6-2005

ELR
NEWS & ANALYSIS

35 ELR 10413

How to Protect Environmental Protections?

Editors' Summary: On March 24, 2005, the Center for American Progress, the Environmental Law Institute, and the American Constitution Society cosponsored a panel discussion entitled "How to Protect Environmental Protections?" The program focused on the role of federalism in implementing U.S. environmental law. The following is a transcript provided by D.C. Transcription & Media Repurposing courtesy of the Center for American Progress. We have edited the transcript only to provide clarifying information and to make certain verbal statements are more clear when reduced to text.[1]

Moderator: Mark Agrast, Senior Vice President for Domestic Policy, Center for American Progress
Featuring: Jonathan H. Adler, Professor of Law, Case Western Reserve University School of Law; Robin Kundis Craig, Professor of Law, Indiana University School of Law; and Douglas T. Kendall, Founder and Executive Director, Community Rights Counsel.

Mark Agrast: If you'd please take your seats we will begin the program. My name is Mark Agrast. I am the Senior Vice President for Domestic Policy at the Center for American Progress. It's my pleasure to welcome you here to the Center for a discussion entitled "How to Protect Environmental Protections?" I would like first to thank Anna Unruh Cohen, our Director of Environmental Policy, for organizing the program, and to express our appreciation to our cosponsors, the Environmental Law Institute (ELI) and the American Constitution Society. Before we begin, I would like to remind you of one local environmental regulation here at the Center: please turn off your cell phones, pagers, and beepers so they don't disrupt the presentation.

Today's program takes as its point of departure a recent volume published by the Environmental Law Institute and edited by one of our panelists—in fact, it's available in the back when we finish—entitled *Redefining Federalism*.[2] That book examines a matter of major importance for the protection of our environment as well as many of the other progressive ends of government: the reemergence of a federalist jurisprudence that challenges the authority of [the U.S.] Congress to enact remedial legislation.

On Capitol Hill, where I used to earn my living, invocations of federalism are routine but largely empty of normative content. Politicians who stoutly defend state prerogatives in one area are quick to impose federal solutions in another—opposing federal handgun checks, for example, while supporting federal damage caps in state malpractice suits. You have just seen a particularly egregious example of this in the unprecedented intervention of avowed federalists in Congress in the tragic case involving Terri Schiavo and her family. In these situations, federalism seems to function chiefly as an argument of convenience—a rhetorical device to be used in opposing particular applications of federal power with which one disagrees.

Few, indeed, are the politicians who pursue a consistent and principled view as to the proper sphere of congressional authority, and fewer still are those who've attempted to articulate a coherent philosophy as to where the line should be drawn. A few years ago, a leading conservative jurist, John T. Noonan Jr., wrote a book called *Narrowing the Nation's Power*, in which he asked whether the new federalism can be squared with the goals and demands of our [U.S.] Constitution.[3] Judge Noonan wrote:

> Do decisions that return the country to a pre-Civil War understanding of the nation establish a more perfect union? Are decisions just that shield not only the states but lesser appendages of the states from paying for the wrongs they commit? Do decisions that leave the elderly and the disabled with inadequate remedies for unequal treatment establish justice?[4]

Judge Noonan went so far as to compare the recent federalism cases to *Dred Scott* [*v. Sanford*],[5] *Lochner v. New York*,[6] and other infamous rights-restricting precedents.

So what remedies exist when the [U.S.] Supreme Court places limits on the protective role in federal judiciary? Nearly 30 years ago, another judge, Associate Justice William [J.] Brennan, urged the state courts to step into the breach and to recognize that federalism is a two-way street.

1. A webcast of this event is available on the Internet at http://www2.eli.org/seminars/pastevent.cfm?eventid=79 (last visited Apr. 28, 2005).*
2. Redefining Federalism: Listening to the States in Shaping "Our Federalism" (Douglas T. Kendall ed., 2004).
3. John T. Noonan Jr., Narrowing the Nation's Power: The Supreme Court Sides With the States (2002).
4. *Id.* at 12.
5. 60 U.S. (19 How.) 393 (1857) (holding that no person of African descent could ever become a citizen of the United States).
6. 198 U.S. 45 (1905) (holding that a New York law forbidding bakers to work more than 60 hours per week violated employers' and employees' Fourteenth Amendment due process rights).

*The original transcript prepared for the Center for American Progress is available on their website at http://www.americanprogress.org.

"With federal scrutiny diminished," he wrote, "state courts must respond by increasing their own."[7] "The legal revolution which has brought federal law to the fore must not be allowed to inhibit the independent protective force of state law—for without it the full realization of our liberties cannot be guaranteed."[8]

In *Redefining Federalism*, Doug Kendall and his co-contributors offer a similarly pragmatic solution that federalism be restated as—and I'm quoting—"a neutral principle, a lens for understanding the appropriate distribution of decisionmaking authority between the levels of government."[9] This neutral principle raises—though it does not answer—a number of important practical questions: What apportionment of authority between the federal government and the states will best further the proper ends of government? When should we seek uniform national solutions? And when it is better to allow the states to develop their own answers—to function, in effect, as the laboratories envisioned by Justice [Louis D.] Brandeis?

Such questions have special resonance in the field of environmental protection. Over the past three decades we have seen steady improvements in the quality of our environment, thanks in large part to federal laws enacted in the 1970s with bipartisan consensus. It is these laws and the expansive scope of congressional authority they embody that are now under attack.

At the same time, efforts to enact new federal environmental laws are at a stalemate, as we saw most recently with the failure of the president's "Clear Skies" initiative. Given that impasse, state legislatures and attorneys general are stepping into the breach, as Justice Brennan urged the state courts to do. Yet as they do so, they are often finding their initiatives blocked by federal courts under a variety of preemption theories.

Faced with this situation, how can we preserve environmental protection? Should we look at the state courts and legislatures as the guardians of our habitat? Or, as Robin Craig suggests, should we empower the citizenry to challenge environmental wrongs through citizen suits? Or do we need to redefine federalism from the states' perspective, as Doug Kendall and his coauthors recommend?

With us to tackle these questions are three distinguished panelists. I will briefly introduce them. Their full biographies are included in your materials.

Robin Kundis Craig is a Professor of Law at Indiana University School of Law and author of *The Clean Water Act and the Constitution*,[10] which, by the way, was also published by [ELI], our cosponsor of this event, copies of which are available in the back of the room. She is the chair of the American Bar Association's [(ABA's)] Marine Resources Committee and has written numerous articles on environmental law, ocean and coastal law, and the intersection of law and science.

Our second speaker is Douglas T. Kendall, Founder and Executive Director of the Community Rights Council and editor of *Redefining Federalism*, which I spoke about earlier in my remarks. It is also available on the tables behind you. In addition to his extensive writings, Mr. Kendall has represented local government clients in state and federal appellate courts around the country and before the United States Supreme Court.

And our third speaker is Jonathan H. Adler, an Associate Professor of Law and Associate Director of the Center for Business Law and Regulation at Case Western Reserve University School of Law, where he teaches constitutional and environmental law. He is the author or editor of three books and numerous scholarly articles including *Judicial Federalism and the Future of Federal Environmental Regulation*, which will appear shortly in the *Iowa Law Review*.[11]

We have asked each of them to offer opening remarks of 10 to 12 minutes or so. Then I will give them an opportunity to respond to each other and then I will open the floor to your questions.

Professor Craig?

Robin Kundis Craig: Thank you. I also want to thank the Center for American Progress and the Environmental Law Institute for inviting me here to speak to you about my book. To put myself in context in the federalism debate, I think the basic thrust or uber-thrust of my book is that federalism should be viewed as a tripartite system and not just as the federal government and the states, with the citizenry at least in environmental law forming the third part of that tripartite structure. To back up a little bit though, environmental law—the intersection of environmental law and constitutional law—is something that's interested me for a long time and I think it's only growing in importance generally.

I'm currently working with the ABA's task force on environmental law and constitutional law and one of the more arduous things we just got done doing—we're counting up how many times constitutional issues come out in federal environmental decisions. The interesting part of that was the discovery that over at least the last five years there is on average at least one constitutional issue for every other federal environmental case decided; over half, basically, of the cases are going to have a constitutional issue in them and those constitutional issues are going to range the gamut. You think a lot of them are standing and, in fact, a lot of them are, but there's also due process, there's spending clause issues. We identified about 18 different kinds of constitutional issues that come up in environmental litigation, so I think it's actually a growing issue.

