Brownfields, Environmental Federalism, and Institutional Determinism

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At all levels of government, efforts are underway to rehabilitate the many abandoned or underutilized industrial sites littering the United States landscape. Particularly in the older cities of the Northeast and the Midwest, these old industrial sites, commonly referred to as Brownfield sites (or “Brownfields”), are seen as central to both the economic woes and economic potential of these cities. At the present time, diverse local, state, and federal programs exist to encourage Brownfields reuse. Critical to rehabilitating Brownfields are questions about which levels or units of government should be involved in such efforts. Policymakers aiming to facilitate Brownfields reuse must assess the capabilities and track records of federal and state governments in protecting environmental amenities, encouraging appropriate economic development, and responding to hazardous substance problems. This article’s examination of past (and likely future) performance of federal or state officials shows many years of federal environmental leadership but more recent state environmental activism.

This article argues that generalizations about the merits and demerits of federal, state, or local activism will usually fail to contribute to the development of sound governmental policies. Such generalizations are frequently rooted in normative views of federalism or antipathy to any government or bureaucratic meddling in the absence of widespread market failure. These generalizations sometimes amount to a sort of “institutional determinism.” By institutional determinism, I mean assumptions that particular institutions will virtually always act in particular ways. The history of Brownfields policy, and environmental laws generally, shows shifting institutional roles, responses, successes, and failures. Rather than making

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assumptions of static institutional proclivities, policy analysts must examine in more detail the historical context of a problem, the task and institution under consideration to remedy that problem, and the particular constellation of relevant environmental, market, and political pressures.

After reviewing the roots of Brownfields problems and changing federal and state roles in Brownfields initiatives and environmental laws in general, the article turns to an analysis of the dynamics of federal and state environmental protection efforts. The article explores both why the federal government has been for several decades the preeminent environmental innovator and regulator, and why states have in recent years become increasingly active. Both federal and state environmental activism are, at least at first blush, unexpected under prevalent theories of legislation and regulation. Environmental laws and regulations hinder and impose costs on industrial polluters, who bear concentrated costs and have strong incentives to fight environmental regulation. Beneficiaries of environmental regulation, in contrast, are dispersed and benefited in a relatively minor way by pollution control measures. As others have observed, entrepreneurial political activity recognizing or catalyzing incipient citizen interest in environmental protection explains the first stringent federal laws regulating industrial polluters.

The durability of the federal period of environmental leadership, however, has been less explored in previous scholarship. This article develops the hypothesis that the durability of federal environmental leadership is attributable in part to the fact that the federal government acted before most states in creating substantive bodies of environmental law, thereby gaining an advantage as the leader in developing a body of law creating political benefits. As the regulatory "first-mover," the federal government, primarily acting through the United States Environmental Protection Agency ("EPA"), gained an advantage in expertise and institutional commitment that even similarly motivated states had difficulty matching, especially as regulated industry invested in compliance with federal requirements. However, under federal laws and regulations that allocated to states the initial or presumptive responsibility to implement schemes to attain federal goals, states increased in competence and those regulated became increasingly dependent on relationships with state regulators. Hence, consistent with first-mover dynamics, states have predictably copied and sometimes improved on federal innovations and eroded the often more inflexible and bureaucratic EPA's preeminence as an
environmental regulator. Nevertheless, the federal government has remained generally ahead of states in its expertise and the rigor of its environmental statutes and regulatory requirements. This durable federal leadership role is likely attributable to the greater importance of issue-identity for federal legislators and presidential candidates than for state and local officials, whose elections more frequently turn not on issue stances but on party affiliation.

The article then analyzes additional reasons for recent state environmental activism, particularly scrutinizing the sometimes-voiced hypothesis that the states are now ready and willing to take over areas of previous federal environmental primacy. As shown below, some areas of state activism are just what they appear to be—reflections of states with cultures particularly committed to protecting environmental amenities. Other areas of state activism, however, particularly in the Brownfields area, appear to be state efforts to protect state budgets or displace a more threatening federal regulator and thereby respond to the concerns of polluters and perhaps retain or attract new industrial investment. This analysis of state environmental activism indicates that broad federal abandonment of environmental leadership would likely result in decreased state environmental protection. However, because environmental regulatory activism remains of electoral interest to federal officials, particularly in responding to environmentalists’ and industry’s joint calls for Brownfields rehabilitation, we are unlikely to witness any such widespread federal abandonment of environmental protection.

Part I reviews the Brownfields problem, previous scholarly and political critiques of Brownfields issues, and current initiatives to rehabilitate Brownfield sites. Part II then reviews elements and past critiques of environmental federalism. Part III develops the hypotheses described above to shed light on the dynamics of federal and state environmental activism. The article closes by reviewing the history of environmental federalism and showing how a perspective rooted in “institutional determinism” is inconsistent with the ever-changing and dynamic interaction of state and federal governments.

I. THE BROWNFIELDS PROBLEM

A. The Extent of Brownfield Sites

As defined by EPA and most analysts, a Brownfield site is a former
industrial site that is now abandoned or underutilized and at least slightly contaminated by hazardous materials. At virtually all industrial complexes, such environmental contamination creates risks of liability and may require cleanup. Estimates of the numbers of such sites vary widely, in large part because many sites are both unused and unassessed for environmental contamination. Estimates usually range from 300,000 to 500,000 sites across the nation.

Many impacted constituencies seek remediation or the return to

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1 See, e.g., OFFICE OF TECH. ASSESSMENT, U.S. CONG., STATE OF THE STATES ON BROWNFIELDS: PROGRAMS FOR CLEANUP AND REUSE OF CONTAMINATED SITES (1995) [hereinafter OTA, STATE OF THE STATES] (giving the same definition and reviewing various states' efforts to return such sites to use); William W. Buzbee, Remembering Repose: Voluntary Contamination Cleanup Approvals, Incentives, and the Costs of Interminable Liability, 80 MINN. L. REV. 35, 40, 46 & n.31 (1995) [hereinafter Buzbee, Remembering Repose] (similarly defining Brownfield sites and discussing different causes of underutilization of such sites); Elizabeth Glass Geltman, Recycling Land: Encouraging the Redevelopment of Contaminated Property, NAT. RESOURCES & ENV’T, Spring 1996, at 3, 3 ("Brownfields typically are characterized as abandoned, inactive, or underutilized industrial sites located primarily in older central cities or suburbs."); Office of the Vice President, Vice President Hails Progress in Urban Revitalization and Announces 20 New Projects to Redevelop Brownfields 1 (June 13, 1996) (press release on file with the William & Mary Environmental Law & Policy Review) ("Brownfields are abandoned pieces of land—usually in the inner cities—that are lightly contaminated by previous industrial use but pose no serious public health risk to the community.").

2 See, e.g., Robert S. Berger et al., Recycling Industrial Sites in Erie County: Meeting the Challenge of Brownfield Redevelopment, 3 BUFF. ENVTL. L.J. 69, 72 (1995); Buzbee, Remembering Repose, supra note 1, at 40, 46; Geltman, supra note 1, at 3; John C. Wise, Brownfields: Recycling Contaminated Urban Land, LAND USE & ENV’T F., Summer 1995, at 140.


productive use of such sites. Such sites, if left unused and contaminated, lead to depreciated neighboring property values, pose potential environmental and health risks to neighbors, contribute to perceptions of urban blight, and contribute little or nothing to local economies. In short, no one benefits from the abandonment of such sites. However, as shown below, rehabilitation of Brownfield sites offers many constituencies and institutions political and economic benefits. The problem is deriving appropriate policies and involving appropriate institutions to return such sites to productive use, if such efforts are likely to succeed.

B. The Roots of the Brownfields Problem

Occasionally, critics of United States environmental laws and policies identify Brownfield sites as a casualty of environmental laws and regulations run amok. Under this view, the sizeable legal liabilities associated with running a polluting industrial facility or owning a contaminated site are the

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5 See Buzbee, Remembering Repose, supra note 1, at 48-50 (discussing how citizens, neighbors, municipalities, and industry all share interests in and have indicated desire to reuse Brownfield sites if liability risks could be ascertained and capped); Georgette C. Poindexter, Addressing Morality in Urban Brownfield Redevelopment: Using Stakeholder Theory to Craft Legal Process, 15 VA. ENVTL. L.J. 37, 59-62 (1995) (arguing that the various impacted "stakeholders"—local residents, environmental justice advocates, mainstream environmentalists, etc.—must compromise to reach acceptable cleanup standards). But cf. Weintraub & Gruza, supra note 3, at 69 (noting that "brownsite" redevelopment is not in great demand by local communities for traditional micro-economic reasons).

6 See Buzbee, Remembering Repose, supra note 1, at 48-51; Will Brownfields Initiatives Really Work?, ENVTL. F., May/June 1995, 28-35 (1995) (discussing reasons for desiring Brownfield reuse but noting that businesses have bypassed urban areas for new development). But cf. Geltman, supra note 1, at 3 (finding that most sites present statistically low health risks to surrounding residents).

7 See discussion infra Part II.B.

8 E.g., Poindexter, supra note 5, at 50 ("Ironically, the legislative and policy initiatives designed to spur and facilitate environmental cleanup are one of the largest obstacles to remediating urban brownfields. Strict and mandatory adherence to arbitrary cleanup standards does not provide an incentive to remediate, to the contrary, it deters any cleanup efforts."); see also Dancy & Dancy, supra note 3, at 112-14 (offering examples of CERCLA’s ambiguity, EPA’s recalcitrance in establishing definitive guidelines, the United States Supreme Court’s failure to address the constitutionality of retroactive provisions, and the resultant widespread abandonment of redevelopment efforts).
cause of the abandonment of America’s industrial infrastructure. The reality is far more complicated. While fears of environmental liabilities and costs of environmental compliance are factors contributing to Brownfields abandonment, a cause-effect attribution is in error. These Brownfield sites are the product of many interrelated phenomena, many of which are unrelated to environmental laws. Any solution that looks exclusively to environmental laws is virtually sure to fail. This part first reviews the impact of environmental liabilities on Brownfield sites, and then examines other non-environmental contributors to the avoidance of Brownfield sites.

Environmental liabilities undoubtedly contribute to Brownfields abandonment. Federal laws requiring industrial sources to control air and water pollution add to the production costs of all U.S. industry. Costs to comply with pollution control statutory schemes seldom, however, are sufficiently large to drive otherwise profitable industry out of business.

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9 John Wise, the Deputy Regional Administrator for Region IX of EPA’s San Francisco office, acknowledged that the liabilities associated with CERCLA property contribute to redevelopment problems. Wise, supra note 2, at 141; see also Poindexter, supra note 5, at 47 (arguing that potential liabilities associated with brownfields and the heavy cost of environmental cleanup hinders the redevelopment of abandoned sites).

10 See OTA, STATE OF THE STATES, supra note 1, at 5-10 (concluding that liability uncertainties contribute to Brownfields abandonment but acknowledging other contributing factors); JAMES BOYD ET AL., THE IMPACT OF UNCERTAIN ENVIRONMENTAL LIABILITY ON INDUSTRIAL REAL ESTATE DEVELOPMENT: DEVELOPING A FRAMEWORK FOR ANALYSIS, Discussion Paper 94-03, at 21 nn.25-27 (Resources for the Future 1994) (showing through case studies that other factors may surpass environmental liability concerns in explaining Brownfield site underutilization); Robert Abrams, Comment, Superfund and the Evolution of Brownfields Federalism, 21 WM. & MARY ENVTL. L. & POL’Y REV. 265 (1997) (showing how the economics of rehabilitating Brownfield sites is likely the major deterrent to their reuse).

11 See Dancy & Dancy, supra note 3, at 104 (citing E. Donald Elliot et al., A Practical Guide to Writing Environmental Disclosures, 25 Envtl. L. Rep. (Envtl. L. Inst.) 10,237, at 10,237 (May 1995), which states that taxpayers spend $185 billion per year, or 2.5% of GNP, on environmental regulations).

12 While the dollar expenditures on environmental controls are high, expenditures by the United States are not the highest percentage of Gross Domestic Product compared to the advanced industrialized nations. See Donald T. Hornstein, Lessons from Federal Pesticide Regulation on the Paradigms and Politics of Environmental Law Reform, 10 YALE J. ON REG. 369, 375-76 (1993) (discussing complaints about pollution control expenditures); Richard B. Stewart, Environmental Regulation and International Competitiveness, 102 YALE L.J. 2039, 2065-67 (1993) (comparing various nations’ expenditures on pollution control and also discussing health and employment benefits to pollution control achievements and
Marginal companies, however, can be driven out of business by such compliance costs. Companies operating at the margin of profitability (or bankruptcy) confront in environmental laws enacted since the 1960s, legal obligations that do not automatically yield to threats of insolvency. As confirmed by the Supreme Court, statutes such as the Clean Air Act ("CAA") anticipate that in the process of cleaning up the environment, some industries may have to shut down if compliance is impossible or inordinately expensive. The imposition of stringent and generally more costly "new source" regulatory requirements under federal pollution control statutes to "modified" facilities creates an additional cost disincentive to rehabilitate old industrial facilities.

