Virginia Surface Mining and Reclamation Association*[37] which sustained managerial federalism, indicate that at least a majority of the Court has decided not to take the tenth amendment seriously. Were one to take the conception of a compound republic seriously, the Court's distinctions among regulation of the states as states, conditioning federal grants on compliance with federal standards and the regulation of private conduct subject to both federal and state power simply would not wash. The recent tenth amendment decisions must be justified not by the Court's logic but by the principle that the federalism elements of the national representative process adequately protect the state interests at issue. As this article will argue, other constitutional doctrines grounded in federalism principles would benefit from a reformulation recognizing the superiority of representative solutions.[38]

II. THE CURRENT FEDERALISM DEBATE

Renewed interest in the concept of federalism as a theory of the process of the allocation of power as opposed to a theory of public administration is the result of the end of the era of national omnipotence. To some, this current state of events is seen as bad and perhaps temporary. Many recent news articles reporting natural resources conflicts have resorted to dramatic predictions of sectional conflicts,[39] but these fears seem exaggerated. There are too many centralizing forces, apart from the Supreme Court, to fear a return to the nineteenth century. Rather, state assertions of diverse regulatory interests may encourage states to assume their responsibilities to govern. This may also put pressure on Congress to discharge more precisely its constitutional responsibilities to decide when uniform rules are necessary to further the purposes of the Union and when they are not.

A. Justifications for a Compound Republic

The highest justification for a theory of federalism that respects state authority is the preservation of the benefits of the compound republic. As Professor Frohnmayer has observed, federalism "is a structural arrangement of governmental power which safeguards individual liberties by means that are unrelated to the explicit guarantees of a bill of rights."[40] This justification cannot support a blanket subordination of national to state authority; it merely reminds us that justifications for national action need to be more carefully delineated than they have often been in the past, because our system is premised on a theory of dual

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[36] *See* THE FEDERALIST No. 9 (A. Hamilton).

[37] 452 U.S. 264 (1981).

[38] *See* LaPierre, *The Political Safeguards of Federalism Redux: Intergovernmental Immunity and the States as Agents of the Nation*, 60 WASH. U.L.Q. 779 (1982).

[39] *See* REGIONAL CONFLICT AND NATIONAL POLICY (K. Price ed. 1982).

[40] Frohnmayer, *supra* note 14, at 912.

sovereignties. The main practical lesson that one can draw from this justification is that dual regulation can be tolerable.

Justice Brandeis once described the states as laboratories to "try novel social and economic experiments without risk to the rest of the country."[41] If the experiments worked, Congress would pick up state innovations. I would recast Justice Brandeis' theory as an argument that concurrent state and federal regulatory programs should be tolerated because concurrent power can respond to problems Congress failed to anticipate in passing national legislation or to define important state interests in situations where there is a low risk that incompletely defined national interests will be compromised. Justice Blackmun's concurring opinion in the California nuclear power plant moritorium case is an excellent example of this concept of federalism and is consistent with the original theory of a compound republic which both contemplated this possibility and provided a remedy to curb the excesses.[42]

B. The Rationale for National Intervention Reexamined

In this century, the case for national solutions to social and economic problems is a strong one. There are four major justifications for either judicial or legislative intervention to promote national solutions to common natural resources problems.[43] First, the Supreme Court has primarily justified its intervention to protect the values of a national common market articulated in The Federalist No. 11. Throughout the years, opinions have consistently warned about the dangers of unilateral state resource embargoes, although it should be noted that congressional intervention is usually not so much to promote free trade as to define the interstate rules of trade preferences. Second, the Court and especially Congress have justified intervention to control market failures such as pollution because it is necessary to prevent actual or threatened degradation when other organizations lack either the authority or the political will to act.

Third, Congress has increasingly justified national environmental legislation that imposes uniform national standards on all polluters regardless of local conditions as necessary to protect citizens of one state from harmful action in the same and another state. The assumption is that state governments are likely to fail to protect adequately their own citizens and those of other states. The political process is biased in favor of well-financed, narrowly defined interests and against diffuse, less well-financed general interests.[44] Fourth, congressional legislation such as the withdrawal of public land for a wilderness is justified by the need to protect national heritage resources against parochial interests.

These standard rationales for national intervention frequently ignore costs to other parts of the federal system, of which there are two important costs. First, national goals achieved through uniform standards can result in the inefficient allocation of resources. Of course, if one makes moral arguments, for example,

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[41] New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1931) (Brandeis, J., dissenting).

[42] Pacific Gas & Electric v. State Energy Resources Conservation & Dev. Comm'n., 103 S.Ct. 46 (1982) (Blackmun, J., concurring in part and concurring in the judgment). *See infra* notes 164-67 and accompanying text.

[43] *See* Stewart, *Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy*, 86 YALE L.J. 196, 1213-14 (1979); Leman and Nelson, *supra* note 29.

[44] F. TRIPPETT, THE STATES—UNITED THEY FELL (1967).

that exposure to any level of risk is unjustifiable, the allocation of resources argument becomes less relevant. The moral counterargument suggests that it is repugnant to democratic values to require local sacrifices to elite ideals.[45] However, there are too many instances where uniform regulations produce substantial inefficiencies without offsetting benefits.

The second cost is more intangible but equally important; it is the impairment of self-determination and accountability. Decentralized decision-making is important, as Professor Stewart has argued, because of "the greater sensitivity of local officials to the preferences of citizens and the costs of achieving environmental goals in a given locality; the diffusion of governmental power and the promotion of cultural and social diversity; and the enhancement of individual participation in and identification with governmental decisionmaking."[46]

III. STATE AND NATIONAL INTERESTS IN RESOURCE ALLOCATION

Because conflicts among states, between states and citizens of other states, and between states and the national government are likely to increase, it is useful to set out the traditional state and national interests in resource allocation. This provides a framework for the more important and difficult issue of assessing the strength of national and state interests in the control, allocation, and use of natural resources.

Throughout most of our history, the states have had primary, if not exclusive, control over the allocation and use of natural resources arising within their borders, with the exception of navigable waters and public lands. In recent years, the national government has asserted a greater interest in the allocation and use of all natural resources generally, although the assertions of national interests vary with shifts in the political climate. For example, federal control over water allocation could increase through a combination of the aggressive assertion of federal reserved water rights, congressional assertion of the commerce clause, increased use of the negative commerce clause by the courts and of the Rivers and Harbors Act of 1899 by both the courts and federal and state agencies.[47] Federal preemption of state severance tax power has been suggested to prevent indirect regional resource embargoes. These possibilities come on top of a decade of "comprehensive" environmental and energy regulation that has greatly expanded national control of resource allocation choices formerly made by the states. Still, outside of resources on public lands and Indian reservations, the states retain the principal authority to control the allocation and use of resources within their borders. In most instances, national standards are floors not ceilings.[48]

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[45] The strength of the two approaches to environmental policy is being dramatically tested in EPA's proposal to let the residents of Tacoma, Washington decide how much of a risk of cancer they wish to incur in return for the continued operation of a copper-smelting plant that exposes the city to airborne arsenic. *See* N. Y. Times, July 18, 1983, at 20, col. 1.

[46] Stewart, *supra* note 43, at 1231.

[47] *See* Proctor, *Section 10 of the Rivers and Harbors Act and Western Water Allocations—Are Western States Up a Creek Without a Permit?*, 10 B.C. ENVTL. AFF. L.R. 111 (1982).

[48] *See supra* note 29.

A. State Interests

State interests in natural resources are asserted through the police power and now encompass a full range of interests, from the regulation of private conduct to protect other private parties to the delineation of public or shared public-private interest in natural resources. In the nineteenth century, state regulation of private choice became necessary, but the idea was not widely accepted.[49] To overcome opposition to natural resources conservation legislation, states justified their regulation with the theory that natural resources were owned by the state in trust for the public, at least pending private capture.[50] Ownership in trust worked satisfactorily for the regulation of wild game and water, but not for resources such as coal, oil and gas which were initially assigned exclusively. Conservation legislation was initially justified on the narrow ground of the protection of private correlative rights[51] and finally on the broader ground of public welfare promotion.

The major constraint on all state regulatory choices is federal and state constitutional prohibitions against taking property without due process of law. This constraint, which has been somewhat relaxed by the Supreme Court and some state courts in recent years, operates primarily against resources such as land which have been historically assigned to private ownership.[52] Taking issues arise less frequently with respect to resources such as navigable waters that have historically been shared among private parties and the general public. State ownership of submerged lands in trust for the public imposes duties on the state to protect public rights that may be impaired as a result of state management or disposition decisions. The trust makes it easier, for example, for the state to recognize retroactively public rights after lands have been severed from the trust.[53] A recent California Supreme Court decision has even unjustifiably extended the trust doctrine to hold that the state has a duty to reassess the impacts of allocations authorized by vested water rights in waters subject to the public trust if the use threatens trust protected-environmental values.[54]

States generally use the police power to set the ground rules for exploitation. Specifically, the states may decide (1) whether resources shall be open to exploitation, (2) what classes of individuals may exploit the resource, (3) what conditions should be placed on the privilege of exploitation, (4) the rate of taxation of exploitation, and (5) the restrictions on exploitation that are necessary to cure market failures such as pollution. A more detailed examination of traditional state interests reveals the breath and diversity of state interests.