But my focus, at least in this book, has largely been structural; specifically, what do constitutional issues do to the structure of environmental regulation that Congress thought was necessary to achieve whatever health, public safety, and environmental goals Congress thought was good for the nation? And so as a history of that I actually focused less on the states than I think either of my two companions will because what interested me was, in the context of the Clean Water Act,[12] why in 1972 Congress very deliberately moved away from what had been a history since 1948 of a state-based environmental regulation. [The] Federal Water Pollution Control Act had been an existing [statute] since 1948. For all of its history, until 1972, it was focused on state regulation. The federal government's role was largely to induce the states

7. William J. Brennan, *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489, 503 (1977).

8. *Id.* at 491.

9. Redefining Federalism, *supra* note 1, at 2.

10. Robin K. Craig, The Clean Water Act and the Constitution: Legal Structure and the Public's Right to a Clean and Healthy Environment (2004).

11. Jonathan H. Adler, *Judicial Federalism and the Future of Federal Environmental Regulation*, 90 Iowa L. Rev. (2005 forthcoming).

12. 33 U.S.C. §§1251-1387, ELR Stat. FWPCA §§101-607.

through money and technical support to enact water quality standards in their own regulatory programs. A little bit down the line, the federal government picked up some regulatory authority in interstate water pollution, but that was about it.

But then in 1972, in what we now call the Clean Water Act, you've got this massive change in the structure of environmental regulation where Congress decided two other players were really necessary. One, most obviously, the federal government. We were going to have [ ] EPA [the U.S. Environmental Protection Agency] and the [U.S.] Army Corps of Engineers actively involved in regulation of water quality. . . . There would be federal standards; there would be minimums. But also, in what [is] probably the second biggest citizen suit provision, . . . citizens had to be part of the regulatory process [not only] to be involved in the notice-and-comment procedures [and] in setting the regulatory standards, but also to have the right to go to court to force not only violators, but the government itself to enact or to do what the statute said it was supposed to do.

So what I was interested in is how do constitutional issues that have arisen affect that tripartite structure that Congress put into place? And again, I was focusing on what constitutional issues do to the federal role and what they do to the citizens' role—not so much what they did to the state role. And there is, I think, a real division in those two in how constitutional issues come out. On the federal side, constitutional law tends to reinforce the federal government's regulatory authority, which may be counterintuitive to what you actually hear about.

But first of all, the obvious things that come up. You've got the Supremacy Clause that gives any federal act preemption power over state or local regulation. Congress actually in many environmental statutes has used the Supremacy Clause quite cleverly though savings provisions to guarantee that the most stringent of the environmental protections will be the ones that govern, whether they are the federal provisions or the state provisions. States can usually be more stringent than the federal government. You've also got a strong basis for most federal environmental regulation in the federal government interstate authority. It comes out in the courts in Article III through the ability of states to sue each other under the Supreme Court's original jurisdiction. That led directly to some of the federal common law of interstate nuisance, which largely passed away when the Congress enacted the statutes, but nevertheless the interstate authority's always been there. [It] also obviously comes through in the interstate Commerce Clause. The Congress can directly regulate interstate issues. So . . . those are both very strengthening issues in constitutional law for regulatory authority.

Now, the possible weaknesses that can come out in constitutional issues are . . . primarily three. First of all, you've got issues of federal sovereign immunity. Congress has decided in most federal environmental statutes that the federal government should also be subject to them. That raises all sorts of issues regarding federal sovereign immunity, which is kind of a penumbral federal constitutional right. I don't see that as much of a limitation on federal regulatory authority because if Congress wants to, and manages to say so clearly enough for the Supreme Court, Congress can in fact waive federal sovereign immunity and subject the federal government to whatever it wants to subject the federal government to, which it has tried to repeatedly do over the history of environmental regulation.

The second thing that's normally looked at as somewhat of a limitation, especially in the wake of the *Solid Waste Agency [of Northern Cook County v. U.S. Army Corps of Engineers]*[13] or *SWANCC* decision in 2001, is the Commerce Clause itself and its corresponding or inverse issues of Tenth Amendment federalism for states. Again, well, I dislike the *SWANCC* decision intensely, as anything I have written on it I will tell you. I don't think it is, in fact, that much of a limitation or that Commerce Clause issues are that much limitation on federal regulatory authority because the [*United States v.*] *Lopez*[14] decision appears to have left open the possibility of the cumulative impact analysis. I think even with the isolated wetlands, if you worked a little harder at the constitutional analysis, you could keep pretty much everything in.

So the third possible limitation [is] the Fifth Amendment regulatory takings limitation on both federal and state actions—Fourteenth Amendment for states. Again, while this is out there as a limitation, I don't think its practical value or its practical limits on the federal government have been all that intense. When I went through and tried to count up actual awards given under the Clean Water Act for regulatory takings, I could only find about . . . four or five actual awards of money. Now, obviously there was much more litigation than that, but actual awards of money? Four or five, several of which were overturned on appeal. They tend to come up in the context of §404 permitting. As most of you I'm sure know, you can only bring a Fifth Amendment takings claim if your permit's been denied. The Army Corps of Engineers, if you count the general permits, is dealing with tens of thousands of permit applications a year, so the fact that I could really only find four or five awards in the history of this Clean Water Act suggests to me it's not that big of a limitation on federal regulatory authority.

When you turn to citizen suits, on other hand, when citizen suits have run into constitutional issues, the constitutional issues have tended pretty much across the board to undermine citizen suit authority. Starting with standing: Article III standing; injury; causation; redressability; *Sierra Club v. Morton*.[15] I didn't even have to get to the *Lujan* [*v. National Wildlife Federation*][16] cases before I wasn't very happy with them. *Sierra Club v. Morton* got rid of public interest standing, put in that injury requirement, [and] limited who could be bringing citizen suits to effectuate Clean Water Act regulation and actually all environmental regulations.

Again, citizen suits ran into federal sovereign immunity issues. Again, I don't think that's as limiting as some of the

13. 531 U.S. 159, 31 ELR 20382 (2001) (holding that the Corps exceeded its Clean Water Act §404(a) authority to regulate the discharge of dredged or fill material into U.S. navigable waters, when, under the Migratory Bird Rule, it extended the definition of "waters of the United States" to include non-navigable, intrastate, isolated waters used as migratory habitat).

14. 514 U.S. 549 (1995) (holding that Congress exceeded its power under the Commerce Clause by enacting the Gun-Free School Zones Act of 1990).

15. 405 U.S. 727, 2 ELR 20192 (1972) (holding that a party has standing to seek judicial review under the Administrative Procedure Act only if he can show that he himself will suffer injury as a result of the challenged administrative action).

16. 497 U.S. 871, 20 ELR 20962 (1990) (holding that a party must be within the zone of interests protected by a statute to have standing to sue).

others because Congress can waive it if Congress is careful enough. Eleventh Amendment sovereign immunity for states, however, the Supreme Court basically wiped out citizen's abilities to go after states in the *Seminole Tribe* [*of Florida v. Florida*][17] case. And the *Ex Parte Young*[18] doctrine is apparently still vibrant and alive for citizen suits, but it sets a severe limitation: basically no more citizen suits against states and state agencies.

And the one that's looming (and I have been saying it's being looming for about 10 years now, but it is still looming), is an Article II separation-of-powers challenge to all citizen suits based on the president's duty and power to take care that the laws are faithfully executed. This comes up recurrently in citizen suit litigation. There have been two decisions in the last year in the context of (unintelligible) litigation raising this issue again. Four Supreme Court Justices have indicated that they would like to hear an Article II case, which is, of course, enough to grant cert[iorari], so that if citizen suits are found to unconstitutionally interfere with the president's duties, then they will pretty much be wiped out as a class.

And so the question I left the book with, and the question I will end with here is, if we are running into a situation where constitutional issues are in fact undermining or impeding regulation and enforcement structure that is in fact necessary to bring about environmental goals that we want, is it time to think about a structural—and I want to emphasize structural, not substantive—amendment to the Constitution?

And I'll leave it there.

