



## Who's In Charge?

Federalism is being redefined by the courts. This shift may mark the most profound change in course since the launch of the modern environmental era.

An expanding role for the federal government in environmental protection was seldom questioned in the years after Earth Day, the states having so dramatically failed to police pollution and protect public health and natural resources within their borders. But many state programs today are mature, and often state agency administrators chafe at intervention in what can appear to be local matters.

States have a long tradition of common law authority through their police powers to abate nuisances and regulate land use and protect natural resources in the public trust. And while the Constitution gives the federal government no express authority to protect the environment, Congress's powers to regulate interstate commerce and navigation, engage in treaties, provide for national defense, and arguably ensure equal protection of the laws provide the constitutional basis for America's robust system of national environmental laws. States often are delegated authority to carry out federal programs within their jurisdictions, and the two levels of government work together in administering these programs — sometimes called "cooperative federalism" or "environmental federalism." States also retain the authority to set more stringent standards in many cases.

As a result of several decisions by the Supreme Court and other federal courts, many of which do not involve environmental law directly, the federal-state balance in environmental protection is in flux. Decisions are challenging the reach of the Commerce Clause and finding that states enjoy sovereign immunity when citizens bring actions against states that are implementing federal laws.

Environmental protection will change as a result of these decisions, but whether for good or bad, or even whether significant in scope, is a subject of much debate.



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“There is value to debate regarding environmental federalism. However, that dialogue would be more useful if it focused less on theoretical extrapolations from Supreme Court cases, and more on innovative solutions that involve effective state-federal coordination.”

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## Judicial Federalism Not Anti-Environment

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Recent Supreme Court decisions concerning the proper balance between the federal government and state governments prompt some to fret about the future of environmental protection. Over the last decade, the Court has curtailed Congress's power to regulate non-commercial activity, commandeer state and local officials for federal programs, and subject unconsenting states to private suit for alleged violations of federal law. Few of the relevant cases directly addressed federal environmental protections. It is nonetheless clear that the resulting legal rules will impact some existing environmental programs.

Collectively, these rulings proscribe federal power, but this does not mean that environmental protection is threatened. Thus far, the Court's federalist decisions have been exceedingly modest, trimming federal power only on the margins. Congress retains substantial authority to adopt environmental measures, especially in those areas of particular federal concern. Should the Court take bolder strides in future cases, this will still pose no inherent threat to environmental protection. Federal regulation is not the only means to advance environmental values, nor is it always the most desirable, equitable, or effective.

The Supreme Court's federalism holdings are grounded in the notion of "dual sovereignty" — the idea that states are sovereign entities much like the federal government. This creates a division of authority

between the federal and state governments that is no less integral to our constitutional system than the separation of powers among the branches of the federal government. As the Court explained in *Gregory v. Ashcroft*: "Just as the separation and independence of the coordinate branches of the federal government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the states and the federal government will reduce the risk of tyranny and abuse from either front." The federal government retains substantial power to address matters of truly federal concern, and to ensure that state governments do not infringe upon Americans' constitutionally protected rights, but it lacks an all-encompassing police power able to address the wants and concerns of each and every community or interest group.

While the federalism decisions are significant, they are not revolutionary. As Stephen McAllister and Robert Glicksman have pointed out in the *Environmental Law Reporter*, the federal government retains substantial power to enact environmental regulations and induce state cooperation. Truly local, noncommercial activities may lie beyond Congress's reach, but there appears to be no constitutional barrier to regulating regional air quality, controlling the pollution of interstate waters, or imposing liability for the cleanup of hazardous wastes. Although private suits against states are limited by sovereign immunity, direct federal action is not. Nor is the use of the federal spending power to encourage — some would say bribe or even blackmail — states into cooperating with federal programs or even voluntarily waiving their immunity from suit. Even if the Court increases its scrutiny of such exercises of conditional spending, most federal environmental programs will remain largely intact.

Some fear that the Court's sovereign immunity decisions will encourage states to flout federal law, particularly where direct federal enforcement actions are unlikely. This may be so. But sovereign immunity in such cases is a two-edged sword. The imposition of federal priorities on unconsenting states is not always environmentally beneficial. Sovereign immunity will frustrate some environmentalist suits against recalcitrant states, but it will also limit corporate efforts to preempt local decisions about land-use and community character. In *Federal Maritime Commission v. South Carolina State Ports Authority*, for instance, a cruise ship operator sought to force South Carolina to allow the berthing of a gambling boat. Because of sovereign immunity, the effort didn't get off the ground.