The federal environmental statutes most directly contributing to Brownfields abandonment and avoidance are the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA") and the Resource Conservation and Recovery Act ("RCRA"). In its sections regulating hazardous wastes, RCRA regulates such wastes from "cradle to grave," while in another section concerning "corrective actions," sets forth obligations for the cleanup of hazardous waste sites that are no

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13 Robert Benson, U.S. Envtl. Protection Agency, Comments at the University of Georgia Red Clay Conference (Mar. 11, 1995) (reporting on study of metal plating industry that revealed marginal plating operations were also big polluters and likely to go out of business if forced to come into compliance). For an exploration of how potential insolvency of an environmentally liable party impacts incentives of potentially responsible parties ("PRPs") under CERCLA and CERCLA amendment proposals, see Lewis A. Kornhauser & Richard L. Revesz, Evaluating the Effects of Alternative Superfund Liability Rules, in ANALYZING SUPERFUND: ECONOMICS, SCIENCE, AND LAW 115-44 (Richard L. Revesz & Richard B. Stewart eds., 1995).

14 See Union Elec. Co. v. EPA, 427 U.S. 246 (1976) (rejecting an industry attack on a CAA State Implementation Plan ("SIP") and stating that the Act gives state planners authority to "force technology" even where it may result in loss of industry).

15 For example, under the CAA, New Source Performance Standards apply to both new facilities and older facilities that have undergone "modifications." See 42 U.S.C. § 7411(a)(2) (1994). This disincentive to the creation of new or upgraded facilities has been criticized. See generally Bruce A. Ackerman & Richard B. Stewart, Reforming Environmental Law, 37 STAN. L. REV. 1333 (1985).


17 Id. §§ 6901-6992. RCRA is also known as the Solid Waste Disposal Act, its name before substantial amendments in 1984.
CERCLA’s and RCRA’s corrective action provisions overlap, but RCRA’s corrective action provisions generally regulate intentionally created waste disposal sites at the end of their intended use. CERCLA operates as a catch-all liability scheme imposing potential strict, and joint and several liability for often massive cleanup costs on any entity owning, operating, or otherwise associated with the creation of a substantially contaminated site. Liability is not limited by one’s capital investment in a piece of contaminated property, but is measured by the costs of site cleanup. Cleanups frequently dwarf the value of the contaminated land, creating properties that, viewed in isolation, may have substantial negative value.

EPA and the environmental enforcement arm of the Department of Justice generally focus on sites on CERCLA’s list of the nation’s most

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19 See id. at 201-07. Key to the view that CERCLA deters use or reclamation of contaminated sites is its broad liability scheme. See Weintraub & Gruza, supra note 3, at 57; see also Poindexter, supra note 5, at 50 (“Where the possibility of contamination exists, the uncertain magnitude of potential environmental liability discourages redevelopment projects.”); Wise, supra note 2, at 141 (noting that environmental concerns are “looming larger” in the decision process, negatively impacting companies’ decisions to redevelop Brownfield sites). As construed by numerous courts, liability under CERCLA is strict, joint, several and potentially eternal. See, e.g., Bell Petroleum Serv. v. Sequa Corp., 3 F.3d 889, 902-04 (5th Cir. 1993) (explaining various courts’ approaches whether to apply joint and several liability); General Elec. Co. v. Litton Indus. Automation Sys. 920 F.2d 1415, 1418 (8th Cir. 1990), cert. denied, 499 U.S. 937 (1991); United States v. Monsanto Co., 858 F.2d 160 (4th Cir. 1988); New York v. Shore Realty Corp., 759 F.2d 1032 (2d Cir. 1985) (holding landlord environmentally liable for tenant’s activities); United States v. Conservation Chem. Co., 619 F. Supp. 162, 204 (W.D. Mo. 1985).
21 To say that sites have “negative values” is not the same as saying such sites will always remain unused. In the dynamics of a multi-asset transaction, such a site may be passed to an acquiror along with many other assets and liabilities. Furthermore, if a site must be cleaned up under a federal or state law mandate, a company able to clean up a site in a more cost-effective manner than a PRP owner may be willing to “buy” such land in a transaction where the seller pays the buyer. See Buzbee, Remembering Repose, supra note 1, at nn.33-55 and accompanying text (discussing transactional dynamics that would create incentives to acquire and clean up contaminated sites if the extent of legal obligations were ascertainable). RCRA similarly creates potentially large cleanup liabilities associated with corrective action obligations, but such obligations are usually the subject of negotiation and agreement with government officials. See id. at nn.89-98 (discussing RCRA sections applicable to cleanups of contamination).
contaminated sites, known as the National Priorities List ("NPL").\textsuperscript{22} CERCLA liabilities, however, can also arise out of cleanup activities in emergency settings at sites not yet on the NPL\textsuperscript{23} or in the context of private cleanups which are followed by private cost-recovery actions.\textsuperscript{24} Thus, in addition to the over 1000 sites generally on the NPL at any point in time, any site with a contamination problem potentially could give rise to CERCLA liability.\textsuperscript{25} Further adding to the regulatory requirements associated with

\textsuperscript{22} See generally KATHERINE N. PROBST ET AL., FOOTING THE BILL FOR SUPERFUND CLEANUPS 4 (1995) (detailing EPA's use of the NPL). The current hazard ranking that places a site on the NPL was chosen by the EPA and can be modified. See OFFICE OF TECH. ASSESSMENT, U.S. CONG., COMING CLEAN: SUPERFUND PROBLEMS CAN BE SOLVED 115-16 (1989) (briefly describing the ranking structure of the NPL).


\textsuperscript{25} CERCLA liability attaches to a wide variety of PRPs. The following categories of PRPs may be liable for cleanup obligations: generators of hazardous substances disposed at a site, past owners or operators of such a site at the time it became contaminated, current owners or operators of a contaminated site (regardless of whether they participated in actions contributing to such contamination), and transporters of hazardous substances who choose such sites for disposal. See 42 U.S.C. § 9607(a). These broad categories of PRPs have further been expanded in broad interpretations by the EPA and courts adjudicating CERCLA cases. Corporate affiliates, banks taking an active management role or perhaps only having authority to impact waste disposal actions, trustees administering estates holding contaminated sites, and even not-for-profits receiving real property donations all have been held to be PRPs. See, e.g., Nurad, Inc. v. William E. Hooper & Sons Co., 966 F.2d 837, 846 (4th Cir.), cert. denied, 506 U.S. 940 (1992) (holding passive owners liable for gradual leaking of contaminants during their period of ownership); Portsmouth Redev. & Hous. Auth. v. BMI Apartments Assocs., 827 F. Supp. 354, 358 (E.D. Va. 1993) (finding the same liability for passive owners); Pantry Inc. v. Stop-N-Go Foods, 796 F. Supp. 1171, 1179 (S.D. Ind. 1992) (finding the same liability for passive owners). See generally Erika C. Birg, Comment, Redefining "Owner or Operator" Under CERCLA to Preserve Traditional Notions of Corporate Law, 43 EMORY L.J. 771 (1994); Henry L. Stephens, Jr., When is "Leaching" Not "Leaking"?: CERCLA Liability of Owners and Operators at the Time of Disposal, 24 Envtl. L. Rep. (Envtl. L. Inst.) 10,177, 10,179 (Apr. 1994); Lisa A. Lee, Note, Guilty for Having Done Nothing: Passive Past Owners Face CERCLA Liability, 1 Mo. ENVTL. L. & POL'Y REV. 88, 89-91 (1993). See infra note 50 and accompanying text for brief discussion of new 1996 amendments to CERCLA offering lenders and fiduciaries exemptions from CERCLA liability.
contaminated industrial sites are state environmental laws. Following the enactment of CERCLA in 1980 and widespread political support for CERCLA and concern about hazardous waste exposure, many states enacted mini-CERCLAs of their own.\textsuperscript{26} State mini-CERCLA statutes usually share with the federal CERCLA law a broad liability scheme, empowering state officials to ensure that contaminated sites are remediated.\textsuperscript{27} Some state laws were explicitly intended to provide regulatory coverage for sites not contaminated enough to merit federal action.\textsuperscript{28} Other state laws largely mirrored CERCLA.\textsuperscript{29} In some instances, parallel state coverage of contaminated sites led to states taking the lead in addressing such sites.\textsuperscript{30}

Of at least equal significance to the creation of Brownfield sites are industrial demographics, particularly the deindustrialization of the Northeast and Midwest in areas that were once the industrial backbone of the United States economy. The causes of deindustrialization extend far beyond mere environmental liabilities. Among the leading explanations are the movement of capital from unionized to non-union jurisdictions in the South and


\textsuperscript{27} See, e.g., Warren, supra note 26, at 10,348, 10,354-56 (analyzing mini-CERCLA liability schemes and mentioning that Maine, Massachusetts, Minnesota, Missouri, New Hampshire, and New Jersey are examples of states with "express strict liability provisions").

\textsuperscript{28} See, e.g., Robert B. McKinstry, Jr., The Role of State "Little Superfunds" in Allocation and Indemnity Actions Under the Comprehensive Environmental Response, Compensation and Liability Act, 5 VILL. ENVTL. L.J. 83, 84 n.3, 92 (1994).


Southwest, and the movement of available labor away from urban industrial centers to suburban areas. Analysts of deindustrialization also point to urban crime and banks' unwillingness to finance increased investments in low-income, primarily minority, neighborhoods. Reduced reliance on port or river access and railroads, in favor of the use of container ships and truck transportation has reduced further the dependence of industry on particular locations near coastal or river cities. Finally, racial prejudice and fears have deterred industry from remaining in or moving into older industrial neighborhoods.

In contrast to these trends away from continued or new investment in old industrial areas, "Greenfield" sites outside of urban centers, as well as Greenfield sites in other states, offer potential industrial investors increased open space, low crime rates, and the ability of industry to design new space to exact current needs, rather than to undertake complicated efforts to retrofit older industrial facilities. State and local governments in the South and Southwest have been further adding to these primarily market and cultural trends by enticing capital investment to their Greenfield areas with special tax

31 See, e.g., Roger W. Schmenner, Geography and the Character and Performance of Factories, in INDUSTRY LOCATION AND PUBLIC POLICY 241, 243 (Henry W. Herzog, Jr. & Alan M. Schlottmann eds., 1991) ("Clearly the low level of unionism has been an important ingredient in the economic development of the Sunbelt states.").


33 See, e.g., VICTOR R. FUCHS, CHANGES IN THE LOCATION OF MANUFACTURING IN THE UNITED STATES SINCE 1929, 93 (Yale U. Press 1962) (explaining that the use of automobiles played a role in this shift because "factories formerly found it necessary to locate in heavily populated localities or near public transit lines").


37 See, e.g., FUCHS, supra note 33, at 91-93.
breaks.\textsuperscript{38}

C. Current Brownfields Programs and Policies: Carrots and Sticks

Federal, state, and local governments have implemented and are considering a wide variety of initiatives to encourage Brownfields reclamation and reuse. Few of these efforts under relevant statutory authority have their roots in statutory schemes calling for "cooperative federalism," as do most other major federal environmental statutes such as the CAA or Clean Water Act ("CWA").\textsuperscript{39} As discussed in greater depth below, under cooperative federalism schemes the federal government sets a basic target or requirement and, with varying degrees of flexibility, state governments are offered the initial opportunity to implement the schemes. Nevertheless, although federal hazardous substance laws generally eschew such a cooperative federalism approach, federal-state cooperation continues to increase in an area of previously independent or parallel regulatory activity.

