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CANARY IN A COAL MINE? FEDERALISM AND THE FAILURE OF THE CLEAN AIR ACT AMENDMENTS OF 1990

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With the advent of the New Deal, the federal regulatory state exploded in both size and scope. The increasing role of the national government in the day-to-day affairs of citizens, however, has not provoked substantial action by the federal courts. Throughout most of the past fifty-five years, the Supreme Court has played with kid gloves, deferring to Congress's determination of the constitutionality of its actions.¹ As the degradation of the environment moved to the forefront of the nation's political and social agenda, the federal government reacted through the formation of what can only be loosely termed a "partnership" between the federal and state governments.² Despite tremendous gains in environmental remediation and awareness, the nation's pollution problems still remain.³ Moreover, after a quarter century of "cooperative federalism,"⁴ cracks are appearing in the very foundations of the federal environmental structure.

Born of the environmental problems of our nation, the Clean Air Act of 1970 ("CAA")⁵ has likewise grown in size and scope over the last twenty-five

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1. See Deborah J. Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1, 4 (1988).

2. See John E. Daniel, *The Balance of Roles: EPA and the States Under the Reagan Administration*, in THE NEW FEDERALISM IN ENVIRONMENTAL LAW: TAKING STOCK 21 (1982) [hereinafter TAKING STOCK].

3. *U.S. Gets a Mixed Environmental Report*, UPI, Apr. 21, 1995, available in LEXIS, Nexis Library, UPI File. Lead emissions decreased by 98%, and sulfur oxide emissions dropped 30% since the enactment of the Clean Air Act in 1970. *Id.* However, almost one million people live in regions that do not meet air quality standards. *Id.* Air pollution is linked to increasing rates of asthma, and an estimated 60,000 premature deaths in the nation's most polluted cities. *Id.*

4. "Cooperative federalism" envisions a partnership between the federal and state governments. The relationship seeks to achieve the benefits of federalism by delegating the responsibilities necessary to meet stated objectives between the states and the federal government. *But see*, E. Donald Elliott, Keynote Address at the Nineteenth Annual Conference on the Environment (May 1990), in FEDERAL VERSUS STATE ENVIRONMENTAL PROTECTION STANDARDS: CAN A NATIONAL POLICY BE IMPLEMENTED LOCALLY? 1 (1991) (noting cynics' description of "cooperative federalism" as a way for the federal government, which faced a deficit, to spend money "off budget" by establishing requirements to be implemented by the states).

5. Clean Air Act Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1676 (codified as amended at 42 U.S.C. §§ 7401-7671q).

years. States and individuals, however, under the banner of "New Federalism,"⁶ are signaling a growing trend toward political reformation. In part a result of frustration with regulations imposed by the federal government, the states are demanding substantive changes in the federal-state working relationship, and explicitly calling for revisions in the CAA.⁷ Under attack for its increasingly paternalistic emphasis on federal authoritarianism, the Clean Air Act Amendments of 1990 ("1990 Amendments") await judicial determinations on their constitutional fitness, the result of suits filed by the States of Missouri and Virginia.⁸

Notwithstanding the current rebellion against the national regulatory system, a reexamination of the precepts of federalism is needed to evaluate existing environmental programs with an eye toward reconstruction. Skirmishes over the 1990 Amendments do not represent an isolated by-product of legislative shortcomings or executive mismanagement; rather, they symbolize the "canary in the coal mine" and indicate the need for a realignment of the roles shared by federal and state governments under the CAA. The current situation did not develop overnight. Part I accordingly traces the development of the CAA. Part II assesses the changes to the CAA in the 1990 Amendments.⁹ Part III briefly discusses the values of a dual system of government and the emerging federalist doctrine. Part IV presents a background on the constitutional issues raised by Virginia and Missouri in their judicial attacks on the sanctions provisions of the

6. "New Federalism" roughly translates into a movement seeking a balance of power between the federal government and the states. The notion contemplates a restructuring of the federal-state relationship in order to embrace the perceived values of federalism, such as accountability, diversity, innovation and political liberty. See, e.g., Richard C. Reuben, *The New Federalism*, A.B.A. J., Apr. 1995, at 76. See also, *Society and Politics States' Rights: Govs Say Washington Has Too Much Power*, GREENWIRE, Mar. 27, 1995, available in LEXIS, Nexis Library, Greenwire File (citing state frustration with environmental mandates and plans to convene a state conference to "consider ways of reinvigorating the Constitution's Tenth Amendment").

7. See generally, *Air Pollution: EPA Administrator Will Not Fight Bill to Repeal FIP Requirements in 1977 Law*, 25 Env't Rep. (BNA) No. 1998 (Feb. 17, 1995) (discussing testimony by governors before House Subcommittee on Oversight and Investigations of the Commerce Committee demanding significant changes in CAA) [hereinafter *EPA Administrator*]; *Texas Joins States Fighting CAA, EPA Emissions Testing Mandates*, 32 Air Water Pollution Rep. No. 40 (Mar. 6, 1995) (citing growing efforts by states to resist enforcement of CAA provisions) [hereinafter *Texas*]; *Virginia Governor Tells Senate Panel Restraint Needed on Clean Air Act Rules*, 25 Env't Rep. (BNA) No. 47, at 2387 (Mar. 31, 1995) (Virginia Governor George Allen testifying that CAA needs to be reopened).

8. *Missouri v. United States*, No. 4:94-CV-1288 ELF (E.D. Mo. filed July 1, 1994); *Virginia v. United States*, No. 3:95-CV-21 (E.D. Va. June 12, 1995) (dismissed for lack of subject matter jurisdiction); *Virginia v. Browner*, No. 95-1052 (4th Cir. filed Jan. 12, 1995) (appealing final agency action disapproving Virginia's CAA program).

9. While each successive enactment of the CAA led to the disappearance of numerous forests in the ensuing legal commentary, it is imperative to understand the regulatory structure, its successes, and its failures in order to provide a basis for understanding the need to reform the CAA and to analyze it within the ambit of New Federalism.

1990 Amendments. Acknowledging the important roles that the federal and state governments share in air pollution prevention, Part V argues for a shift in the structure of the CAA. Part VI concludes that the CAA should be restructured—lest the canary dies, and the miners with it.

I. DEVELOPMENT OF THE CAA

Highlighted by fears over nuclear fallout and “killer smog,” the problems of air pollution led to a public outcry in the early 1960s.¹⁰ While air pollution control laws existed in the past, the CAA amended earlier enactments¹¹ and provided the current regulatory structure. The CAA aimed then, as now, “to protect and enhance the quality of the Nation’s air resources so as to promote the public health and welfare and the productive capacity of its population.”¹²

A. *Structure of the CAA*

The CAA sought to clean up the nation’s air within a miraculous five years¹³ through the promulgation by the Environmental Protection Agency (“EPA”) of national ambient air quality standards (“NAAQS”).¹⁴ The NAAQS target and place limits upon specific pollutants affecting air quality. Aided by federal funds, the states develop state implementation plans (“SIPs”) to enforce

10. See KIRKPATRICK SALE, *THE GREEN REVOLUTION: THE AMERICAN ENVIRONMENTAL MOVEMENT, 1962-1992*, 18, 19 (1993); ARNOLD W. REITZE, JR., *A CENTURY OF AIR POLLUTION CONTROL: WHAT’S WORKED; WHAT’S FAILED; WHAT MIGHT WORK* 1549, 1586, 1588 (1991) (noting link between focus on air pollution problems and air pollution regulations). “Air pollution has been defined as a group of chemical compounds that ‘are in the wrong place or in the wrong concentrations at the wrong time.’” GARY C. BRYNER, *BLUE SKIES, GREEN POLITICS: THE CLEAN AIR ACT OF 1990* 42 (1993) (citation omitted).

11. The CAA dates back to the Clean Air Act of 1963, Pub. L. No. 88-206, 77 Stat. 392 (codified at 42 U.S.C. §§ 1857-1857i (1964)).

12. 42 U.S.C. § 7401(b)(1). This was in part based upon Congress’s findings that:
[T]he growth in the amount and complexity of air pollution brought about by urbanization, industrial development, and the increasing use of motor vehicles, has resulted in mounting dangers to the public health and welfare, including injury to agricultural crops and livestock, damage to and the deterioration of property, and hazards to air and ground transportation.

42 U.S.C. § 7401(a)(2).

13. Pub. L. No. 91-604, §§ 6, 110(a)(2)(A), 110(e), 84 Stat. 1676, 1680, 1682 (codified at 42 U.S.C. §§ 7410(a)(2)(A), 7410(e) (1988)), amended and repealed, Clean Air Act Amendments of 1990, Pub. L. No. 101-549, §§ 101-b, -d, 110(a)(2), (e), 104 Stat. 2399, 2404, 2408 (codified at 42 U.S.C. § 7410 (1991)).

14. 42 U.S.C. § 7511(f), amended by Clean Air Act Amendments of 1990, Pub. L. No. 101-549, §§ 108(b)(2), 111(f)(1), 104 Stat. 2399, 2467 (codified at 42 U.S.C. § 7411(f) (1993)).

these standards.¹⁵ The EPA retains ultimate authority over all air pollution control programs.¹⁶ A state's failure to offer an acceptable SIP empowers the EPA either to amend the SIP or to implement a federal implementation plan ("FIP").¹⁷ Additionally, the CAA mandated substantial reductions in automobile emissions, and provided for citizen suits against polluters and the EPA for inadequate fulfillment of statutory obligations.¹⁸

B. *Problematic Foundations*

While the CAA's enactment rested partly upon the urgency and fears regarding the nation's air pollution problems,¹⁹ the primary rationale centered upon the failure of the states to control air pollution.²⁰ The inadequacy of state programs has been traced to a slow, out-moded legal system, an inability to deal with interstate pollution problems, the pressure of economic competition among the states, and the absence of a broad public consensus in support of increasing state expenditures on environmental enforcement.²¹ Despite the documented regulatory failure of states to manage competently their natural resources, Congress still granted "[e]ach State . . . primary responsibility for assuring air quality within the entire geographic area comprising such State."²² A reflection of the realistic demands in protecting the environment, the states play an integral

15. 42 U.S.C. § 7410.

16. *See id.*

17. *Id.* § 110(c)(1).

18. *See id.* § 7521; 42 U.S.C. § 7604.

19. *See supra* note 10 and accompanying text.

20. *See* REITZE, *supra* note 10, at 1586 (noting that failure of most states to "allocate adequate resources to air pollution control indicated that federal action was required"). Despite reluctance by Congress to empower federal officials, no state had established a complete set of pollution standards by 1970. *See* BRYNER, *supra* note 10, at 81. Moreover, during floor debate on the CAA, Senator Edmund Muskie, Chair of the Senate Committee on Public Works' Subcommittee on Environmental Pollution, stated:

In 1963, Congress recognized that the Federal Government could not handle the enforcement task alone, and that the primary burden would rest on States and local governments. However, State and local governments have not responded adequately to this challenge. It is clear that enforcement must be toughened . . . and [that] the Federal presence and backup authority must be increased.

116 CONG. REC. 32,901 (1970).

21. Herbert H. Humphrey & LeRoy C. Paddock, *The Federal and State Roles in Environmental Enforcement: A Proposal for a More Effective and More Efficient Relationship*, 14 HARV. ENVTL. L. REV. 7, 12 (1990). *Cf.* Lynda L. Butler, *State Environmental Programs: A Study in Political Influence and Regulatory Failure*, 31 WM. & MARY L. REV. 823 (1990) (arguing that states continue to lack serious commitment and adequate mechanisms with which to regulate their natural resources).

22. 42 U.S.C. § 7407(a). Moreover, Congress mandated that the EPA Administrator "shall encourage cooperative activities by the States and local governments for the prevention and control of air pollution" and authorized states to enter into compacts. *Id.* § 7402(a), (c).

role in administering and enforcing national environmental laws and are responsible, in large part, for their success.²³

Cooperative federalism, the watchword of early environmental enactments, envisions "national unity with local diversity," culminating in a federal-state partnership.²⁴ The EPA provides oversight, and the state government applies for delegation of particular programs, induced usually through a combination of federal pressure, program subsidies and public opinion.²⁵ Employing traditional "command and control" principles, the EPA then specifies uniform environmental standards and delegates a CAA program to the state. The state then implements and enforces the standards.²⁶

C. Regulatory Assumptions

Any advantages of such a regulatory system are linked to the underlying assumptions originally justifying federal enactment of the CAA. First, Congress assumed that the states lacked the expertise, resources and knowledge required to create detailed scientific pollution standards.²⁷ As a centralized agency, the EPA was uniquely situated to act as an information clearinghouse for research and development.²⁸ With uniform national standards and decentralized enforcement,

23. Paul R. Portney et al., *The EPA at "Thirtysomething,"* 21 ENVTL. L. 1461, 1472 (1991) (stating that "state and local governments are responsible for the implementation, monitoring, and enforcement necessary for any national environmental law to succeed").