Environmental activists often seem to forget that federal intervention in state and local matters does not always serve environmental ends. Many of the environmental problems which our country struggles with today are the legacy, at least in part, of ill-conceived (albeit well-intentioned) federal programs. Federal legislation often preempts state efforts to adopt more protective environmental measures and can distort local priorities with the promise of financial assistance for participation in federally preferred programs. In evaluating the environmental effects of judicial limits on federal power, we must remember that such proscriptions impair Uncle Sam's ability to despoil the environment, not just to protect it.

Pervading the Supreme Court's federalist jurisprudence is the idea that some governmental functions are best provided by the federal government, while the rest should be performed at the state and local level. For this reason, the Constitution specifically enumerates those powers which Congress may exer-

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cise, leaving the remainder with the states or the people. Whereas the federal government may be especially able to address large scale environmental problems, such as air pollution which crosses state lines, state and local governments are in a better position to address environmental concerns arising from local land-use decisions and location-specific ecological conditions. Demographic variation, localized culture, differing geography, and varied economic strengths mean that one-size-fits-all approaches to policy too often fit nobody. Leaving substantial power in the hands of state and local governments helps those governmental units do a better job of matching local government policies with the tastes and preferences of local citizens than a national government could do.

Insofar as recent decisions reduce the federal government's ability to dictate environmental policy from Washington, D.C., states will have greater opportunity to pick up the slack. It is often forgotten that many of today's environmental programs were preceded by — if not modeled on — state efforts. States regularly adopt environmental measures that are more protective than the federal floor and most innovative environmental reforms have their roots in state and local efforts. Yet existing federal programs often obstruct or discourage state reform efforts. Even so-called "cooperative" efforts under which the federal government funds approved state environmental programs can distort state and local priorities, redirecting resources from more to less urgent environmental matters.

Excessive centralization is perhaps the greatest failing of existing environmental regulation. Addressing today's environmental concerns requires more localized and nimble measures than are embodied in most federal environmental laws. Additional judicial restrictions on federal

power could have a salutary effect on environmental protection if they encourage greater experimentation with non-regulatory measures and further innovation at the state and local level.

The threat to environmental protection comes not from the Supreme Court's federalism jurisprudence, but from how we respond. There is nothing incompatible between federalism and environmental protection.

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## The Emperor's New Dignity Is Transparent

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When it comes to protecting the sovereign dignity of states, the Supreme Court has little use for orthodox methods of constitutional interpretation. A steady five-justice majority seems to prefer a more free-form approach that lets them explore the "presuppositions" and "postulates" embedded in the document's structure, but invisible in its text. This unconventional style of analysis was on full display in *Federal Maritime Commission v. South Carolina*, the latest addition to a growing body of state sovereign immunity decisions. Like the recent and better-known Commerce Clause decisions, this jurisprudence signals a new emphasis on state sovereignty that threatens to undermine federal environmental protections.

Justice Clarence Thomas, writing for the majority in *FMC*, candidly acknowledges that the Court's sovereign immunity holdings cannot be derived from what the Constitution actually says. By its terms, the 11th Amendment merely carves out a narrowly tailored exception to Article III's conferral of federal judicial power over controversies "between a state and citizens of another state." Subsequent case law held that it also immunizes a state from many suits brought by its own citizens.

But in the Rehnquist Court's view, the scope of state immunity extends well beyond the terms and history of the 11th Amendment. The amendment "stands[s] not so much for what it says, but for the presupposition of our constitutional struc-

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ture which it confirms," the Court explains, quoting a passage that has appeared in all of its recent immunity cases. In other words, a broad rule of state immunity (which the amendment merely exemplifies) inhered in the constitutional design from the beginning. Thus, writes Thomas, to allow citizens to bring a complaint against a state before a federal administrative agency represents "an impermissible affront to a state's dignity."

As it has in all these cases, the Court abandons text and history in favor of telling a story about the founding that resembles folklore as much as it does legal analysis. At the center of this story is the remarkable claim that the states "entered the Union with their sovereignty intact." In spirit, the Court is echoing President Reagan's comment that "the federal government did not create the states, the states created the federal government." While this was true under the Articles of Confederation, the Constitution was a creation of the people, not of the states.

As far back as 1816, the Court had observed that the Constitution "is crowded with provisions which restrain or annul the sovereignty of the states in some of the highest branches of their prerogatives." Chief Justice John Marshall explicitly rejected the "sovereign dignity" theory in the 1821 case of *Cohens v. Virginia*, which held that Article III confers federal appellate jurisdiction over state criminal cases. Federal supremacy was a defining characteristic of the new form of government, a point that seems lost on the Rehnquist Court.