Douglas Kendall: I would also like thank our three cosponsors here today for putting on this terrific event: the American Constitution Society, the Center for American Progress, and the Environmental Law Institute. I'd also like to right up front recognize that while I'm the editor of *Redefining Federalism*, I'm only one of six coauthors and three of the coauthors are in this room: Tim Dowling, Jennifer Bradley, and Jason Rylander. And I just want to thank them for their incredibly valuable contributions in the book.

I want to begin my remarks by . . . making a couple points that I think will help clarify the differences of opinion among the panelists here on the topic presented. First, in contrast to Professor Adler, who has been a longtime, passionate critic of federal environmental safeguards, I think these laws have been among this country's greatest legislative accomplishments with benefits that far exceed economic costs.

Second, while I worry a great deal about the threat that recent Supreme Court rulings pose to environmental safeguards, I don't think it's all that likely that the current Supreme Court will extend those rulings in a way that invalidates significant parts of our federal environmental structure, so while I agree with Professor Craig that it would be wonderful to have a structural amendment to the Constitution, . . . I think that our existing Constitution provides ample authority for the federal government to enact and for citizens to enforce environmental safeguards. Similarly, while I agree with Professor Adler that state and local governments are underappreciated actors in the environmental arena, I don't agree that federal constitutional limitations mandate greater reliance on those state and local actors.

So with those baselines established, I want to turn to the quandary I think that faces those supporting environmental protections over the term "federalism." Simply stated, federalism represents both a great threat and a great opportunity for environmental protection. Federalism is a threat because it is defined by many on the right—federalism is a stalking horse for an attack on environmental safeguards at all levels. And disturbingly—more disturbingly still—the United States Supreme Court has issued a series of rulings over the last decade that seem to mirror the vision of the so-called libertarian federalists. In rulings like the *SWANCC* case that Robin mentioned—*Solid Waste* [*Agency*] *of Northern Cook County v. U.S.* [*Army Corps of Engineers*]—the Supreme Court has begun to chip away at the foundations of our federal environmental structure. In rulings like *Engine Manufacturers v. South Coast Air Quality Management District*,[19] this court has been similarly hostile or aggressive in striking down environmental protections at the state and local level.

So there appears to be emerging from the court a form of libertarian federalism that is hostile to environmental safeguards at all levels. And as probably most people in the room know, President [George W.] Bush has been quite aggressive about nominating judges who have been ardent proponents of this libertarian federalism.

Now, on the other hand, federalism, or, more accurately, action at the state and local level, represents perhaps the greatest opportunity for environmental progress that exists over the next several years. Eliot Spitzer and even Arnold Schwarzenegger have become some of the most important environmental leaders, and some of the most aggressive environmental legislation in recent years has come out of the states.

At the local level, Professor John Nolan has edited a series of books for [the] Environmental Law Institute which document what he calls a remarkable and unnoticed trend among local governments to adopt laws that protect natural resources. Environmentalists can no longer ignore what is going on in states and they can no longer conclude that federalism is bad. Environmentalists instead need to define what they mean by federalism and recognize that, properly defined, federalism can improve environmental protection.

Which brings me to our book, which is conveniently called *Redefining Federalism*. (Laughter.) Now, writing a book called *Redefining Federalism*, the first difficulty you face is redefining a term when no one knows what the term means in the first place. And the reason I think there is so much confusion about the term federalism is that for the history of our republic, advocates on one side of an issue have turned a fact—the fact that we have a federal structure where government power is allocated among the various levels of government—and tried to turn that fact into an ideology.

17. 517 U.S. 44 (1996) (holding that the *Ex parte Young* exception to the Eleventh Amendment is not available where "Congress has prescribed a detailed remedial scheme for the enforcement against a state of a statutorily created right").

18. *See* Ex Parte Young, 209 U.S. 123 (1908) (providing an exception to Eleventh Amendment immunity in suits against individual state officers for prospective relief to end an ongoing violation of federal law).

19. 124 S. Ct. 1756, 34 ELR 20028 (2004) (certain aspects of local fleet rules do not escape preemption under Clean Air Act §209(a) simply because they address the purchase of vehicles rather than their manufacture or sale).

Now, the ideology has changed considerably over time. As everyone knows, the federalists in the founding era supported a strong federal government and the antifederalists supported increase in aggregate power at the state level. At this point, those roles seem completely opposite in that—and most people, when you say you support federalism these days, most people think you are supporting a devolution of authority to the states.

In a nutshell, our book argues for a return for a definition of federalism as a fact rather than federalism as an ideology. Federalism as the Framers designed it is about allocating government authority to the correct level or levels of government in our constitutional structure. The Framers wanted a strong federal government. The entire point of the Constitution was to remedy the flaws in the Articles of Confederation. They also cared deeply about protecting the roles of states and built into the Constitution protections for the states.

Now today, almost no one seems to care about federalism as a fact or as a system of government. Almost everyone wants to use the term to support an ideology. For the most of part, at least until very recently, liberals have not talked about the term at all. Sometime in the [1960s] as federalism was being used to oppose civil rights legislation, liberals seem to have decided that federalism is bad, which has left the term . . . basically to conservatives to define what the term means.

Now, there is a raging war within conservative circles about what federalism means. On one hand there are the states rights federalists who believe very passionately that federalism is about devolving authority to the state. Now, increasingly and increasingly prominently in conservative circles there is a new brand of federalism called libertarian federalism. And this isn't about returning power to the states at all; it's about no government. Now, I would argue libertarian federalism is an oxymoron. Federalism is about the structure of our government, not about no government at all, but there is an increasingly powerful portion of the conservative movement that believes that libertarian federalism is exactly what federalism means. And I'll just quote Michael Greve, who runs the Federalism Project at the American Enterprise Institute [(AEI)]. He calls states the real enemies of real federalism. He views his mission at AEI to convince conservatives to "get over" their "terribly sentimental" views "about the virtues of state government."[20]

Now, *Redefining Federalism* painstakingly explains why libertarian federalism has nothing to do with either the Constitution or federalism, and for those interested, I recommend chapter four of the book, which goes through that critique in enormous detail. But what is forcing Americans right now most to grapple with federalism is the Supreme Court, and most specifically the five most conservative Justices on the Supreme Court who have in a series of rulings over the last 13 years attempted to find what the Court has historically called . . . federalism.

Now, these rulings have been savaged in progressive circles, but I think the Court deserves praise for starting a national dialogue about federalism. The problem is that—in my view—is that the work of the Supreme Court so far has been both chaotic and controversial. Chaotic because the pattern of rulings or because the Court has been aggressive about protecting federalism in some areas, but not others. Controversial because its pattern of ruling seems to fit more closely with the political ideology of the justices than with the text or the original intent of the Framers.

Far more compelling . . . [than] the Court's work, we argue in the book, is a string of amicus briefs that have been filed in Supreme Court cases by state attorney generals. These briefs are or should be particularly influential upon the Court because they've said over and over again that they are protecting federalism to protect the states. But we examined these state briefs in detail in *Redefining Federalism*, which is why the book bears the label or bears the subtitle *Listening to Our States in Shaping "Our Federalism."*

Now, the states agree with important aspects of what the Court has done in its federalism jurisprudence, but what is particularly interesting is that more often than not the states' positions have diverged from what the Court has done in their name. For example, in *United States v. Morrison*,[21] 36 states argued in favor of the federal Violence Against Women Act. Only one state argued that the Violence Against Women Act was an intrusion onto . . . areas of state autonomy.

Similarly, in . . . the *SWANCC* case, eight states argued in favor of broad federal authority under the Clean Water Act. Again, only one state—Alabama in both of these cases—argued on behalf of state autonomy. Now, in both of these cases the states lost, leading Justice [David H.] Souter to quip in his *Morrison* dissent: "Not the least of the ironies of these cases is that the states will be forced to enjoy this federalism whether they like it or not." (Laughter.)

Even more forcefully, the states have been arguing that the Court has erred in ignoring their pleas to reform judicial doctrines of preemption under the Supremacy Clause and the dormant Commerce Clause that in the states' opinions inappropriately limits state experimentation. So the Court, according to the states, is protecting federalism both too much and too little: too much in striking down federal laws where even the states agree there is an important role for the federal government in solving a national problem; too little by inappropriately limiting state experimentation. The states, in short, are asking the Court to redefine federalism. They seek a federalism jurisprudence that is about protecting the critical structural roles they play in our federal system and about what Justice Brandeis called the Court's grave responsibility to protect state experimentation and less about limiting government powers at all levels. As we say in the first page of our book, if federalism is about protecting the state, why not listen to them?