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[49] *See* S. HAYS, THE RESPONSE TO INDUSTRIALISM 1885-1914, 140-62 (1957).

[50] Geer v. Connecticut, 161 U.S. 519, 529-34 (1896). This is still good law on this point after Hughes v. Oklahoma, 441 U.S. 322 (1979).

[51] Ohio Oil v. Indiana, 177 U.S. 190 (1900).

[52] The Court follows a per se taking rule for physical invasions, Loretto v. Teleprompter CATV Corp., 458 U.S. 419 (1982), and an ad hoc balancing test for regulatory takings that is highly favorable to government. Penn Central Transportation Co. v. City of New York, 438 U.S. 104 (1978).

[53] *E.g.*, City of Los Angeles v. Venice Peninsula Properties, 31 Cal.3d 288, 644 P.2d 792, 182 Cal. Rptr. 599 (1982), *cert. granted*, Summa Corp. v. California, 103 U.S. 1425 (1983).

[54] National Audubon Society v. Superior Court, 33 Cal. 3d 419, 658 P.2d 709, 189 Cal. Rptr. 346 (1983).

1. What Classes of Individuals Shall Have Access and Under What Conditions

To promote resource use and resulting human welfare, the state must set ground rules for the exploitation of resources. Some resources such as water in the western states, have been opened to all who gain access to a source. Others, such as oil and gas, geothermal resources and in some states groundwater, have been limited to overlying surface owners. Implicit in the power to set ground rules for the exploitation of a resource is the power to condition the enjoyment of privilege to promote widespread access among claimants. Oil, gas, hard rock and water rights are hedged with limitations such as due diligence standards and implied covenants to prevent speculation and to increase access to the resource.[55]

2. The Protection of Citizens From the Adverse Impacts of Market Failure

The original purpose of state police power is and remains the protection of the health of its citizens.[56] Today, this power is generally exercised through the creation of regulatory agencies to control pollution, but the origins of this exercise of the police power lie in the right of states to restrict the use of their resources through *parens patriae* suits against common law nuisances.[57] Other manifestations of this right include quarantines[58] and the recovery of damages for injuries to state owned commons.[59]

B. National Interests

The national interest in resource allocation has historically been less concerned with establishing the ground rules for resource exploitation than with protecting access to and the use of interstate commons. The major exception, of course, has been federal management of the public lands. Even here, however, Congress has never asserted its power to define fully all rights of access and use under the property clause. There is a federal law of hard rock mining but no general federal water law.[60]

There are four sources of federal control over natural resources. The first source is the power to regulate commerce among the states and Indian tribes. This power has been aggressively exercised in recent years to enact legislation regulating air, water and hazardous waste pollution and stripmined land reclamation.[61] The second source is the power to spend. This power has been used as a justification for federal reclamation projects.[62] The third source is the power to manage and hold public lands. The Supreme Court has recently cut the national government loose from former theories of the property power that limited the

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[55] *See* 5 H. WILLIAMS & C. MEYERS, OIL & GAS LAW (1982).

[56] Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440 (1960).

[57] *See, e.g.*, Georgia v. Tennessee Copper, 206 U.S. 230 (1907); Illinois v. City of Milwaukee, 406 U.S. 91 (1972).

[58] *See* Bowman v. Chicago and N.W. Ry., 125 U.S. 465 (1888). *Cf.* Mintz v. Baldwin, 289 U.S. 346 (1933).

[59] Commonwealth of Puerto Rico v. SS Zoe Colocotroni, 628 F.2d 652, 670-71 (1st Cir. 1980).

[60] Andrus v. Charlestone Products, 430 U.S. 604 (1978).

[61] United States v. Ashland Oil and Transportation Co., 504 F.2d 1317 (6th Cir. 1974), ended any doubts about congressional power to regulate pollution under the commerce clause. Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264 (1981), seems to foreclose tenth amendment challenges to national regulatory programs that require resource protection standards stricter than those imposed by the state.

[62] *See* United States v. Gerlach Live Stock Co., 339 U.S. 725 (1950).

rights of the federal government to the rights of a private land owner. The property power now includes the management authority to regulate activities both on[63] and off federal lands.[64] The final source of property rights recognized by the federal judiciary is through the negative commerce clause, the declaration of a federal common law of interstate property rights or the recognition of federal property rights necessary to administer federal programs.

Using spillover arguments one can easily find a corresponding national interest for each state interest discussed previously,[65] but the former interests are not always of equal strength to the state interests because they respond to more limited problems. Until recently the initial responsibility for the regulation of natural resources development was thought to lie with the states, and this assignment of responsibility is consistent with the theory of a compound republic and the nature of resource allocation problems. States are presumed to have the authority to act unless either the interests of citizens of other states are adversely affected or a clear and overriding national interest has been asserted by Congress. Traditional assertions of the national interest either by the Congress or the courts fit this pattern as the following examples illustrate.

1. Property Rights Assignment

Aside from the disposition of public lands, the national interest in the assignment of uniform, federal property rights in natural resources have been confined to two situations. First, the courts had to develop a federal common law of equitable apportionment[66] or nuisance[67] to allocate the right to use interstate streams. To maximize the use of the resource and to do a rough measure of regional equity, resources that are shared between two or more states must be allocated on some other basis than temporary physical control over a portion of the resource. The Supreme Court is the only judicial body with the power to enforce its judgment on all interested parties. Outside of the equitable apportionment of interstate streams and federal common law nuisance actions, federal courts have only fashioned federal rules of property when it has been necessary to prevent the frustration of a national objective, usually wildlife management, in the natural resources context.[68] Otherwise, state property and conservation laws have been adopted as the federal rule.[69]

2. Protection of Citizens From Interstate Environmental Insults

In recent years, uniform air and water pollution standards have been justified in part both because they provide citizens of one state pollution safe harbors and because the protection of public health is an overriding national priority.[70] The

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[63] Kleppe v. New Mexico, 426 U.S. 529, 540 (1976).

[64] Minnesota v. Block, 660 F.2d 1240, 1249 (8th Cir. 1981).

[65] *See, e.g.*, Lutz, *Interstate Environmental Law: Federalism Bordering on Neglect*, 13 SW. U.L. REV. 603 (1983).

[66] *See* Nebraska v. Wyoming, 325 U.S 589 (1945); Colorado v. New Mexico, 103 S. Ct. 539 (1982).

[67] Illinois v. Milwaukee, 406 U.S. 91 (1972).

[68] *See* North Dakota v. United States, 103 S. Ct. 1095 (1983); United States v. Little Lake Misere Land Co., 412 U.S. 580 (1973).

[69] *See* Texas Oil & Gas Corp. v. Phillips Petroleum Co., 277 F. Supp. 366 (W.D. Okla. 1967), *aff'd*, 406 F.2d 1303 (10th Cir. 1969).

[70] *See* Huffman, *supra* note 12, at 888-94.

case for national standards, however, especially uniform ones, remains open to question.[71] There are ways of protecting citizens of one state from interstate pollution other than the current regulatory strategies.[72]

The national role in natural resources management has expanded rapidly in the past two decades. The promotion of environmental quality has unexpectedly, and with widely varying levels of success, thrust the federal government into all areas of resource management because of the "interconnectedness" of the physical problems addressed by various statutes. In an effort to control what it saw as specific problems, Congress enacted legislation that cut across all sectors of private industry and public activity. Vast new ranges of private, state and local choices suddenly became potentially inconsistent with federal policy. If the federal government asserted the full range of its statutory authority to manage resources ancillary to the promotion of environmental quality, the national role could increase even more dramatically in the future.

Notwithstanding all the new assertions of the national interest in resource management, the federal government's role remains less comprehensive than the role of the states. The national interest in resource management is also narrower compared to traditional national functions such as defense, foreign affairs, economic stabilization, and wealth redistribution. In this century there have been many grand plans for comprehensive resources[73] and energy policies,[74] but they have not been acted upon by Congress. When Congress defines the national interest, it often asserts less than the full reach of its Constitutional powers; it also attempts to limit the national role to filling gaps left by state action or inaction. The decline of the states as centers of effective and responsible authority have created major gaps, and often national legislation is necessary to protect individual welfare. Still, the pattern of Congressional delineation of a relatively narrow national interest in natural resources management suggests that the most appropriate judicial role is to vindicate assertions of federal authority when necessary. The judiciary must also refrain from defining hypothetical, abstract national interests when the assertion of federal authority is less clear.

IV. JUDICIAL DEFINITION OF NATIONAL INTERESTS

National interests defined by Congress have two virtues over judicially defined interests. First, decisions made by the representative process, flawed and ambiguous as the concept is, are likely to reflect responses to acute problems, so that there is a certain justification for subordinating state to national interests.[75] Second, Congressional legislation that subordinates state to national interests is more likely to do so only after hearing the full range of relevant state interests and attempting to find the least intrusive method of asserting the national interest. There are exceptions, such as the Clean Air Act, but the congruence of circum-

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[71] Krier, *The Irrational National Air Quality Standards: Macro- and Micro-Mistakes*, 22 U.C.L.A. L. REV. 323 (1974).