As discussed above, federal hazardous substance laws create a situation of massive potential liability for anyone involved with or owning or operating a contaminated industrial site. CERCLA, as well as analogous state mini-CERCLAs, have been criticized for the breadth of their statutory liabilities, their contribution to industrial closures, and the huge costs of battling over and eventually cleaning up contaminated sites.\textsuperscript{40} Although CERCLA creates categories of PRPs, ownership or pollution of a contaminated site does not create immediate cleanup obligations. Risk averse

\textsuperscript{38} See, e.g., Douglas P. Woodward & Norman J. Glickman, Regional and Local Determinants of Foreign Firm Location in the United States, in INDUSTRY LOCATION AND PUBLIC POLICY, supra note 31, at 190, 199. ("Much of the discussion about the movement of jobs to the Sunbelt has centered around the congenial business climate of southern and western states."); Vicki Been, "Exit" As a Constraint on Land Use Exactions: Rethinking the Unconstitutional Conditions Doctrine, 91 COLUM. L. REV. 473, 512-15 (1991) [hereinafter Been, "Exit"] (discussing interjurisdictional battles to attract or retain capital investment); see also Thomas J. Lueck, Lower Budgets Don't Cut Flow of Tax Breaks: Businesses Get Millions to Stay in New York, N.Y. TIMES, July 5, 1995, at A1 (reporting economic enticement offered by governments to businesses, but also reporting new questioning of efficacy of such efforts in context of governmental budget cuts).

\textsuperscript{39} See infra notes 141-44 and accompanying text (discussing components of "cooperative federalism" schemes).

\textsuperscript{40} See, e.g., Mark K. Dowd, New Jersey's Reform of Contaminated Site Remediation, 18 SETON HALL LEGIS. J. 207, 210 (1993).
owners and investors, however, fear potentially costly cleanup obligations. I will refer to a PRP who desires to cleanup a contaminated site without a preceding government order to do so as a cleanup volunteer. The difficulty confronted by a PRP seeking to extricate itself from liability has led to further criticism.\footnote{See, e.g., OTA, \textit{State of the States}, supra note 1, at 1-4, 8 (stating that uncertain liabilities hinder use and redevelopment of former industrial sites); Frederick W. Addison, III, \textit{Reopener Liability Under Section 122 of CERCLA: \textquoteright{}From Here to Eternity,\textquoteright{}} \textit{45 Sw. L.J.} 1081, 1086-97 (1991) (discussing how EPA settlement policy creates eternal liability).} If cleanup volunteers could obtain feedback and greater finality and repose, volunteers could make informed market decisions and would not face potentially disastrous cleanup obligations.\footnote{See Buzbee, \textit{Remembering Repose}, supra note 1, at 96.} Although I and other commentators have called for the creation of a federal voluntary cleanup approval process (which I have in the past and here will refer to as a Cleanup Approval Process, or \textquotedblright{}CAP\textquotedblright{}), no amendment to CERCLA, RCRA, or regulatory programs created pursuant to those statutes has yet created a federal CAP scheme.\footnote{See, e.g., \textit{id.} at 41; Don R. Clay, \textit{It\textquotesingle{}s Time to Consider Voluntary Cleanups}, \textit{Envtl. F.}, Nov./Dec. 1992, at 28.} Late efforts in the 104th Congress to pass a freestanding Brownfields-targeted CERCLA reform bill failed in the press of election year politics.\footnote{The leading, but unsuccessful, bill was S. 2028, sponsored by Senators Lautenberg, Baucus, Reid, Graham, and Moynihan. S. 2028, 104th Cong. (1996).}

Following failed efforts in the early to mid-1990s to amend CERCLA, EPA responded to demands for CERCLA program changes by issuing the Brownfields Action Agenda, also referred to as the Brownfields Redevelopment Initiative.\footnote{See \textit{Hearings Before the Subcomm. on Commerce, Trade, and Hazardous Materials of the House Comm. on Commerce}, 104th Cong. (1995) (statement of Timothy Fields, Jr., Deputy Assistant Administrator, Office of Solid Waste and Emergency Response, U.S. EPA) [hereinafter Statement of Timothy Fields, Jr.]. \textquoteleft{}EPA\textquotesingle{}s Brownfield Economic Redevelopment Initiative is designed to . . . encourage economic redevelopment through environmental cleanup . . . \textquoteleft{}Brownfields have been shunned by new industry and prospective developers who are understandably afraid they might inherit expensive cleanup liabilities for contamination they did not create.\textquoteright{} \textit{Id.; see also} Office of Emergency and Remedial Response, U.S. Envtl. Protection Agency, \textit{The Brownfields Action Agenda} (visited Jan. 30, 1997) <http://www.epa.gov/swerosps/bf/ascii/action.txt>; \textit{see also} Announcement of Competition for Final Five Brownfield Economic Redevelopment Initiative Pilots, 59 Fed. Reg. 60,012 (1994).} This initiative involves several interrelated programmatic efforts.
Investors and banks interested in financing new Brownfield acquisitions successfully sought more explicit protection for prospective purchasers and investors in contaminated property. In response, EPA amended its “prospective purchaser” policy to provide prospective purchasers with heightened protection from liability for site contamination. Banks reluctant to lend to investors in Brownfield, and even active industrial, sites also succeeded in persuading EPA to issue a favorable regulation protecting banks involved in contaminated sites. That regulation, however, was invalidated on the ground that EPA lacked authority to issue regulations further clarifying the contours of the statutory definition of liable PRPs. By a recent little-noticed statutory amendment to CERCLA, appended as a rider to an appropriations bill, lenders and several categories of previously vulnerable PRPs are given new or at least more explicit exemptions from CERCLA liabilities.

46 In 1995, the EPA changed its policy for inclusion of many sites on the CERCLA Information System (“CERCLIS”), in response to “numerous oral and written comments... from property owners, the housing and banking industry, prospective purchasers of CERCLIS properties, and the general public indicating that there is an apparent yet unintended stigma attached to sites in CERCLIS.” 60 Fed. Reg. 16,054 (1995).


49 See Kelley v. EPA, 15 F.3d 100 (D.C. Cir. 1994) (holding that Congress gave courts, not the EPA, authority under CERCLA § 107 to interpret questions of liability).

50 Although courts of appeals differed on when banks could be held liable despite a presumptive “secured creditor exemption” under CERCLA, 42 U.S.C. § 9601(20), that legal uncertainty for banks has been greatly reduced by amendments to CERCLA passed on September 30, 1996, as a rider to the Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208, 110 Stat. 3009. This rider, entitled the Asset Conservation, Lender Liability, and Deposit Insurance Protection Act of 1996, also provides new protections for fiduciaries and involuntary government holders of contaminated property. Id. subtit. E. For a preliminary assessment of the new amendments’ implications, see William W. Buzbee, CERCLA’s New Safe Harbors for Banks, Lenders, and Fiduciaries, 26 Envtl. L. Rep. (Envtl.
In a recent guidance document, EPA further clarified that real property owners will not be pursued as PRPs where contamination from another site flows under a neighboring parcel of land.\textsuperscript{51} EPA also removed many sites from its list of potential priority cleanup sites and designated them as “No Further Remedial Action Planned” sites, thereby greatly reducing perceptions of associated liability risks.\textsuperscript{52} EPA also has provided modest federal funds for Brownfields redevelopment efforts in the form of direct grants to cities with Brownfields redevelopment plans.\textsuperscript{53}

During the last several years, numerous states either have amended their mini-CERCLA laws to address industry criticisms or enacted new voluntary cleanup approval schemes whereby a cleanup volunteer receives government guidance about cleanup and, at the end of a successful cleanup, receives varying degrees of reassurance that liability is terminated.\textsuperscript{54} State voluntary cleanup approval initiatives continue to be enacted across the country.\textsuperscript{55} Approvals of cleanups under state law cannot at this time bind or preclude further cleanup pursuant to federal laws and authority.\textsuperscript{56} Federal officials, however, generally are reluctant to devote administrative and

\textsuperscript{51} See Keener, supra note 47, at 145 (stating EPA does not anticipate suing owners of property to which subsurface ground water contamination has migrated) (citing Final Policy Toward Owners of Property Containing Contaminated Aquifers, 60 Fed. Reg. 34,790 (1995), covering owners of all types of commercial property).

\textsuperscript{52} See 60 Fed. Reg. 16,053, 16,054 (1995) (codified as an amendment to the National Oil and Hazardous Substances Pollution Contingency Plan at 40 C.F.R pt 300 (1996)).

\textsuperscript{53} See Statement of Timothy Fields, Jr., supra note 45, at 14-15 (initiating $200,000 in Brownfields pilot grants with plans for 50 such sites).

\textsuperscript{54} See, e.g., Anne Slaughter Andrew, Brownfield Redevelopment: A State-Led Reform of Superfund Liability, NAT. RESOURCES & ENV'T, Winter 1996, at 29; James T. O’Reilly, Environmental Racism, Site Cleanup and Inner-City Jobs: Indiana’s Urban In-Fill Incentives, 11 YALE J. ON REG. 43, 58 (1994); see also Buzbee, Remembering Repose, supra note 1, at 118-22 (summarizing in table the status of state voluntary cleanup initiatives).

\textsuperscript{55} See generally Geltman, supra note 1, at 3, 8 (providing more recent table showing state efforts to encourage the reuse and redevelopment of contaminated industrial property through Brownfields restoration and voluntary cleanup legislation).

\textsuperscript{56} See, e.g., Andrew, supra note 54, at 29 (“[States with voluntary cleanup programs] cannot give comfort to lenders about federal CERCLA liability, [however midwestern states] have responded to this crisis by adopting laws or rules that give greater comfort to lenders regarding the potential threat of environmental liability under their respective state Superfund programs.”); O’Reilly, supra note 54, at 58 (“[S]tates cannot prevent federal authorities from bringing suit against owners of polluted sites.”).
cleanup resources to sites already subjected to state scrutiny. This federal forbearance is explained both by fiscal moderation and concerns for federal-state comity. 57

Several of EPA’s regional offices recently entered into agreements with state authorities setting forth EPA’s willingness to give states primacy and potentially final authority over contamination cleanups. 58 A draft central office EPA guidance document would have allowed state settlements with PRPs to preclude further federal intervention at remediated sites. 59 This guidance has been sought eagerly by the states. To the dismay of interested states and industry, EPA now appears likely to preserve a potential federal right to revisit state-supervised cleanups under state voluntary cleanup schemes. 60 Even without such express federal relinquishment of potential statutory authority, state voluntary cleanup approvals reduce the threat of parallel federal and state contamination liabilities and provide investors or property owners with greater repose and investment security than would a cleanup lacking any government guidance. Additional analysis of the purposes and impacts of these alternating state and federal innovations is discussed below in Part III.

Additional proposals under consideration and likely to become law

57 See, e.g., Andrew, supra note 54, at 30 (discussing state cleanup schemes and federal official acknowledgment of need to avoid impediments to cleanup resulting from federal liability risks); O'Reilly, supra note 54; Telephone Interview with Douglas Stewart, Bureau Chief of ISRA Program, New Jersey Department of Environmental Protection (Feb. 10, 1995) (discussing general assumption that federal intervention is less likely if state oversees cleanups).

58 See, e.g., Andrew, supra note 54, at 30 (mentioning that EPA Region V has entered into Memoranda of Agreement with states such as Illinois and Minnesota); Region VI, Texas Sign Agreement on Voluntary Cleanups, INSIDE EPA’S RCRA REP., May 3, 1996, at 7 (discussing agreement between Region VI of EPA and Texas prohibiting EPA interference in state-approved cleanups); Carey S. Rosemarin & Christina M. Riewer, Taking a Clean Look at Purchasing Contaminated Property, CHI. LAW., July 1996, at 53 (reporting similar April 1995 EPA-Illinois agreement).

59 See EPA Drops Liability Releases in Draft Voluntary Cleanup Guidance, INSIDE EPA’S ENVTL. POL’Y ALERT, Aug. 28, 1996, at 11 (reporting that EPA “backed off” policy that would have allowed states to exempt parties from Superfund liability and further reporting that “[s]tate officials say they are furious with the agency”).

60 See id.
soon are tax deductions and possibly even tax credits for cleanup costs. Utilization of credits or deductions would displace current tax policy which treats cleanup expenses as capital investments and, therefore, at most, offers potential future tax benefits in the form of reduced taxes upon a taxable disposition of remediated industrial property. A credit, in contrast, would constitute a direct dollar for dollar reduction in federal tax obligations and thus would, in effect, subsidize cleanup activities from revenues that would otherwise be available for other federal appropriations.