24. See *supra* note 4; J. William Futrell, *The Administration of Environmental Justice, in SUSTAINABLE ENVIRONMENTAL LAW: INTEGRATING NATURAL RESOURCE AND POLLUTION ABATEMENT LAW FROM RESOURCES TO RECOVERY* 120 (Celia Campbell-Mohn et al. eds., 1993).

25. See Futrell, *supra* note 24, at 120.

26. "Command and control" simply implies the direction of entities to produce no more than a pre-determined amount of pollution. See BRYNER, *supra* note 10, at 20 (discussing "command and control" principles and criticisms of its rigidity and inefficiency).

27. See *supra* notes 20-21 and accompanying text.

28. An often-cited advantage to centralization of environmental regulatory structures is the presence of economies of scale. Economies of scale exist when a firm's long-run average costs fall as production increases. The EPA may enjoy economies of scale in the setting of environmental standards because the regulatory process requires the culling of large amounts of scientific data on pollutants. If a state agency sought to duplicate the EPA's work, it would be inefficient or wasteful. See Jacques LeBoeuf, *The Economics of Federalism and the Proper Scope of the Federal Commerce Power*, 31 SAN DIEGO L. REV. 555, 565-67 (1994).

However, the advantages of economies of scale are limited. First, government activities are often characterized by diseconomies of scale—long-run average costs rise as output increases. *Id.* at 566. Frequently, this results from a firm's increase in bureaucracy as it grows in size and scope. Second, the mere presence of economies of scale does not mandate centralization of all of the functions of production. *Id.* EPA could simply collect the pollution information and allow states to set standards that would maximize their individual preferential levels of social welfare. *Id.*

assurance of local flexibility was presumed.²⁹

Second, the federal government had that "can-do" spirit, ending the Depression through the New Deal, winning World War II, and placing a man on the moon. Indeed, Congress expressed its belief that "[f]ederal financial assistance and leadership [was] essential for the development of cooperative Federal, State, regional, and local programs to prevent and control air pollution."³⁰ Moreover, the negative externalities of air pollution were not content to remain within political boundaries.³¹ Thus, federal regulation was justified where the costs associated with pollution were imposed by one state upon another state.³²

Third, in the absence of federal regulation, many in Congress concluded that states would not manage the environment in a manner consistent with the goals of federal regulations.³³ The "race-to-the-bottom" theory contemplates

29. This embodies the goal of cooperative federalism. See *supra* note 24 and accompanying text.

30. 42 U.S.C. § 7401(a)(4). John Jay also noted that:

[O]nce an effective national government is established, the best men in the country will not only consent to serve, but also will generally be appointed to manage it; for, although town or country, or other contracted influence, may place men in State assemblies, or senates, or courts of justice, or executive departments; yet more general and extensive reputation for talents and other qualifications will be necessary to recommend men to offices under the national government,—especially as it will have the widest field for choice, and never experience that want of proper persons which is not uncommon in some of the States. Hence it will result that the administration, the political counsels, and the judicial decisions of the national government will be more wise, systematical, and more judicious than those of individual States, and consequently more satisfactory with respect to other nations, as well as more *safe* with respect to us.

THE FEDERALIST PAPERS NO. 3, at 11 (John Jay) (Roy P. Fairfield ed., 2d ed. 1966).

31. See 42 U.S.C. § 7401(a)(1) (1988). Congress found that the nation's population is not confined to individual geo-political boundaries. *Id.* This finding implied that pollution would migrate from state-to-state.

32. See LeBoeuf, *supra* note 28, at 570-71. If a factory emits air pollution upwind of a neighboring state, the failure of the polluting state to enact effluent regulations imposes costs on the other state. *Id.* (citing as an example *Georgia v. Tennessee Copper Co.*, 237 U.S. 474 (1915)). Such costs represent a transfer of wealth from the residents of the pollution-receiving state to the residents of the polluting state. *Id.* at 570-71. Moreover, the costs produce a net loss to society when the level of pollution differs from that which would maximize social wealth. *Id.* at 571.

33. See James M. McElfish, Jr., *Minimal Stringency: Abdication of State Innovation*, 25 *Envtl. L. Rep.* (Envtl. L. Inst.) 10,003 (Jan. 1995) (stating that, in adopting federally mandated regulation minimums as state regulation maximums, certain "states have . . . continued the 'race to the bottom' that Congress [has] decried," and concluding that, in absence of federal regulations, many states would not likely regulate to same degree as federal government now requires); REITZE, *supra* note 10, at 1613-14 (describing states as "willing to sacrifice the environment" in "their attempts to attract money and jobs to the state").

lessening environmental quality as states compete for industry.³⁴

Traditional economic theory holds that the socially optimal level of pollution reduction is the level that maximizes the benefits that accrue from such reduction to the individuals who breathe the polluted air, minus the costs of pollution control. To achieve this optimal reduction, a regulator must force polluters to internalize the costs that they impose on the breathers.³⁵

“Within the national market then, other forums being equal, firms will try to reduce the costs of pollution control by moving to the jurisdiction that imposes the least stringent requirements.”³⁶ In theory, states should analyze the costs of air pollution relative to the benefits of industrial activity, which include job creation and tax revenue increases.³⁷ Because air pollution is not necessarily confined within state boundaries, some of the costs of transboundary migration of air pollutants is imposed upon non-residents.³⁸ Thus, Congress assumed that it must regulate the environment to insure clean air throughout the United States.³⁹ Yet, while Congress was concerned with interstate externalities, much of the CAA was premised on the assumption that states would enact suboptimal air pollution regulations to attract industry.⁴⁰

34. See Richard L. Revesz, *Rehabilitating Interstate Commerce: Rethinking the “Race-to-the-Bottom” Rationale for Federal Environmental Regulation*, 67 N.Y.U. L. REV. 1210, 1214, 1216 n.14 (1992) (citing Richard B. Stewart, *Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy*, 86 YALE L.J. 1196, 1212 (1977), and the article’s argument that the “race-to-the-bottom” theory assumes a lack of cooperation among the states premised upon insurmountable transaction costs); LeBoeuf, *supra* note 28, at 573-74, 579 (discussing the Coase Theorem’s inability to provide a solution to interstate externalities primarily due to insurmountable transaction costs). See also 42 U.S.C. § 7402 (mandating that EPA Administrator encourage cooperation among various governmental entities to prevent air pollution and to allow states to enter into interstate compacts).

35. Revesz, *supra* note 34, at 1214.

36. *Id.*

37. *Id.* at 1215.

38. See 42 U.S.C. § 7401(a)(1) (1988). See also LeBoeuf, *supra* note 28, at 570-71.

39. See 42 U.S.C. § 7401(a)(4) (1988); *Hodel v. Virginia Surface Mining and Reclamation Ass’n*, 452 U.S. 264, 281-82 (1982) (recognizing that prevention of environmentally destructive interstate competition is justifiable use of commerce power). See also Revesz, *supra* note 34, at 1217 (stating that federal regulation is justifiable means of slowing environmental degradation).

40. See *supra* notes 33-35 and accompanying text. See also 42 U.S.C. § 7410(a)(2)(E) (1988) (prohibiting emissions which interfere with another state’s air quality); 42 U.S.C. § 7423 (1988) (disallowing reductions in emissions limits due to the height of “smoke stacks”); 42 U.S.C. § 7426 (1988) (requiring SIPs to identify proposed new and modified major sources which may impact another state’s air quality); Revesz, *supra* note 34 at 1224-27 (discussing congressional justification of CAA provisions on “race-to-the-bottom” theory).

Finally, federal regulation of air pollution under the CAA was supported by Congress's distrust of states and localities.⁴¹ Whereas distrust is a component of much of the above-stated rationale, it did not prevent Congress from delegating CAA programs to the states.⁴² Nevertheless, subsequent interpretations of Congress's intentions represent patent paternalism that inevitably belie meaningful cooperative federalism.⁴³ Indeed, not only are many of Congress's assumptions deeply problematic in terms of both economic analysis and federalist principles, but many of the assumptions no longer hold true.⁴⁴

II. 1990 AMENDMENTS

The CAA of 1970 embodied a landmark attempt to rein in the problems associated with air pollution, and in large measure, it was successful.⁴⁵ A cost-benefit analysis of the CAA declared it a "winner,"⁴⁶ and emission levels of lead, particulates, and carbon monoxide dropped substantially between 1970 and 1990.⁴⁷ Although the EPA concluded that pollution control efforts stemming from the 1970 Amendments resulted in significant reductions in air pollution, "its goal—protecting public health with an adequate margin of safety—is far from being achieved."⁴⁸

A. *Passage of the 1990 Amendments*

In 1990, after more than a decade of legislative and executive gridlock, President George Bush signed S. 1630,⁴⁹ the 1990 Amendments to the CAA, into law. Bush stated that his proposal "was designed to improve our ability to control urban smog and reduce automobile and air toxic emissions, and to provide

41. See *supra* notes 20-21 and accompanying text. The apparent distrust also is evident in Congress's acceptance of the "race-to-the-bottom" argument which reflects a deep-seated belief that states cannot regulate in a manner to guarantee maximum social benefit.

42. See U.S.C. §§ 7401(a)(3), 7407(a); Portney et al., *supra* note 23, at 1472; see also *supra* text accompanying note 23.

43. See Revesz, *supra* note 34, at 1217.

44. See *infra* Parts III and V.

45. See *supra* note 3; REITZE, *supra* note 10, at 1632 (noting that while CAA has been successful, increases in population and energy act to nullify CAA gains).

46. See Steven Pearlstein, *The Myths That Rule Us: In the Debate on Regulatory 'Reform,' Six Legends Bear a Closer Look*, WASH. POST, Mar. 5, 1995, at H1 (noting that economists' study found CAA's benefits outpaced its costs).

47. See ENVIRONMENTAL PROTECTION AGENCY, NATIONAL AIR QUALITY AND EMISSIONS TRENDS REPORT, 1990 1-2 (1991); *supra* note 3.

48. See BRYNER, *supra* note 10, at 48-49 (citing ENVIRONMENTAL PROTECTION AGENCY, ECONOMIC INVESTMENTS: THE COST OF A CLEAN ENVIRONMENT (1991)).

49. S. 1630, 101st Cong., 2d Sess. (1990).

the enforcement authority necessary to *make the law work*.⁵⁰ Unfortunately, in trying to “make the law work,” Congress did not learn from the lessons of the past.

A statutory failure is no reason not to try again, and Congress in 1990 attacked the intransigent nonattainment problems with the same set of tools that had been tried and found wanting earlier—a revised redesignation authority, new deadlines, harsh SIP and permit provisions, and stiff sanctions. The most conspicuous feature of this new package, though, is that it looks a great deal like the old, with the ruffles and flourishes of twenty years experience.⁵¹

B. *Structure of the 1990 Amendments*

Prior to the 1990 Amendments, CAA programs were structured so that: (1) the SIPs established source-specific emissions levels and applied the NAAQS to all sources of air pollution, (2) stringent technology and permitting requirements were mandated for new sources, and (3) specific air pollution problems were addressed as they arose.⁵² In addition to substantially revising existing CAA programs,⁵³ the 1990 Amendments also create an operating permit program which placed all of the CAA requirements for a given source into one document.⁵⁴ Rather than regulate sources through a SIP, the 1990 Amendments require a state to provide source-specific regulation.⁵⁵ As under previous enactments, the state holds “primary responsibility for assuring air quality within the entire geographic area comprising such State,”⁵⁶ and the EPA continues to retain its preeminent authority over the SIPs and expands its oversight to all individually issued permits.⁵⁷

Additionally, the 1990 Amendments mandate that states develop and implement “inspection and maintenance” (“I&M”) programs for ozone nonattainment areas classified as “moderate and above.”⁵⁸ I&M programs are

50. Statement by the President on Signing the Bill Amending the Clean Air Act, 26 WEEKLY COMP. PRES. DOC. 1824 (Nov. 15, 1990) (emphasis added).

51. WILLIAM H. RODGERS, ENVIRONMENTAL LAW 211 (2d ed. 1994).

52. J. GORDON ARBUCKLE ET AL., ENVIRONMENTAL LAW HANDBOOK 120 (12th ed. 1993).

53. See REITZE, *supra* note 10, at 1608-12 (providing overview of 1990 Amendment revisions); ARBUCKLE ET AL., *supra* note 52, at 120.

54. 42 U.S.C. § 7661a(b) (1995); ARBUCKLE ET AL., *supra* note 52, at 140.

55. See ARBUCKLE ET AL., *supra* note 52, at 139-40.

56. 42 U.S.C. § 7407(a) (1988).