[72] *See generally*, Lutz, *supra* note 65, at 616-31.

[73] S. HAYS, CONSERVATION AND THE GOSPEL OF EFFICIENCY: THE PROGRESSIVE CONSERVATION MOVEMENT 1890-1920, 13 (1959).

[74] *See* ENERGY POLICY IN PERSPECTIVE: TODAY'S PROBLEMS, YESTERDAY'S SOLUTIONS (C. Goodwin ed. 1981).

[75] *See generally*, H. PITKIN, THE CONCEPT OF REPRESENTATION (1967).

stances that resulted in its passage are not often present.[76]

Judicially defined national interests, by contrast, are likely to be based on abstract theories about the proper balance of national-state relations that exaggerate the need for the subordination of state to national interests. The press for uniform and coherent doctrines indicates that judicially defined national interests can never be as sensitive to the varying strength of state interests asserted and to alternative means of recognizing the national interest as Congressional legislation. In short, the national interests protected by the Court will often be too unconnected to substantial federalism concerns and too speculative, especially since most national interests are raised by self-interested private litigants. This section discusses recent Supreme Court cases in the negative commerce clause and preemption area, and argues for doctrines that require less judicial definition of national interests in deference to congressional resolution of the problems.

A. The Negative Commerce Clause

State regulation of natural resources even when not preempted by an act of Congress may still be invalid if a private party or another government unit convinces a court that the regulation is an undue burden on interstate commerce and is thus invalid under the negative commerce clause doctrine. The negative commerce clause doctrine is a judicially implied limitation on state power; the text of the commerce clause speaks only to Congress. Because of the Court's assertion of the power to invalidate state legislation *not* inconsistent with national legislation, the doctrine has always been controversial. It continues to be controversial because after experimenting with different "tests" the Court has settled on a balancing approach that closely resembles substantive due process.[77] The Court has not yet used the doctrine to constrain unduly state natural resources allocation choices, but the risk that it will do so is increasing. In fact, on big ticket items such as coal severance taxes[78] and container regulation,[79] state power has been upheld. But recent Supreme Court opinions in the areas of game management, hazardous waste regulation, high level nuclear waste transportation and water conservation suggest the negative commerce clause may operate as a substantial constraint on state choices in the future. The Court's current use of the doctrine gives insufficient weight to the strength of the state's interest in resource allocation and to the role of political solutions, and too much weight to the purported burden on interstate commerce. Thus, there is a need for a new interpretation of the doctrine that gives more deference to state regulatory initiatives.

1. Current Supreme Court Doctrine

The Court has divided state regulations that allegedly burden interstate commerce into facially and nonfacially discriminatory statutes. Both classes of statutes are reviewed under the multi-factor balancing test announced in 1970 in *Pike*

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[76] *See* Schoenbrod, *Goals Statutes or Rules Statutes: The Case of the Clean Air Act*, 30 UCLA L. REV. 201 (1983).

[77] Tushnet, *Rethinking The Dormant Commerce Clause*, 1979 WIS. L. REV. 125, 147.

[78] *See* Commonwealth Edison Co. v. Montana, 453 U.S. 609 (1981).

[79] *See* Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456 (1981).

v. Bruce Church Inc.[80] This relatively simple case involved a cantaloupe packaging standard for Arizona-grown mellons that apparently had no purpose except to give Arizona fruit packers a competitive advantage over their California counterparts. An unanimous Court stated the balancing test as follows:

> Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. *Huron Cement Co. v. Detroit*, 362 U.S. 440, 443. If a legitimate local purpose is found, then the question becomes one of degrees. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities. Occasionally the Court has candidly undertaken a balancing approach in resolving these issues, *Southern Pacific Co. v. Arizona*, 325 U.S. 761, but more frequently it has spoken in terms of "direct" and "indirect" effects and burdens.[81]

Facially discriminatory legislation is unlikely to survive a *Pike v. Bruce Church* inquiry unless the resource or state activity is immune from the commerce clause. Such statutes or regulations are subject to an almost *per se* rule of invalidity since the Court is unlikely to find that a state objective—no matter how legitimate—justifies a means that interferes with the free flow of commerce.[82]

Not surprisingly, states consistently argued that natural resources owned in trust for the public were immune under *Geer v. Connecticut*,[83] but the Court rejected this argument.[84] *Geer* held that a state could prohibit the export of game killed within the state. The court relied on alternative theories to explain why the statute was not a burden on interstate commerce. Either states had the power to decide that resources owned by the state in trust could not become part of interstate commerce "except with the consent of the State . . ." or state declarations that in-state conservation was necessary to supply the needs of its citizens were unreviewable.[85]

From the outset, both of these arguments were flawed. The ownership in trust theory is simply an assertion of the state's police power. But the negative commerce clause assumes that states cannot unilaterally subordinate national interests to state interests through the use of the police power. The conservation rationale is equally flawed because it merely reasserts a variant of the basic premise of the trust theory: that state owned resources are unique. At least for purposes of complete immunity from judicial scrutiny, there can be no valid distinction between resources assigned to private owners, such as oil and gas, and resources owned in trust for the public, such as water in which private rights may be acquired.[86] State laws that prevent the entry of the resource into interstate

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[80] 397 U.S. 137 (1970); *see also* Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333 (1977).

[81] 397 U.S. at 142 (citation omitted).

[82] *See* Hellerstein, *Hughes v. Oklahoma: The Court, The Commerce Clause, and State Control of Natural Resources*, 1979 SUP. CT. REV. 51, 91.

[83] 161 U.S. 519 (1896).

[84] Sporhase v. Nebraska, 458 U.S. 941 (1982).

[85] 161 U.S. at 535.

[86] *See* Tarlock, *So It's Still Not "Ours" Why Can't We Still Keep It? A First Look At Sporhase v. Nebraska*, 18 LAND & WATER L. REV. 137 (1983).

commerce offend the judicially defined goal of creating and protecting a national common market as much as other preferential treatment statutes.

The Court as early as 1911[87] rejected the theory in *Geer* concerning state assertions of regulatory immunity because of "ownership in trust." The Court held that it was inconsistent with the national common market embedded in the Constitution. There can be no national common market if each state has the power to embargo its own natural resources. Even before the Court began to strike down embargoes and state conservation legislation designed to give in-state citizens resource use preferences,[88] Justice Holmes applied the second rationale of *Geer*, conservation for the benefit of its own citizens, to uphold a state's power to prohibit the interstate export of water.[89] All states, especially western ones, clung to *Hudson County Water Co. v. McCarter*[90] as a defense against judicial and congressional interference with state law. The unrestricted power of a state to define its interest in conservation without considering the demands of citizens of other states for the resource equally undermines the theory of a national common market. Throughout the twentieth century, the Court continued to undermine *Geer* and *Hudson County*,[91] but the Court did not apply the negative commerce clause to game and water embargoes until 1979 and 1982, respectively.

Hughes v. Oklahoma[92] invalidated an Oklahoma law that prohibited the export of natural minnows and overruled *Geer*. Oklahoma's trust argument was swept away with the conclusion that all state regulatory actions should be judged by the same standard.[93] The Court rejected the state's conservation argument because the state chose "to 'conserve' its minnows in the way that most overtly discriminates against interstate commerce."[94] In addition, less restrictive alternatives were available to advance a legitimate state interest.[95] A purported ecological balance justification was properly brushed-off as a post hoc justification for the statute.

Although *Hudson County* fell in *Sporhase v. Nebraska*,[96] *Sporhase* was a bad case to test the strength of state interests because the actual state interest was insubstantial. Nebraska required a permit to transport groundwater out of state, and the state water resources agency could only issue a permit if four conditions were met, including one that required that the host state grant reciprocal export privileges. A farmer who owned land that straddled Nebraska and Colorado did not apply for a permit to irrigate his Colorado lands with groundwater pumped from Nebraska. The Nebraska Supreme Court held that the state could enjoin the transfer because under its water law groundwater could not be an article in commerce.[97] Nebraska follows a combination of the reasonable use and correlative

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[87] West v. Kansas Natural Gas Co., 221 U.S. 229 (1911). *Accord*: Pennsylvania v. West Virginia, 262 U.S. 553 (1923); New England Power Co. v. New Hampshire, 455 U.S. 331 (1982).

[88] *See, e.g.*, Hicklin v. Orbeck, 437 U.S. 518 (1978); Foster-Fountain Packing Co. v. Haydel, 278 U.S. 1 (1928).

[89] Hudson County Water Co. v. McCarter, 209 U.S. 349 (1908).

[90] *Id.*

[91] *See, e.g.*, Missouri v. Holland, 252 U.S. 416 (1920); Toomer v. Witsell, 334 U.S. 385 (1948); Douglas v. Seacoast Products, Inc., 431 U.S. 265 (1977).

[92] 441 U.S. 322 (1979).

[93] *Id.* at 335.

[94] *Id.* at 338.

[95] *Id.*

[96] 102 S. Ct. 3456 (1982).