Another state and federal innovation possibly increasing incentives to use Brownfield sites is the modification of cleanup obligations in light of anticipated future uses of such sites. Future uses that will lead to few exposure pathways may lead to lesser levels of cleanups, while future uses that could lead to widespread environmental risks lead to requirements of more costly cleanups. Under current federal law, however, modification of cleanup obligations in light of anticipated future uses is of questionable

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61 See, e.g., Brownfields Tax Bill Near, SUPERFUND WK., May 17, 1996, at 1 (quoting Senator Carol Moseley-Braun’s explanation that a Brownfields tax incentive bill she introduced would help companies absorb the costs of restoring Brownfields because the environmental cleanup costs would be deductible in the same year that the costs were incurred); Clinton Pushes Brownfields Tax Incentive, SUPERFUND WK., Mar. 15, 1996, at 1, 8 (reporting President Clinton’s proposed tax deductions for cleanup costs).

62 See, e.g., Brownfields Tax Bill Near, supra note 61, at 1 (stating that under the current law, costs are capitalized and deductions can be taken only by companies who contaminated the site, not by purchasers).

63 See Yoseph Edrey & Howard Abrams, Equitable Implementation of Tax Expenditures, 9 VA. TAX REV. 109, 110, 115 (1989) (discussing tax credits and other forms of tax relief and stating that government subsidization of activities through tax relief defeats progressivity goals of current tax structures and is “undemocratic if not immoral”).


Complicating Brownfields diagnoses and prescriptions are conflicting views within the environmental "justice," "equity," or "racism" movement. This relatively new movement is built upon the observation that the brunt of industrialization's ills are borne most often by the poor, and particularly the minority poor. Much of the environmental justice literature focuses on the siting of noxious facilities like hazardous waste burning or disposal facilities, while other studies look at the configuration of industrial facilities and the demographics of surrounding residential populations. Some analysts identifying themselves as proponents of environmental justice call for more equal dispersion of industrial burdens, which necessarily would call for

66 See id. at 1506-07, 1514-16. Recent CERCLA amendment proposals sought to further sanction varying cleanup levels in light of future uses but were defeated as part of the general defeat of CERCLA amendment and reauthorization legislation in 1993 and 1994. See id. at 1519-22 (discussing recent CERCLA amendment proposals' impact on future use analysis); see also, e.g., 140 CONG. REC. E602-01, E603 (daily ed. Mar. 24, 1994) (statement of Rep. Zelliff) (introducing the Comprehensive Superfund Improvement Act of 1994). See also Wegman & Bailey, supra note 64, at 893 (discussing 103d Congress' consideration of SRA). Several leading proposals of the 104th Congress to reform regulation through enactment of a single statute imposing on agencies new cost-benefit and risk analysis obligations also contained a provision seeking to allow lesser levels of cleanups based on less conservative (or protective) assumptions of risk. See S. 343, as set forth in S. REP. NO. 104-90, app. § 631 (1995); see also William W. Buzbee, Regulatory Reform or Statutory Muddle: The "Legislative Mirage" of Single Statute Regulatory Reform, 5 N.Y.U. ENVTL. L.J. 298, 339 (1996) [hereinafter Buzbee, Regulatory Reform] (discussing proposed risk assessment provisions and citing sections of reform bills that would have impacted CERCLA cleanup obligations). This provision regarding CERCLA cleanups died along with other leading regulatory reform proposals in late 1995.


reduced reliance on concentrated clusters of industry.\textsuperscript{69} Any such attempts to disperse the burdens of industry more equitably might contribute to the creation of Brownfield sites. Other analysts of environmental justice issues seek to balance concerns about residual environmental risks with efforts to retain industrial neighborhood employment.\textsuperscript{70} Nevertheless, despite tensions in these goals, environmental justice advocates share the widespread goal of contaminated site cleanups.\textsuperscript{71}

The ills associated with abandonment of Brownfield sites thus cannot be attributed to any one cause. The particular constellation of market forces, demographic shifts, cultural bias and prejudice, state and local efforts to attract industry, as well as fears of potential federal environmental liabilities, all add up to strong incentives to avoid investments in Brownfield sites. Initially parallel, but increasingly coordinated, state and federal efforts are underway to address the lost potential and ills associated with Brownfield sites.

II. ENVIRONMENTAL FEDERALISM AND BROWNFIELDS POLICIES

This section briefly sketches out the basics of federalism law and logic, illuminating each common explanation or critique of federalism principles with reference to environmental law developments and Brownfields policies. This section sets the stage for discussion in Part III of an alternative explanation for the development of federal and state hazardous

\textsuperscript{69} See, e.g., Deeohn Ferris, \textit{A Challenge to EPA: An Environmental Justice Office Is Needed}, EPA J., Mar./Apr. 1992, at 28 ("The keystone of this quest for justice is equal protection, not equal pollution.").

\textsuperscript{70} See Christopher Boerner & Thomas Lambert, \textit{Environmental Injustice}, PUB. INTEREST, Jan. 1, 1995, at 61 (providing an example of the NAACP supporting a company's plan to build an incinerator and landfill in minority community because of the economic benefits the company promised to bring to the community); Fred Kalmbach, \textit{Jackson Says U.S. Firms Poison Poor}, BATON ROUGE ST. TIMES, Apr. 3, 1990, at 1A ("John O'Connor, head of the National Toxics Campaign, said the quest for a safe environment should not deny minorities and the poor the jobs they desperately need.").

\textsuperscript{71} See, e.g., Rita Beamish, \textit{Gore is Told of Pollution Woes for Poor}, BOSTON GLOBE, Dec. 3, 1993, at 11 (reporting statement of an urban pastor to Vice President Al Gore about interest in Brownfields rehabilitation and investment, but "only if the economic growth and trade enhances human life and does not destroy human life").
waste laws, Brownfields policies, and environmental laws in general.\(^\text{72}\)

By federalism, I refer generally to a system of governance with a central government authority and regional governments with at least some areas of policymaking autonomy.\(^\text{73}\) Under our Constitution, and for purposes of this article, federalism refers to a legal system recognizing the United States federal government and state governments as entities with areas of autonomous political authority and areas of overlapping or delegated authority.

A substantial amount of federalism scholarship analyzes issues of "constitutional federalism." This body of scholarship and case law primarily addresses the limits of federal and state authority under the United States Constitution.\(^\text{74}\) Constitutional federalism scholarship and cases address issues such as state restrictions on interstate commerce and the dormant Commerce Clause, or federal intervention in areas of local concern without the requisite showing of Commerce Clause authority or other bases for federal action. Paradigmatic cases falling into this latter category are the Supreme Court's recent United States v. Lopez and New York v. United States opinions, both of which found constitutionally untenable assertions of federal authority.\(^\text{75}\)

\(^{72}\) This alternative approach developed infra Part III applies the logic of "first-mover" market dynamics to the setting of entrepreneurial environmental politics to shed new light on the history of environmental and Brownfields policy, particularly focusing on federal and state environmental activism.

\(^{73}\) See Edward L. Rubin & Malcolm Feely, Federalism: Some Notes on a National Neurosis, 41 UCLA L. REV. 903, 910-11 (1994) (stating that "[f]ederalism is not a managerial decision by the central decision-maker, as decentralization can be, but a structuring principle for the system as a whole," and that in this system, "subordinate units possess prescribed areas of jurisdiction that cannot be invaded by the central authority"); see also William Ty Mayton, The Fate of Lesser Voices: Calhoun v. Wechsler on Federalism 1 (Oct. 1996) (unpublished manuscript, on file with the William & Mary Environmental Law & Policy Review) (stating that "federalism denotes, and implies a respect for, the sovereignty of the states.").


As shown below, little in hazardous waste law or Brownfields policy implicates issues of constitutional federalism.

Another body of federalism literature posits that although federal activity may be authorized, our constitutional structure reflects a value preference for state authority as the norm, with only limited federal government. I will characterize this school of federalism as “normative federalism.” Normative federalism’s general preference for state primacy is rooted in constitutional language and structure, but seldom mandates a particular result. Instead, advocates of such a concept of federalism add state primacy values as a weight to be considered in developing law and policy.

A third major category of federalism looks at questions of state and federal authority through an instrumental perspective. Under this “instrumental federalism” prism, the issue is generally one of comparative institutional competence—how should authority be divided between state and federal authorities to achieve particular goals. Instrumental federalism judgment calls may be influenced by the extent to which one sees normative federalism as a heavy or light weight on the scale of appropriate policy options.

interjurisdictional competition for business investment and citing recent articles discussing dormant Commerce Clause issues raised by tax incentives to entice investment).

See Ann Althouse, Variations on a Theory of Normative Federalism: A Supreme Court Dialogue, 42 DUKE L.J. 979 (1993); Rubin & Feely, supra note 73, at 914 n.50 (“A justification for federalism is normative,... if it views federalism (that is, the autonomy of states to choose their own political norms) as inherently desirable.”).

See Althouse, supra note 76, at 980.

Professor Merritt’s approach to federalism, which relies upon constitutional language, structure, and goals to derive arguments for judicial protection of state sovereignty, could be characterized as adopting a “normative federalism” approach. See, e.g., Deborah Jones Merritt, The Guarantee Clause and State Autonomy: Federalism for a Third Century, 88 COLUM. L. REV. 1 (1988). In her critique of the Lopez decision, which in turn responded to another professor’s article, Professor Merritt acknowledges that the Commerce Clause “does not yield a single, fixed answer,” but she continues by articulating “guideposts” for Commerce Clause disputes. See Deborah Jones Merritt, The Fuzzy Logic of Federalism, 46 CASE W. RES. L. REV. 685, 689 (1996).

See John Denvir, Justice Rehnquist and Constitutional Interpretation, 34 HASTINGS L.J. 1011, 1039 (1983) (stating that “federalism has usually been an ‘instrumental’ value; one’s view of federalism has been linked to some larger substantive issue”); Rubin & Feely, supra note 73, at 914 n.50 (explaining that “a justification for federalism is instrumental if it views federalism as a means to some independent end, such as citizen participation”).
Among the virtues of federalism identified by instrumental federalism and, to a lesser extent, normative federalism analyses are responsiveness offered by decentralized law implementation by state authorities and economies of scale in the form of federal information gathering or technological or scientific expertise benefitting many states. An additional benefit of a federal system is the existence of diverse state legal schemes offering citizens with diverse preferences the ability to choose their preferred jurisdiction for home or business. Diversity of autonomous political institutions is also more likely to allow for innovation than would a single

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80 See David R. Hodas, Enforcement of Environmental Law in a Triangular Federal System: Can Three Not Be a Crowd When Enforcement Authority Is Shared by the United States, the States, and Their Citizens? 54 MD. L. REV. 1552, 1571 (1995) (“Strong state enforcement programs are invaluable within a federal system. A strong state can respond more rapidly to local pollution problems than can the federal government.”); David Schnapf, State Hazardous Waste Programs Under the Federal Resource Conservation and Recovery Act, 12 ENVTL. L. 679, 737 (1982) (“State agencies tend to be more responsive to their citizens, act faster, and are more flexible in fashioning pragmatic solutions to problems.”); Richard B. Stewart, Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy, 86 YALE L.J. 1196, 1210 (1977) [hereinafter Stewart, Pyramids] (discussing rationale for decentralized implementation). But see Rubin & Feely, supra note 73, at 924-25 (contending that an argument for the benefits of decentralization is not one for federalism since a federalist system preserves state policymaking autonomy).

81 See, e.g., States Express Concern over EPA’s Limited Funding, INSIDE EPA, Feb. 2, 1996, at 13 (“State sources also claim that many research projects would be virtually impossible to continue without sustained support and technical assistance from E.P.A.”).

unified political unit. In contrast to the thesis that autonomous states will offer a diversity of legal regimes, some scholars posit that state versus state regulatory competition for business, often referred to as "competitive federalism," may lead to reduced opportunities for "special interest" skewing of state laws than if such regulatory competition was prohibited. The end result of this competition is not a diversity of legal schemes but legal schemes sharing similar attributes.

Within this "instrumental federalism" camp, one of the most prevalent explanations for federal intervention in the area of environmental law is to prevent competitive federalism from causing a "race-to-the-bottom" among the states that would be destructive to attempts to protect citizen safety, health, and the environment. Under this theory, which recently has been questioned by Professor Revesz, were the federal government not to enact a uniform goal or standard for the states, the states would compete for business and capital by offering more business-friendly and less consumer- or environment-protective regulatory schemes than would otherwise be

83 The idea that preserving areas of state autonomy would offer opportunities for diversity and innovation was best expressed by Justice Brandeis: "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." New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J. dissenting). The supposition that states will, in reality, innovate in ways leading to a diversity of state legal schemes has been questioned. See Susan Rose-Ackerman, Risk-Taking and Reelection: Does Federalism Promote Innovation?, 9 J. LEGAL STUD. 593 (1980). But see William R. Lowry, The Dimensions of Federalism: State Governments and Pollution Control Policies (1992) (analyzing state pollution control policies and discussing contexts in which states have acted as innovators or leaders in pollution control strategies); David L. Schapiro, Federalism: A Dialogue 85-86 (1995) (discussing Rose-Ackerman's argument but asserting that despite "the force of these points, it seems clear that [thousands of] state and local government units . . . are more likely to engage in experiments than one national unit").