The Court's far-reaching new approach to state sovereign immunity will have real repercussions for environmental protection. On its face, the *FMC* holding does not seem to apply to EPA, whose administrative law judges don't hear complaints brought by private parties. But, as

Justice Stephen Breyer notes in dissent, the case may mean that employees of state environmental agencies cannot seek administrative relief from the Department of Labor under the whistleblower provisions of various environmental statutes, such as the Clean Air Act and the Clean Water Act.

Several federal courts have ruled that sovereign immunity principles bar such whistleblower complaints, and the *FMC* decision appears to support the result reached by these lower courts.

The Court's approach also may encourage reasoning such as that of the Fourth Circuit in *Bragg v. West Virginia Coal Association*, which rejected a citizen suit under the Surface Mining Control and Reclamation Act against a state environmental agency on 11th Amendment grounds. In order to do so, the *Bragg* court went to great lengths to characterize federally delegated SMCRA authority as state law rather than federal law, despite the fact that state permitting and enforcement statutes and policies are required to meet national minimum standards. The opinion carefully distinguished the SMCRA regime from the "cooperative federalism" found in other environmental laws such as the Clean Water Act, but future courts, emboldened by *FMC*, may not be so discriminating.

The main practical consequence of decisions like *FMC* and *Bragg* is to cut citizens out of the enforcement process, with no meaningful protection of state "dignity." As Justice Breyer's *FMC* dissent makes clear, the majority's formalistic approach merely throws up practical and procedural hurdles to the legitimate federal exercise of powers that are undoubtedly an "affront" to state dignity — but an affront that would be permitted by the supremacy clause. Declaring that a federal administrative proceeding is akin to a judicial proceeding, as the majority

does in *FMC*, may curb citizens' ability to bring formal complaints against state entities before federal agencies. However, it cannot prevent the agencies themselves from investigating the same set of facts and seeking to enforce federal law against the state — including through enforcement actions triggered by an informal citizen complaint. Similarly, declaring that SMCRA relies more on state law than on federal law may immunize a state from citizen suits under the *Bragg* court's reading of the 11th Amendment, but it does not alter EPA's ultimate power to revoke the state's delegated SMCRA authority altogether. In short, all these cases accomplish is to reveal a judicial bias against citizen enforcement of valid federal law.

This is not to say that the doctrine of state sovereign immunity should play no role in modern constitutional practice. It has existed in one form or another throughout our history, creating a set of expectations and reliance interests on everyone's part. But the time has come to recognize that federal supremacy remains the dominant feature of our constitutional terrain. In environmental law, the balance of federal-state relations is a key determinant of success or failure. The Court's new immunity jurisprudence, like its abstract Commerce Clause rulings, forecloses the kind of practical inquiry into this balance that environmental law demands. How long will it take the Court to acknowledge that the emperor's new dignity is woven from transparent fabric?

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## Federal Role Changes But Is Still Strong

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What effect have recent federal court decisions on the federal-state relationship in regulation and administration of federal programs had on our country's ability to protect the environment? The cooperative federalism of our environmental statutes has nurtured an interdependence between state and federal government in achieving the environmental goals of the statutes. Our ability to achieve far-reaching environmental goals through a strong federal-state relationship is not threatened by recent cases. Its foundation is a solid national commitment to environmental protection.

When environmental laws are violated, either by an individual or by the failure of the state or federal government to take necessary action, each statute provides multiple remedies. A full range of remedies is still available, notwithstanding recent cases recognizing states' 11th Amendment immunity from some federal statutory claims brought by private litigants. Take the Clean Water Act, for example. Under the CWA, if a state is not administering its EPA-approved program as required by federal standards, the EPA administrator may notify the state of deficiencies and, if the state does not correct the problems, withdraw approval of the program. Citizens also have the ability under the act to petition the administrator to take action against a state for inadequacies in the state program. Citizens may sue the administrator to act on a petition under the CWA, includ-

ing one directed against a state. Citizens may petition the administrator to amend regulations and policies that they believe are not supported by law or inadequately protect the environment. Citizens may likewise sue a state directly under its own law for failure to carry out the goals of the state program.

These and other remedial actions envisioned by Congress provide ample opportunity to compel action where government has failed to protect the environment. Every day, citizens use these tools. Their continuing recourse to these remedies prompts us and the states to be vigilant in implementing the CWA's protections. Any narrowing of remedial options will not diminish our efforts.