[97] State v. Sporhase, 208 Neb. 703, 305 N.W.2d 614 (1981), *rev'd*, 102 S. Ct. 3456 (1982).

rights theories of groundwater ownership,[98] and the court reasoned that groundwater was not an article of commerce because the state does not allow transfers off of overlying land.[99] This simplistic description of Nebraska's rule is an incomplete and confusing summary of groundwater law, and is also a misreading of commerce clause jurisprudence. Not surprisingly, the Supreme Court invalidated the export ban and remanded for further proceedings. *Sporhase* holds that state property theories (but not state management interests) are irrelevant to the issue of whether a resource is an article of interstate commerce. Nebraska groundwater was found to be an article of interstate commerce: first, because the state law of groundwater was in effect price regulation; and second, on the erroneous conclusion that the state's claim of immunity "would curtail the affirmative power of Congress to implement its own policies concerning such regulation."[100] Only Justices Rehnquist and O'Connor accepted the *Geer*-based theory that a state may prevent a resource from being an article of interstate commerce if it severely restricts the locus of its use.[101]

On the surface *Sporhase* is another ruling in the long line of Supreme Court decisions protecting the national common market from discriminatory state legislation. However, the opinion departs from the modern line because it reflects a greater sensitivity to state interests. Water may no longer be unique simply because the state claims it is owned in trust for the public. State trust ownership, however, may be a relevant defense to a negative commerce claim challenge. *Sporhase* recognized the state's substantial interest in water allocation compared to other types of regulation that impede the flow of commerce.

Justice Stevens noted that the state's power to allocate its water was at the core of its police power and that the federal government had created strong state expectations of control over its waters by deference to state law. Justice Stevens also opined that "the natural resource has some indicia of a good publicly produced and owned in which a state may favor its own citizens in times of shortage."[102]

The Court nevertheless found the reciprocity requirement unconstitutional because it was an explicit barrier to commerce and thus the state had to demonstrate a close fit between the requirement and its local purpose. "[T]here is no evidence that this restriction is narrowly tailored to the conservation and preservation rationale."[103] Western states, however, may take some hope from the Court's suggestion of a true arid state defense to export bans:

> If it could be shown that the State as a whole suffers a water shortage, that the intrastate transportation of water from areas of abundance to areas of shortage is feasible regardless of distance, and that the importation of water from adjoining States would roughly compensate for any exportation to those States, then the conservation and preservation purpose might be credibly advanced for the reciprocity provision. A demon-

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[98] Prather v. Eisenmann, 200 Neb. 1, 261 N.W.2d 766 (1978).

[99] 208 Neb. at —, 305 N.W.2d at 617.

[100] 103 S.Ct. at 3463 (citing Philadelphia v. New Jersey, 437 U.S. 617, 621-23 (1978)). This statement is simply wrong. The tenth amendment is the only possible restraint on congressional assertion of the commerce clause.

[101] 103 S. Ct. at 3467 (Rehnquist, J., dissenting).

[102] *Id.* at 3464-65.

[103] *Id.* at 3465 (citing Reeves, Inc. v. Stake, 447 U.S. 429 (1980)).

> strably arid state conceivably might be able to marshall evidence to establish a close means-end relationship between even a total ban on the exportation of water and a purpose to conserve and preserve water. Appellee, however, does not claim that such evidence exists.[104]

Professor Stephen B. Williams is undoubtedly correct when he argues that "[t]he general tenor of opinion suggests that an allegation of shortage will help a state defend an export barrier only when there is a scarcity so extreme as to directly impinge on human survival in the source state."[105] Any broader definition of shortage tied to long range conservation efforts will be inconsistent with the national common market protected by the Court's current negative commerce clause doctrine.

Despite *Sporhase*, there are two other sources of immunity for resource management choices that the Court has considered. These are state safety regulations and the disposition of state produced resources. Recent opinions have abrogated the first immunity but have affirmed the second. Conventional wisdom dictates that the reverse result is more logical. State public safety regulation should be the beneficiary of a strong presumption of validity, but the court should not distinguish between state regulated and state produced resources.

a. State Safety Regulation

The protection of public health, stemming from common law prohibitions against nuisances, is at the core of the police power. Consequently, the Court has traditionally been deferential to state safety legislation. Quarantines, for example, have long been upheld against negative commerce power challenges. The Court still accords great deference to state safety legislation. Recently, however, the Court has become skeptical of state declarations of public health needs which appear to be merely attempts to justify anti-competitive legislative efforts.[106] In *City of Philadelphia v. New Jersey*,[107] the Court invalidated a New Jersey law that banned the importation of wastes generated out of state, and held it to be an arbitrary burden on interstate commerce. The Court dismissed New Jersey's quarantine argument because the harms caused by the disposal of the waste arose only after disposal in landfills sites and "there is no basis to distinguish out-of-state waste from domestic waste."[108] *City of Philadelphia* and a case decided the same year, *Raymond Motor Transportation Co. v. Rice*,[109] reject firmly the view that state safety regulations need not be scrutinized to determine the degree of interference with interstate commerce. *Raymond Motor* and other cases nevertheless suggest that states still have more right to use the police power to regulate activities that cause externalities (bads) than to use the police power to regulate product competition (goods) to protect select groups from the harsh rigor of the market.

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[104] *Id.*

[105] Williams, *The Impact of Sporhase v. Nebraska ex rel. Douglas on Free Trade in Water Resources*, 2 SUP. CT. ECON. REV. —, — (1984).

[106] Kassell v. Consol. Freightways, Inc., 450 U.S. 662 (1981). *But compare* Raymond Motor Transp. Co. v. Rice, 434 U.S. 429 (1978). *See generally* Anderson, *The Resource Conservation and Recovery Act of 1978*, 1978 WIS. L. REV. 635, 704-12.

[107] 437 U.S. 617 (1978).

[108] *Id.* at 629.

[109] 434 U.S. 429 (1978).

Arguably, state environmental and safety regulation does not offend the core values of the negative commerce clause to the same extent as run-of-the-mill protectionist legislation. Rather than distorting the operation of national markets only to redistribute wealth between in and out-of-state citizens, state environmental and safety legislation is generally enacted to cure a market failure. This view is not, however, shared by everyone. Recently, Judge Posner of the Court of Appeals for the Seventh Circuit squarely considered and rejected this argument, and the Supreme Court denied certiorari. *Illinois v. General Electric Co.*[110] involved a statute banning the out-of-state importation of high level nuclear wastes for reprocessing within the state. Regulation of the back-end of the fuel cycle is a textbook illustration of the danger of granting too much deference to federal agency expertise.[111] Illinois argued that its legislation did not violate the negative commerce clause because it was regulating externalities and not competition or the production of goods and services. In response, Judge Posner found no distinction between the two types of regulation:

> "To pass laws that arbitrarily burden interstate commerce, by forbidding shipments merely because they originate out of state, violates the commerce clause . . . and it is irrelevant that the traffic is in "bads" rather than goods. The efficient disposal of wastes is as much a part of economic activity as the production that yields the wastes as a byproduct, and to impede the interstate movement of those wastes is as inconsistent with the efficient allocation of resources as to impede the interstate movement of the product that yields them."[112]

Judge Posner is certainly right that all regulatory activities have economic impacts that may offend the negative commerce clause. His reasoning is flawed, however, by the assumption that the Constitution commands an immediately efficient solution to the disposal of high risk nuclear wastes. The Constitution authorizes Congress to force states to accept their fair share of spent nuclear wastes, but absent a congressional mandate, a state should have the discretion to give itself what is in effect interim relief from exposure to serious risks. The state is acting to prevent a problem that the federal government should have but did not fully address. Moreover, the state is not engaged in a wealth redistribution scheme under the guise of natural resources management.

b. State Produced Goods

The negative commerce clause cases seek to protect a national common market from state anti-competition legislation. Accordingly, the Court generally takes a dim view of state efforts to prefer its own citizens by allowing preferential access to resources found within the state.[113] Thus, it is surprising that despite this general hostility to in-state preferences, the Court has recently created a new category of immunity from the negative commerce clause that does allow states

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[110] 683 F.2d 206 (7th Cir. 1982), *cert. denied*, 103 S. Ct. 1891 (1983). Judge Posner's analysis is supported in Florini, *Issues of Federalism in Hazardous Waste Control: Cooperation or Confusion*, 6 HARV. ENVTL. L. REV. 307, 327-31 (1982).

[111] *See generally*, 6 Rochilin, *supra*, n.2; D. FORD, THE CULT OF THE ATOM: THE SECRET PAPERS OF THE ATOMIC ENERGY COMMISSION (1982).

[112] 683 F.2d at 213. *Accord*, Washington State Bldg. and Constr. Trades Council v. Spellman, 684 F.2d 627 (9th Cir. 1982), *cert. denied*, 103 S.Ct. 1891 (1983).

[113] *See* Anson & Schenkkan, *Federalism, The Dormant Commerce Clause, and State-Owned Resources*, 59 TEX. L. REV. 71 (1980).

to prefer its own citizens. State-produced goods, as opposed to state regulated goods or trust resources, may be limited to state citizens or they may be given preference to purchase or otherwise benefit from these goods. The state-produced goods immunity is without merit and runs contrary to the interests in interstate comity and to the protections embodied in the privileges and immunities clause,[114] but the Court recently reaffirmed it with few, if any, qualifications.