85 See William J. Carney, Federalism and Corporate Law: A Non-Delaware View of the Results of Competition, in INTERNATIONAL REGULATORY COMPETITION AND COORDINATION (Joseph McCary & William Bratton eds., 1997); see also Joel R. Paul, Free Trade, Regulatory Competition and the Autonomous Market Fallacy, 1 COLUM. J. EUR. L. 29 (1994/95) (discussing European Union regulatory dynamics, "race-to-the-bottom" theories, and how economic integration has been accompanied by a rise in packaging waste regulations).

86 See Revesz, supra note 82.
sought by state citizens and officials. Indeed, one finds substantial documentation of interjurisdictional competition to retain or attract new business. The risks of state officials neglecting environmental concerns may be particularly high in the setting of individualized negotiations about the degree of cleanup required at a contaminated site, especially if a state is in fiscal straits.

Hazardous waste and Brownfields issues concededly have a substantially local flavor in their immediate impacts. Nevertheless, collectively, the interstate nature of hazardous waste businesses, interstate commercial impacts of polluting industries, occasional interstate pollution impacts, and interjurisdictional competition for businesses possibly involved in abandoning, buying, or remediating contaminated sites, easily justify under

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87 See Stewart, Pyramids, supra note 80, at 1212. Although Professor Revesz has called the sufficiency of this rationale into question, the extent to which his critique makes sense in the context of adjudicatory (or individualized) decisions rather than legislative or regulatory decisions requires further analysis. See Buzbee, Remembering Repose, supra note 1, at 110-16; see also Adam Babich, Our Federalism, Our Hazardous Waste, and Our Good Fortune, 54 Md. L. Rev. 1516, 1533 (1995) ("Professor Revesz's analysis may demonstrate limitations of 'the theoretical literature on interjurisdictional competition,' but it does not call into serious question the need for federal standards to provide a minimum level of environmental protection to all U.S. residents."). Furthermore, as Professor Lowry has shown in his study of state pollution control policies, a number of variables may make states more vulnerable to capital migration threats; among those variables are the degree of federal intervention, the medium regulated and various other aspects of state political structures and finances. See LOWRY, supra note 83, at ch. 1.

88 See, e.g., Been, "Exit," supra note 38, at 512-15 (citing and discussing news and scholarly articles regarding interjurisdictional competition for business); see also Lueck, supra note 38 (discussing state and municipal efforts to attract business and reduced willingness to offer concessions to businesses). Two recent articles analyze interjurisdictional competition for new businesses, the use of tax incentives to attract investment, and implications of such state incentives under dormant Commerce Clause jurisprudence. See Peter D. Enrich, Saving the States from Themselves: Commerce Clause Constraints on State Tax Incentives for Business, 110 Harv. L. Rev. 378, 382-405 (1996); Walter Hellerstein & Dan T. Coenen, Commerce Clause Restraints on State Business Development Incentives, 81 Cornell L. Rev. 789, 790-92 (1996).

89 See LOWRY, supra note 83, at 8, 40-41; Buzbee, Remembering Repose, supra note 1, at 114-15.

90 See, e.g., Adam Babich, Circumventing Environmental Laws: Does the Sovereign Have a License to Pollute, Nat. Resources & Env't, Summer 1991, at 28; Sean D. Murphy, Prospective Liability Regimes for the Transboundary Movement of Hazardous Wastes, 88 Am. J. Int'l L. 24, 28 (1994) ("[H]azardous wastes . . . pose mostly a local environmental threat.").
the Constitution a federal role in addressing hazardous waste and Brownfields issues.\textsuperscript{91} Brownfields issues present an area of concurrent federal and state authority, with instrumental and normative federalism views influencing one's choice of legal and regulatory policy.

Many other federal environmental laws fall into the "instrumental federalism" category and adopt a "cooperative federalism" approach.\textsuperscript{92} Under cooperative environmental federalism schemes, federal laws set goals and federal authorities provide states with technological and scientific data and oversee state or local government implementation decisions. Part of the rationale for such cooperative federalism schemes is simple comparative institutional expertise.\textsuperscript{93} Under such schemes, the degree of local enforcement discretion and autonomy varies in different sections of the federal environmental statutes. Many praise the cooperative federalism instituted in the CAA and the CWA as an effective sharing of authority, capitalizing on the best capabilities of federal and state officials and preventing destructive races to the regulatory bottom.\textsuperscript{94} Under most cooperative federalism schemes, states have a substantial role in tailoring federal requirements to the varying needs of state and local jurisdictions. Critics decry the predominant role of federal authorities as unduly bureaucratic and insensitive to the needs and political preferences of state and local populations.\textsuperscript{95}

As Professors Dwyer and Stewart have explained, these cooperative schemes may be inevitable; federal authorities simply could not do it all themselves, but are necessarily dependent on state partners to achieve

\textsuperscript{91} See Richard L. Revesz, \textit{Federalism and Interstate Environmental Externalities}, 144 U. Pa. L. Rev. 2341 (1996) (analyzing interstate pollution as a rationale for federal intervention). \textit{But see} United States v. Olin Corp., 927 F. Supp. 1502 (S.D. Ala. 1996) (reasoning that mercury contamination on land used by Olin was purely local, did not constitute "economic activity," and did not have a "substantial effect" on interstate commerce, and holding application of CERCLA liability under these facts an unconstitutional exercise of Commerce Clause power).

\textsuperscript{92} See Percival, \textit{Environmental Federalism}, supra note 30, at 1174.


\textsuperscript{94} See Dwyer, \textit{Practice}, supra note 93, at 1217-18, 1223-25.

\textsuperscript{95} See Hornstein, supra note 12, at 374-75 (discussing the criticisms of the "overly rigid bureaucratic commands" in environmental statutes of early 1970s and noting only "modest" changes to allow greater flexibility in subsequent amendments).
environmental protection. Federal oversight of state efforts perhaps fosters greater state diligence and may reduce the risks of “capture” of state authorities by those with concentrated interests in a particular issue.

CERCLA and the Brownfields story are not, as with other major federal statutes such as the CAA and the CWA, rooted in a cooperative federalism scheme dictated by statute. Instead, as shown previously in Part I, much of the story of hazardous substance regulation shows a different dynamic, with federal, then state, authorities showing leadership in devising strategies to attack and remedy problems associated with contaminated sites. In this area, one finds a history of copycat legislation, alternating innovations, and generally parallel legal coverage. The realities of state enforcement of parallel state laws has created what might be called “bottom-up” federalism, leading to a de facto cooperative enforcement scheme even in the absence of explicit statutory or regulatory mandates to states to establish such a scheme.

The dynamic at play here is a vertical federal-state variant on what is often labeled “competitive federalism” in the context of state versus state competition. Considerable activism of both federal and state governments is especially notable in the history of environmental federalism. Under much of the literature analyzing political and regulatory dynamics, one would not expect to find laws or regulations on the books that harm concentrated interests to the benefit of dispersed interests. Part III analyzes the substance

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96 Dwyer, Practice, supra note 93, at 1217-18, 1223-25; Stewart, Pyramids, supra note 80, at 1201; see also Robert R. Kuehn, The Limits of Devolving Enforcement of Federal Environmental Laws, 70 TUL. L. REV. 2373, 2384-85 (1996) (arguing for an ongoing federal role, but observing increased state resources and commitment to assume enforcement of federal laws).

97 See LOWRY, supra note 83, at 50 (quoting a state official’s statement that state officials “don’t mind having the ‘federal gorilla in the closet,’ which can be turned loose if polluters object too much”). For further discussion of the elements of “capture” theories of regulation, see infra note 101 and accompanying text.

98 See, e.g., Percival, Environmental Federalism, supra note 30, at 1160-63; see also Babich, Our Federalism, supra note 87, at 1534-37 (discussing possibility under CERCLA of federal-state “cooperative agreements” under CERCLA § 104, but reporting minimal use of such a cooperative federalism option).

99 See infra Part III.

100 Some aspects of CERCLA actually show an inverted federalism scheme, with federal officials making some decisions with reference to state legal standards. See Babich, Our Federalism, supra note 87, at 1535-37.
and timing of federal and state environmental activism, particularly examining interrelationships between federal and state actions. After analyzing the dynamics and incentives underlying state and federal actions, Part III offers suggestions for why Brownfields initiatives have struck a responsive political chord and analyzes how best to implement efficacious Brownfields rehabilitation efforts.

III. **Vertical Competitive Federalism and the First-Mover Story**

Under the logic of classic "capture" theories of regulation and legislation, rigorous environmental laws should be a rarity, especially at the state level.¹⁰¹ Some portions of environmental laws are consistent with

¹⁰¹ "Capture" theories have their roots in the observation that elected politicians or regulators are likely to be disproportionately contacted and influenced by entities with concentrated interests in an issue, thereby skewing the law or regulation in their favor. See Neil K. Komesar, Imperfect Alternatives: Choosing Institutions in Law, Economics and Public Policy 56 (1994) (discussing "capture theory" and pointing out that it is also referred to as special interest theory, interest group theory, or what Komesar prefers to call "minoritarian bias"). Regulated entities are expected to achieve this disproportionate influence over officials because they likely will be fewer in number and hence have lower costs of acting collectively, and greater monetary interests at stake, than will the usually more dispersed beneficiaries of a political initiative. See id. See generally Mancur Olson, Jr., The Logic of Collective Action: Public Goods and the Theory of Groups (1965) (discussing costs of collective action and disparate impacts of political and economic choices on concentrated groups and the public). See also Edward L. Rubin, Institutional Analysis and the New Legal Process, 1995 Wisc. L. Rev. 463, 466 (1995) [hereinafter Rubin, Institutional Analysis] (reviewing Komesar’s book, supra, and observing that the effectiveness of market, legal, and political institutions “will tend to vary in similar directions as a result of similar phenomena . . . [tending] to be responsive to small, well-organized groups with high stakes in a given issue, and to undervalue interests that are widely and shallowly dispersed”). The anticipated result is laws and regulations skewed to benefit concentrated interests to the detriment of the dispersed public. See Daniel A. Farber, Politics and Procedure in Environmental Law, 8 J.L. Econ. & Org. 59, 60-61 (1992) [hereinafter Farber, Politics and Procedure] (applying insights to disparity in impacts of environmental laws on regulated entities and dispersed beneficiaries but exploring why, despite this disparity, current environmental laws impose substantial burdens on those regulated); see also Komesar, supra, at 54-58 (discussing theories and literature concerning capture); Daniel A. Farber, Positive Theory as Normative Critique, 68 S. Cal. L. Rev. 1565, 1567 (1995) [hereinafter Farber, Positive Theory] (exploring how past scholars inadequately have considered the political characteristics of government institutions in the United States and defining “positive political theory” as grounded in the “basic assumption . . . that individuals act rationally and strategically, selecting the most effective means to achieve
capture theories, with particular provisions of law offering an advantage to
a particular region’s industry.\textsuperscript{102} Taken as a whole, however, environmental
laws like the CAA, the CWA, and CERCLA impose substantial burdens on
industry despite industry’s substantial financial clout and adversely impacted
interests. Far from our finding political flight from a politically risky area of
legislation and regulation, federal and state officials have engaged in a tug of
war over environmental regulatory primacy. Little in federal or state official
behavior appears predictable or constant. Each change in the political,
market, and regulatory terrain causes a shift in the political environment and
creates different political opportunities and risks.\textsuperscript{103}

The hypothesis developed in this Part builds off of previous
scholarship which has pointed to political enterprise or entrepreneurial
activity to explain the substance of modern environmental legislation. This
section starts by examining this “political enterprise” hypothesis in the
comparative context of the history of federal and state environmental law and
policy, particularly in the hazardous substance and Brownfields areas. This

\textsuperscript{102} See generally \textit{ Bruce Ackerman & William Hassler, Clean Coal, Dirty Air} ch.
4 (1981) (showing how provisions of the CAA were primarily to benefit segments of coal
industry).