57. See *id.* § 7661a (1995); 42 U.S.C. § 7661d(b) (1995).

58. See 42 U.S.C. § 7511a).

designed to reduce air emissions from "mobile sources" by testing vehicle emissions systems for compliance with air quality standards.⁵⁹ The status of an attainment area is measured by reference to the air quality in that particular geographic region.⁶⁰ For moderate areas, states must implement "basic" I&M programs which permit vehicles to be tested and repaired at the same location.⁶¹ More controversial, however, are I&M programs for areas classified as "serious ozone nonattainment areas and above."⁶² These so-called "enhanced" I&M programs require motorists to test their vehicles at a centralized facility and have repairs at another facility.⁶³

C. *Structural Concerns*

Although passage of the 1990 Amendments resulted in a number of new regulatory programs,⁶⁴ they have not resolved existing structural shortcomings. First, the CAA's fragmented, single-media approach continues unabated. Although adoption of source-specific permitting brings the CAA closer to other environmental laws such as the Clean Water Act, "[d]etail diminishes EPA's discretion to attempt new approaches and robs EPA of the administrative resources that could be used to implement them."⁶⁵ Second, while uniform environmental standards provide industry with stability and certainty and allow for a minimum standard of air quality throughout the nation,⁶⁶ they are

59. See 42 U.S.C. § 7401 (1988); 42 U.S.C. § 7511a (1985); 40 C.F.R. § 51.350 (1994).

60. See 42 U.S.C. § 7407(e) (1988).

61. See 40 C.F.R. § 51.353 (1994); 42 U.S.C. § 7511a(b)(4) (1995); 42 U.S.C. § 7511a(a)(2)(B) (1995).

62. See 40 C.F.R. § 51.353 (1994); 42 U.S.C. § 7511a(c)(3) (1988).

63. 40 C.F.R. § 51.353 (1994).

64. See, e.g., *supra* notes 51-55 and accompanying text.

65. Craig N. Oren, *The Clean Air Act Amendments of 1990: A Bridge to the Future?*, 21 ENVTL. L. 1817, 1839 (1991); see also Robert M. Sussman, *EPA at the Crossroads*, ENVTL. FORUM, Mar.-Apr. 1995, at 14, 17 (arguing that EPA needs to adjust its organizational structure to adopt multi-media approaches and reinforce concept of pollution prevention).

66. See Futrell, *supra* note 24, at 118; see also BRYNER, *supra* note 10, at 84 (noting that President Nixon's support for CAA's reauthorization was motivated in part by concerns about uniform standards for industry). The support for uniformity has been recognized as an additional justification for federal involvement:

[T]o control interstate competition and to grant all citizens a certain minimum level of health and welfare protection, the national government should set minimum nationally uniform health and welfare standards. This approach, of course, lies behind such centerpieces of current law as the national ambient air quality standards Indeed, this approach is now part of our culture, and very few persons propose doing away with it I would attribute at least some of this inaction to the long standing lack of attention to issues of state's rights

William F. Pedersen, Jr., *Federal/State Relations in the Clean Air Act, the Clean Water Act, and the RCRA: Does the Pattern Make Sense?*, in TAKING STOCK, *supra* note 2, at 6.

economically inefficient, ignoring the advantages of decentralized decisionmaking and flexibility and responsiveness to local conditions and needs.⁶⁷ Third, the CAA directs that pollution control should be driven by technological achievability,⁶⁸ not relative risk or cost-benefit analysis.⁶⁹ Whereas opponents contend that assessing the relative risk of certain activities usually ends up “justifying pollution,”⁷⁰ supporters argue it “is essential if we are to know ‘when a regulatory expenditure is not a good investment, and decide whether we want to spend money elsewhere to save a lot of lives.’”⁷¹ Given limited financial and natural resources, regulators should be permitted to concentrate efforts on those air pollution concerns which pose the greatest threats to human and ecological health.

Finally, despite an avowed distaste over the states’ ability to regulate air pollution, Congress expressly “granted” primary responsibility for air quality to the states.⁷² Subsequent interpretations of the CAA, however, appear to bestow omnipotence in air pollution matters to federal agencies.⁷³ Although largely a problem of construction and interpretation, the failure to realize Congress’s statutory intentions for concurrent jurisdiction and a more cooperative framework continues to hamper efforts aimed toward achieving optimal air quality under the CAA.⁷⁴

67. See Futrell, *supra* note 24, at 118; Edward L. Strohbehn, Jr., *The Bases for Federal/State Relationships in Environmental Law*, in TAKING STOCK, *supra* note 2, at 11 (acknowledging that “some environmental problems involve concerns that differ significantly from one locality to another, making national solutions possibly inappropriate or inefficient in an economic sense. And some environmental concerns involve matters that have been the subject of state and local control”); David Clarke, *A Contract Without Green Ink*, ENVTL. FORUM, Jan.-Feb. 1995, at 32 (Noting that, while uniformity may not have been “hot” topic in the past, many politicians are making “power devolution their top priority, repeating their battle cry . . . that ‘one size does not fit all’”); BRYNER, *supra* note 10, at 20 (noting criticism that uniform standards are more expensive than they need to be for some facilities).

68. For example, in the 1990 Amendments, Congress shifted the basis for regulation of air toxins from health-based to technology-based regulations, requiring maximum achievable control technology. 42 U.S.C. § 7412(d)(2) (1995).

69. Although the cost-benefit versus “best technology” debate fills countless academic journals, serious economic questions have been raised about current CAA provisions mandating wasteful technology.

70. Bryner, *supra* note 10, at 153-54.

71. *Id.* at 154 (quoting Graeme Browning, *Taking Some Risks*, 1991 NAT’L J. 1279); see also Pearlstein, *supra* note 46, at H4 (describing \$31 million mandated expenditure by Amoco refinery to eliminate benzene from waste water treatment system despite ability to reduce four times as much benzene from other processes for only \$6 million).

72. See 42 U.S.C. § 7407(a); *supra* note 22 and accompanying text.

73. See *supra* note 42 and accompanying text.

74. See *infra* Parts III and IV.

D. *Administrative Concerns*

While structural problems abound, they are the result of legislative misdrafting and could be mitigated through successful implementation efforts. Congress's distrust of the executive branch during the legislative process, however, has led to the inclusion of major obstacles in the 1990 Amendments that will deleteriously affect any attempt to achieve long-term success.⁷⁵ A by-product of congressional frustration with the EPA and a divided government, the 1990 Amendments furnish very detailed provisions with specific deadlines for compliance.⁷⁶ Unfortunately, the deadlines prove to be an administrative hurdle to efficient implementation: "It is unnecessary to look beyond the CAA for evidence that deadlines are not self-enforcing. It is somewhat surprising, then, that the SIP revisions and sanctions relied upon to encourage compliance depart only modestly from the patterns found wanting in the 1977 version of the law."⁷⁷

Likewise, despite requests from some state officials for "more direct guidelines and more precise standards" under the CAA in order to deal with the greater number of regulated sources,⁷⁸ the 1990 Amendments "represent an extremely detailed approach that converts an already intricate statute into a 'monster of complexity.'"⁷⁹ Increased regulation has the potential for making the EPA, already constrained in its flexibility by the 1990 Amendments, even less responsive to state and local needs, frustrating any existing notion of cooperative federalism.⁸⁰ The rigidity inherent in the statutorily-imposed deadlines and the

75. See BRYNER, *supra* note 10, at 129-31.

76. See Sussman, *supra* note 65, at 16. See also Oren, *supra* note 65, at 1830-31 (noting irony that environmental forces in Congress burden EPA with voluminous details and numerous deadlines in order to "protect" EPA from executive branch discretion).

77. RODGERS, *supra* note 51, at 223-24. See also 42 U.S.C. § 7661a(d)(3) (Supp. 1992) (requiring EPA to "promulgate, administer, and enforce" operating permit program for recalcitrant states by November 15, 1995); EPA Administrator, *supra* note 7, at 1998 (stating that EPA would not oppose legislation repealing CAA requirement that EPA develop FIP for nonattainment areas in California).

78. Steve Novick & Bill Westerfield, *Whose SIP Is It Anyway? State-Federal Conflict in Clean Air Act Enforcement*, 18 WM. & MARY J. OF ENVTL. L. 245, 269-73, 272 n.152 (1994).

79. Oren, *supra* note 65, at 1828. See ARBUCKLE ET AL., *supra* note 52, at 149 ("EPA will be faced with implementation responsibilities that far surpass those that have been assigned to virtually any other administrative agency."); Sussman, *supra* note 65, at 18 (disparaging "tyranny of statutory deadlines"). See, e.g., *Date for Section 112(g) Compliance Delayed Until EPA Completes Final Rule*, 25 Env't Rep. (BNA) No. 41, at 1995 (Feb. 17, 1995) (noting implementation difficulties; EPA will not tie compliance with 42 U.S.C. § 7412(g) to acceptance of a state's Title V program until after final rules have been issued).

80. See generally, *GOP Governors Refrain from Urging Major Rewrite of CAA by Congress*, 1 Air Water Pollution Rep. No. 3 (Feb. 13, 1995), available in LEXIS, Nexis Library (Governor Pete Wilson stated: "We welcome clear federal standards but demand flexibility to meet the standards."); Texas, *supra* note 7 (noting that Texas demanded flexibility in meeting 1990 Amendment pollution control standards and "rejected" enhanced I&M testing program); *Changes, Clarifications Promised by EPA in Response to Requests from State Groups*, 25 Env't Rep. (BNA) No. 45, at 2285 (Mar.

complexity of detail deplete the resources necessary for an effective execution of the 1990 Amendments.⁸¹

E. *Probability for Success*

The numerous statutory and administrative hurdles placed by Congress on the EPA substantially hinder any possibility of reaching long-term success.⁸² The run-away paternalism fostered by successively detailed enactments erodes the EPA's relationships with the states and has exhausted the utility of a top-down, command-and-control regulatory approach. The challenge lies in reviewing established patterns and looking toward restructuring the federal-state relationship.

III. FEDERALISM

Behind the initial justifications for federal intervention into environmental regulation festers a fundamental problem at the core of the CAA and the 1990 Amendments—a loss of perspective on the goals and advantages of federalism. In examining the relationship between the federal and state governments, it is imperative to review not only the values of a decentralized system, but also the more recent attempts to define federalism in the dawning of the twenty-first century.

A. *Values of a Federalist System*

While Congress has enjoyed plenary powers to regulate under the Commerce Clause for much of the past fifty years, there exists a resurgent recognition of federalist values and an acknowledgement of the need to avoid “obliterat[ing] . . . distinction[s] between what is national and what is local and create a completely centralized government.”⁸³ The aim of federalism should focus on capturing the benefits of centralization, without the attendant costs.⁸⁴ Embracing the concept of federalism, legal commentary has centered upon the relative efficiency of state and local governments, and on the protection of

17, 1995) (noting that EPA attempted to respond to 65 requests for 1990 Amendment clarifications submitted by states) [hereinafter *Changes*].

81. See Sussman, *supra* note 65, at 17 (discussing “resource shortfall” at EPA); Howard Latin, *Regulatory Failure, Administrative Incentives, and the New Clean Air Act*, 21 ENVTL. L. 1647, 1693 (1991) (“[T]he SIP revision process constitutes an expensive drain on EPA and state resources that would otherwise be available for implementation of diverse CAA programs.”); *supra* note 4.

82. See BRYNER, *supra* note 10, at 165-66.

83. *United States v. Lopez*, 115 S. Ct. 1624, 1643 (1995) (Thomas, J., concurring) (quoting *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937)).

84. See LeBoeuf, *supra* note 28, at 557.

individual political liberties within our dual system of government.⁸⁵

Federalist values provide a number of advantages to environmental policymaking. First, decentralization provides a citizenry with the ability to participate more directly in the democratic process and to have a greater awareness of the costs and benefits of legislation. It also permits accessibility to, and accountability of, elected officials.⁸⁶ Under the CAA, greater federal authority over air pollution regulation has the potential for less responsiveness to the needs of local and state officials.⁸⁷ "[W]here the Federal Government directs the States to regulate, it may be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision."⁸⁸

Second, diversity among the states allows citizens to "create the type of social and political climate they prefer."⁸⁹ Diversity among subcentralized entities allows for innovation as governments attempt to match publicly supplied goods to the tastes and preferences of their constituencies.⁹⁰ Thus:

Denial of the right to experiment may be fraught with serious consequences to the Nation. It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.⁹¹

85. See, e.g., Lewis B. Kaden, *Politics, Money, and State Sovereignty: The Judicial Role*, 79 COLUM. L. REV. 847 (1979) (discussing importance of state sovereignty in federalist system).