The immunity began in *Hughes v. Alexandria Scrap*.[115] To encourage scrap metal recycling, Maryland started a program that paid in and out-of-state processors a bounty on state-titled car hulks. In upholding the statute, Justice Powell failed to address the concern that the bounty program might disrupt the processing capacity of other states by diverting hulks from cars titled in their states to those titled in Maryland. Instead, he announced a new immunity: nothing in the commerce clause "prohibits a State, in the absence of congressional action, from participating in the market and exercising the right to favor its own citizens over others."[116]

The Supreme Court affirmed and applied the market participation doctrine in *Reeves, Inc. v. Stake*[117] to allow South Dakota to give its citizens preference over out-of-state citizens to purchase cement from a state-run plant, a legacy of the north central plains prairie populism. The Court was careful to draw a distinction between cement and state trust resources, but the line is not always easy to understand. For example, can a state, South Dakota for example, claim (as it has done) that water impounded by federal dams is the state's property and cannot be exported except on the state's terms? South Dakota's present policy is to sell water to the high bidder such as coal slurry pipelines, but other states could use the market participation doctrine defensively. In 1983, the Court applied the doctrine to uphold a Boston ordinance that required one-half of all labor on municipal construction projects be Boston residents.[118] Because Boston was a market participant, the Court found that "the Commerce Clause establishes no barrier to conditions such as these . . ."[119]

The balance between the rights of state citizens to enjoy state goods and the power of the state to prevent the destruction of the commons in the name of a higher national interest is complex. But the market participation doctrine adds little to the accommodation because it is a blanket rule of immunity that is at odds with the general policies of the negative commerce clause and the privileges and immunities clause.

2. The Inadequacy of the Principle Justification for the Negative Commerce Clause

Since the negative commerce clause doctrine does not rest on an express constitutional footing, both the Court and commentators have offered justifications for judicial invalidation of state laws not preempted by Congress. The proffered justifications are a combination of structural constitutional arguments, based mainly on the Federalist numbers 45 and 46, and legal process arguments about

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[114] Varat, *State Citizenship and Interstate Equality*, 48 U. CHI. L. REV. 550-52 (1981).
[115] 426 U.S. 794 (1976).
[116] *Id.* at 810.
[117] 447 U.S. 429 (1980).
[118] White v. Mass. Council of Constr. Employers, Inc., 103 S. Ct. 1042 (1982).
[119] *Id.* at 1046.

the proper relationship between the Court and Congress. Both lines of arguments perhaps justify *a* role for the Court in reviewing state legislation, but they do not support the intrusive role that the Court has carved out for itself.

Justice Jackson in *H.P. Hood & Sons v. Du Mond* articulated the structural argument.[120] His reading of history convinced him that the Constitution was designed to embody the Founder's vision of a national common market and that the Court should implement the vision of an open economy driven by free competition:

> Our system, fostered by the Commerce Clause, is that every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the Nation, that no home embargoes will withhold his exports, and no foreign state will by customs duties or regulations exclude them. Likewise, every consumer may look to the free competition from every producing area in the Nation to protect him from exploitation by any. Such was the vision of the Founders; such has been the doctrine of this Court which has given it reality.[121]

Powerful as it is, his argument suffers from two defects. First, the Commerce Clause grants Congress the power to regulate trade, but the promotion of competition is only one of the regulatory options that Congress can and does choose. As Professor Eule has argued, "[t]he commerce clause thus, cannot be said to establish and protect free trade or a national market place as a fundamental constitutional value."[122] The Constitution does not mandate economic efficiency. Second, there is the familiar question, even if the constitution commands, why must the Court enforce it if the states are adequately represented in Congress?

Several legal scholars have tried to answer this question without complete success. One line of argument admits that the Court's assertion of power is questionable, but justifies it because of a tacit partnership between the Court and Congress to curb the inevitable tendency toward state parochialism. One must accept the premise that national power must be encouraged to respond to most modern problems. The negative commerce clause cases support Congress' exercise of the affirmative commerce clause because the Court is able to catch low-visibility intrusions on national power and an open economy that Congress is too busy to catch. Justices Holmes and Stone articulated this view along with Professor Ernest Brown.[123] Recently, Dean Choper restated this position in a book that generally advocates less judicial review of federalism issues such as interpretations of the tenth amendment. Dean Choper concedes that the Court does engage in "value-balancing of national versus state concerns," but finds comparatively little tension between judicial review and majoritarian government:

> [T]his aspect of the Court's work . . . is akin to statutory interpretation and not to judicial review. For this reason, the traditional tension between constitutional decisionmaking by the federal judiciary and the principles of majoritarian democracy is not of any real concern.[124]

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[120] 336 U.S. 525 (1949).

[121] *Id.* at 539.

[122] Eule, *Laying the Dormant Commerce Clause to Rest*, 91 YALE L.J. 425, 434 (1982).

[123] Brown, *The Open Economy—Justice Frankfurter and the Position of the Judiciary*, 67 YALE L.J. 219 (1957).

[124] J. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS 208 (1980).

If the Court errs, Congress can easily correct the decision. But, of course, the relevant question is why the Court should take it upon itself to perform a congressional oversight function. Despite the press of business, Congress is not without staff and a sense of contemporary national-state conflicts.

Dean John Hart Ely of Stanford University has provided a more satisfactory justification for the negative commerce clause doctrine, although a contrary conclusion is warranted about many potential applications of the justification. In the context of a general theory of judicial review of political choice, he finds that the negative commerce clause cases reinforce the core values of an open, responsive political process protected by the Constitution.[125] State parochial legislation, especially if it facially discriminates against interstate commerce, is a symptom of a malfunction in the political process. Out-of-state interests have been the object of legislation where there is a high risk both that their interests were not considered and that in-state interests were biased against them and in effect, conspired to discriminate against them.

A core function of judicial review under the negative commerce clause is to enforce an effective republican decision-making process, and thus the negative commerce clause serves the same function as do constitutional doctrines that protect the franchise from infringement and minorities from discrimination.[126] Dean Ely's argument has the merit of coherence and principle, but the analogy between the negative commerce clause and civil rights and liberties cases lacks the force that he claims, at least for natural resources issues. An application of the theory that the primary function of judicial review is to maintain open political processes in the natural resources area supports only minimal use of the negative commerce clause doctrine. This position is the focus of Section V, pertaining to representative federalism.

B. Preemption

Congressional power to preempt state laws is an essential attribute of a federal system bound together by a strong national government. For this reason, the Court's preemption decisions have been subject to less criticism than those applying the negative Commerce Clause. The constitutional basis of preemption is beyond doubt, and the preemption inquiry is more focused compared to negative commerce clause balancing. However, despite these differences between the two doctrines, the two lines of cases often display similar rigid and abstract theories of federalism, employ a similar balancing process, and fail to defer sufficiently to state interests.

To determine if state law is preempted, the Court must conclude that state law is inconsistent with federal law. If Congress expressly preempts state law, there is a conflict and state law must yield.[127] The Court has also assumed the power to determine whether state law is impliedly preempted; these are the difficult cases. Although both express and implied preemption are grounded in congressional intent, the standards for implied preemption are much broader. The Court can inquire into the pervasiveness of the federal regulatory scheme to determine if

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[125] *See generally*, J. ELY, DEMOCRACY AND DISTRUCT (1980).
[126] *Id.* at 83-84.
[127] *See, e.g.*, Fidelity Savings & Loan v. de la Cuesta, 458 U.S. 141 (1982).

Congress has occupied a field to such an extent that a state's enforcement of its laws should be presumed to frustrate a federal purpose. In the absence of occupation, preemption may exist if there is a conflict between state and federal law. The core concept of conflict is sufficiently open-ended to allow the Court to determine Congressional intent in light of the Court's conceptions of the proper balance between national and state regulatory authority.

The Court's conception of the proper balance between national and state authority has changed radically over time. Prior to the 1930's, the Court followed an expansive theory of federal preemption. The sole question was whether Congress had legislated on the same subject matter dealt with by state law. In the 1930's, the presumption of preemption was replaced by a state-centered theory that required an actual conflict between federal and state law. This presumption generally placed the burden of demonstrating a specific Congressional intent to occupy the field on the proponent of preemption. Beginning with *Hines v. Davidowitz*,[128] the Court moved back to the pre-1930's theory of nation-centered federalism as the Court expanded the federal interests entitled to protection. *Hines* asserted the power to find preemption whenever the Congress had acted, and many commentators pointed out that the Court used preemption to avoid deciding directly some difficult constitutional issues or to indicate "implicit" federal policies.[129] The nation-centered theory enjoyed its zenith under the Warren Court; the Burger Court has moved back to a state-centered theory of federalism that tolerates more concurrent regulation by defining federal interests more narrowly.[130]

Doctrinally, the preemption cases are incoherent because the Court now adds dashes of quotes from all eras with no seeming appreciation of the inconsistent theories of the proper federal-state balance underlying the cases. Moreover, the focus on Congressional intent makes generalization hazardous, because in each era there are cases that do not fit the general pattern of the era.[131] Still, the Court is currently striving to articulate a theory of preemption that reflects actual political accomodations of federal-state interest rather than one which imposes a judicially-created model of federalism on issues that need not always be characterized as conflicts. The Court's general approach and its strengths and weaknesses are illustrated in *City of Milwaukee v. Illinois*[132] and the recent California nuclear moritorium case, *Pacific Gas & Electric Co. v. California State Energy Conservational Development Commission*.[133]

The Supreme Court's original jurisdiction is a grant of the power to declare a federal common law of nuisance where uniform rules are needed to resolve interstate disputes. The 1972 case of *Illinois v. City of Milwaukee*[134] held that this power

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[128] 312 U.S. 52 (1941).