That said, I am convinced there is another more fundamental reason why our ability to protect the environment will not be compromised by recent cases. The strong national commitment to environmental protection and strong leadership at both the state and federal levels, which underlies our laws and remains constant in the face of changing legal opinion, is why our ability has not been affected.

In addition to 11th Amendment jurisprudence, challenges to the existing remedial structure of our statutes arise and are resolvable in favor of the environment in many other contexts. Two recent examples are *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers* and *Aviall Services, Inc. v. Cooper Industries, Inc.*

In *SWANCC*, the Supreme Court removed federal Clean Water Act protection from some wetland resources. Specifically, the Court held that the federal government may no longer claim CWA jurisdiction over isolated, intrastate non-navigable waters, where jurisdiction is based solely on the presence of migratory birds. After *SWANCC*, states will undoubtedly take a more active role in wetlands protection; that is already happening.

In turn, the federal government has reinvigorated its commitment to restoring and protecting wetlands, in part by more than doubling the authorized acreage for enrollment in the Wetlands Reserve Program, which encourages farmers to restore lost wetland resources. Strong federal support is directed to landowners and communities for wetlands restoration through many programs administered by the departments of Agriculture and Commerce, EPA, and other agencies. The federal government supports state-based comprehensive aquatic area protection through Wetland Program Development Grants and supports states' and tribes' wetland protection efforts with organizational and technical expertise.

These and other state-federal programs demonstrate that the infrastructure is in place to protect our wetlands resources and to address changes in CWA wetlands jurisdiction. Our challenge is to work with states to ensure seamless protection of our nation's wetlands.

Federal-state cooperation in brownfields cleanups is another area in which the states and federal government could see their long-settled roles realigned. President Bush recently signed into law the Small Business Liability Relief and Brownfields Revitalization Act, which promotes rapid, voluntary cleanups through reduced litigation risk and transaction costs. Forty-eight states have voluntary cleanup programs, with 18,000 voluntary cleanups recorded. Over time, these states expect to share in the \$1.25 billion in authorized funds to support their brownfields programs. This act is the only major amendment to our federal hazardous waste statutes in more than a decade, and the first specifically targeted at encouraging voluntary cleanups.

Yet the goals of the Brownfields Act may be undermined by a pending case. In *Aviall Services*, now before the Fifth Circuit on rehearing en

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## Better To Work Outside Courts To Mix Roles

DAVID MEARS

banc, the court will address whether a party who voluntarily cleans up a site may seek contribution from other potentially responsible parties under the Comprehensive Environmental Response, Compensation, and Liability Act. The plain language of CERCLA appears to say "no": if you voluntarily clean up without government intervention, CERCLA contribution is not available. However, as the federal government has pointed out in its brief to the Fifth Circuit, the practical implications of that interpretation could disrupt the state-federal balance, which relies on CERCLA contribution as a critical factor in encouraging voluntary, privately funded cleanups.

If the Fifth Circuit in *Aviall* eliminates this federal contribution remedy, the states and federal government may have to formulate another way to accomplish their common goal of efficiently reducing the environmental risks at these sites through increased privately funded voluntary cleanups. Based on the SWANCC experience, I fully anticipate that such a decision in *Aviall* will compel states and the federal government to find a way to accommodate the decision without sacrificing environmental protection.

To be sure, recent cases have realigned the parties somewhat and restricted the availability of certain remedies, prompting the need to rethink how some environmental goals are accomplished. I am convinced, however, that we will ultimately meet these challenges due to our national commitment to environmental protection, and via the strong leaders at both the state and federal levels who remain fully committed to protecting our natural resources and environment.

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For me, as a state assistant attorney general on the beat, the spate of law review articles and commentary regarding the impact of recent federal court decisions on the balance of power between states and the federal government might as well be paper airplanes passing between ivory towers. Lofty discussions regarding concepts of environmental federalism versus centralized environmental control, when captured in all of their ideological purity, have little relevance to environmental regulation on the ground.

My day-to-day work is to define and defend viable, long-term solutions to the myriad and complex set of environmental problems facing state government. The prospect of a judicially driven, dramatic shift of power is an unwelcome distraction, largely irrelevant to governmental efforts to protect the environment. Further, the suggestion in recent commentary that the courts could be on the verge of significantly redefining the relationship between states and the federal government in the realm of environmental regulation appears misplaced.