86. See LeBoeuf, *supra* note 28 at 571-72; Kaden, *supra* note 85, at 860-63; Merritt, *supra* note 1, at 3.

87. See F. WILLIAM BROWNELL ET AL., CLEAN AIR HANDBOOK 28 (1993). By delegating power to the EPA, members of Congress benefit by appearing to address environmental problems. Yet, their distance from EPA decisions allows members to downplay their own responsibility for the regulations—"[t]he result is a loss of democratic accountability." Harold Krent & Jim Rossi, *Avoiding a Mistake with Corrections Day*, LEGAL TIMES, Apr. 3, 1995, at 22, 25.

88. *New York v. United States*, 505 U.S. 144, 169 (1992). "The theory that two governments accord more liberty than one requires for its realization two distinct and discernable lines of political accountability: one between the citizens and the Federal Government; the second between the citizens and the States." *Lopez*, 115 S. Ct. at 1638 (Kennedy, J., concurring).

89. Merritt, *supra* note 1, at 8. See LeBoeuf, *supra* note 28, at 558-59 ("A basic shortcoming of a unitary form of government is its probable insensitivity to varying preferences among the residents of the different communities.").

90. *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991) (recognizing that federalism "makes government more responsive by putting the States in competition for a mobile citizenry"). See LeBoeuf, *supra* note 28, at 566-68 (describing interstate competition for residents by offering citizens public goods which match their tastes).

91. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). See John Pendergrass, *Laboratory Reports*, ENVTL. FORUM, May-June 1995, at 8 (noting that, while environmental policy experimentation by 50 states can be inefficient, such experimentation is extremely valuable).

While Congress's delegation of responsibility to the states to meet the NAAQS would appear to allow for flexibility and innovation,⁹² the 1990 Amendments stifle "state laboratories" with excessive details, deadlines, and requirements for stringent oversight by the EPA.⁹³

Finally, in a dual system, the "principal benefit of the federalist system is a check on abuses of government power."⁹⁴ "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"⁹⁵ This "double security" protects an individual's liberty to participate in public life and to influence the political processes by drawing lines of distinction between federal and state government.⁹⁶ The principle of accountability is meaningless without the ability to employ it through active participation in the democratic process.

B. *New Federalism*

Discussions on the merits of a federalist system touch at the heart of a movement pursuing a more "conservative" interpretation of the Constitution under the rubric of "New Federalism." "New Federalism," as defined by President Ronald Reagan, seeks to: (1) permit individuals to perform all of the functions that can be accomplished privately; (2) place control over public functions in the hands of the level of government which is both capable and close to the communities it serves; and (3) reserve federal action for those problems that only

92. 42 U.S.C. § 7407(a) (1988) (granting primary responsibility for air quality attainment to states). See Strohbehn, *supra* note 67, at 10 (noting Congress's recognition of importance of "state laboratories" by allowing enactment by states of stricter standards and encouraging greater state roles).

93. See *supra* notes 67-73 and accompanying text.

94. *Gregory*, 501 U.S. at 458.

95. *Lopez*, 115 S. Ct. at 1638 (Kennedy, J., concurring). The balance of power under the 1990 Amendments is disrupted, however, because the EPA has the authority "to overrule state environmental offices, [which is] a blunt repudiation of federalism." S. REP. NO. 228, 101st Cong., 1st Sess. (1989), reprinted in LEGISLATIVE HISTORY OF THE CLEAN AIR ACT AMENDMENTS OF 1990, at 8815 (1993) (statement of Sen. Syms).

96. Kaden, *supra* note 85, at 860-63. See *Lopez*, 115 S. Ct. at 1638 (Kennedy, J., concurring) (quoting *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 636 (1992)).

If . . . the federal and state governments are to control each other . . . and hold each other in check by competing for the affections of the people . . . those citizens must have some means of knowing which of the two governments to hold accountable for the failure to perform a given function. "Federalism serves to assign political responsibility, not to obscure it."

the national government can assume.⁹⁷ The overriding message is: dial 911 if there is a fire; call the Pentagon if there is a military crisis. To a large degree, the principles of New Federalism mirror the values envisioned by the Founders of our dual system.⁹⁸ As lawyers and politicians "dust off" the Tenth Amendment⁹⁹ and confront the regulatory roles assigned to federal and state governments, the implications for the 1990 Amendments remain unclear.

Under the catch words of "states' rights" and "federalism," however, many are challenging the authorizing assumptions under which the CAA was enacted. Echoing cries for increased governmental accountability, personal responsibility, and individual opportunity, Republican candidates in the 1994 midterm elections sought to achieve a greater balance of power between the federal government and individuals in their self-styled "Contract With America."¹⁰⁰ Federalists, however, were less concerned with substantive changes on the federal level, and more concerned with returning ample power to the states to balance the equation and allow federalist values to flourish.¹⁰¹ Instead, Congress focused on changing the federal government's regulatory role from "Big Daddy to Big Buddy,"¹⁰² while the states assailed the federal government's authority to regulate.¹⁰³

Rather than addressing air pollution problems and the structure of the CAA, critics have sought, at least symbolically, the wholesale dismantling of the

97. Economic Report of the President: Annual Message to the Congress, 18 WEEKLY COMP. PRES. DOC. 162, 164 (Feb. 10, 1982).

98. See *supra* notes 75-88 and accompanying text.

99. U.S. CONST. amend. X. "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." *Id.*

100. NEWT GINGRICH ET AL., CONTRACT WITH AMERICA (1994).

101. See Reuben, *supra* note 6, at 76-77. "Restoring true federalism lies at the heart of the conservative revolution . . . Returning power to the states will allow people to reconnect with their government and to be able to participate in it more directly, which in turn makes government more accountable." *Id.* at 77 (quoting Clint Bolick, civil rights activist with the Institute for Justice). Apparently, this sentiment is shared by the public. A recent survey commissioned by the nonpartisan Council for Excellence in Government found that 64% of respondents favored concentrating power in the state governments, and 62% supported state or local governments running air and water quality programs. *The Dimming American Dream*, ST. LEGISLATURES, July-Aug. 1995, at 7.

102. See Reuben, *supra* note 6, at 77. Congressional attempts to federalize crimes and place limits on tort awards does not evince a clear understanding of federalist principles and specifically intrudes upon traditional areas of state regulation, overruling both the common law and the decisions of state legislatures. Ironically, there is a conspicuous absence of measures dealing with federal subsidies to the grazing, timber, mining and recreation industries. Joan Hamilton, *Getting Polluters Off Welfare*, SIERRA, Mar.-Apr. 1995, at 30-31.

103. See Reuben, *supra* note 6, at 77; see *supra* note 8 and accompanying text.

1990 Amendments.¹⁰⁴ Aside from calls to repeal existing CAA programs, discussion regarding the roles accorded the federal and state governments in environmental policymaking has been non-existent.¹⁰⁵ This is unfortunate as the real focus should be on the federal-state partnership in a modern society.

IV. ENTER THE DRAGON: STATE CONSTITUTIONAL ATTACKS ON THE 1990 AMENDMENTS

A. *States Attack Sanctions Provisions of 1990 Amendments*

Challenging the constitutionality of the sanctions provisions in the 1990 Amendments, Missouri and Virginia have filed suit in federal court.¹⁰⁶ Primarily at issue are two sanctions provisions: a cut-off of federal highway funds and a 2:1 minimum emissions offset for new and modified sources seeking permits.

104. See *House Majority Whip Introduces Legislation To Repeal Several Portions of Clean Air Act*, 25 Env't Rep. (BNA) No. 37, at 1787 (Jan. 20, 1995) (noting comment by aide to Rep. Thomas A. DeLay that "[he] is making a statement with that bill" to repeal 1990 Amendments and believes that 1990 Amendments micro-manage pollution control efforts better handled by states). Among the bills introduced were: H.R. 473 (repealing provisions dealing with toxic air emissions); H.R. 474 (repealing Title IV which deals with acid rain controls); H.R. 475 (repealing Title VI provisions which reduce stratospheric ozone depleters); H.R. 476 (preventing motor vehicle emissions standards from taking effect under Title II); H.R. 477 (allowing credits from emissions reduction stemming from fleet turnovers to be applied toward emissions reduction requirements in Title II); H.R. 478 (prohibiting requirement of SIPs to include vehicle trip-reduction plans); H.R. 479 (repealing 1990 Amendments). *Id.* Moreover, in response to criticism from state officials, Senator Christopher Bond (R-Mo) introduced a less restrictive version of H.R. 1158, allowing states flexibility in choosing alternatives to the "enhanced" I&M program. See *Senate Rescissions Bill Would Allow States To Choose Vehicle Emissions Program with IM 240*, 25 Env't Rep. (BNA) No. 48, at 2424, 2425 (Apr. 7, 1995); *Tensions Flare Between House Committees over Addressing Problems in Clean Air Act*, Daily Env't Rep. (BNA) (Mar. 29, 1995), available in LEXIS, Nexis Library (discussing efforts at reconciling problems with 1990 Amendments).

105. In a truly bipartisan fashion, there appears to be no discussion of the future of environmental protection. The new popular mood has a decidedly anti-environmentalist perspective. While the public may not have forsaken environmentalist values, it "would be equally mistaken to assume that the prevailing hostility to environmental regulation will disappear without fundamental changes in the current framework for environmental protection." Sussman, *supra* note 65, at 14. Still, only 18% of polled voters desire weakened environmental protection laws. Eric Alterman, *Choose Your Poison*, ROLLING STONE, Apr. 20, 1995, at 41. Voters in Virginia, for example, overwhelmingly favor lessened government regulation, yet 61% reject less regulation of air pollution. DICK MORRIS, REPORT ON SURVEY OF OPINIONS ON ENVIRONMENTAL ISSUES IN VIRGINIA I (Va. Env'tl. Endowment June 1995).

106. *Missouri v. United States*, No. 4:94-CV-1288 ELF (E.D. Mo. filed July 1, 1994); *Virginia v. United States*, No. 3:95-CV-21 (E.D. Va. June 12, 1995) (dismissed for lack of subject matter jurisdiction); *Virginia v. Browner*, No. 95-1052 (4th Cir. filed Jan. 9, 1995).

1. *Missouri*

In January of 1993, the EPA notified the State of Missouri that it had failed "to make a submittal as to three nonattainment plan elements required for the St. Louis ozone nonattainment area."¹⁰⁷ The EPA found that the SIP lacked necessary revisions to its proposed I&M program, failed to adequately plan for a required fifteen percent reduction in volatile organic compounds ("VOCs"), and did not submit a SIP revision applying reasonably available control technology to all major sources of nitrogen oxides.¹⁰⁸

In response to the EPA's threat of sanctions, the Missouri legislature enacted Senate Bill 590, "authorizing the Missouri Department of Natural Resources to establish an 'enhanced' [I&M] program which would meet CAA requirements for 'moderate areas.'"¹⁰⁹ Missouri alleged that implementation will be both costly and politically controversial.¹¹⁰ Moreover, it claimed the offset sanction would have a "disastrous" impact on the St. Louis economy,¹¹¹ and the cut-off of highway funds would have a "substantial[ly] adverse affect on the economies . . . of St. Louis . . . and the State of Missouri as a whole."¹¹²

2. *Virginia*

Virginia vociferously attacked the sanctions provisions of the 1990 Amendments, filing suit in both the federal district court¹¹³ and the federal court of appeals¹¹⁴ following final disapproval by the EPA of Virginia's SIP.¹¹⁵ Disapproval stemmed from two major disputes with the EPA regarding Virginia's compliance with the CAA. First, Title V, enacted by the 1990 Amendments, requires implementation of a source permitting program, distinguished from the SIP, which is to be developed and enforced by the states.¹¹⁶ The EPA found Virginia's operating permit program unacceptable, partly on the basis of the limited scope of Virginia's judicial review statute regarding appeals from state

107. Complaint at 10-11, *Missouri*, No. 4:94-CV-1288 ELF (noting also that EPA is required to apply sanction provision per 42 U.S.C. § 7509).

108. *Id.* at 11-12.

109. Plaintiff's Trial Brief at 6, *Missouri*, No. 4:94-CV-1288 ELF.

110. *Id.* at 8-13.

111. *Id.* at 9-10 (alleging extreme losses in population, personal income, economic development, employment, clean air and political accountability).

112. *Id.* at 12.

113. *Virginia*, No. 3:95-CV-21.

114. *Virginia v. Browner*, No. 95-1052 (4th Cir. filed Jan. 9, 1995).