I want to end by quickly addressing what I think the states are saying that environmentalists should want to hear. Obviously, environmentalists are listening to the states right now because there is so little hope for environmental progress at the federal level. Federalism clearly offers the prospect of environmental gains when the consensus for action for federal protection at the national level has broken down.

I also think that the states offer great promise as laboratories of environmental democracy. Individual states are doing things today that will be done everywhere in the not so

20. Michael S. Greve, Remarks at the Federalist Society's Federalism and Separation-of-Powers Practice Group Roundtable, *Federalism: A Tenth Amendment and Enumerated Powers Revival?*, *at* http://www.federalismproject.org/masterpages/publications/fedsoc.html (last visited Apr. 13, 2005) (paraphrasing original quote).

21. 120 S. Ct. 1740 (2000) (striking down the Violence Against Women Act).

distant future. But to bring the importance of federalism further home and the prospect of it further home, I think you only need to look at the two most endangered and perhaps controversial provisions of our federal environmental framework: the habitat protection provisions of the federal Endangered Species Act [(ESA)][22] and the wetlands protections provisions of the Clean Water Act.

More than those aspects to the federal law, these provisions intrude into local land use authority and decisionmaking that has historically been controlled by state and local governments, and yet, unlike other aspects of federal environmental law, these provisions are enforced these days with very little involvement by state and local officials. Now, I wholeheartedly support these two programs, but I don't think that it's a coincidence that these programs are both uniquely controversial and uniquely anti-federalist.

Local officials have competencies and capabilities in making land use decisions that federal officials lack, and I think these programs could be significantly improved if they were far more integrated with state and local land use planning processes. I think, in short, that the genius of our federal structure could be better employed to protect these endangered environmental protections. And I look forward to talking with my co-panelists about how this might work.

Jonathan Adler: I, too, would like to thank the sponsors of today's event, the Center for American Progress, ACS, and ELI. It's a pleasure to be back in Washington, D.C., and to talk about issues of federalism and environmental protection.

When I talk about federalism and environmental protection these days, I can't help but think about my adopted home of Cleveland, because as many of you know, Cleveland, for better or worse, was the site of an event that plays a pretty large role in the birth of federal environmental regulation. In June 1969, some sparks under a bridge caught fire or lit some debris and oil floating on the river surface, sparking a blaze which, although never successfully caught on film—more on that in a second—lived long in the nation's consciousness and was used, and it's still used today, as evidence for why we needed federal environmental protection.

Now, I'm sure some of you are saying: "But wait a second; I've seen pictures. *Time* magazine ran a picture. Lots of places ran pictures." Yes, *Time* magazine ran a picture in 1969 of a fire on the Cuyahoga River, but it wasn't of the 1969 fire. It was a fire from 1952. And in fact one of the things that I—when I moved to Cleveland and began researching the history of the Cuyahoga fire—what I learned is that what was notable about the 1969 fire was not that an industrial river was used as a sewer by oil companies and companies along the harbor and the lake. What was remarkable about it was that this was the first such fire in a long time, and that such fires had once been common.

In the late 19th century and early 20th century, harbors and industrial rivers burned all the time and it didn't make news. They burned in Baltimore. They burned in Philadelphia. They burned in Detroit. They burned in Houston. And, yes, they burned quite often in Cleveland. But by 1969 this problem had largely been solved.

The reason Cuyahoga still caught fire was, among other things, because of the unique geological environmental conditions of the river. It is known as the crooked river; it is a particularly slow moving river that, because of its shape and course, is particularly good at capturing debris and accumulating debris and because of other aspects about Cleveland's local industry. But what was really remarkable about the 1969 fire was this was an example of the sort of environmental problem that we used to have all the time, but by 1969 didn't have anymore. And so when it happened, the nation responded with: "Oh, my God; a river is burning. Those terrible states and local governments; they can't handle environmental problems. We must do something about it." When in fact if we looked at the history, . . . this was something that in fact state and local governments had done something about. And the federal government's involvement in addressing such concerns under its existing authority was late and essentially brought in kicking and screaming due to state and local activists.

This isn't only a story we see with debris and oil on river surfaces; it's a story we see in lots of environmental contexts. EPA's first water quality inventory in 1973 noted that for the water pollutants of greatest concern, things like raw sewage, there had been substantial progress in the preceding decade—the decade before the adoption in 1972 of the Clean Water Act. Several recent studies of air pollution trends prior to 1970 show that for, again, the air pollutants of greatest concern, the air pollutants we knew the most about, many of the trends—not all, but many of the trends—were rapid in a positive direction. Folks at Resources for the Future and Brookings and elsewhere have pointed out these trends.

In the area of wetlands, the states with the greatest wetland acreage had all adopted wetland protections prior to the federal government. The first of these states, Massachusetts, in 1963 basing its state laws on preexisting local rules which had incorporated wetland conservation into local zoning. And what's particularly interesting about the pattern with wetland regulation is the pattern of state regulation is the exact opposite of that which we would predict would result from a race to the bottom; that is, the states with the most wetlands and the most to lose economically from burdening land development—land use development and wetland development—were the states that regulated first and the states that regulated most.

So while I'm not going to claim that in the early 1970s we had the level of environmental protections that we would want or that I would want or any of you would want, I think it is hard to say that the reason we got federal regulation is because the states were slacking off. The trends were positive. They may not have been as quick as we would like, and in many respects many of our current environmental trends are not as positive or as quick as you would like, but the reason for that was not because of state abdication. In fact, in some cases we know that one of the reasons for federal regulation is because states were doing too much.

Doug mentioned the *Engine Manufacturers* case, which dealt with the Clean Air Act provisions preempting state and local regulations of automobile tailpipe emissions.[23] Well, we know full well where those provisions came from. They came from the fact that the automakers in the 1960s didn't like the fact that California has adopted emission regulations for new vehicles and that other states were looking at

22. 16 U.S.C. §§1531-1544, ELR STAT. ESA §§2-18.

23. 42 U.S.C. §§7543, 7545, 7573.

what California was doing and said: "Hey, this is a good idea." And the automakers were suddenly shocked and terrified at the idea of: "Oh, my God. States are going to be regulating our tailpipe emissions. We have to stop this. Ah, here's an idea. We'll send it to Washington. It will get bottled up in the regulatory process for years and even if standards eventually result, we'll get one single standard instead of variable standards in different states." And that's more or less what happened. They were largely successful. California got grandfathered in, but we know full well that's the origin of federal regulation of emissions.

So when we look at the federal regulations that we have and the federal regulations that may in some few instances be under threat from revived understandings of federalism, we shouldn't be viewing this from the standpoint of, "oh my God, if the federal government has less authority there will be no one there to protect our environment," because in many cases state and local governments were doing it first and in many cases, and certainly today in many cases, are doing it better and would be doing it better [if] the federal government got out of the way.

I am not saying the federal government has no role in environmental protection, but I am saying that we can't justify the federal government's role on the idea that states can't and won't address many environmental problems. There are areas where the federal government has a comparative advantage; areas where the federal government is uniquely positioned to address environmental concerns; areas where, for example, we see interstate spillovers or areas where there are economies of scale.

The problem is that you can't justify much of our current regulatory regime on those grounds. There are a few provisions in the Clean Air Act, a few provisions in the Clean Water Act; provisions which until a few years ago were hardly ever invoked. We can't justify much of those . . . laws on interstate spillover grounds. Certainly there are economies of scale in scientific research and data collection and the like, but as anyone who works in the environmental field knows, that's an area where the federal government is woefully deficient. The paucity of data and knowledge about . . . basic environmental conditions and basic environmental trends is embarrassing given the extent and history of our federal regulatory programs. And so certainly the federal government has a very needed role there, but it's a role that we don't see very much in existing federal environmental law.