\textsuperscript{103} \textit{Cf.} William N. Eskridge, Jr. & Philip P. Frickey, \textit{Foreword: Law as Equilibrium}, 108
Harv. L. Rev. 26, 33 (1994) (analyzing recent United States Supreme Court decisions and
proposing that, as an institution, it too is “\textit{rational} in taking actions that serve [its]
preferences or goals, and that, in pursuing such goals, institutional actors act in light of
the knowledge that they are \textit{interdependent}”) (emphasis in original).
part adds to those previous analyses by showing how the approximate twenty-five year period of federal environmental policy leadership is consistent with literature analyzing "first-mover advantage" dynamics and different electoral incentives of federal or state politicians to establish their environmental credentials. The article then turns to analysis of abundant state environmental activity of recent years, particularly efforts to encourage Brownfields rehabilitation. This subsection questions whether state eagerness to assume delegated federal statutory programs or enact independent but parallel state regulatory schemes can be assumed to reflect a new and independent state eagerness to protect the environment and state citizens. Much of the recent state environmental activity appears to be largely the result of preceding federal actions and the threat of federal enforcement if states fail to be environmentally active. These observations about the dynamics of environmental federalism in turn offer lessons for Brownfields rehabilitation initiatives.

A. The First-Mover Phenomenon and Its Environmental Regulatory Parallels

The history of federal and state environmental regulatory activity is remarkably consistent with literature analyzing "first-mover advantages." This literature analyzes how institutions gain advantages by being the first to produce an innovation or new product, in this case an innovative legal and political product in the form of new bodies of law and regulation. First-mover analysis is not distinct to environmental federalism or legal structures.

104 For an excellent survey of literature on the dynamics of first-mover advantages, see Marvin B. Lieberman & David B. Montgomery, First-Mover Advantages, 9 STRATEGIC MGMT. J. 41 (1988). See also Ian Ayres, Supply-Side Inefficiencies in Corporate Charter Competition: Lessons from Patents, Yachting and Bluebooks, 43 U. KAN. L. REV. 541 (1995) [hereinafter Ayres, Supply-Side Inefficiencies] (exploring circumstances in which interjurisdictional competition for business might fail to create "first-best efficiency"); Brown, supra note 82, at 816-18 (applying first-mover dynamics to explore legislative incentives to be the first state to recognize same-sex marriages); Carney, Political Economy, supra note 84, at 159-61 (exploring how despite first-mover advantages, competitive federalism which allows for competitive forces outside a legal system will weaken power of interest groups to engage in "rent-seeking activities"); Roberta Romano, Law as a Product: Some Pieces of the Incorporation Puzzle, 1 J.L. ECON. & ORG. 225 (1985) (exploring how a state's speed of responsiveness in creating a demanded legal product contributed to efforts to attract business).
Instead, it focuses on how institutions evolve and may compete. If the federal government's several-decade preeminence as the environmental policymaker or enforcer is primarily, or at least in part, the result of its being the political "first-mover," rather than the result of some inherent institutional superiority rooted in the place of the federal government in our constitutional structure, then reduced reliance on an ongoing predominant federal role may be appropriate. It is difficult, however, to analyze inherent superiority versus context-specific superiority of federal environmental efforts. The analysis below seeks to distinguish the advantage the federal government gained as the "first-mover" in the environmental regulatory arena from less time- or context-specific differences in the types of preferences, pressures, and incentives felt by state or federal officials.

1. The Ebb and Flow of the Federal First-Mover Advantages

Substantial federal activity starting around the late 1960s followed relatively passive to nonexistent state anti-pollution efforts, despite federal grants to states and encouragement of anti-pollution efforts. The standard story is that the federal government, in essence, gave up on resistant or inactive states. The problem with this story, however, is that the federal

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105 In this discussion, references to federal "preeminence" or "superiority" in the context of environmental political activism refer both to federal leadership in creating new legislative and regulatory strategies and to the likelihood that government action will, in fact, provide the claimed environmental benefits. Whether more stringent environmental enforcement is, in fact, beneficial is surely debatable. Here, I seek to explore which institutions most effectively created regulatory schemes and which institution or level of government is likely to achieve stated goals.

106 See Percival, Environmental Federalism, supra note 30, at 1144, 1160.

107 See, e.g., LOWRY, supra note 83, at 21 ("The increased federal role [by the late 1960s] resulted from widespread and growing perceptions that the states simply were not doing the job."); Jerome M. Organ, Limitations on State Agency Authority to Adopt Environmental Standards More Stringent Than Federal Standards: Policy Considerations and Interpretive Problems, 54 Mo. L. Rev. 1373, 1373 ("[I]n response to the states' inability to address adequately [environmental degradation] . . . , Congress concluded that a national system of environmental regulation was necessary . . . ."); Vickie L. Patton, A Balanced Partnership, ENVTL. F., May-June 1996, at 16, 18 ("The primary impetus for the major federal environmental statutes was the need for a national response to states' inability to effectively protect environmental quality."); Percival, Environmental Federalism, supra note 30, at 1144, 1160 ("[E]nvironmental law became federalized only after a long history of state failure to protect what had come to be viewed as nationally important interests.").
government was also quite inactive in anti-pollution efforts until the late 1960s. A more convincing story is that federal legislators, principally Senator Muskie, either catalyzed or were prescient in foreseeing substantial electoral support for federal environmental legislation. That same potential electoral impetus existed throughout the nation, but the federal government by acting first seized a long-term advantage as the preeminent environmental policymaker."108

Significant federal environmental activity followed the publication of Rachel Carson's book *Silent Spring*, the widely covered ravages of the pesticide DDT, and a huge petroleum well blowout off of the California coast.109 These events, and the first Earth Day celebration, generally are credited as catalyzing events that led to heightened citizen concern and awareness about environmental degradation.110 By the mid-1970s, the federal legislature had enacted a broad range of environmental laws changing how polluters and regulators responded to the by-products of industrial production and harmful land use decisions.111 Enforcement authority was concentrated in the newly created EPA.112 From the time of passage of major environmental laws in the late 1960s and early 1970s, widespread public support for environmental protection was found in environmental polls.113 That widespread public support continues today.114

The stringent content of environmental laws is not merely the result

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108 *See infra* note 121 and accompanying text for discussion of previous scholarship developing an "entrepreneurial" environmental politics thesis. As discussed *infra* note 177 and accompanying text, the existence of a groundswell of citizen environmental awareness does not mean that such a change in awareness would have an equal impact in federal and state politics. Different electoral incentives and pressures from those regulated shed light on why federal activism came first and has been so durable.


111 *See* Percival, *Environmental Federalism*, *supra* note 30, at 1159-60.


113 *See* MINTZ, *supra* note 109, at 22, 161 n.5.

114 *See* Buzbee, *Remembering Repose*, *supra* note 1, at 114 & n.284 (reviewing assorted recent polls showing widespread support for environmental protection despite recent anti-regulatory rhetoric).
of interest group pressures. While many theorists posit that post-New Deal agencies promulgate regulations to benefit those regulated, and not for the public interest, federal environmental laws and regulations undoubtedly impose substantial burdens on industry and do not easily fit this “regulatory capture” hypothesis. Moreover, state initiatives to share environmental regulatory credit and burdens and to pass their own stringent laws enacted during the last ten to fifteen years are also frequently hard to explain except as the strong environmental enactments they appear to be.

The key insight that begins to explain this unexpected body of environmental law is that politicians, including both legislators and regulators, are not mere computers registering interest group pressures and producing outcomes desired by those groups with concentrated interests in policy. Instead, politicians have agendas and concerns of their own, which may deviate from or lead to resistance to constituent and interest group pressure. Nevertheless, virtually all political analysts concede that electoral accountability influences politicians’ choices. Some scholars discuss this dynamic with overtones of venality or corruption, but it need not be viewed in such a manner. An alternative view is that sometimes democracy will work; politicians may respond to constituent desires by advocating policies that will marginally increase the likelihood of support in the polling booth.

\[\text{\textsuperscript{115}} \text{See supra note 101 (reviewing capture and related collective action theories).} \]

\[\text{\textsuperscript{116}} \text{See infra notes 180-88 and accompanying text (discussing environmental activism by the states).} \]

\[\text{\textsuperscript{117}} \text{See Fred S. McChesney, Rent Extraction and Rent Creation in the Economic Theory of Regulation, 16 J. LEGAL STUD. 101, 102 (1987) (stating that politicians are “independent actors making their own demands”); cf. LOWRY, supra note 83, at 3-4 (“Policies are not simply created by national officials and then routinely implemented by state and local governments as if they were unquestioning automatons . . . .”). A variant on this thesis is developed in scholarship identifying itself as ground in “positive political theory.” See generally Farber, Positive Theory, supra note 101.} \]

\[\text{\textsuperscript{118}} \text{For a classic exposition of the thesis that the primary goal of legislators is reelection, see DAVID R. MAYHEW, CONGRESS: THE ELECTORAL CONNECTION (1974). See also Rubin, Institutional Analysis, supra note 101, at 473-74 (discussing diverse views of impacts of “participatory process” in democratic societies and different motivations within different institutions).} \]

\[\text{\textsuperscript{119}} \text{Cf. Jerry L. Mashaw, Prodelegation: Why Administrators Should Make Political Decisions, 1 J.L. ECON. & ORG. 81, 95-96 (1985) (showing how broad delegations of authority to agencies may not necessarily reflect politicians “passing of the buck” but instead political responsiveness to citizen desire for more fact-based flexible implementation of regulatory schemes). As discussed further infra note 172 and accompanying text, the} \]
Similarly, agency officials' accountability within executive branch hierarchies to the President or a governor creates at least limited electoral accountability, especially where agency officials serve at the pleasure of those executive officials.  

Politicians' own electoral incentives go far in explaining the history of the first significant and stringent federal environmental laws. This nation's first modern environmental legislation, the CAA Amendments of 1970, was the result not of mere official responsiveness to popular outcry or capitulation to industry's objections, but is more aptly characterized as the result of political entrepreneurial or enterprising activity responding to, or perhaps catalyzing, an incipient environmental activism among the citizenry. In particular, Senator Muskie and President Nixon engaged in an upwardly escalating battle to claim credit as the more environmentally sensitive politician. At the time of this battle, the two appeared to be likely presidential opponents in the upcoming elections. The end result was a stringent law that, along with several other early environmental laws as shortly thereafter amended, established the federal government, and the EPA

salience of environmental issues in voting decisions does not mean that such issues are vote-determinative. Instead, environmental and a variety of other issues may, for voters, indicate something about the character of the candidate. See Morning Edition, Administration Campaigns on Environmental Record, (National Public Radio broadcast, Oct. 4, 1996), available in 1996 WL 12730090 (analyzing importance of environmental issues to voter choices during 1996 elections but also stating that environmental issues are the key voting issue for only 10% of voters).

Part of the theory behind the leading case calling for deference to agency interpretations of ambiguous statutory language, Chevron, U.S.A. v. National Resources Defense Council, Inc., 467 U.S. 837 (1984), is rooted in just such a theory of democratic accountability. The soundness of this rationale, particularly given the likelihood of an executive branch official disregarding the wishes of the legislature, has been questioned. See Cynthia R. Farina, Statutory Interpretation and the Balance of Power in the Administrative State, 89 COLUM. L. REV. 452 (1989).

The dynamics discussed in this paragraph are drawn largely from E. Donald Elliott et al., Toward a Theory of Statutory Evolution: The Federalization of Environmental Law, 1 J.L. ECON. & ORG. 313 (1985), and from insights of Professor Farber, who has further built on that work. See Farber, Politics and Procedure, supra note 101. One of the early explorations of the “entrepreneurial politics” explanation for public interest regulation of the 1970s is James Q. Wilson, The Politics of Regulation, in THE POLITICS OF REGULATION 357, 370-72 (James Q. Wilson ed., 1980) (also discussed in Robert L. Rabin, Federal Regulation in Historical Perspective, 38 STAN. L. REV. 1189, 1293-95 (1986)).

See LANDY ET AL., supra note 112, at 28; Elliot et al., supra note 121, at 327-29, 333-38; Farber, Politics and Procedure, supra note 101, at 67-68.
in particular, as the preeminent environmental policymaker in the nation.\textsuperscript{123} This article explores federal and state environmental activism in greater depth below in subsection 2 to suggest reasons why the federal government acted first and why it has maintained a several decade preeminence as the protector of the environment.

Where, as here, new laws or regulations benefit dispersed beneficiaries to the detriment of concentrated industry confronting huge compliance costs, a capture argument is difficult to make. Despite the considerable role of not-for-profit environmental groups, one still finds greatly disparate stakes in environmental regulation.\textsuperscript{124} One cannot validly claim that regulation at the federal (or, later, at the state level) was "captured" by the environmentalists, because, as Professor Wiley has observed in another context, such an approach would turn capture theory into a tautology—whoever succeeds in the political arena has captured the regulation.\textsuperscript{125}

Instead, for at least two decades, environmental protection efforts became an area of largely bipartisan consensus, with inevitable disagreements about means to environmentally protective ends, but with few politicians or

\textsuperscript{123} See LANDY ET AL., supra note 112, at 26-33 (showing how EPA became the "nation's preeminent designer of environmental policy").