115. Clean Air Act: Commonwealth of Virginia, 59 Fed. Reg. 62,324 (1994).

116. 42 U.S.C. §§ 7661-7661f (Supp. 1992); 40 C.F.R. Pt. 70 (1994) (detailing extensive requirements for Title V operating permit program).

permit decisions in state court.¹¹⁷ While the EPA has interpreted the 1990 Amendments to require broad access to a state's courts, Virginia law permits participants in the public comment process to appeal a decision of the Virginia Air Pollution Control Board *only* if the individual can establish that:

(i) such person has suffered an actual, threatened or imminent injury; (ii) such injury is an invasion of an immediate, legally protected, *pecuniary and substantial interest which is concrete and particularized*; (iii) such injury is fairly traceable to the decision of the Board and not the result of the action of some third party not before the court; and (iv) such injury will likely be redressed by a favorable decision by the court.¹¹⁸

Under EPA's interpretation of the Title V operating permit program, Virginia must allow "any person who participated in the public comment process" access to judicial review in a state appeals court.¹¹⁹

Second, the EPA found that Virginia submitted neither an acceptable I&M program under the 1990 Amendments¹²⁰ nor an adequate plan for reducing VOCs by the mandated fifteen percent.¹²¹ As with Missouri, the EPA *must* impose the 2:1 offset and cut off highway funds in the near future, and the EPA *may* do so at any time.¹²² Thus, Virginia faced the "Hobson's choice of either enacting a multi-million dollar federally conscripted regulatory program or suffering draconian sanctions."¹²³ Specifically, Virginia asserted a loss of federal accountability—Congress, through the CAA, mandates that elected state officials enact laws and issue regulations which may not be in accordance with the views of the citizenry.¹²⁴

117. *Virginia*, No. 3:95-CV-21, at 1-2. The applicable federal statute mandates:

Adequate, streamlined, and reasonable procedures for expeditiously determining when applications are complete, for processing such applications, for public notice, including offering an opportunity for public comment and a hearing, and for expeditious review of permit actions, including applications, renewals, or revisions, and *including an opportunity for judicial review in State court of the final permit action by the applicant, any person who participated in the public comment process, and any other person who could obtain judicial review of that action under applicable law.*

42 U.S.C. § 7661a(b)(6) (emphasis added).

118. VA. CODE ANN. § 10.1-1318(B) (Michie 1993) (emphasis added).

119. 42 U.S.C. § 7661a(b)(6).

120. *Virginia*, No. 3:95-CV-21, at 2; *see supra* notes 55-58 and accompanying text.

121. *Virginia*, 3:95-CV-21 at 2-3.

122. *See* 42 U.S.C. § 7509 (Supp. 1992).

123. Plaintiff's Trial Brief at 2-3, *Virginia* (No. 3:95-CV-21).

124. *Id.* at 27.

The citizens of Virginia expect their state and local officials to be accountable for the regulatory programs administered by state agencies. Under the CAA, however, these officials had no meaningful say in whether the Commonwealth should have such programs. These officials—not Congress—bear the full brunt of public disapproval. Accordingly, there is a fundamental lack of federal accountability for Congress' action.¹²⁵

B. *Sanctions Provisions*

The 1990 Amendments created two sanctions provisions designed to "encourage" state participation in CAA programs: emissions offsets and a cut-off of highway funds.¹²⁶ Premised on reducing the overall pollution pie,¹²⁷ the 2:1 offsets sanction requires major sources seeking to construct or modify industrial operations in nonattainment zones to identify two tons of VOC reductions for every one ton of increased VOC emissions attributable to their project.¹²⁸ The highway sanction empowers EPA to prohibit the Secretary of Transportation from approving or funding state highway projects.¹²⁹

Failure to comply with the requirements for submitting and implementing SIPs leads to mandatory sanctioning and also permits discretionary imposition of sanctions at any time.¹³⁰ Pursuant to the mandatory sanctions provision, a "sanctions clock" begins to run every time the EPA makes a SIP "finding of deficiency" concerning: (1) a state's failure to submit a SIP, or SIP revision, for a nonattainment area; (2) EPA disapproval of the SIP; (3) the completeness of a SIP; or (4) a lack of implementation by a state of a portion of the approved plan.¹³¹ After eighteen months, the EPA "shall apply" either the highway funds cut-off sanction or the 2:1 emissions offset requirement for new or modified major sources.¹³² If a state has not corrected the deficiency within six months of

125. *Id.*

126. *See* 42 U.S.C. § 7509. The EPA Administrator may also withhold financial support for air pollution planning and control programs provided under 42 U.S.C. § 7405. 42 U.S.C. § 7509(a).

127. *See* RODGERS, *supra* note 51, at 218.

128. 42 U.S.C. § 7511(b)(5).

129. *Id.* § 7509(b). Exceptions are permitted for safety improvements, public transit lines, high-occupancy-vehicle lane construction, and other projects related to improving air quality. *Id.* § 7509(b)(1)(B)(i)-(viii).

130. *Id.* §§ 7509, 7661a(d)(2)(A) (Supp. 1992).

131. *Id.* § 7509(a).

132. *Id.* The EPA has adopted a rule that permits it to impose the 2:1 emissions offset automatically at 18 months, and the highway funds cut-off provision at 24 months. 59 Fed. Reg. 39,832 (1994) (to be codified at 40 C.F.R. § 52.31 (a)-(e)).

the first sanction, the EPA must issue the second sanction.¹³³

Moreover, discretionary application of the sanctions by the EPA is permitted "at any time" following a finding of deficiency.¹³⁴ At the end of two years, the EPA is required to implement a FIP in any state that has not corrected all alleged deficiencies within that time.¹³⁵ Even after the EPA implements a FIP, the sanctions remain in place until a state adopts and fully complies with SIP requirements.

The sanctions provisions similarly impact a state's failure to submit, or EPA disapproval of, all or a part of a Title V permitting program.¹³⁶ While the permitting program uses the same SIP "sanctions clock," EPA must implement a federal Title V program in non-complying states by November 15, 1995.¹³⁷ The sanctions will likewise not be lifted until the state fully conforms with operating permit program requirements.

C. *Constitutionality Under the Spending Clause*

As discussed above, the 1990 Amendments link the receipt of federal highway money to the adequacy of a state's SIP and operating permit program.¹³⁸ Despite United States Supreme Court jurisprudence permitting Congress to attach conditions to the receipt of federal money to encourage policy objectives,¹³⁹ the 1990 Amendment highway funds cut-off provision is extreme. Specifically, the condition imposed—state adoption of federal air quality programs—is not rationally related to federal highway funding. Furthermore, the imposed condition constitutes impermissible congressional coercion.

133. 42 U.S.C. § 7509(a). *But see* RODGERS, *supra* note 51, at 229:

Neither of these sanctions will keep recalcitrant state officials awake at night. The threatened cutoff of federal-aid highway funding has roots in federal environmental law going back to the Highway Beautification Act of 1965, and serves chiefly a posturing function. And it is difficult to imagine the effects on official behavior of incremental adjustments in an offset formula that itself is the product of gross guesswork and unlikely enforcement.

134. 42 U.S.C. §§ 7410(m), 7509(a).

135. *Id.* § 7410(c)(1).

136. *Id.* § 7661a(d)(2)(A).

137. *Id.* § 7661a(d)(3).

138. *Id.* §§ 7509(b)(1), 7661a(d)(1).

139. U.S. CONST. art 1, § 8, cl. 1 ("The Congress shall have Power to . . . provide for the . . . general Welfare of the United States . . ."). *South Dakota v. Dole*, 483 U.S. 203, 206 (1987); *Fullilove v. Klutznick*, 448 U.S. 448, 474 (1980).

1. *Linking Highway Funding to Air Pollution*

As expressed in *South Dakota v. Dole*,¹⁴⁰ Congress's spending power will be upheld if the imposed condition: (1) is for the general welfare, (2) bears a reasonable relationship to the expenditure's purpose, (3) is unambiguously stated, and (4) does not violate any independent constitutional prohibitions.¹⁴¹ The highway funds cut-off provision would appear to meet the stated requirements except that the cut-off of highway funding may not bear a relationship to the purpose of the federal spending. Thus, in analyzing the highway funds sanction under the Spending Clause, the main questions are whether the condition—states' adoption of federal air quality programs—is rationally related to the objective—improvement and construction of highways—and what is the necessary nexus between the condition and the objective.

It has long been accepted that "the Federal Government may establish and impose *reasonable conditions relevant to federal interest in the project*."¹⁴² However, the sanction provision lacks the necessary rationale to support its constitutionality. The objective of highway funding is to provide for the construction and maintenance of highways—specifically highways involved in interstate commerce. This is not advanced or related in any way to the development of air quality programs. Congress observed the connection between air pollution and the increasing use of motor vehicles¹⁴³ and stated that one of the purposes of the Intermodal Surface Transportation Efficiency Act of 1991 was "to develop a National Intermodal Transportation System that . . . is environmentally sound."¹⁴⁴ Yet, while Congress evinces a desire for "environmentally sound" highway projects, "federal highway funds are appropriated to facilitate safe and efficient automotive transportation, not to achieve environmental goals."¹⁴⁵ Moreover, the Supreme Court has not discounted demanding a more "direct

140. 483 U.S. 203 (1987).

141. *Id.* at 207-08.

142. *Ivanhoe Irrigation Dist. v. McCracken*, 357 U.S. 275, 295 (1958) (emphasis added).

143. 42 U.S.C. § 7401(a)(2). See also *id.* § 7506(c) (requiring all federally supported transportation projects to be part of transportation plan and transportation improvement program in conformity with state's SIP).

144. Pub. L. No. 102-240, 105 Stat. 1914 (1991).

145. See Stephen F. Smith, *States Defend Constitutional Rights Against EPA*, WASH. LEGAL FOUNDATION, Feb. 17, 1995, available in LEXIS, Nexis Library (citing *Dole*, 483 U.S. at 208). While environmental goals may be clearly reflected in Title 23 (highways) and Title 42 (CAA), their interconnectedness does not necessarily connote a rational basis upon which to conclude that the conditioning of funds is constitutional. If the rationale behind the highway funds cut-off is premised upon reducing air pollution emissions from vehicles, there will no doubt be more emissions as cars spend longer periods in operation due to increased traffic. More likely, the real justification for the sanction is the availability of a powerful, coercive tool with which Congress can guarantee that the EPA will not need to implement a FIP or operating permit program. It is not surprising that the EPA announced that it would not oppose the repeal of a provision requiring it to implement a FIP in nonattainment regions of California. *EPA Administrator, supra* note 7.

relationship” between the condition and the expenditure:¹⁴⁶

If the spending power is to be limited only by Congress’ notion of the general welfare, the reality, given the vast resources of the Federal Government, is that the Spending Clause gives “power to the Congress to tear down the barriers, to invade the states’ jurisdiction, and to become a parliament of the whole people, subject to no restrictions save such as are self-imposed.”¹⁴⁷

Accepting the notion that “Congress knows best,” for instance, would permit conditioning federal Medicare and Medicaid payments to a state’s adoption of CAA programs. After all, automobiles increase the amount of VOCs in the air, and air pollution directly impacts the population’s health.¹⁴⁸ Therefore, there is “some relationship” between federal health care payments and air pollution.¹⁴⁹ The extensions of this argument are numerous; the flaw in logic is obvious.¹⁵⁰

While courts in the past may have been reluctant to tread upon the legislative branches’ power to regulate, it remains the job of the courts to say “what the law is.”¹⁵¹ In *New York v. United States*, the Supreme Court confronted Congress’s ability to regulate the disposal of low-level radioactive waste. While disallowing outright “commandeer[ing] [of] the legislative processes,”¹⁵² the Court found that “[t]he conditions imposed [were] reasonably related to the purpose of the expenditure; both the condition and the payment embod[ied] Congress’ effort to address the pressing problem of radioactive waste disposal.”¹⁵³ Congress addressed air pollution under the CAA; however, they did so impermissibly, as the strings attached to the funds have been pulled taut and will snap under a rational basis analysis.

146. *See Dole*, 483 U.S. at 203, 208-09 n.3.

147. *Id.* at 217 (O’Connor, J., dissenting) (quoting *United States v. Butler*, 297 U.S. 1, 78 (1936)).

148. *See supra* note 3.

149. Regardless of whether there is “some relationship,” the goal of legislation should be to accommodate the stated objective and insure that the advantages of federalism are secured. Obfuscation of the true owner of a particular statute sullies accountability and, in turn, political liberty. “Where a federal interest is sufficiently strong to cause Congress to legislate, it must do so directly; it may not conscript state governments as its agents.” *New York v. United States*, 505 U.S. 144, 178 (1992).

150. *Cf. Lopez*, 115 S. Ct. at 1631-34 (1995) (criticizing and invalidating limitless extension of the Commerce Clause power to regulate possession of firearms near schools).

151. *Marbury v. Madison*, 5 U.S. 137, 177 (1803). *See infra* note 196 and accompanying text.

152. *New York*, 505 U.S. at 176 (quoting *Hodel*, 452 U.S. at 288).

153. *Id.* at 153 (citation omitted).