And so what would have happen[ed] if the Supreme Court and lower courts were more active in enforcing federalism limits on environmental regulation at [the] federal level, as I think they should be? Would federal regulations be restricted? Yes. Would environmental protection suffer greatly? I don't think so. Take the Commerce Clause area. Let's say the Supreme Court and lower courts were more active in policing the rules set forth in *Lopez* and *Morrison*. Let's say that, for example, landowners winning cases like *GDF Realty [Holding Investments, Ltd. v. Norton]*[24] or that the holding in *SWANCC* becomes not just a statutory holding, but a constitutional holding. Does the federal government still have ample authority to deal with interstate spillovers? Yes it does. Does the federal government still have ample authority to encourage and induce states to adopt needed programs through the Spending Clause? It certainly does. Would the federal government lose the ability and sometimes force states to adopt policies that maybe aren't environmentally optimal for those states? It might. We have to remember that just as the federal government has the power to protect the environment, it also has the power to do great environmental harm and certainly environmental history shows that the federal government has been quite good at the latter. In fact, I think it is possible to argue the federal government over history has been much better at harming the environment than it has at protecting it.

And as we say the federal government's ability to abrogate sovereign immunity and allow private citizen suits might mean that some environmental plaintiffs aren't going to be able to sue against state facilities for the environmental harm they do, it also is going to mean that private industry isn't, for example, going to be able to sue states to force increased use of local harbors that state and local communities may think are overused as it is and for environmental and other reasons would like to see used less heavily, which is one of the issues that was underlying the maritime commission's sovereign immunity case.[25]

But these limitations are two-edged swords. Yes, they limit the federal government's flexibility, but we see this in every area. To believe in limits on the means that the federal government may use to advance a goal is not to oppose the goal itself. And I think most people in this audience readily understand that principle. We all recognize that to say to the Justice Department or to the Department of Homeland Security, "yes, security is important; yes, fighting the war on terrorism is important, but you know what? There are constitutional limits to the things you are allowed to do" doesn't mean we oppose keeping the country safe. It means that there are certain limits . . . in the way the government can go about doing that. And the environment is no different than that.

There are limitations—very sound structural limitations—on what the federal government can do and what it should be able to do. Federalism, as Doug already mentioned, is or at least should be a neutral principle, but I think that means it has to be grounded on principle and not on politics; on a principled understanding of the language and the structure of the Constitution and not on what elected state officials or elected federal officials think is needed in a given case.

It's not about protecting states. It's not about protecting states rights. It's about protecting individuals. If you go back in the *Federalist Papers* and you go back in the founding debate, all the discussion of separation of powers at the federal level and between the state and federal governments is all about controlling faction but limiting the use of power to ensure accountability and to protect individuals. That's the underlying principle that comes out of the text, structure, and history of our Constitution; not listening to elected state attorneys general who may sometimes like the federal government on their side or against them, nor about necessarily listening to members of Con-

24. 169 F. Supp. 2d 648, 32 ELR 20103 (W.D. Tex. 2001), *aff'd*, 326 F.3d 622 (5th Cir. 2003), *reh'g denied*, 362 F.3d 286, (5th Cir. 2004), *petition for certiorari filed*, No. 03-1619, 72 U.S.L.W. 3742 (May 27, 2004) (holding that the take provision of the Endangered Species Act, as applied to landowners, does not violate the U.S. Commerce Clause).

25. Federal Maritime Comm'n v. South Carolina State Ports Auth., 122 S. Ct. 1864 (2002).

gress, who may have their own peculiar and inconsistent views of when federal action is warranted.

Two other quick points and then I'll close. When it comes to viewing or advocating for a neutral principle of federalism, not only is it important that it be grounded in principle on politics, I think it's also important that it is something that is applied consistently. And I will be the first to admit that on either side of the political spectrum there are plenty of those who do not apply that principle consistently. And I think that's unfortunate. And as Doug and I were talking about before, and as certainly some of you may know, I've spent a lot time in some of the hats I wear reminding my conservative friends that the federalism that they champion when they are challenging the federal laws they don't like is also a federalism [they] should champion when it cuts against a law that they do like. And for federalism to be meaningful, that's a principle we must recognize, and it's the same sort of principle we see in other contexts.

One thing that's different about federalism, though, when it's enforced by the courts, that's different than other constitutional limitations is that it doesn't invoke the counter-majoritarian difficulty to the same extent. A lot of times when the courts strike down legislation, they are removing certain questions from the democratic sphere. They are saying legislatures can't act here. But in the federalism context, what the courts are merely doing is adjudicating which level of government gets to decide the issue; whether or not we can invoke the democratic process at the federal level or at the state level. And so if anything, I would argue, that makes the judicial role even more appropriate than in areas such as protecting certain fundamental rights where when the court acts it takes things completely out of the democratic sphere. Now, I think there are many perfectly appropriate cases for courts to act to strike down legislation to protect fundamental rights, but we have to recognize that the anti-democratic aspect of court action is greater there than it is in the federalism context.

The last point is about states. I would hope we would all agree that we want states to be able to have . . . more ability to do good things for the environment. I don't think it's fair to blame the courts for their inability to do so because the preemption cases are at heart statutory cases, not constitutional cases. They are largely the court applying or the courts applying preexisting rules about how to interpret statutes, rules, and standards that have been around for a while and rules that Congress—when Congress enacts legislation—Congress knows these are the rules courts will use. Now, is the court always 100 % consistent? No. But at the end of the day since they are statutory decisions, these are problems that Congress can address. And I would argue that the biggest problem in state flexibility and ability to take more action in environment sphere is not because of the courts, it's because of the nature of the regulatory and statutory framework that ultimately Congress gave us.

If [the] preemption provisions of the Clean Air Act are too strict, Congress can easily fix them and the courts will not stand in the way. If the Safe Drinking Water Act doesn't give states enough flexibility to set priorities, Congress can easily fix that and the courts will not stand in the way.[26] And so while I think it's an important concern and I think states need more flexibility—and there is another ELI book where I have a . . . chapter explaining one way at least to give states more flexibility—I don't think it's fair to say that the courts or federalism as a doctrine is the reason states don't have more of the freedom that they should have.

And I thank you.

Mr. Agrast: Thank you. Thanks to all three of you for your statements. . . .

Okay. Well, let me open with one [question] that was prompted by one of the examples that was given by Professor Alder, and that has do with the Clean Air Act provisions that provided a special rule for California. And let's use this as kind of a concrete test of where people are.

Late last year, as you all know, California decided to use its special authority to . . . require reductions in CO_2 [carbon dioxide] emissions from automobiles. And the carmakers argued in that instance that the California rule was preempted because the only practical way to reduce CO_2 emissions from automobiles is make cars more fuel efficient and the federal government has the exclusive authority to do that, to set efficiency standards. What do you all think of this argument and would you uphold the California rule?

Mr. Kendall: I think it's going to be, under existing preemption doctrine, a really hard case for California to win, and I think that's one of the illustrations of why preemption law has gotten so out of control. As Jonathan says, the Clean Air Act was passed after California had—the only state in the country—had started to crack down on automobile manufacturers and started to put in place their own standards. And the Clean Air Act has a specific provision which allows California to go beyond the federal standards and create their own automobile emissions standards. And that's the authority that California is using for this global warming emissions rule.

Now, the argument that it's preempted is under a different federal act, the [Energy Policy and Conservation Act (EPCA)], the Act under which the CAFÉ [corporate average fuel economy] standards are granted. And . . . there is an argument that it's preempted under that, but I think if I were the courts I think the express allowance for California to create their own emissions standards would trump . . . a strong but not definitive preemption argument under the other federal statutes. But I don't think that's the way the court's going to come out and I think that's part of the problem.

Mr. Adler: I mean, I largely agree with that. I think, I mean, I certainly think California should have the ability to do this, but as a practical matter under the EPCA—the energy law that Doug mentioned—I think California has a very tough case. And I think under existing preemption case law, . . . not only do I think California has a tough case, I would be very surprised, I mean, I'd really be very surprised if California won, and again this is something that if Congress wants to fix, Congress can fix. And this is, you know, part of the two-edged sword of federal environmental regulation is that when the federal government . . . gets involved, it often does preempt state action and often preempts state action in ways that were not foreseen. I mean, in 1970 they weren't thinking about climate change as an issue.

Mr. Agrast: Ms. Craig, should Congress fix it?