\textsuperscript{124} Concededly, public interest environmental groups are stakeholders with a concentrated interest in legal policies. They are frequently given explicit powers to litigate as private attorneys general; their involvement is a source of publicity and credit-taking in the fund raising arena; and their expertise in interpreting laws they helped draft virtually ensures future productive work. See, e.g., Farber, Politics and Procedure, supra note 101, at 70-75; R. Shep Melnick, Law and Bureaucratic Reality, 44 ADMIN. L. REV. 245, 250 & n.24 (1992). Nevertheless, their monetary stake in environmental laws is dwarfed by industry impacts. Furthermore, ideological commitment seems a much better explanation for the activities of these groups. Particularly for public interest lawyers, if monetary wealth were the true goal, private sector work would surely leave them far more wealthy. Environmental groups do, however, undoubtedly have a greater interest in environmental laws and regulations than does the public, and may have interests in statutory structures to enhance their ongoing role. See Farber, Politics and Procedure, supra note 101, at 73-75 (discussing the ongoing role of environmental groups as citizen suit litigators in statutory implementation process).

regulators willing to speak against measures to protect the environment.\textsuperscript{126} Federal politicians confronted ongoing incentives to at least appear sensitive to environmental concerns to satisfy electoral pressures.\textsuperscript{127} Ideological commitment to environmental protection further played a likely role in environmental initiatives.\textsuperscript{128} Building upon past successful legislative initiatives, Congress passed more environmental laws and amended laws that already existed.

From the time of its creation in 1970, EPA was an agency with concentrated authority and expertise, as well as an institutional stake in retaining or expanding its role as chief environmental enforcer. Consistent with the first-mover literature, EPA gained expertise and that expertise in turn built on itself as EPA attracted a substantial number of highly qualified and dedicated employees.\textsuperscript{129} Furthermore, once federal jurisdiction over environmental problems was established, the federal government, if it wanted to, could have chosen to rely upon the constitutional Supremacy Clause to preempt or dictate the content of state environmental regulation.\textsuperscript{130} Thus, the federal government, as the environmental first-mover, had a far stronger

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\textsuperscript{126} This concern about being perceived as “soft” on polluters is felt both by federal and state officials. See, e.g., Ken Sternberg, Regulation: States Have the Ball, CHEMICAL WK., Dec. 6, 1989, at 33, 35 (discussing state environmental activism and reporting that “[d]espite intense industry lobbying, state regulators are keenly aware of early dioxin scares and have tended to protect themselves from charges of being soft on dioxin’’); see also Farber, Politics and Procedure, supra note 101, at 65 (citing Mark Sagoff’s quotation of Republican Richard Darmon).
\textsuperscript{127} See LOWRY, supra note 83, at 21-22 (discussing the electoral pressures on federal politicians).
\textsuperscript{128} See id. at 22 (quoting Senator Gaylord Nelson’s interest in improved environmental protection); Rubin, Public Choice, supra note 101, at 57 (discussing the role of ideology in development of governmental policies).
\textsuperscript{129} See LANDY ET AL., supra note 112, at 9-10, 34-36, 39; MINTZ, supra note 109, at 22-23. States, in the early days of environmental laws, were viewed as having lower caliber employees than their federal counterparts. See Stewart, Pyramids, supra note 80, at 1218 & n.87 (noting the difference in caliber between state and federal health and environmental protection bureaucracies). But see MINTZ, supra note 109, at 74 (discussing the problem in the mid-1980s of EPA losing qualified employees as they “hit their stride,” and suggesting reasons for the turnover problem).
\textsuperscript{130} For discussion of the Supremacy Clause as a basis for potential preemption in the context of federal intervention in real estate finance, see Frank S. Alexander, Federal Intervention in Real Estate Finance: Preemption and Federal Common Law, 71 N.C. L. REV. 293, 334-37 (1993).
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position than would two entities or jurisdictions of equal but competing power. Generally, however, federal environmental schemes left EPA with a potential oversight role, but with substantial involvement by the states in implementing federal goals.\textsuperscript{131} States also had ongoing state court jurisdiction over state common law environmental claims and explicit authority to provide greater environmental protections than under federal law.\textsuperscript{132} Some reliance on state implementation was inevitable, given the breadth of tasks assigned to EPA.\textsuperscript{133}

As EPA invested in developing and implementing new statutory and regulatory initiatives, the regulated community invested heavily in understanding and complying with federal initiatives.\textsuperscript{134} As observed in other contexts, both the first-mover and those consuming the first-mover's product (in this case federal environmental law and regulation) confronted incentives to avoid excessive policy change, even if such change might better achieve goals of protecting the environment, or even goals of reducing regulatory burdens.\textsuperscript{135} Even with legislation like CERCLA, which has contributed to the Brownfields problem and has many critics, proposals for legislative change

\textsuperscript{131} See Percival, \textit{Environmental Federalism}, supra note 30, at 1173-75.

\textsuperscript{132} See Andrew Thompson, Note, \textit{Free Market Environmentalism and the Common Law: Confusion, Nostalgia, and Inconsistency}, 45 EMORY L.J. (forthcoming 1996) (discussing how states and state courts retained concurrent authority over environmental harms despite creation of federal environmental laws, and showing how "free market environmentalists" have erroneously asserted that common law actions were "mugged" by federal statutory enactments).

\textsuperscript{133} See \textit{supra} notes 93-96 and accompanying text.

\textsuperscript{134} See ACKERMAN & HASSLER, \textit{supra} note 102, at 44-48 (discussing how CAA provisions acted to protect certain regional industries and were therefore politically palatable); Hornstein, \textit{supra} note 12, at 375-76 (discussing substantial investments of industry in pollution control strategies).

\textsuperscript{135} See Robert W. Hahn & Roger G. Noll, \textit{Barriers to Implementing Tradable Air Pollution Permits: Problems of Regulatory Interactions}, 1 YALE J. ON REG. 63, 71 (1983) (stating that "[s]ource-specific standards, although resisted prior to their adoption, can be competitively advantageous to established firms because they give old sources a cost advantage over new ones and erect an entry barrier to potential competitors."); see also David B. Spence, \textit{Paradox Lost: Logic, Morality, and the Foundation of Environmental Law in the 21st Century}, 20 COLUM. J. ENVTL. L. 145, 177 (1995) ("One argument for why American policy makers have been slow to accept market-based regulatory approaches is that businesses prefer the existing approach because it provides certainty and familiarity and poses a barrier to the entry of potential new competitors.") (citing James M. Buchanan & Gordon Tullock, \textit{Polluters' Profits and Political Response: Direct Controls Versus Taxes}, AM. ECON. REV., Mar. 1975, at 139).
have threatened those who have already complied with existing law. In addition, over time, as legal schemes became more and more complex, both information and compliance costs associated with pollution control efforts undoubtedly created at least incidental barriers to new entrants into polluting industries and created incentives for those already complying with existing regulations to favor the status quo. Furthermore, the more stringent burdens in federal statutes on new or upgraded sources of water and air pollution create increased disincentives to new market entrants, or at least to the creation of new industrial facilities. “Hard look” judicial review of the factual underpinnings of agency rulemakings has contributed to regulatory “ossification,” further contributing to agency reluctance to change the regulatory terrain. Thus, those initially burdened by the federal environmental “first-mover” confronted incentives not to rock the regulatory boat once compliance efforts were underway.

Consistent with the first-mover phenomenon, the federal government’s environmental preeminence soon dwindled. EPA’s resources

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136 See PERCIVAL ET AL., supra note 16, at 390 (discussing concerns of those undertaking cleanups under current CERCLA scheme with any change that would lessen cleanup obligations).

137 See Stigler, Economic Regulation, supra note 101 (discussing diverse areas where regulatory enactments benefit regulated industry by controlling entry of new competitors). Stigler’s examples focus on direct government regulation of particular industries and markets, but environmental regulatory change similarly would threaten the advantage gained by industry complying with earlier mandated pollution control strategies. To deter excessive rapidity of legal change, federal environmental statutes in several places protect the durability of pollution control investments. See, e.g., 42 U.S.C. § 7412(i)(5) (1994) (stating that sources of air pollutants establishing a 90 or 95% reduction in hazardous air pollutants can meet an alternative emission limitation for a period of 6 years); id. § 7521(b)(1)(C) (forbidding EPA modification of numerical car emission standards until model year 2004). This disincentive to the creation of new industrial facilities was the major focus of a classic article criticizing the structure of federal environmental laws. See Ackerman & Stewart, supra note 15. But see Howard Latin, Ideal Versus Real Regulatory Efficiency: Implementation of Uniform Standards and “Fine Tuning” Regulatory Reform, 37 STAN. L. REV. 1267 (1985) (developing contrary arguments in support of current schemes and criticizing Ackerman and Stewart’s arguments).

began to lag far behind the mammoth tasks assigned to EPA by Congress.\textsuperscript{140} States did not stand by and let federal authorities take over the field of environmental law. In the generation of environmental laws passed in the late 1960s and 1970s, states under “cooperative federalism” schemes either had first crack at meeting federal requirements or could seek to take over initial federal enforcement of environmental goals.\textsuperscript{141} In some instances implementing state legislation was a prerequisite to states taking over delegated federal enforcement authority.\textsuperscript{142} Under virtually all such schemes, other than the politically controversial regulation of private wetland “dredging or filling” under section 404 of the CWA, states took over enforcement efforts.\textsuperscript{143} In fact, even under schemes where states showed lax enforcement efforts, they fought to retain that authority when challenged by citizens or the EPA.\textsuperscript{144}

As discussed in greater detail above, states also followed federal legal innovations with parallel but independent legislation of their own. In the passage of a wave of state mini-CERCLAs during the 1980s, state legislators

\textsuperscript{140} See Mintz, supra note 109, at 43-44, 114-15 (discussing reductions in EPA's budget while legal tasks increased); R. Shep Melnick, Pollution Deadlines and the Coalition for Failure, in Environmental Politics: Public Costs, Private Rewards 89, 91-97 (Michael S. Greve & Fred L. Smith, Jr. eds., 1992) (discussing use of statutory deadlines to force agency action, and arguing that politicians and environmentalists may benefit from legislation containing unrealistic goals).

\textsuperscript{141} See generally Cleveland Elec. Illuminating Co. v. EPA, 572 F.2d 1150 (6th Cir. 1978) (discussing the rationale for delegated state programs under federal law).

\textsuperscript{142} For example, for states to take over CWA industrial permitting, they must establish the existence of a sufficient state program. This is generally done through legislative and regulatory enactments. See 33 U.S.C. § 1342(b) (1994); see also Oliver A. Houck & Michael Rolland, Federalism in Wetlands Regulation: A Consideration of Delegation of Clean Water Act Section 404 and Related Programs to the States, 54 Md. L. Rev. 1242, 1266-70, 1279 (1995) (discussing requirements for state enactment of laws and regulations to become eligible to take over § 404 tasks).

\textsuperscript{143} See Houck & Rolland, supra note 142, at 1268-70, 1310 (discussing minimal state interest in taking over implementation of section 404’s “dredge and fill” provisions and referring to such regulatory tasks as a political “minefield”).

\textsuperscript{144} See Zygmunt J.B. Plater et al., Environmental Law and Policy 777-78, 800, 810, 830 (1992) (discussing states' eagerness to qualify for and retain delegated implementation and enforcement authority under most federal statutory schemes); see also Dwyer, Practice, supra note 93, at 1208-14 (discussing state failures to implement CAA requirements and state opposition to federal intrusion into state implementation efforts); infra note 190 (citing cases in which state and local governments failed to implement federal laws but still sought to retain enforcement primacy).
advocated and pushed for measures closely tracking the coverage of the federal CERCLA statute. In the area of Brownfields-oriented legislation, states took the lead in devising regulatory strategies to encourage Brownfields reuse. In numerous areas, several states even enacted measures surpassing, or at least potentially surpassing, federal levels of environmental protection. Much as had federal legislators and regulators starting in the 1960s, state politicians pursued environmental initiatives and began to share the limelight in an area of initial federal action.