[129] Comment, *Preemption as a Preferential Ground: A New Canon of Construction*, 12 STAN. L. REV. 208, 210 (1959).

[130] Note, *Shifting Perspectives on Federalism and the Burger Court*, 75 COLUM. L. REV. 623 (1975). *See also* Note, *A Framework for Preemption Analysis*, 88 YALE L.J. 363 (1978).

[131] A modern instance where the court found preemption when the state interest in regulation was strong and the federal interest was not clearly defined is Ray v. Atlantic Richfield Co., 435 U.S. 151 (1978) (State regulation of oil tanker to minimize risk of oil spills preempted).

[132] 451 U.S. 304 (1981).

[133] 103 S. Ct. 1713 (1983).

[134] 406 U.S. 91 (1972).

survived *Erie R. Co. v. Tompkins*[135] and that district courts had the authority to hear federal common law nuisance suits between states and local units of government of another state. *Illinois* was decided under the sketchy federal law of water pollution control that existed prior to the legislation that now constitutes the Clean Water Act.[136] Justice Douglas was thus able to brush-off Milwaukee's argument that federal laws and regulations preempted common law actions. After a trial on the merits, the Seventh Circuit again considered the preemption argument but held that the Clean Water Act did not preempt the action and that compliance with an NPDES (National Pollution Disposal Elimination System) permit was not a defense to a common law nuisance. The circuit court also ruled that the discharge standards imposed on Milwaukee were too stringent.[137] On appeal to the Supreme Court, Milwaukee finally prevailed on its preemption argument.

In *City of Milwaukee v. Illinois*[138] the Supreme Court held, 6 to 3, that the Clean Water Act preempts federal common law nuisance actions. Although the issue is theoretically open with respect to other federal environmental legislation,[139] Justice Rehnquist's opinion assures that most common law actions will be preempted. Despite various sections of the Act that seem to preserve common law remedies, it is surprising to learn that Justice Rehnquist, considered generally sensitive to state interests, found Illinois action preempted. Justice Rehnquist characterized the issue as one of the separation of powers rather than a national-state issue, and thus he was able to justify a broad presumption in favor of preemption.[140]

Courts should realize that Congress should properly decide

> the appropriate standards to be applied as a matter of federal law. . . . Congress has not left the formulation of appropriate federal standards to the courts through application of often vague and indeterminate nuisance concepts and maxims of equity jurisprudence, but rather has occupied the field through the establishment of a comprehensive regulatory program supervised by an expert administrative agency.[141]

Mr. Justice Rehnquist's reasoning is misguided. The dissenting opinion went to the heart of the majority's error:

> The Court's analysis of federal common law displacement rests, I am convinced, on a faulty assumption. In contrasting congressional displacement of the common law with federal preemption of state law, the Court assumes that as soon as Congress "addresses a question previously governed" by federal common law, 'the need for such an unusual exercise of lawmaking by federal courts disappears. . .' This 'automatic displacement' approach is inadequate in two respects. It fails to reflect the unique role federal common law plays in resolving disputes between one State

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[135] 304 U.S. 64 (1938).

[136] The Federal Water Pollution Control Act of 1972, 33 U.S.C. §§ 1251-1376 (1976).

[137] Illinois v. City of Milwaukee, 599 F.2d 151, 177 (7th Cir. 1979), *vacated*, 451 U.S. 304 (1981).

[138] 451 U.S. 304 (1981).

[139] Compare the two Clean Air Act cases, New England Legal Found. v. Costle, 666 F.2d 30 (2d Cir. 1981) and United States v. Kin-Buc, Inc., 532 F. Supp. 699 (D.N.J. 1982). A recent federal district court case holds that Congress did not intend to preempt the development of federal common law under the Comprehensive Environmental Response Compensation and Liability Act of 1980, 42 U.S.C. §§ 9601-57 (1981 Supp.). United States v. Chem-Dyne Corp., — F. Supp. —, 19 E.R.C. 1953 (S.D. Ohio 1983).

[140] *See* Powell, *The Complete Jeffersonians: Justice Rehnquist and Federalism*, 91 YALE L. J. 1317 (1982).

[141] 451 U.S. at 317.

> and the citizens or government of another. In addition, it ignores this Court's frequent recognition that federal common law may complement congressional action in the fulfillment of federal policies.[142]

Comprehensiveness is more of a descriptive rather than normative statement about legislation that has evolved in response to changed perceptions about the nature of a social problem. The Clean Water Act does not, as Justice Rehnquist implies in the majority opinion, represent Congress' final allocation of all the costs of water pollution and the benefits of abatement. The opinion rests on "the unstated assumption that the 1972 Amendments reflect a Congressional decision that federal and state water pollution standards represent the maximum liability to which a discharger should be subject."[143] A more sensitive and true reading of Congressional intent would be that the Act represents Congress' understanding of the major water pollution problems at the time, but that Congress did not intend to foreclose common law actions that respond to substantial unforeseen interstate injuries.[144] The legitimate interests of dischargers in estimating the extent of their financial liability must be subordinated to the public's interest in being protected from newly discovered health hazards. Dischargers are always at risk that common law standards of liability will change. The severe judicially imposed limitations on the scope of common law nuisance liability offer adequate protection to dischargers and counter the dischargers' arguments that the failure to find preemption exposes them to too much liability.

States have a legitimate interest in applying their own law to disputes arising within, but have no interest in applying their own law when the nature of the problem is interstate and a uniform federal rule may be necessary to curb state parochialism and adjust equities among overly self-interested parties.[145] Justice Rehnquist's analysis applies with much greater force to more traditionally defined national interests such as public land management. As owner and manager, the federal government has always assumed the dominant role in public lands decisionmaking, and thus separation of powers principles would support a presumption of preemption to prevent the frustration of Congressional objectives.[146]

Pacific Gas & Electric Co. v. California State Energy Conservation and Development Commission[147] grew out of the erosion of the nuclear dream. Beginning in 1946 when Congress opted for civilian control of nuclear energy, the federal government promoted nuclear power as an alternative to electricity generated by conventional fuels. Utilities began to go nuclear in the 1960's, but a decade of optimism for atomic power was replaced by a decade of skepticism, if not fear, as doubts about the safety of nuclear energy grew in the 1970's. One of the many neglected safety problems was the back end of the fuel cycle. Until 1974 it was assumed that all spent fuel could be chemically reprocessed, but reprocessing was

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[142] *Id.* at 333-34.

[143] *Hearings on S. 777 and S. 2652 Before the Subcomm. on Environmental Pollution of the Senate Committee on Environment and Public Works*, 97th Cong., 2d Sess. 654 (1982) (statement of Dan Tarlock).

[144] Note, *City of Milwaukee v. Illinois: The Demise of the Federal Common Law of Water Pollution*, 1982 WIS. L. REV. 627, 658-60.

[145] *See* Bleiweiss, *Environmental Regulation and the Federal Common Law of Nuisance: A Proposed Standard of Preemption*, 7 HARV. ENVTL. L. REV. 41 (1983).

[146] Ventura County v. Gulf Oil Corp., 601 F.2d 1080 (9th Cir. 1979), *aff'd mem.* 445 U.S. 947 (1980).

[147] 103 S. Ct. 1713 (1983).

stopped after fears that this technology would contribute to nuclear weapons proliferation. Storage and disposal replaced reprocessing, and states such as California became alarmed at the lack of acceptable long term disposal sites and the lack of a clear federal regulatory policy on the back end of the fuel cycle generally.

In 1976 California reacted to inadequate federal regulation of the back end of the fuel cycle by passing three amendments to the state's general power plant siting statute, the Warren-Alquist Act of 1974.[148] Collectively, the amendments shifted the burden of proving the safety of nuclear waste management options to the federal government. The California Legislature enacted these amendments just before a costly and controversial initiative and referendum, barring the construction of new nuclear plants unless a permanent method of waste disposal was found, which the California voters later rejected.

The first amendment, section 25524.1, prohibits the siting of new nuclear plants that require their fuel rods to be reprocessed unless the California Energy Resources Conservation and Development Commission finds that the federal government has identified and approved the reprocessing technology for the spent fuel generated by the plant. The second amendment, section 25524.2, prohibits the siting of all new nuclear plants until the state Commission determines that the federal government has identified and approved a demonstrated technology for the disposal of the high-level nuclear wastes. The final amendment, section 22524.3, provides that new nuclear plants are not permitted land uses in California until the Commission has completed a study of the desirability and economic feasibility of berm-containment and putting all new plants underground.