26. 42 U.S.C. §§300f to 300j-26, ELR STAT. SDWA §§1401-1465.

Ms. Craig: Should Congress fix it? Well, it wasn't where I was going to go with my comment.

Mr. Agrast: Why don't you go ahead and make your comment? I'd love to hear your thoughts on this.

Ms. Craig: All right. Well, in general I'm in favor of Congress fixing any preemption provision that doesn't allow for stricter environmental regulations, so yes, in this case I think they should fix it.

However, the comment I was going to make is, I think why the carbon dioxide issue really brings a lot of the larger federalism issues into play is because what California is trying to address really is global warming and you think about the label: it's global warming, which suggests that maybe states are not the right level of government to be addressing the issue. And I think what this case is bringing into force is where exactly do you draw some of the lines that maybe Jonathan and I would drive different places, but to remind [us] all that we need to take it to a constitutional level.

Even federalism as a structure leaves a heck of a lot of overlap between the federal and state governments. It's not like there's a bright line: this is fed, this is state. There's always been a lot of overlap and part of what you see playing out in environmental law right now is making those decisions as we get more experience with environmental regulation. Which sphere should something actually be in? And carbon dioxide, EPA's the institution to regulate carbon dioxide. It looked like it was going to and then it didn't, so there was this attempt to put it at the national level. Obviously, we didn't (plan on?) the Kyoto [Protocol] and that would have done it at an international level, but it plays out in other realms, too. If you trace what's been going on in the Clean Water Act, it went from a state water quality standard through a federal, basically, technology-based regulation, and now it's going back to water quality standards. Where EPA wants to go is watersheds and TMDLs [total maximum daily loads], so that's cycling through. The Clean Air Act started with states and SIPs [state implementation plans] and then went to more Clean Air Act, or Clean Water Act technology-based; maybe it will cycle back too.

And so for me the more interesting issue is the carbon dioxide. It isn't so much the statutory preemption as the fact that we're wrestling with these where to shove various environmental issues—what level of government is the most appropriate place.

Mr. Kendall: I just wanted to respond a little bit, too, to Jonathan's comment about preemption law and doctrine being somehow a lesser doctrine of federalism because it can be overruled by Congress. I don't think there is any more central doctrine to federalism than the role that the Supreme Court plays in refereeing whether or not Congress has exercised its power under the Supremacy Clause. That is the core of what the Court has to do to enforce the structural roles of the two levels of government. And the doctrines that the Court has imposed in that context are blatantly anti-states, which is why the states are so opposed to them and universally opposed to them, where they're divided on some of the other issues.

And I would say, it's much more appropriate and important for a court that wants to protect the states at least for them to reform those doctrines than to get involved in trying to put arbitrary limits on the federal government's power under the Commerce Clause; that it can enforce neutrally, that it hasn't over the course of history been able to define in anyway that's satisfying even to Justices like Justice [Antonin] Scalia and Justices [Anthony M.] Kennedy and [Sandra Day] O'Connor in *Lopez*. And so, to the extent that the Court wants to address federalism issues, I think the first place it should start is by looking at what it's doing in the areas of preemption.

Mr. Adler: If I could just jump in. I would certainly agree that the Court is more preemption happy than I would like. My point is twofold. One, though, is that since those are statutory decisions, Congress can fix them. Even in the dormant Commerce Clause context, which is, you know, a small portion of these sorts of cases, Congress can create exceptions. Congress can come in and say, "yes, we know the dormant Commerce Clause prohibits this, but we are going to allow states to do it."

The other interesting thing about preemption in the context of federalism is that when we're complaining about the Court being too eager to find preemption, we're not really complaining about the same five Justices that are usually enforcing federalism on that. Those five Justices are very divided over preemption questions and certainly in the dormant Commerce Clause example, or are, for example, the Justices that would be most sympathetic to Doug's position are also some of the Justices that are most progressive in finding limits on federal power. Justices [Clarence] Thomas and Scalia are not big fans of an aggressive dormant Commerce Clause jurisprudence and at least Justice Thomas is not the biggest fan of finding preemption where Congress hasn't been absolutely clear that's what its intention was.

And one other interesting thing on listening to states—there's a recent empirical study of the pattern of preemption decisions and trying to figure out, you know, what's going on here. Is it ideology? Is it signaling and so on? And . . . two things that are significant predictors of how a court will rule in preemption cases, this study finds, is, one, . . . where states are actually a party to the case, as opposed to being amici, the court is much more likely to find there is no preemption. The other interesting finding is that when the SG's [Solicitor General's] office, in the few cases in which it does so, argues against preemption—admittedly that is rare, and that is particularly rare under the current Administration—the court is very likely to find against preemption. And so that to me suggests that at least when states are a party that a majority of the court is listening to state concerns.

Mr. Agrast: Well, let us move from that to give our audience a chance to comment and to question. When I recognize you, please wait until the microphone is brought to you since all of this is being webcast. And then, if you would, please state your name and your affiliation. And in order to be sure that we can take as many questions as possible, we do ask you to refrain from making speeches from the floor and to please keep your questions brief and to the point. The floor is open. Yes?

Q: Mr. Adler, when you were making the comments about how the states might be better served if the federal government got out of the way, I had a sudden image in my head about a cat making an argument about what's in the best inter-

ests of a mouse. And I was wondering, is there any sort of . . . evidence that perhaps, for instance, California might be interested in the federal government not interfering . . . . They seem to be happy with the federal laws; they just would like to strengthen them more. That's my understanding.

Mr. Adler: Well, I mean, there are certainly lots of cases in which states have challenged federal environmental regulations, and in some cases you have challenges where state and local governments are seeking to be more aggressive, as in the *Engine Manufacturers* case. And there are other cases like Nebraska's challenge to the arsenic standard under the Safe Drinking Water Act where states are asking the federal government to . . . get out of the way.[27]

And then in the implementation process we see all the time states asking the federal government to interpret its rules differently, and in the SIP process under the Clean Air Act we've seen this. We've seen litigation in that process of states challenging the federal government. We've seen it in California's context, for example, the oxyfuels fight and the fight over ethanol and MTBE [methyl tertiary butyl ether] in fuels. And that's a very good example of where if the federal government was more flexible and states had an easier time saying to the federal government: "Thank you for your advice. We understand you have more technical expertise. We understand that your experts think MTBE is the greatest thing since sliced bread, but we'd rather not use it because it increases the price of gas, produces no real improvement for air quality in modern automobile engines, and, oh yeah, by the way, it's not so good for groundwater."

Environmentally, California and a lot of states would have been better off. We know from the National Academy of Sciences that given the nature of the way ozone forms in urban areas, that the current approach to addressing ozone pollution will in some areas for some time not produce consistent gains, and that because ozone formation is a function of the ratio of VOCs [volatile organic compounds] and NO_x [nitrogen oxide] in the atmosphere, that certain strategies mandated essentially [at] the federal level as a one-size-fits-all approach could, in some cases, actually result in increases in ozone formation.

So, yes, in some cases states, if you give more flexibility, will say, like Nebraska did in the arsenic case: "Thank you. Leave us alone. We have other things we want to worry about." But it also means that states will be able to say: "You know what? This environmental strategy may make sense somewhere else, but it doesn't make sense for us and if we are going to maximize the benefits to our citizens for their health and for their local environmental conditions, we'd rather devote our time and resources to something else."

Mr. Agrast: Any responses or should we go to the next question?

Mr. Kendall: Next question.

Mr. Agrast: Okay. Next question? The gentleman on the end.

Q: I guess the question for the panelists is, I am not totally familiar with what the litigation strategies that have been pursued in preemption cases are, but it seems to me that the problem for environmental defenders in preemption cases, and maybe for consumer advocates in ERISA [Employee Retirement Income Security Act] cases is that we've let people like Professor Adler—very smart people like him—frame the question as a sort of dormant Commerce Clause framework. In another words, because it is so hard for Congress to supervise what 50 states are doing, the courts have to be aggressive in protecting the federal framework. But it seems to me that that's not right when you have an agency for whom it is much easier to act. You don't have bicameralism and [inaudible]. And so are we making an argument that actually the presumption in preemption cases should be flipped? That we should presume unless the agency has taken an action to reverse what a state has done that there shouldn't be a preemption?