2. Congressional Coercion

Intimately connected to both the highway funds cut-off provision and Tenth Amendment analysis is Congress's coercion of state governments into regulating for the federal government under the CAA. The Supreme Court has "recognized that in some circumstances the financial inducement offered by Congress might be so coercive as to pass the point at which 'pressure turns into compulsion.'"¹⁵⁴ Unfortunately, the Court in *Dole* did not provide a standard with which to test the coercion theory and further declared that one cannot equate mere temptation with coercion.¹⁵⁵ The Court did suggest, however, that a conditional grant must "remain[] the prerogative of the States not merely in theory but in fact."¹⁵⁶ Theoreticians may well point to Virginia's *ability* to retain federal highway funds by: (1) enacting liberal standing laws; (2) developing an EPA approved SIP and permit procedures, and (3) regulating air quality to the satisfaction of the EPA officials. The alternative is federal operation of the permitting program, federal issuance of a FIP, and a possible end to federal highway funding with the attendant economic sacrifices that this would entail. Thus, theoretically, Virginia possesses a "choice;" however, factually and realistically, Virginia has but one option and that is to submit to federal mandates.

Regrettably, the Court in *New York* provides little guidance as to how to resolve questions involving choice. In discussing the conditional granting of funds to states, the Court implied that the constitutional distinction lies in the citizenry's retention of "the ultimate decision as to whether or not the State will comply."¹⁵⁷ As noted, the 1990 Amendments do allow states to decide whether or not to accept highway money; however, it is a catch-22 situation. States may either regulate and reap political hell or choose not to regulate, lose the highway money, and reap political hell.

While the Court in *New York* acknowledged that conditional funding is not guaranteed to be constitutionally fit,¹⁵⁸ the court's distinction appears to lie in semantics. The Court required direct compulsion of states by the federal government to implicate constitutional concerns over accountability.¹⁵⁹ When a state is compelled to act, "[a]ccountability is thus diminished when, due to federal coercion, elected state officials cannot regulate in accordance with the views of

154. *Dole*, 483 U.S. at 211 (quoting *Steward Machine Co. v. Davis*, 301 U.S. 548, 590 (1937)).

155. *Id.* (quoting *Davis*, 301 U.S. at 590). "[T]o hold that motive or temptation is equivalent to coercion is to plunge the law in endless difficulties. The outcome of such a doctrine is the acceptance of a philosophical determinism by which choice becomes impossible." *Id.*

156. *Id.* at 211-12.

157. *New York*, 505 U.S. at 168.

158. *Id.* at 167 (citing *Dole*, 483 U.S. at 207-08) (requiring conditions to bear some relationship to purpose of federal expenditure).

159. *See id.* at 168-69.

the local electorate in matters not pre-empted by federal regulation.”¹⁶⁰ According to the decision in *New York*, constitutional concerns over accountability are not necessarily triggered by an actual loss of accountability. Rather, the focus is on whether the state had a choice in accepting the conditioned grant. The analysis ignores factual losses of accountability in the absence of express federal mandates. In *New York*, the Court avoided directly applying federalist principles in order to circumvent difficult questions regarding the scope of Congress’s powers.

Similarly in *Dole*, the temptation/coercion debate expresses judicial reticence to engage in second-guessing the legislative branch; yet it is the job of the courts in a federal system to say “what the law is.”¹⁶¹ The author of the *New York* opinion, Justice O’Connor, dissented in *Dole* and called for limitations on Congress’s use of the spending power.¹⁶² Narrowly construing “coercion” as a feature present only in direct congressional mandates fails to do justice to federalism, given the realities of an unrestrained federal legislature’s ability to obfuscate the lines of accountability.

Despite broad federalist implications, courts have been unwilling to utilize a coercion theory due to the difficulties of its application. In *Nevada v. Skinner*,¹⁶³ the United States Court of Appeals for the Ninth Circuit noted that the coercion argument had been mentioned in both *Dole* and *Steward Machine Co. v. Davis*, however, the theory “has been much discussed but infrequently applied in federal case law, and never in favor of the challenging party.”¹⁶⁴ While a broader examination of the ability of courts to reach workable decisions regarding Congress’s coercive use of the spending power is beyond the scope of this paper, courts routinely make life-death decisions, examine dormant Commerce Clause limitations, and assess the validity of myriad economic, political, social and scientific evidence. Thus, while Missouri and Virginia may be on shifting ground in asserting a coercion theory, they are not without constitutional foundation.

D. *Constitutionality Under the Tenth Amendment*

Virginia and Missouri both challenge the sanctions provisions of the CAA, alleging that they unconstitutionally coerce the states into regulating for the federal government. Both the mandatory offsets and the revocation of highway funding present fundamental concerns under the Tenth Amendment, which reserves powers not delegated to the federal government or the people, to the

160. *Id.* at 169.

161. *Marbury*, 5 U.S. at 177.

162. *Dole*, 483 U.S. at 217.

163. 884 F.2d 445 (9th Cir. 1989).

164. *Id.* at 448 (addressing challenge to federal requirement that state post 55 mile-per-hour speed limit on all affected highways).

states.¹⁶⁵ Virginia and Missouri's Tenth Amendment claims flow from Congress's use of the Commerce Clause. The Commerce Clause grants Congress the power "to regulate Commerce . . . among the several States."¹⁶⁶ Recent Supreme Court jurisprudence suggests that Congress's use of the Commerce Clause has limits and such limits restrict Congress's ability to compel or coerce states into performing regulatory actions in the name of the federal interest. Underlying the federalist resurgence in Court doctrine, however, is the explicit need for a choice, and that such a choice, even in theory, may uphold the constitutionality of mandates vis-a-vis the states and Congress.

1. *Developing Federalist Jurisprudence*

The CAA has moved from a regulatory system embodying relative cooperative federalism to one of command-and-control. The precipitous increase in regulations to be administered by the states has accompanied the federal courts' acquiescence to Congress's use of the commerce power. Since the Court's decision in *National Labor Relations Board v. Jones & Laughlin Steel Corp.*,¹⁶⁷ the Commerce Clause has been interpreted as an overarching grant of power to Congress to regulate under the aegis of interstate commerce.

In upholding the National Labor Relations Act, the Court in *Jones & Laughlin* "restricted" Congress's application of the Commerce Clause to those activities that "have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect commerce from burdens and obstructions."¹⁶⁸ By abandoning earlier distinctions based upon the direct and indirect effects of particular activities on commerce, the Court:

ushered in an era of Commerce Clause jurisprudence that greatly expanded the previously defined authority of Congress under that Clause. In part, this was a recognition of the great changes that had occurred in the way business was carried on in this country.

165. U.S. CONST. amend. X. "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." *Id.* Exactly what powers, if any, are reserved to the states is wide open to debate. See *United States v. Darby*, 312 U.S. 100, 124 (1941):

The amendment states but a truism that all is retained which has not been surrendered. There is nothing in the history of its adoption to suggest that it was more than declaratory of the relationship between the national and state governments as it had been established by the Constitution before the amendment or that its purpose was other than to allay fears that the new national government might seek to exercise powers not granted, and that the states might not be able to exercise fully their reserved powers.

166. U.S. CONST. art. 1, § 8, cl. 3.

167. 301 U.S. 1 (1937).

168. *Id.* at 37.

Enterprises that had once been local or at most regional in nature had become national in scope. But the doctrinal change also reflected a view that earlier Commerce Clause cases artificially had constrained the authority of Congress to regulate interstate commerce.¹⁶⁹

2. Limitations on Infringements of State Sovereignty

Despite “recogni[tion] that there are attributes of sovereignty attach[ed] to every state government which may not be impaired by Congress,”¹⁷⁰ the Supreme Court, in *Garcia v. San Antonio Metropolitan Transit Authority*,¹⁷¹ replaced the unworkable traditional functions test with an examination of the “political process” behind the enactment of a challenged statute. The Court concluded that “laws that unduly burden the States will not be promulgated.”¹⁷² Under prevailing Supreme Court decisions, a state must show that a statute was borne of a seriously flawed political process to successfully claim a violation of the Tenth Amendment.¹⁷³ The requisite burden of proof placed on the states led to comments that judicial review simply does not apply to questions of federalism when Congress acts under the Commerce Clause.¹⁷⁴ The five-four decision in *Garcia* has been modified, however, in subsequent decisions by the Supreme

169. *Lopez*, 115 S. Ct. at 1628.

170. *National League of Cities v. Usery*, 426 U.S. 833, 845 (1976).

171. 469 U.S. 528 (1985).

172. *Id.* at 556. The Court in *Garcia* stated the political process argument: [W]e are convinced that the fundamental limitation that the constitutional scheme imposes on the Commerce Clause to protect the “States as States” is one of process rather than one of result. Any substantive restraint on the exercise of Commerce Clause powers must find its justification in the procedural nature of this basic limitation, and it must be tailored to compensate for possible failings in the national political process rather than to dictate a “sacred province of state autonomy.”

Id. at 554 (quoting *EEOC v. Wyoming*, 460 U.S. 226, 236 (1983)) (citation omitted). *But see* Kaden, *supra* note 85 (arguing that national political process is unable to protect rights of states); TIMOTHY CONLAN, *NEW FEDERALISM: INTERGOVERNMENTAL REFORM FROM NIXON TO REAGAN* 231-33 (1988) (quoting commentator Martha Derrick: “One wonders why, if the states’ interests are so well protected by the political branches, the issue reached the Supreme Court at all.”).

173. *South Carolina v. Baker*, 485 U.S. 505, 512-13 (1988). In *Baker*, the Court articulated that, under *Garcia*, constitutional protection through the Tenth Amendment requires a showing of a substantially flawed political process. *Id.*

174. William W. Van Alstyne, *The Second Death of Federalism*, 83 MICH. L. REV. 1709, 1721 (1985). “Since 1803 the court has claimed the authority . . . to invalidate actions of the federal government if they conflict with the constitution. *The [Garcia] decision seems to suggest that the principle of judicial review does not apply to questions of federalism when congress acts under the commerce clause.*” *Id.* (citation omitted) (emphasis in original).

Court.

In *New York*, the Court reexamined state sovereignty issues in its review of the Low-Level Radioactive Waste Policy Act.¹⁷⁵ While upholding several portions of the Act,¹⁷⁶ the Court found that the "take-title" provision was an unconstitutional infringement of a state's sovereignty.¹⁷⁷ The provision mandated that a state must either regulate per Congress's direction or take title to low-level radioactive waste.¹⁷⁸ Because the choice was between two unconstitutional choices, the Court found that there was no choice, in theory or in fact.¹⁷⁹ Under *New York*, Congress may neither compel states to enforce a federal regulatory system nor encourage states to enforce such a system if the alternative to enforcement is unconstitutional.¹⁸⁰ Consistent with this holding, Congress may, for example, direct the states to regulate air pollution or subject the states' residents to federal regulation.¹⁸¹

As discussed earlier, the Supreme Court does recognize certain limitations on Congress's power to condition funds, including requiring that all conditions be rationally related to the federal expenditure.¹⁸² While the economic aspects are dire for refusing to accept a CAA program,¹⁸³ "this kind of effect, standing alone, is insufficient to establish a violation of the Tenth Amendment."¹⁸⁴ Moreover, a "choice" does exist: develop a state program consistent with federal mandates or capitulate and have the federal government regulate per federal mandates. As the choice over regulation rests with the citizenry, accountability will be assured

175. Pub. L. 99-240, 99 Stat. 1842. See *New York*, 505 U.S. at 151-54 (discussing provisions of Radioactive Waste Disposal Act).

176. See *New York*, 505 U.S. at 171-74.

177. *Id.* at 174-77.

178. See *id.* at 175.

179. *Id.* at 175-77. The Court points out that, unlike the other provisions, the take title provision forces a state to either regulate according to federal instruction or "submit to another federal instruction." *Id.* at 176. While such coercion is impermissible, Congress may: (1) attach conditions to the receipt of federal funds, and (2) offer states the opportunity to regulate private activity according to federal standards or have the federal government pre-empt state law. *Id.* at 166-67 (quoting *Dole*, 483 U.S. at 206).

180. See William A. Hazeltine, *New York v. United States: A New Restriction on Congressional Power Vis-A-Vis the States?*, 55 OHIO ST. L.J. 237, 253 (1994).

181. See *New York*, 505 U.S. at 174. "The affected States are not compelled by Congress to regulate, because any burden caused by a State's refusal to regulate will fall on those who generate [air pollution] and find no outlet for its disposal, rather than on the State as a sovereign." *Id.*

182. See *supra* notes 128-42 and accompanying text.

183. See *supra* notes 101-102, 111 (discussing economic ramifications that imposition of sanctions would have upon Virginia and Missouri).