Although no utility had been denied permission to construct a plant under the Act, the Court found that the moratorium was ripe for review because the issue was solely one of law and the utilities needed an answer to the preemption issue for long range planning purposes. After a brief and unenlightening explanation of the law of preemption,[149] the Court turned to the merits and unanimously concluded that federal regulation did not preempt California law.

Pacific Gas & Electric argued that federal law preempted California's moratorium. First, Pacific Gas contended the moratorium regulated the safety of nuclear plants and Congress had already assigned this function exclusively to the

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[148] Cal. Pub. Res. Code §§ 25000-25968.

[149] The Court's statement of the law mixes indiscriminately quotations from all recent eras of preemption law:

> Absent explicit preemptive language, Congress' intent to supersede state law altogether may be found from a "scheme of federal regulation so pervasive as to make reasonable the inference that Congress left no room to supplement it," "because the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject," or because "the object sought to be obtained by the federal law and the character of obligations imposed by it may reveal the same purpose." *Fidelity Federal Savings & Loan Ass'n v. de la Cuesta*, — U.S. —, 102 S. Ct. 3014, 3022 (1982); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 . . . (1947). Even where Congress has not entirely displaced state regulation in a specific area, state law is preempted to the extent that it actually conflicts with federal law. Such a conflict arises when "compliance with both federal and state regulations is a physical impossibility," *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-143 . . . (1963), or where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67 . . . (1941).

103 S. Ct. at 1722.

NRC. Second, it claimed the waste disposal policy of section 25524.2 was inconsistent with NRC regulations and the Nuclear Waste Policy Act of 1982. Third, it asserted that Calfornia's nuclear policy frustrated federal promotion of nuclear power as a major source of energy.[150]

The utility's strongest argument was that Congress had delegated reactor and plant safety to the NRC. In response, California relied on a strategy designed by its attorney, Professor Laurence Tribe of Harvard Law School. To avoid the highly probable conclusion that direct safety regulation was preempted, Professor Tribe argued that states still retain the authority to regulate the economic aspects of nuclear power incident to traditional state regulation of public utilities.[151] The Court agreed with his position.

Professor Tribe's assumption that the Court would find safety regulation preempted was well-founded, but the Court accepted his fictive distinction. Justice White's opinion for the Court concluded that state safety regulation was preempted for three reasons: first, the federal government had occupied the field; second, state regulation would conflict with the Nuclear Regulatory Commission's judgment that the construction of nuclear plants could proceed in the face of uncertainty about disposal; and last, state regulation would conflict with the federal government's effort to promote nuclear development through uniform safety standards. To sustain California's statute, Justice White's opinion accepted the distinction between economic and safety regulation. NRC regulations require an inquiry into a license applicant's financial qualifications only if the information is related to public health and safety, and the Court found that section 271 of the Atomic Energy Act removed any doubts about the preservation of "traditional" state areas of concern. This section provides that "[n]othing in this chapter shall be construed to affect the authority of or regulations of any Federal, State or local agency with respect to the generation, sale or transmission of electric power produced through the use of nuclear facilities licensed by the Commission . . ."[152]

Distinguishing economic regulations from safety regulations is a difficult problem. In fact, no such distinction exists. Professor Tribe earlier accurately characterized the purpose of section 25524.2 as a guarantee "that its citizens need not bear the psychic and economic costs of having to manage high-level waste with no assurance"[153] of a safe method of permanent disposal. California first tried to present the Court with a theory that would not require the distinction, but only the two concurring justices accepted the state's argument that a state may prohibit the construction of new plants until the federal government satisfies safety concerns on issues other than plant construction standards.[154] Instead, Justice White stitched together random quotations from well-crafted state legislative history and combined them with the self-imposed judicial limitation on inquiry into legislative motives to indulge in the fiction that section 25524.2 was "aimed at

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[150] *Id.* at 1722.

[151] *See* Tribe, *California Declines the Nuclear Gamble: Is Such A State Choice Preempted?*, 7 ECOLOGY L.Q. 679 (1979).

[152] The amendment was a response to a Ninth Circuit opinion, Maun v. United States, 347 F.2d 970 (9th Cir. 1965), holding that Palo Alto, California had the right to regulate power lines running to the federally funded Stanford University linear accelerator.

[153] Tribe, *supra* note 152, at 708.

[154] *See* note 144.

economic problems, not radiation hazards."[155]

Pacific Gas & Electric's second argument was that NRC regulations specifying the general design criteria and control requirements for fuel storage and the handling of stored radioactive wastes, in combination with the Nuclear Waste Policy Act of 1982,[156] created a conflict between federal and state policy.[157] Relying again on the distinction between safety and economic regulation, the Court found no conflict between compliance with NRC regulations and section 24424.2:

> Because the NRC order does not and could not compel a utility to develop a nuclear plant, compliance with both it and § 25524.2 are possible. Moreover, because the NRC's regulations are aimed at insuring that plants are safe, not necessarily that they are economical, § 25524.2 does not interfere with the objective of the federal regulation.[158]

The Nuclear Waste Policy Act of 1982 presented a greater challenge, because for the first time it announced a congressional waste disposal policy. But the Court found an easy exit in the legislative history of the Act. The Senate passed an amendment that would have preempted state law, but the House deleted the Senate language. In the words of Representative Ottinger, this change was "to insure that there be no preemption."[159] More interesting is Justice White's suggestion that "it is certainly possible to interpret the Act as directed at solving the nuclear waste disposal problem for existing reactors without necessarily encouraging or requiring that future plant construction be undertaken."[160]

The utility's third argument was the most far-reaching and central to the continued development of nuclear energy against hostile state efforts. It argued that federal policy mandated the development of nuclear power, and thus California's moratorium frustrated the achievement of this objective. Although the Court initially appeared to subscribe to this view, it ultimately rejected the argument on the same grounds as the two previous preemption arguments. Justice White first reiterated the Court's traditional promotional attitude toward nuclear power. He found "little doubt that *a* primary purpose of the Atomic Energy Act *was, and continues to be*, the promotion of nuclear power,"[161] and dismissed as "unconvincing," the Ninth Circuit's suggestion that the 1974 separation of the regulatory from the promotional activities of the Atomic Energy Commission altered Congressional policy. But Justice White finally agreed with the Court of Appeals "that the promotion of nuclear power is not to be accomplished 'at all costs.' "[162] Thus, state economic regulation was not preempted and any change in the pattern of concurrent regulation should come from Congress.

Read narrowly, the opinion of the Court makes the conclusion of whether federal law has preempted state nuclear regulation turn on careful and fictitious

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[155] *Infra*, text accompanying 103 S. Ct. at 1727.

[156] 42 U.S.C. §§ 10101-226 (Supp. 1982).

[157] 103 S. Ct. at 1729.

[158] *Id.* at 1979-30.

[159] 128 CONG. REC. H8797, (daily ed. Dec. 2, 1982). *See* Nuclear Waste Disposal Policy, Hearings Before the Subcomm. on Energy and Commerce of the, 97 Cong., 2d Sess. — (1982).

[160] 103 S. Ct. at 1731. He found that evidence of a Congressional shift of purpose was rebutted by the extension of the Price-Anderson Act until 1987. P.L. No. 94-197 § 2-14, 89 Stat. 1111-15 (1975).

[161] 103 S. Ct. at 1731 (emphasis added).

[162] *Id.*

legislative drafting. Although the Court's reliance on the distinction between economic and safety regulation gives states a draftsman's roadmap, the possibility remains that the Court will not accept at face value state declarations that the purpose of the regulation is economic rather than safety. For example, state incantations of safety are no longer accepted as a basis for immunity from a negative commerce clause inquiry.[163] State nuclear safety legislation, therefore, is still at risk after *Pacific Gas & Electric*. The question remains: should state regulation depend on such a transparent and uncertain fiction?

Justices Blackmun and Stevens concurred in *Pacific Gas & Electric* and reasoned that state safety as well as economic regulation should be sustained absent strong evidence of Congressional intent to preempt state law particularly when current federal regulation is incomplete.[164] They found unpersuasive each of Justice White's reasons for concluding that Congress preempted safety regulation. First, they found that Congress had not occupied the whole field of safety concerns, "but only the narrower area of how a nuclear plant should be constructed and operated to protect against radiation hazards."[165] Second, they found no conflict between an NRC and a state safety judgment because Congress had not mandated the states to proceed with a nuclear plant. Third, the concurring opinion read recent nuclear legislation and related legislation such as the Energy Reorganization Act of 1974[166] and Section 122 of the Clean Air Act[167] as softening Congress' earlier confidence in the nuclear dream. Rather than promoting nuclear power, "Congress has merely encouraged the development of nuclear technology so as to make another source of energy available to the States; Congress has not forced the states to accept this particular source . . . In sum, Congress has not required States to 'go nuclear.' "[168]

V. TOWARD A THEORY OF REPRESENTATIVE FEDERALISM

The principal argument of this article is that the negative commerce clause and preemption doctrines should be reformulated to give greater recognition to the legitimate state right of self-defense to respond to new demands for the regulation of natural resources development and use. Judicial intervention under these doctrines is best justified in two circumstances. The first exists when the state has enacted protectionist legislation, without the participation of relevant interests, that does little more than redistribute wealth from out-of-state to in-state residents. The second is present when uniform regulatory standards are necessary to prevent the frustration of a clearly defined national objective. Invalidation of state legislation is least necessary when the state is trying to deal with market failures that are unique to the state or surrounding region, and when there is a strong likelihood that either state or national political processes will

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[163] Raymond Motor Transp. Inc. v. Rice, 434 U.S. 429 (1978).