Mr. Kendall: Well, part of the problem with preemption doctrine is that . . . the court says one thing and it doesn't really follow through with it. It says that there has to be a clear statement by Congress that something is going to be preempted and then it has established a whole variety of forms and versions of implied obstacle field preemption that have nothing to do with what Congress has said.

And so one of the things that we argue for in the book is that there needs to be a genuine clear statement rule. The court has such things. They created one in a case called *Gregory v. Ashcroft*,[28] which applies to a very limited form of federal interference at the state level. And we argue that that type of clear statement rule should apply in preemption cases pretty much across the board. And so I think the answer is already in the Supreme Court's opinions but not exercised or applied in those opinions.

Mr. Adler: I largely agree with that. The one caution I would add is I am not so sure I like—and I'm not sure people would disagree with me in terms of policy and results should necessarily like—deferring to agencies on preemption questions because preemption questions are really about . . . not the scope of federal power, but the scope of power the federal government has exercised. And I much prefer those decisions be made in the legislature than in agencies, for reasons of agency capture and interest group influence and the like. I am not sure, for example, I want the decision about how much, you know, federal pesticide regulations in EPA or drug regulations in FDA [Food and Drug Administration] preempt state law to be a decision made by the agencies. I'd much rather have that decision made in the statute.

And, you know, I think one reason why some people here might want to be sympathetic to that is, you know, think about when the administration or the agencies are controlled by folks that may be more sympathetic to industry arguments for preemption. Well, if courts are going to defer to agencies, then the agencies suddenly have a lot of power to preempt state law. And, you know, for me, I am concerned about this more because I just want legislatures to be making these decisions. I mean, I want Congress to be saying we're preempting, and if that means the states are unhappy, well, then members of Congress go back to their states or when a

27. Nebraska v. EPA, 331 F.3d 995, 33 ELR 20228 (D.C. Cir.), *reh'g denied* ____ (D.C. Cir. 2003).

28. 501 U.S. 452 (1991) (holding that Missouri's mandatory retirement requirement for its state court judges did not violate either the Age Discrimination in Employment Act or the Fourteenth Amendment's Equal Protection Clause).

House member's running for Senate, and suddenly a county commissioner or state representative is going to withhold support in a primary. To me, you know, that's part of the process we want to ensure is robust, and punting it off to agencies, I think, can short-circuit that.

Ms. Craig: I largely agree with both of my colleagues. I do think the rule you want—not regard[ing] agencies, but regarding the presumption—is at least nominally already there, but it's not applied that way. The only thing I would add is the one point where I think I would be sympathetic to an agency call rather than a congressional call would be if you were in a situation that I think was kind of the case when [the] *Solid Waste Agency* case was decided, which wasn't preemption, but that the agencies and the states are working on a common understanding and what a court decision is going to be is the reversal of a long-term understanding of how a particular preemption provision works. But otherwise I agree, it should probably be the legislature making the call.

Mr. Agrast: Doug? Okay. Next question? Gentleman in the center.

Q: Listening to attorneys handle some very abstract issues, the comment that rose to my mind was the pragmatic way, as a former New Jersey citizen, I went about saying, what are the (several?) forces in impulses for protection at what level of government? And the history of New Jersey in habitat protection and regulatory land use issues especially, which is my field of expertise, . . . was that the local governments and county governments had a terrible track record of protection and that we got the best protection for our goals at the state level.

And I am thinking right now also—and I invite your comments on the federal Endangered Species Act—why is that so? Why is it so controversial? It's the inherent regulatory land use powers in the habitat conservation plans that, it seems to me (still, if you look at—I don't care what species you come up with, I think generically it's going to be true, playing out over the 50 states in theory and in practice in that law for species in question), you are going to get more protection because the power of that law is greater than most state traditions and land use regulatory powers for protection at the state level. . . . (inaudible).

Mr. Agrast: Good question.

Mr. Kendall: I'll start because I probably raised those issues most directly in . . . my remarks. I agree that there needs to be a federal role here. For example, in the wetlands protections provision or in Endangered Species Act provisions, I think we should set the goals of no net loss of wetlands, no—as much as possible—extinctions of a major species at the federal level.

On the other hand, I do think that we've made a mistake in not involving or convincing state and local governments to be involved in those programs. There are capabilities that happen in the land use planning process where the government is giving you things. The government as part of the land use planning process is giving you permission to change the use of the land to build whatever you want to build. In that process, there is a carrot that the federal government doesn't have in applying the wetlands provisions or the Endangered Species Act provisions. And we are taking those carrots off of the table, or not applying those carrots in a way that gets protection of what resources we want in that context.

We're letting these things play out in completely separate spheres, and as a result, you are exposing yourself—the federal government—to not, as Robin said, often successful but frequent takings lawsuits because what the federal government does is just say, "you can't do what you want to do," whereas the local government much more frequently would be saying, "okay, you can develop this portion of your property or you can take this amount of your timber, but you can't take it all. You've got to leave this for habitat or this for wetlands or this for something else."

And so you're taking away a role by the levels of government that have the carrots . . . and making this a federal program where it seems like . . . the feds are just coming in and imposing their will on the process. And that's why I think, you know, while there needs to be a federal role and while the federal government needs to set the standards, we could be better about the way we implement the program and achieve our objectives.

Ms. Craig: What's always been interesting to me about the comparison or comparing the Endangered Species Act habitat protections and wetlands protection under §404 of [the] Clean Water Act is, while I agree with a stronger local or state law in both would be admirable, the fact remains [that] under §404, states [have] been able to take over that authority for years and only two have done it. As compared to, say, the §402 NPDES [national pollutant discharge elimination system] program. . . . I think there [are] like three exceptions left of states that haven't taken over that permitting authority.

So, you know, I am a pragmatist above all else. Like I said, I am the one advocating for the tripartite checks-and-balances system of environmental regulation. But the question that intrigues me, and I have read the official answer: states are afraid of regulatory takings liability of themselves; they'd rather leave it with the government on the §404 permits; that it's complicated to implement and all of that. But I think there are larger questions of why, you know, in the Endangered Species Act they don't really have that option but in the Clean Water Act §404 they did. Why, having that option, more states haven't taken it?

And this is also informed by the fact that I've now spent a great deal of time in four different states with four completely different attitudes toward environmental regulation. I think the . . . first of which was California. The California Coastal Commission I would put up against anyone to protect the environment. I mean, they are one of the most aggressive state agencies I've ever seen. They'll take on anyone if they're going to protect the California coast.

I lived in Oregon, which is now facing the perverse, in my opinion, situation of the government actually had some really great land use regulations in place and the citizenry voted that all that's going to constitute regulatory takings, which as many of you probably know is going through some interesting conniptions in court. So, you know, that to me is the inverse of what would normally happen. You know, Massachusetts was very good on some things, but their BMPs—their best management practices requirements—for water were horrible, especially

since I'd just come from Oregon, where they were great at the time. And, you know, Indiana I am not going to comment on. (Laughter.)

You know, I don't like the fact that I live downwind of five of the power plants that . . . have been the targets of several years now of attempts to enforce the Clean Air Act. So, you know, the pragmatic in me said go with the level of the government that's doing what you want it to do, but I think there are interesting studies that remain on why sometimes . . . various levels of governments will pick up the ball and sometimes they won't.

Mr. Adler: Just add a few thoughts. I mean, the Endangered Species Act has been an interesting statute and it's an interesting area to talk about federalism for a bunch of reasons. One is . . . because unlike . . . most of the other areas which have some public health aspect or kind of clear value that can be captured by state regulation aspect to it, you didn't see much state action prior to 1973. So unlike in air and water and wetlands and so on, states really were not doing much. And I will certainly admit that I'm not sure what states would do in that context absent a greater federal role, but you also don't have the cooperative federalism aspects, as Robin mentioned, in the ESA, so the inhibition on state flexibility is also less under the ESA than under some other statutes.