184. *Hodel*, 452 U.S. at 292 n.33 (discussing lack of effect that a potential economic impact has upon a court's legal analysis of exercise of commerce power).

under the formula dictated by *New York*.¹⁸⁵

Alas, we are faced with true form over substance: no state legislator would deliberately forego highway funding, yet refusal to enact federal standards would lead to such a result. While the Court abandoned categorizing direct versus indirect effects in examining Commerce Clause challenges over half a century ago,¹⁸⁶ one must now determine whether congressional action is “good coercion” or “bad coercion”—good coercion being when Congress gives a state a choice between two evils and bad coercion when Congress gives you a choice between two unconstitutional evils.¹⁸⁷

While the highway funding sanction faces a stiff constitutional battle, the offset provision arguably violates the Tenth Amendment. Similar to the unconstitutional options presented in *New York*,¹⁸⁸ a state must regulate according to federal standards under the CAA; if a state does not regulate according to the CAA and, in the case of Virginia, open up its state courts, the state “takes title” per federal order to a regional economic ban with all of the attendant consequences, including losses in state tax revenues and economic development, population emigration, and an increased need for state social welfare programs.¹⁸⁹ Moreover, the offset order is permanent, as with the cut-off of highway funds, until the state “assents” to operating a CAA program for the federal government.¹⁹⁰ Once again there is the issue of “choice;” however, with the offset provision it appears that the coercive choice is between two unconstitutional evils. Congress has directed the states either to implement a federal program or to discontinue economic development. “Accountability is thus diminished when, due to federal coercion, elected state officials cannot regulate in accordance with the views of the local electorate in matters not preempted by federal regulation.”¹⁹¹

185. *New York*, 505 U.S. at 168-69. Unfortunately, such an arbitrary determination for achieving accountability fails to account for the pressures faced by state officials and the citizenry’s inability to determine the source of the actions. While the highway sanction may not be technically “coercive,” an assumption could be made that few, if any, would choose to forego state regulation in favor of federal regulation, given the massive differential between costs and benefits.

186. *See supra* note 158 and accompanying text.

187. The distinction is based upon the Court’s technical reading of coercion and compulsion. *See New York*, 505 U.S. at 166-69. The implication is that Congress need only provide some mechanism whereby the federal government allows a choice which could substantially impact the citizenry but not directly impact the state. Yet, as with the highway cut-off funds, some decisions are so untenable as to lack real choice, leaving accountability obscured as state legislators “do the right thing.”

188. *Id.* at 174-77.

189. *See Smith, supra* note 145 (discussing unconstitutionality of “economic ban”); *supra* notes 101-03, 110 (discussing economic and political consequences to Virginia and Missouri).

190. *See supra* notes 123-25 and accompanying text.

191. *New York*, 505 U.S. at 169 (citations omitted).

The accountability of elected officials was also at stake in *United States v. Lopez*.¹⁹² The Court in *Lopez* declared unconstitutional Congress's use of the commerce power to criminalize firearms in a school zone.¹⁹³ While the case did not directly raise Tenth Amendment arguments, the decision is relevant to an analysis of the constitutionality of the CAA because it: (1) acknowledged that Congress is limited in its use of the commerce power, (2) continued a judicial trend that narrows the holding in *Garcia*, and (3) explicitly recognized the advantages of a balanced federal system.¹⁹⁴

In *Lopez*, the government argued that the Gun-Free School Zone Act of 1990 was constitutionally fit under the Commerce Clause because possession of a firearm in a school zone may lead to violence; violence, in turn, may create interstate costs, reduce citizens' willingness to travel, and hamper the educational process, leading inevitably to a less productive nation.¹⁹⁵ Refusing to uphold such a broad interpretation of Congress's power under the Commerce Clause, the Court stated:

[W]e would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States. Admittedly, some of our prior cases have taken long steps down that road, giving great deference to congressional action. The broad language in these opinions has suggested the possibility of additional expansion, *but we here decline to proceed any further*. . . . This we are unwilling to do.¹⁹⁶

The Court concluded that to proceed further would ignore the Constitution's specification of enumerated powers which distinguishes between "what is truly national and what is truly local."¹⁹⁷

Similarly, Congress blurred the distinctions between "what is national and what is local" under the CAA. While air pollution undoubtedly has national impact, the imposition of draconian sanctions coerces states into acting as federal surrogates. This results in inefficiency and dispels the inherent advantages of a

192. 115 S. Ct. 1624 (1995).

193. *Id.* at 1630-31.

194. *Id.* at 1630-34.

195. *Id.* at 1632. The Gun-Free School Zone Act of 1990 is codified at 18 U.S.C. § 922(q) (Supp. V 1993).

196. *Lopez*, 115 S. Ct. at 1634 (citations omitted) (emphasis added).

197. *Id.* The Court specifically noted that the Commerce Clause must be understood in the context of a "dual system" of government. *Id.* at 1626.

federal system which embraces diversity, accountability and political freedom.¹⁹⁸ In many ways, interstate air pollution highlights the changing nature of federalism and its ability to encompass federal efforts to protect natural resources and public health. It does not necessarily follow, however, that Congress may unilaterally disparage state sovereignty and the Tenth Amendment through top-down fixes—it is a question of the manner and the method by which Congress acts.

One apparent solution to constitutional usurpation rests in the judiciary's "duty to insure that the federal-state balance is not destroyed."¹⁹⁹ Supporters of the legislative branch may point to potential congressional abdication of problems which are properly addressed by the federal government due to "legal uncertainty" as to the ability of Congress to regulate a specific activity. Yet, "[a]ny possible benefit [from providing greater legal certainty] . . . would be at the expense of the Constitution's system of enumerated powers."²⁰⁰

In so holding, the Court in *Lopez* further tightened the noose around Congress's apparent unbridled political power in the wake of *Garcia*. Arguments that the political process assures a proper federal balance ignore the fact that "the federal balance is too essential a part of our constitutional structure and plays too vital a role in securing freedom for us to admit inability to intervene when one or the other level of Government has tipped the scales too far."²⁰¹

E. Outcome

Perhaps as Justice Thomas wrote, it is time to "refashion[] a coherent test that does not tend to 'obliterate the distinction between what is national and what is local and create a completely centralized government.'"²⁰² The sanctions provisions in the 1990 Amendments tend to blur the lines of accountability and, by doing so, disrupt the tenuous federal-state balance. The Tenth Amendment and Spending Clause provide ample authority upon which states should be granted relief from the coercive mandates in the 1990 Amendments. Moreover, Virginia and Missouri suits are likely to be joined by other states as the voluminous detail

198. See *supra* notes 74-87 and accompanying text; *Lopez*, 115 S. Ct. at 1638-39 (Kennedy, J., concurring) (discussing merits of federalism and necessity of preserving dual system).

199. *Lopez*, 115 S. Ct. at 1640 (Kennedy, J., concurring).

200. *Id.* at 1633. Unlike the narrow differentiation of coercion that the Court pursued in *New York*, the Court in *Lopez* appears less concerned with creating an easy bright-line standard, and more concerned with interpreting the Constitution as a federalist document, not necessarily given to easy answers.

201. *Id.* at 1639 (Kennedy, J., concurring). In an apparent direct refutation of the political process argument driving *Garcia*, Justice Kennedy argues: "the absence of structural mechanisms to require those [federal] officials to undertake this principled task [of maintaining the federal balance], and the momentary political convenience often attendant upon their failure to do so, argue against a complete renunciation of the judicial role." *Id.*

202. *Id.* at 1643.

of the 1990 Amendments is digested.²⁰³ Unfortunately, due to a lack of subject matter jurisdiction, Virginia was unable to present its arguments to the federal district court.²⁰⁴ However, Virginia still has an appeal pending on the disapproval of Virginia's CAA program. Regardless of the outcome, the issues surrounding the role of federalism in the CAA remain: what is the proper role of the states and the EPA, and how should Congress best respond to air pollution, a matter of obvious national urgency?

V. OUTLOOK

Difficulties with the implementation of the 1990 Amendments run the gamut; political, legislative, judicial and administrative problems hamper any possibility for long-term success in reducing and controlling air pollution. Undoubtedly, there has been substantial progress since the era of killer smog. Unfortunately, however, increasing population and consumption patterns, reliance on automobiles, and the need to target not only major sources, but also the tens of thousands of laundries, gas stations, barbecues and other small sources, make the going much tougher. The ability to solve these problems does not lie within the current environmental regulatory system. Moreover, the very assumptions that justified the regulatory structure of the CAA no longer remain persuasive. Such a realization demands a reexamination of the federal balance and the roles that state and executive environmental agencies play. While the literature is replete with suggestions on how to "fix" the EPA and the CAA, the goal should be to develop an environmental partnership that maximizes the benefits of federalism.

203. While Virginia and Missouri are the only states currently challenging the CAA on Tenth Amendment grounds, several states face sanctions and are likely to file suit if Virginia and Missouri succeed; regardless, many states would probably join in any appellate action. See Paul Kemezis, *States' Revolt Against EPA Emissions Rules Is Growing*, 8 ENV'T WEEK No. 2, Jan. 12, 1995. Moreover, plans to introduce low-emission vehicles in twelve Eastern states pursuant to 42 U.S.C. § 7511c has sparked a constitutional controversy. The Ozone Transport Commission was set up by Congress to deal with smog problems in the Northeast, but states and industry argue that it would be more effective to introduce a 49-state plan. Opponents of the Commission argue that it forces states to form a regional government agency without state consent, permits representatives not to be accountable to residents and creates problematic distinctions among the 38 states not included. See generally, *Attorneys Say LEV Section of CAA Could Face Constitutional Challenge*, CLEAN AIR NETWORK ONLINE TODAY, Dec. 29, 1994, available in WESTLAW; *Constitutionality of OTC Actions Upheld in Memo from Justice Department Attorney*, 25 Env't Rep. (BNA) at 1687 (Jan. 6, 1995).

204. *Virginia v. United States*, No. 3:95-CV-21 (E.D. Va. June 12, 1995). Relying upon *Natural Resources Defense Council v. Reilly*, 788 F.Supp. 268 (E.D. Va. 1992), the court found that when a challenge to the EPA's authority to act is embedded in a challenge to a specific action, the claim can only be heard by an appellate court. *Id.* at 15. The impact of this decision, as noted by the court, will be Virginia's inability to utilize the district court's broad discovery powers to strengthen its constitutional challenges. *Id.* at 8-12.

A. *State Capabilities*

When the original call to action was made to curb air pollution, states were seemingly unable, or unwilling, to act decisively.²⁰⁵ Over the past twenty years, however, states have not only increased their capabilities to protect air quality, but they have also taken the lead in enacting, regulating and enforcing air pollution controls.²⁰⁶ Fifty states are capable of brainstorming and experimenting in a way that a single government is unable to do, leading to innovation and sharing of what is successful and what is not.²⁰⁷ In addition, states have the advantage of proximity to the sources and share in a number of administrative strengths not found on the federal level.²⁰⁸ Finally, it is useful to remember in

205. See *supra* notes 20-21 and accompanying text.

206. Calculations made by the Congressional Budget Office in 1987 estimated that 80% of all governmental environmental expenditures were made on the state and local level. See Elliott, *supra* note 4, at 1. Additionally, state capabilities in enforcement have been proven since the first environmental enactments.

[G]iven the huge enforcement workload, Congress and EPA must begin to view environmental enforcement as a true partnership effort. While the partnership terminology has long been used by EPA, the actual federal-state relationship has been closer to that of a parent watching over an unreliable child than a relationship of equals.

Humphrey & Paddock, *supra* note 21, at 40.

Moreover, many states are not only regulating but are also breaking new ground, and the EPA should nourish these efforts. See Portney et al., *supra* note 23, at 1473. State environmentalism has also led to more active state legislatures and increasingly sophisticated environmental agencies. *Id.* Whereas before, environmental groups were primarily active on the national front, the locus of environmental activity has increasingly shifted toward the state level with the rise in grass roots organizations and decentralization of national environmental advocacy groups. *Id.*

207. See David L. Markell, *States as Innovators: It's Time for a New Look to Our "Laboratories of Democracies" in the Effort To Improve Our Approach to Environmental Regulation*, 58 ALB. L. REV. 347, 354 (1994) (quoting J. William Futrell that "[t]he prospects for early innovation and experimentation on the state level are better than in Washington"); John Pendergrass, *A Rich History of State Innovation*, ENVTL. FORUM, Nov.-Dec. 1994, at 12 (describing recent innovative efforts by states and formation of organization that acts as clearinghouse for state environmental efforts); John Pendergrass, *State Savvy on Superfund*, ENVTL. FORUM, May-June 1994, at 6 (noting contributions of states toward reduction of risks from contaminated sites and innovations developed in regulating Comprehensive Environmental Remediation and Cleanup Act); BRYNER, *supra* note 10, at 183 (noting that "[i]nnovative states will find ways to go beyond the Clean Air Act in devising effective air pollution programs").