[164] 103 S. Ct. 1732. *See* Wiggins, *Federalism Balancing and the Burger Court: California's Nuclear Law as a Preemption Case Study*, 13 U.C.D. L. REV. 3 (1979) for a further elaboration of Justice Blackmun's argument. *See also* Sorenson, *A Preemption Analysis of California's Moratorium on Nuclear Plan Construction: Pacific Legal Foundation v. State Energy Resources Conservation and Development Commission*, 66 MINN. L. REV. 1258 (1982).

[165] 103 S. Ct. at 1732.

[166] 42 U.S.C. §§ 5801-5891 (1976).

[167] 42 U.S.C. § 7422 (1976).

[168] 103 S. Ct. 1734-35.

deal with the issue. In these situations, the national interest is likely to be defined through the push and pull of representative politics in a manner superior to abstract judicial interest balancing. It is unnecessary to agree with the full scope of Justices McReynolds and Sutherland's individualistic philosophy, expressed in a dissent from a holding that a state-imposed quarantine was preempted, in order to accept the wisdom of their analysis:

> We cannot think Congress intended that the Act of March 4, 1917, without more should deprive the States of power to protect themselves against threatened disaster like the one disclosed by this record.
>
> If the Secretary of Agriculture had taken some affirmative action the problem would be a very different one. Congress could have exerted all the power which this statute delegated to him by positive and direct enactment. If it had said nothing whatever, certainly the State could have resorted to the quarantine; and this same right, we think, should be recognized when its agent has done nothing.
>
> It is a serious thing to paralyze the efforts of a State to protect her people against impending calamity and leave them to the slow charity of a far-off and perhaps supine federal bureau. No such purpose should be attributed to Congress unless indicated beyond reasonable doubt.[169]

A recent example of the superiority of political solutions is the Nuclear Waste Policy Management Act of 1982.[170] State efforts to ban the importation of spent nuclear fuel for reprocessing or storage are likely to be invalidated under the negative Commerce Clause or preemption. These decisions leave the states with few options to protect themselves against the risks of the back end of the nuclear full cycle. By contrast, the Nuclear Waste Policy Act of 1982 provides for a federal site selection process with strong state representation at all stages of the process. The Act provides for federal designation of nuclear waste disposal sites, but allows the state an enhanced opportunity to participate in the selection process. This opportunity includes a requirement that a majority of both houses of Congress approve a site over the objection of the host state. Few, if any, states will voluntarily open themselves to permanent repositories, but when the national interest is finally asserted through a federal list of acceptable state sites, the states will have had a much better chance to assert their interests than they would have through the courts.

A. The Negative Commerce Clause Reformulated

All state legislation—evenhanded and facially discriminatory—should be presumed constitutional once the state carries the initial burden of demonstrating that it seeks to further a legitimate state interest. A showing by the State that the legislation serves one of the traditional state interests in resource allocation should be sufficient to carry this burden. Given the Court's disinclination to probe the motives of the legislature, this burden will be light. However, the need to link the statute to a traditional resource allocation interest serves as a check on the use of the legislative process to redistribute wealth among in and out-of-state interests. At this point, the party objecting to the legislation would have the

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[169] Oregon-Washington R.R. & Navigation Co. v. Washington, 270 U.S. 87, 103 (1926).
[170] P.L. 97-425, 96 Stat. 2201 (to be codified at 42 U.S.C. §§ 10101-10226 (1983)).

burden of overcoming the presumption.[171]

Because states will always have a taste for anti-competitive, redistributive legislation, the presumption of validity must be a rebuttable one. There are legitimate national interests that should be protected by the federal judiciary, even though they are less compelling than has generally been assumed. The opponent of the legislation would have to show that there is either a failure of the political process regarding out-of-state representatives, or that the state interest can be furthered by more sophisticated regulatory mechanisms that are less offensive to the values promoted by the negative Commerce Clause. Protectionist legislation that interferes with the functioning of a national common market is most troublesome in two situations: (1) the out-of-state interest has not been effectively represented in the legislative or administrative process, or (2) the state's action is unlikely to be redressed by Congress because the action is a low visibility one.[172] Wyoming's attempt to limit the exportation of water for coal slurry pipelines, by requiring legislative approval of out-of-state diversions, is an example of legislation that is highly suspect under existing law—but that might pass muster under a reformulated negative commerce clause doctrine.[173] On its face, this statute appears to be a candidate for invalidation under *Sporhase*. But it is not a case where the statute has a disproportionate impact on unrepresented interests or exclusively burdens out-of-state residents. Nor is this a case of benefits falling almost exclusively on in-state residents. The legislation is largely designed to cushion the impact of potential large-scale water diversions on in-state water uses. The statute is thus asserting a traditional interest in conservation and market failure prevention. Legislation of this variety is much less troublesome than fruit labelling requirements, imposed by one state to keep out superior fruit from another state, because it does not represent a sufficient failure of the political process to merit judicial intervention. Out-of-state interests have been invited into the state political process to bargain, and any state failure to deal honestly is likely to be redressed at the national level. Congress has the power, without apparent limitation, to exempt state discriminatory legislation from the Commerce Clause.[174] Yet, Congress has been considering coal slurry legislation for several sessions with little inclination to preempt traditional state water allocation prerogatives.

B. Preemption

Justice Blackmun's opinion in *Pacific Gas & Electric* seems more consonant with the Burger Court theories of preemption and federalism because it starts from the assumption that states have a right to protect themselves from new hazards. No such right exists, however, if the federal government can demonstrate that Congress has occupied the field. This presumption forwards the theory of the fragmentation of power, implicit in principles of a compound republic. Judicial

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[171] I am much indebted to Eule, *Laying the Dormant Commerce Clause to Rest*, 91 YALE L.J. 425 (1982) for many of the ideas in this analysis.

[172] *See, e.g.*, Commonwealth Edison Co. v. Montana, 453 U.S. 609 (1981). *See also* McGrath & Hellerstein, *Reflections on Commonwealth Edison Co. v. Montana*, 43 MONT. L. REV. 165 (1982).

[173] WYO. STAT. § 41-3-115(c) (1977). *See* Tarlock, *supra* note 86, at 170-73.

[174] *See* Prudential Insurance Co. v. Benjamin, 328 U.S. 408 (1946) (the standards for congressional exemption are strict); New England Power Co. v. New Hampshire, 455 U.S. 331 (1982).

deference to state regulatory authority is particularly appropriate in cases such as *Pacific Gas & Electric* because the underlying issue is a highly visible political question and the federal government has reached no clear consensus on an appropriate national policy.

The concurring opinion also responds silently to the failure of the NRC to convince the public of its legitimacy. Other Supreme Court cases continue to defer blindly to agency expertise in this area, but the era of widespread public acceptance of administrative expertise is over. When federal policy, both in Congress and in the administrative agencies, is confused and evolving, the Court is justified in defining conflict between federal and state policy narrowly and refusing to indulge in a presumption of federal occupation of the field. A law of preemption that displays a high level of tolerance for concurrent regulation allows states to fill federal regulatory gaps and forces Congress to assume its proper role in deciding whether the balance of federal and state regulatory authority frustrates overriding national objectives.

VI. CONCLUSION

This article has suggested a way that the revived interest in federalism can contribute to constitutional doctrines that are more responsive to state initiatives in the management of natural resources. The argument advanced here does not fundamentally challenge the present imbalance between national and state authority created during the last hundred years. Nor does it contain a uniform prescription for all allocations of regulatory authority. Rather, it seeks to suggest a diminished role for the Court in the negative Commerce Clause and preemption areas that will encourage political responsibility at both the national and state levels.[175] Because all bodies of law, particularly constitutional law, are unstable mixes of more enduring principles and changes in societal values, this argument rests on a number of stated and unstated empirical assumptions, each of which is open to challenge and revision in the light of experience. I hope, however, that this article causes natural resources lawyers to take a fresh look at some venerable Supreme Court doctrines in an effort to chart new doctrines that are more responsive to genuine federalism concerns.

[175] Similar arguments are being made to support a revived delegation doctrine. *See, e.g.*, Aranson, Gellhorn, and Robinson, *A Theory of Legislative Delegation*, 68 CORNELL L. REV. 1, 63 (1982); Schoenbroad, *supra* note 77. *Goals Statutes or Rules Statutes: The Case of the Clean Air Act*, 30 UCLA L. REV. 201 (1983).