This is not to say that the Supreme Court's decisions interpreting the Commerce Clause and the 11th Amendment are irrelevant to my work. It is just that the Court's decisions relating to state and federal power have not really shifted the balance to states in the arena of environmental protection. Under the Court's recent Commerce Clause

cases, the relevant test for determining the constitutionality of federal laws is to answer the question whether Congress is attempting to regulate non-economic activities. In the arena of federal environmental law, the answer is "no." Nearly every action regulated under the federal environmental laws is quintessentially economic in nature. As a result, even after *Lopez* and *Morrison*, federal environmental laws are not likely to suffer the fate of the federal laws considered by the Court in those cases, which addressed guns near schools and violence against women.

Nor do the Court's 11th Amendment cases do much to affect the balance of authority struck by Congress between states and the federal government in the environmental arena. Federal authority for the environmental laws already on the books is primarily grounded, not in those cases or the 11th Amendment, but in Congress's Commerce Clause and Spending Clause authority. Cases such as *New York, Seminole, Printz*, and their progeny are important in that they prevent Congress from abrogating the states' 11th Amendment immunity under the guise of the Commerce Clause. Federal environmental laws, however, have not significantly intruded into state sovereignty nor commandeered state regulation. In fact, state participation in almost every federal environmental regulatory scheme is voluntary. The primary effect of recent 11th amendment jurisprudence has been to provide insulation against state environmental priorities being driven by third-party lawsuits or citizen suits, with the Fourth Circuit's recent decision in *Bragg v. West Virginia Coal Ass'n et al.* serving as a case in point. However, such suits have not historically been a pervasive problem for states.

But two recent Supreme Court environmental cases with implications for environmental federalism

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do deserve special mention. In *Solid Waste Ass'n of N. Cook Co. v. U.S. Army Corps of Engineers*, the Court held, based on its interpretation of the Clean Water Act, that the Corps overstepped its statutory authority by regulating isolated wetlands. While the Court refrained from addressing constitutional challenges presented, this 2001 decision includes language suggesting that the Court might at some point be willing to consider a Commerce Clause challenge to the Clean Water Act.

However, the Court also indicated its presumption that Congress had struck the right balance between state and federal authority in the CWA. This presumption is justified since the CWA and nearly all of the major federal environmental laws allow states to exercise considerable authority. Further, this presumption is supported by the Court's findings in other cases in which Commerce Clause challenges have been made to environmental laws. For these reasons, a wholesale reversal of federal environmental law by the Court is unlikely, despite the ominous language in *SWANCC*.

Another case deserving mention in this discussion is *Intertanko v. Locke*, decided in 2000. Federal preemption cases such as *Intertanko* often get short shrift in the law review articles discussing the balance of state and federal authority in the environmental arena. In *Intertanko*, all nine justices on the Court ruled that the State of Washington's regulation of oil vessels intended to prevent spills was preempted not only by federal statutes, but also by U.S. Coast Guard regulations implementing those statutes. If there were indeed a desire on the Court to shift additional power to states, that desire is not evident from this decision.

So, regardless of whether states might prefer a shift in the existing balance of authority for protecting the environment from the federal to the state end of the scale, the Su-

preme Court's decisions to date have not done so. Of more concern is the possibility that federal court decisions may shift the balance the other way, upholding broad federal authority based upon concepts such as federal preemption.

Supreme Court cases aside, we are at a point in time when real progress is being made in defining a coordinated state-federal approach for protecting the environment. States are increasingly sophisticated in their ability to address environmental problems. The federal government, under successive administrations, has shown a steady willingness to include states as full partners. While state environmental officials are frequently frustrated about the manner in which federal officials attempt to use their role in this partnership to influence state decisionmaking, most accept a federal role for ensuring a level playing field through national environmental standards.

Further, most players in the realm of environmental regulation want to invest in long-term solutions to environmental problems. Such solutions depend upon certainty of role and expectation. In light of these factors, it would be counter-productive to rely upon the courts to shift the balance of authority between governmental actors through case-by-case decisionmaking. As enjoyable and steeped in tradition as is the debate over federalism jurisprudence, a better use of time would be to work outside of the courtroom to reach agreement on the most effective mix of federal and state regulatory authorities for solving environmental problems.

We should not look to the courts to solve problems that are better addressed by administrative agencies or legislatures. Effective and comprehensive solutions can only be reached through the coordinated efforts of state and federal agencies with the authorization of Congress

and state legislatures. States can and do play a major role in influencing congressional proposals. State and federal administrative agencies have broad authority to fashion solutions. Legislative and regulatory changes are thus the areas most ripe for discussion.

Ultimately, there is value to continued debate regarding environmental federalism among the various ivory towers housing our academic institutions. However, that dialogue would be more useful if it focused less on theoretical extrapolations from Supreme Court cases, and more on studying and describing innovative, but on the ground, solutions that involve effective coordination among state and federal governments.

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