208. See William M. Eichbaum, *State/Federal Relations in Environmental Protection: How Will They Evolve in the 1980's?*, in TAKING STOCK, *supra* note 2, at 26. States enjoy a number of administrative strengths which are not found on the federal level: (1) state decisionmakers are more accessible, (2) states can tailor environmental programs to actual conditions and needs, (3) intimacy with actual problems in the field breeds innovative solutions, (4) more people are involved on the state level, than are on the national level in environmental management, and (5) the presence of the

considering the appropriate role of the states that, "[t]o a large extent, the future of clean air lies in the hands of state officials."²⁰⁹

The federal government's "can do" spirit contributed to the centralization of air pollution planning and control under the CAA. More and more often, as states grapple with air pollution and develop regulatory and administrative expertise, they are "assuming responsibilities that go far beyond those of hand maiden to the federal government."²¹⁰ While a state's enthusiasm to take the lead should not be exaggerated, neither should it be ignored.²¹¹ Regardless of the various successes, some may still point to state environmental programs as an example of regulatory failure, concluding that states have inadequate constitutional principles, barriers to environmental legislation, deficiencies in judicial principles and perspectives, and problematic regulatory structures.²¹² Yet, in examining the 1990 Amendments, similar problems surfaced, but on the greatly magnified national scale. It is doubtful that all of the states have experienced an environmental epiphany, climaxed through efficient allocation of environmental resources so as to maximize societal welfare. However, this is not a logical reason to punish the many for the actions of the few. Finally, regulatory failure in the 1990 Amendments serves as an example in the great laboratory of democracy of what not to do and may guide officials toward the proper path—not simply the beaten one.

In many ways, claims of regulatory failure are linked to the race-to-the-bottom argument, so popularized in the 1970s as a principal justification for federal intervention and regulation.²¹³ In fact, the CAA can largely be explained by reference to the race-to-the-bottom argument.²¹⁴ Even assuming that a race-to-the-bottom does exist between states in environmental regulation, the establishment of federal control over air pollution "would not necessarily be an appropriate response."²¹⁵ Federal environmental regulation may result in a state's

advantages listed above could lead to more efficient solutions. *Id.*

209. BRYNER, *supra* note 10, at 183.

210. Portney et al., *supra* note 23, at 1472-73 (noting that state advances in environmental management capabilities have led to a mindset of "we can do this better ourselves").

211. See Markell, *supra* note 207, at 353-54 (citations omitted):

[M]any states have tossed away their recalcitrant stance toward strong environmental programs, and in many instances state governments, not 'the feds,' are at the forefront in efforts to protect the environment [S]tates occupy an increasingly prominent role in environmental regulation and that considerable innovation has occurred at the state and local levels, making these governmental efforts especially rich mines to explore.

212. See Butler, *supra* note 21.

213. See Revesz, *supra* note 34, at 1210-11.

214. *Id.* at 1224-27 (discussing congressional justification of CAA provisions on the race-to-the-bottom theory). *Id.* at 1227 (pointing out that an alternate rationale for promulgation of CAA, eliminating interstate air pollution, has "proven remarkably ineffective").

215. *Id.* at 1245.

lessening of other regulatory interests. Thus the benefits of federal regulation should be compared to the negative effects of lessened regulation in other areas, such as worker safety.²¹⁶ Using the race-to-the-bottom argument to justify federal environmental regulation challenges the core of a dual system of government.²¹⁷ Under the race-to-the-bottom theory, if the federal government regulates air pollution, states would logically lessen other regulatory interests in order to attract industry.²¹⁸ The federal government would then be justified, under the race-to-the-bottom theory, in regulating those areas as well in order to prevent interstate competition over socially beneficial regulation.²¹⁹ "States will simply respond by competing over another variable. Thus, the only logical answer is to eliminate the possibility of any competition altogether. In essence, then, the race-to-the-bottom argument is an argument against federalism."²²⁰

While the foregoing discussion has assumed that such a race may exist, there is little in the way of theoretical support for such a conclusion.²²¹ Anecdotal evidence usually attempts to link a state's reticence to regulate above federal standards as evidence that in the absence of federal regulation, states would have a race-to-the-bottom.²²² State enactment of "minimal stringency" laws, however, may recognize the regulatory confusion of duplicative and conflicting standards or indicate that federal standards may be appropriate for a given state's needs. Since the 1970s, states have been constrained in their regulation and control of air pollution. Thus, it dispels logic to conclude the existence of a "race" in which no state has ever gotten to the starting line in the age of modern environmental policymaking.

Interstate competition is neither inconsistent with the maximization of societal welfare, nor do states compete for economic development by offering increasingly lax standards in a manner contrary to state interests.²²³ It is not lost upon state leaders that high per capita income is tied to stringent regulation of the environment. To concede the fallacy of the race-to-the-bottom argument does not, however, mandate capitulation by the federal government in environmental policy. Rather, it points to the need to review the structure of the federal-state relationship in terms of the operating assumptions so as to maximize the

216. *Id.* at 1245-46.

217. *Id.* at 1245.

218. *Id.* at 1245-47.

219. *Id.* (noting need to eventually eliminate all state autonomy as states progressively lower other regulatory standards to match federal government regulations in order to stop race-to-the-bottom—points to radical underinclusivity of federal environmental regulations).

220. *Id.* at 1247.

221. *Id.* at 1242.

222. See McElfish, *supra* note 33, at 1006-07 (concluding that states' enactment of minimal stringency laws indicates that, in absence of federal regulation, states would not regulate environment to same degree as federal government).

223. See Revesz, *supra* note 34, at 1242-44.

relationship.

B. *Restructuring the Federal-State Relationship*

Simply because a problem is national in scope does not automatically make it a federal issue or appropriate for federal resolution.²²⁴ Rather, the aim of federalism should be to take advantage of the benefits of centralization while avoiding the drawbacks.²²⁵ Although the CAA may have been primarily justified on a race-to-the-bottom argument, the federal government should and must regulate where state regulation would be inefficient due to negative externalities; e.g., the transfer of air pollution from one state to another.²²⁶ This scenario does not, however, grant carte blanche to the federal government to continue the current command and control regulatory system. Such a compromise would ignore the guarantees of federalism, innovation, diversity, accountability, and the security of political liberty.²²⁷

While there exist numerous prescriptions to heal the system, the best advice recognizes that clean air demands a partnership. In the words of Governor E. Benjamin Nelson: "I was elected governor—not administrator of federal programs in Nebraska."²²⁸ Several factors would aid in making a leaner, meaner air pollution program, while at the same time realizing the advantages of a dual system of government.

First, states must be part of the problem, not *the* problem. While the EPA, through congressional dictates, once enjoyed a monopoly in both technical expertise and policymaking, that is no longer the case.²²⁹ Much of the states' frustration stems from a regulatory system in which "one of the parties has the luxury of taking the lead in developing policies that somebody else has the responsibility to implement and to fund."²³⁰

The future of air pollution control will necessarily come from more numerous, smaller sources.²³¹ Because air pollution control may require personal sacrifices in consumption, transportation, and conservation, life-style changes will be more easily affected by institutions closer in proximity to the sources—states

224. Exec. Order No. 12,612, 52 Fed. Reg. 41,685 (1987) (instituting federalist principles within executive branch).

225. See LeBoeuf, *supra* note 28, at 557.

226. *Id.* at 591. See John Milne, *Maine Blames Massachusetts, Others for Polluting Air*, BOSTON GLOBE, Aug. 2, 1995, at 20 (citing New England states that are filing requests with the EPA to stop other states from polluting their air).

227. See *supra* text accompanying notes 75-88.

228. Reuben, *supra* note 6, at 78.

229. See *supra* text accompanying notes 194-97.

230. Elliott, *supra* note 4, at 2.

231. See Futrell, *supra* note 24, at 119; Pearlstein, *supra* note 46, at H1. While many gains have been made in pollution control, "[t]he 'better safe than sorry' approach was useful in stimulating the first 90 percent of cleanup but is not practical for the last 10 percent." *Id.*

and localities.²³² Disregarding Commerce Clause jurisprudence, Congress could enact statutes curtailing emissions from Billy Bob's Laundry or Wanda's Bar and Grill. Absent real state participation, however, Congress would doom any likelihood for success.²³³

Second, success entails flexibility. "Agency forcing" statutes do not allow for effective policy decisions on either end,²³⁴ and the 1990 Amendment's voluminous detail produces waste and inefficiency.²³⁵ From an economic standpoint, "consistency is the hobgoblin of simple minds." While industry desires uniformity in environmental regulation, inflexibility leads to "arbitrariness, inequity, and waste."²³⁶ As EPA Administrator Carol M. Browner recently pledged: "If we are to clean up our air, we need to move beyond the one-size-fits-all approach and work toward flexibility and innovation—solutions that work for real people, real communities."²³⁷ Diversity and innovation, hallmarks of a federalist system, are forgotten without some vehicle for their institutionalization within the CAA.

Third, along with demands for greater flexibility by both the EPA and the states, is the need for less oversight in the CAA. One current point of contention concerns the Title V operating permit program.²³⁸ Proposals to allow states to shield permittees from regulations after a permit was issued and to let states change SIPs without formal revision were not included in the 1990 Amendments.²³⁹ Consequently, sources refrain from making investments in pollution control technology until a regulation mandates compliance; otherwise sources run the risk of wasting resources on obsolete equipment.²⁴⁰ Moreover, many states that had operating permit programs prior to the 1990 Amendments

232. See Futrell, *supra* note 24, at 119.

233. See BRYNER, *supra* note 10, at 183:

The impact of the Clean Air Act of 1990 may extend beyond air pollution. Environmental legislation, and clean air laws in particular, have aroused high expectations about the capacity of government to solve pressing problems. When such legislation is not aggressively implemented, because of underfunding, policy disputes, and partisan posturing, the public becomes more cynical about law, politics, and government in general.

234. See Elliott, *supra* note 4, at 2.

235. See *supra* text accompanying notes 60, 68-73.

236. BRYNER, *supra* note 10, at 28.

237. EPA Administrator, *supra* note 7.

238. See *supra* text accompanying notes 53-55.

239. See JOHN-MARK STENSVAAG & CRAIG N. OREN, 1 CLEAN AIR ACT: LAW AND PRACTICE § 14.1 (1993).

240. *Id.*

accuse the EPA of overreaching the CAA requirements.²⁴¹ State frustration over EPA oversight boils down to three points: (1) attention to details versus broad policy objectives, (2) delay in performing oversight, and (3) the so-called "late hits"—the EPA is failing to present objections to permitting decisions until it is too late, thus requiring permittees to start the process all over again.²⁴²

Finally, air pollution regulators should continue to look both outward and upward. Both states and the EPA should embrace efforts by industry and recognize that, given the opportunity, the private sector knows more than the states and the EPA in how to reduce pollution.²⁴³ Active participation of industry serves both the regulators and the public.²⁴⁴ It should not be forgotten that individuals can often perform services in the private sector and thus obviate the need for increased government expenditures.

VI. CONCLUSION

While much progress has occurred since the passage of the CAA, much more remains to be done. Unfortunately, given the legislative, judicial, constitutional and structural barriers placed upon the 1990 Amendments, success is not likely in the long term. Regardless of the outcome, the constitutional challenges by Virginia and Missouri symbolize the "death of the canary" and signal the need either to deal with the problem or to get out of the "coal mine." The focus of efforts to reform the CAA must turn now toward the values of federalism and acknowledge that a dual system demands a partnership, not an overlord.

EPA's success should be a priority for all its stakeholders,

241. See *Renewed Operating Permit Rule To Be Released This Spring, Will Account for State Concerns*, 25 Env't Rep. (BNA) No. 39, at 1863 (Feb. 3, 1995). An earlier proposed rule requiring EPA oversight over all minor new source reviews would have led to a continual permit review process as industries made routine changes, placing a large burden on regulators. *Id.* The EPA has since said that it would revise the review process, requiring oversight of only the "most environmentally significant minor NSR changes." See *Changes*, *supra* note 80, at 2285.

242. See Elliott, *supra* note 4, at 2.

243. See Pearlstein, *supra* note 46, at H4 (describing the inefficiency resulting from a requirement to remove benzene from a waste water treatment facility when four times the reduction could have been achieved at one sixth of the price by reducing emissions from another process); STENSVAGG & OREN, *supra* note 239, § 14.1:

Often SIPs do not use the most cost-effective strategy for attaining the ambient standards. State and federal officials cannot be expected to have industry's detailed knowledge about the cheapest ways to comply; moreover, governmental officials may prefer, for administrative convenience, uniform rules that fall short of ideal cost-efficiency.

244. In addition to restructuring efforts to regulate, there may be a need to broaden air pollution control policy, integrating air pollution controls with meaningful land use and energy policies. See REITZE, *supra* note 10, at 1643.

including those who often oppose the agency, because the price of failure in environmental policy making is unacceptably high. To rebuild EPA's mission and credibility, supporters and critics should join together to build a centrist agenda—one that recognizes the need for continued environmental progress and a strong agency but advocates fundamental administrative and statutory reforms to bring about new priorities, decision-making models, and partnerships.²⁴⁵

245. Sussman, *supra* note 65, at 23.