One thing I would just throw out, though, and if we're going to talk about the practical problems of environmental protection under the Endangered Species Act, more species have been delisted because they went extinct or should never have been listed in the first place than because they were recovered, and that's a tiny, tiny, tiny fraction of the over 1,000 species that have been listed. That's not, to me, a great success. And when you look at some of the species [that] . . . have been upgraded from endangered to threatened or that are kind of on the short list of species to possibly be recovered, they aren't [ESA] §9 recoveries. They aren't species that were helped by limitations on private land. There are species like—there's a really small species of deer that I'm forgetting the name of that was protected because it mostly lives . . . on some federal land, and the federal government decided that it would control predators. And lo and behold, the species is doing better. I mean, there are certainly some examples like that, but §9—the part that regulates private landowners, the part that is so controversial—doesn't have poster children of successes.

And one of the reasons for that is—and I should say that's important—because 75% of listed species rely upon private land for a significant portion if not all of their habitat. So if we are not protecting them on private land, we've got real problems. But why isn't it doing that? Well, for a long time there [were] a lot of anecdotal arguments that one of the reasons [why] the Act makes landowners enemies of species [is] because it imposes really serious costs on whoever just is unlucky enough to own the desired habitat. Essentially, the people that didn't develop their land, that didn't build the shopping centers, that didn't build their homes are the ones now that own the habitat that the endangered species need and they're the ones that get stuck footing the bill, and that makes the lot of people really angry.

And we now actually have empirical studies—pretty sophisticated empirical studies—looking at things like timber rotation patterns on private land and how they are affected by species listing, or a paper that was just published in *Conservation Biology* using the survey data of landowners about how landowners react to species listings, finding that we are driving a lot of landowners away from cooperating with species protection under §9. The study of timber rotation in the *Journal of Law and Economics* shows timber companies accelerating timber rotations to a point that would not be economical were it not for the threat of §9, were it not for the threat that they couldn't cut it all. And as a result, they're systematically preventing the replacement of red-cockaded woodpecker habitat because they're not letting trees grow long enough to serve as habitat.

The *Conservation Biology* study looked at the Preble's jumping mouse showing that for every landowner that when they hear the mouse is endangered are willing to do something, there's another landowner that not only says, "I am not going to do anything to help the species, but I'm not even going to let biologists on my land to look for it." And why? Because they are afraid of what the law does to them. And from a conservation standpoint that should be really chilling; that not only are we getting landowners saying I am not going to help, but I'm not even going to let biologists look because if they find it I'm afraid of what's going to happen to me and what's going to happen to my land and my ability to use it or the ability of my children to use it, and so on.

And if we compare the ESA with some of the programs in the wetlands context, and not even §404 litigation, but programs like Partners for Wildlife and the North American Waterfowl Management Plan that have been incredibly successful at working with landowners at low cost, have much greater success rates than wetland restoration and creation than §404 mitigation. Section 404 mitigation is like a 70% failure rate when you look at [the] ecological function of the restoration, but when you get Ducks Unlimited to work with the landowner through Partners for Wildlife and you are paying at most, you know, $100 an acre for an easement, you don't get that failure rate.

And I think there are actually practical, on-the-ground models of where we cannot only enlist state governments, but, more importantly, enlist conservation groups and landowners in a way that produces less conflict. And it's a way that actually requires less federal regulatory authority. And my concern is that, you know, as long as the federal government has the ability to use the hammer, well, everyone looks like a nail and that's the approach it's going to use. And one of the salutary effects of the courts suggesting that that hammer is not unlimited in the context of wetlands and the context of Endangered Species Act might be—and I certainly hope it will be saying—what other tools are available in the toolbox? And are there tools that hurt less? Because they hurt less, people won't be so angry when they use them. And for the 75% of species that need private land to survive, I think that would actually be a very positive environmental development.

Mr. Kendall: I'd just like to reply to that a little bit. Look, I think there are things that could be done to improve the Endangered Species Act. I think [U.S. Department of the] Interior Secretary [Bruce] Babbitt did a tremendous amount of those things through administrative action. I think it's completely facetious to argue that the Endangered Species Act is a failure because we haven't delisted that many species. I think the question is, what would have happened without the

Endangered Species Act? What type of the extinctions would we have seen? And that's a question that you're just not examining when you are saying there haven't been that many species that have been delisted.

The question is whether we've stemmed a tide of extinction that we were facing when the Endangered Species Act was put into place. And the question is, is there a better way of achieving the goals of habitat or of protecting endangered species? And I've put on the table a few ways that I think would. But to say the Act's a failure based on a few landowners who are upset about it and the fact that we haven't delisted that many species, I think, is just completely the wrong standard.

And I think, again, one of the things that differentiates Jonathan and I is just our general views of, first, you know, how much we need federal environmental protection. I think externalities are a much more robust justification for federal environmental law than Jonathan will give them credit for, and I think the success of our environmental programs are completely underappreciated in his remarks.

If you look at, for example, the . . . Clean Air Act and you look at what EPA estimates costs and benefits to be over the period from 1970 and 1990, the EPA estimates that the Clean Air Act cost about a half a trillion dollars to implement and to comply with and it yielded benefits of between $2.5 and $11 trillion dollars. Now, maybe those things would have happened if there was just states doing those things, but I doubt it. And I think we've got to start from the premise that we've had an enormously successful federal environmental program, and then think about where we go in improving it, rather than saying, "oh, . . . you know, the states would have done just as well and let's just return the power to them and it's really not that big of a deal if the Supreme Court mandates that."

Mr. Adler: Let me just [add] a couple of quick things: one on the Endangered Species Act. It's not just, . . . are there species that would have gone extinct. It's also, are there species like the red-cockaded woodpecker . . . and the like that actually are doing worse because of the Act? I mean, the *Journal of Law and Economics* study on timber rotations in the southeastern U.S. where most of the timberland is private, where the red-cockaded woodpeckers need private land to survive, is showing that because of the Act timber companies that used to manage their forests in a way that were just fine for red-cockaded woodpeckers because they would let the trees grow to a point at which they would develop the cavities that red-cockaded woodpeckers need to survive aren't doing it anymore, and it correlates with where the woodpeckers are in their listing. Now so, there are species like that, and the more empirical work that's being done, the more we're finding them.

The second thing that I would just note [is] there are other aspects of the Endangered Species Act. We can find §7 successes. We can find successes of other federal laws protecting species. We know several birds that were protected by the ban on DDT [dichlorodiphenyltrichloroethane]. But we can't find §9 successes and we can't even find them from going from endangered to threatened. And in 30 years of the thousand-some species, we can't even find one §9 success, but we can show species that are clearly doing worse because of §9. We should at least be willing to say: "Wait a second, maybe we've really done something wrong." I mean, at least we need to ask that question. And most of Secretary Babbitt's reforms, . . . many of which in principle I like, although I question their legality under the Act, and the no surprises rule, for example, has been having some trouble in court, effectively operate by saying we are going to turn off §9. I mean, the way these reforms work is by saying we're going to take the hammer and we are going to put it away. And if you have to do that to make the Act work, maybe we should reconsider the hammer.

And the last thing. . . . I fully accept interstate externalities as a justification for federal intervention. When my state of Ohio pollutes the air of New York and Vermont, that is the strongest possible case for the federal government to get involved. The problem is that very little of our federal environmental regulatory structure addresses that sort of problem. There are two provisions in the Clean Air Act. There's maybe one or two in the Clean Water Act. I wrote those provisions. I actually think there should be more such provisions, and I wish it wasn't until the 1990s that those provisions were invoked. But that's the reality. And when we—yes, the EPA—comes out and says: "Oh, look at the wonderful success of the Clean Air Act, let's take credit for all the gains in air pollution that occurred in the early [1970s] before the law was even enforced; let's assume that there wasn't a single benefit to air quality that wasn't the result of our laws, even though the rate of reduction of SO_2 [sulfur dioxide] concentrations was faster prior to 1970 than after." I mean, so yes there's been tremendous progress, but to say it's all because of the wonderful federal government flies in the face of the history, flies in the face of the facts. And to say the federal government should focus on the things that we need it to do—preventing my state from polluting the Northeast—and should spend less time worrying about local things, which is what the bulk of the federal environmental regulatory structure does, isn't to say federal government go home. It's to say, set some priorities that actually make sense within a federal structure and actually can maximize the good that federal efforts do.

Mr. Agrast: So that's going to have to be the last word. . . . I am glad we ended on such an illuminating discussion of the Endangered Species Act . . . .

With that I want to thank you for being with us and I hope you will join . . . me in thanking our panelists.