Given all of this state activity, states undoubtedly began to build up their own institutional competence and attract high quality employees. Federal data-gathering and investigation into pollution control strategies resulted in widespread dissemination to the states of substantial pollution control information. As states built up their environmental regulatory apparatus, regulated entities invested in an ongoing state enforcement role. Furthermore, state efforts came both later in time than most federal initiatives and exhibited greater sensitivity to local desires and concerns, particularly the

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145 See supra notes 27-29 and accompanying text.
146 See supra notes 30, 54.
147 For a discussion of areas of state environmental activism, see supra notes 29-30 and accompanying text, and infra notes 185-88, 217-20 and accompanying text; see also Houck & Rolland, supra note 142, at 1297-98 (noting occasionally rigorous state protection of wetlands and coastal areas, but also noting other lax state efforts).
148 See Mintz, supra note 109, at 25 (describing initial state resistance to federal initiatives but stating some states began to embrace a more active environmental posture); Dwyer, Practice, supra note 93, at 1217-18, 1222-23 (discussing how federal reliance on states to implement federal goals has led to improved state capabilities and sophisticated state regulation). But see Houck & Rolland, supra note 142, at 1252 (questioning if states have fiscal and personnel resources to take over task of protecting wetlands).
149 See Dwyer, Practice, supra note 93, at 1222-23; Rose-Ackerman, supra note 83, at 614-16 (questioning whether federalism will actually contribute to innovation because regulatory innovations cannot be “patented” and, therefore, investments in innovation may be chilled).
150 In the first-mover literature, the resistance of a regulated entity to dealing with new regulation or a new regulator is referred to as “switching costs.” See Lieberman & Montgomery, supra note 104, at 46. This disincentive to switch may be overcome by other advantages of the new regulatory scheme. See id. at 48.
concerns of those bearing the burdens of regulation. The idea that second and third generation "movers" will show greater flexibility than the first-mover and adjust to newly developed needs of the consumers of the relevant product is also a basic tenet of first-mover phenomena.

As a corollary to later "movers" showing greater flexibility and adjustability to new needs, first-mover literature predicts that the first-mover's advantaged position will diminish over time due in large part to bureaucratization, inflexibility, and sunk investments in status quo structurings. Consistent with this observation, by the 1980s, EPA's honeymoon period began to end. Reagan-era appointments of anti-environmental officials contributed to shoddy EPA performance. A pro-environmental backlash followed, however, and EPA once again had substantial political and public support. Again in the mid-1990s, however, particularly in the 104th Congress, EPA confronted vituperative criticisms.

See LOWRY, supra note 83, at 7-9, 48-55, 75-78, 95-96, 115-19 (exploring a variety of factors leading states to be leaders or innovators in environmental regulation, and emphasizing the importance of different states' political cultures); Dwyer, Practice, supra note 93, at 1218 (discussing the need for local implementation of federal goals because of diversity of conditions throughout the United States). However, as discussed by Professors Rubin and Feely, the need for sensitivity to local conditions is not an argument for a federalist scheme with independent state authority, but is an argument for decentralization. See Rubin & Feely, supra note 73, at 924-26. In fact, EPA itself during the 1980s explored greater use of its regional offices to capitalize on the benefits of decentralization, after several years of substantial central office oversight of regional decisions. See MINTZ, supra note 109, at 30, 42, 65, 70-71. An issue worthy of greater empirical research is whether regional offices of the EPA feel greater fealty to EPA's central office in Washington, D.C. or to state authorities, citizens, and industry in the states covered by each region. In his thorough and authoritative work on EPA's enforcement efforts, Professor Mintz discusses different attitudes and enforcement practices of officials in EPA's central and regional offices as partially attributable to the appointment of regional administrators who had support of state environmental officials for the relevant regions. See id. at 74-75.

See Lieberman & Montgomery, supra note 104, at 48-49.

See id. (describing studies examining loss of first-mover advantage due to "incumbent inertia").


See LANDY ET AL., supra note 112, at 251-52 (discussing the resignation of EPA Administrator Gorsuch in light of public outcry, and support for renewed and more active efforts of new Administrator Ruckelshaus).
and massive threatened budget cuts.\textsuperscript{156} Both the early 1980s critics and those of the last few years have made much of the federal environmental bureaucracy becoming too rigid and insensitive to the particularized needs of the regulated community.\textsuperscript{157} Much of this talk has been in the context of pitched political battles and overblown rhetoric. This sense that EPA is sometimes a lethargic and conservative bureaucracy resistant to change has been articulated at times, however, by former EPA officials.\textsuperscript{158}

In the context of CERCLA, despite the calls of both environmentalists and industry for means to facilitate cleanups, particularly voluntary cleanups, EPA was slow to respond.\textsuperscript{159} States, however, did respond. States were undoubtedly the first innovators in efforts to rehabilitate Brownfield sites. EPA initially resisted this innovation, but faced with substantial criticism and threatened budget cuts, eventually adopted measures to facilitate Brownfields remediation and showed a new willingness to share environmental regulatory turf with the states.\textsuperscript{160} Thus, in ways analogous to earlier state efforts to share regulatory authority with federal officials, federal officials started to respond in concert with innovative state efforts. Most recently, explicit regional EPA willingness to forego jurisdiction at sites cleaned up under state authority has begun to create a coordinated hazardous waste scheme lacking for most of

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\item House Speaker Newt Gingrich called EPA "a highly centralized command bureaucracy artificially trying to impose its judgment with almost no knowledge of local conditions and with a static rather than dynamic view of itself." Gary Lee, Gingrich Lashes Out at EPA: Browner Praises Its Efforts, \textsc{Wash. Post}, Feb. 17, 1995, at A23 [hereinafter Lee, Gingrich Statement]. House Majority Whip Tom DeLay stated that "EPA, the Gestapo of government, pure and simply has been one of the major claw hooks that the government has maintained on the backs of our constituents." Janet Hook, House Rejects Bid to Curtail EPA: Vote Splits GOP Moderates, Conservatives, \textsc{Chi. Sun-Times}, July 29, 1995, at 3. Republican-led efforts to cut substantially the budget of EPA and several other agencies contributed to a budget battle standoff and federal government shutdown. See Buzbee, \textit{Regulatory Reform}, supra note 66, at 303-09 (reporting and citing sources discussing the budget battles over EPA funding).
\item See, e.g., Lee, Gingrich Statement, supra note 156.
\item See William F. Pedersen, Jr., \textit{Formal Records and Informal Rulemaking}, 85 \textsc{Yale L.J.} 38, 59 (1975).
\item See supra notes 45-53 and accompanying text (discussing various EPA initiatives to encourage voluntary cleanups and Brownfields reuse).
\item See supra notes 90-97 and accompanying text.
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CERCLA's sixteen-year existence. EPA's central office has been less willing to make such a commitment.

Hence, both in the more recent history of hazardous waste regulation and Brownfields rehabilitation efforts, and in the longer history of federal and state environmental regulatory efforts, the federal government's sustained preeminent policymaking role could be largely due to its being the first-mover, which is largely traceable to Senator Muskie's sensitivity to the electoral salience of environmental activism.

2. Reasons the Federal Government Moved First

One major gap in the literature on the dynamics of environmental legislation is an explanation for why Senator Muskie and federal officials responded first to incipient citizen interest and maintained that preeminent position for several decades. First-movers sometimes gain their advantaged position by happenstance or by the luck of having an innovative employee or official in the ranks. Different preferences or incentives also may explain first-mover innovation. Little reason exists, however, to suppose that federal officials inherently have stronger environmentally conscious "preferences" than their state counterparts. Furthermore, while the wave of environmental awareness during the late 1960s may have constituted a "republican moment" of public political participation and awareness, why did it manifest itself in federal legislative activity instead of a wave of state enactments? Relatedly, why do we find strong federal environmental laws that are a durable and substantive addition to the legal landscape, not a short-
lived set of solely symbolic enactments?\textsuperscript{166} Any elected official, federal or state, starting in the late 1960s could not help but be aware of citizen environmentalism as an issue of potential political salience. Yet federal officials acted first and maintained that activism for many years. This subsection explores how different electoral incentives confronted by federal and state officials sheds light on why federal officials moved first in developing substantive environmental laws and regulations.

Professor Elliott and his coauthors point to presidential aspirations as creating the impetus for the Muskie-Nixon environmental escalation leading to the stringent CAA Amendments of 1970.\textsuperscript{167} Election-year dynamics, with varying characteristics of political opponents, may in fact play a significant role in explaining the content of federal and state environmental laws.\textsuperscript{168} How particular elections and opponents will develop positions on any particular issue seems to be largely a wild-card factor leading to little in the way of long-term predictable political outcomes. Few politicians, however, can risk appearing anti-environmental any longer.\textsuperscript{169}

\textsuperscript{166} See \textit{id.} Federal environmental laws also have their share of largely symbolic provisions and language, but nevertheless have other provisions creating substantial regulatory burdens. See John Dwyer, \textit{The Pathology of Symbolic Legislation}, 17 \textsc{Ecology} \textsc{L.Q.} 233 (1990); Farber, \textit{Politics and Procedure}, \textit{supra} note 101, at 68-69; Paul Portney, \textit{Policy Watch: Economics and the Clean Air Act}, 4 \textsc{J. Econ. Perspectives} 173 (1990); Rubin, \textit{Public Choice, supra} note 101, at 22 (criticizing the prediction by public choice scholars that laws will be largely symbolic).

\textsuperscript{167} Elliot \textit{et al., supra} note 121, at 326-29 (discussing how Senator Muskie and President Nixon engaged in “competitive credit-claiming” preceding their anticipated opposition in the upcoming presidential race).


\textsuperscript{169} See Farber, \textit{Politics and Procedure, supra} note 101, at 65 (stating that “environmental legislation seems to have a base of support much broader than ‘wine and cheese’ nature lovers”). Farber cites to Mark Sagoff’s quotation of Republican Richard Darman, one-time head of the controversial Reagan Office of Management and Budget, who stated: “Increasingly we are all environmentalists.” \textit{Id.} Darman goes on to include both major political parties, Jane Fonda, the National Association of Manufacturers, and Bugs Bunny among his all-inclusive list of environmentalists. \textit{Id.} (citing Mark Sagoff, \textit{Three Essays on...}}
A body of political science scholarship offers insights into federal innovation and leadership. No voter can keep apprised of all political views of all candidates. Instead, voters typically rely on other indicators or proxies for making assumptions about a politician's character or stances on a range of issues. Hence, citizens with great frequency vote along party lines, with a candidate's Democratic or Republican party affiliation assumed to reflect a likely bundle of political views. In low-level or low-visibility elections, voters tend not even to know the candidates' positions on the issues. However, electoral analyses reveal increased voter awareness of

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Ethics and the Environment, in SELECTED ENVIRONMENTAL STATUTES (1990)).

170 See Barbara Hinckley, Issues, Information Costs, and Congressional Elections, 4 AM. POL. Q. 131, 132 (1976) (summarizing past studies, introducing her own study of voter behavior, and noting that, while voter ignorance can no longer be assumed, "'rational decisionmakers acquire only a limited amount of information before making choices' limited by 'the value to [them] of making a correct decision opposed to an incorrect one'") (quoting A. DOWNS, AN ECONOMIC THEORY OF DEMOCRACY 207 (1957)). As Professor Farber similarly observes, "public choice theory has some well-known difficulties accounting for the fact that people vote at all" because voters are so unlikely to influence political outcomes. Farber, Politics and Procedure, supra note 101, at 65.

171 See Rubin, Public Choice, supra note 101, at 34 (critiquing public choice hypotheses and stating that legislators may show "ideological consistency [to] give[ ] the legislator an electoral advantage, akin to brand recognition"). Farber makes an analogous point in stating that politicians will seek support of environmental groups because "environmental groups serve something of the same informational purpose as the Underwriter's Laboratory does, by a placing a stamp of approval on the product." Farber, Politics and Procedure, supra note 101, at 71.

172 See SHELDON KAMIENIECKI, PARTY IDENTIFICATION, POLITICAL BEHAVIOR, AND THE AMERICAN ELECTORATE 81 (1985) ("Those who lack the necessary time, skill, or motivation to develop a good understanding of politics probably use familiar cue and symbols to help them formulate views on issues, candidates, and the political system. Party identification, no doubt, is an important cue for many Americans."); Hinckley, supra note 170, at 138-42, 147 (finding substantially lower levels of voter awareness of actual candidate positions on issues in congressional elections than in senate or presidential elections). This is not to deny that voters will over time sometimes change their party affiliations. For an exploration of how party affiliations develop and may change, see KAMIENIECKI, supra, at chs. 1, 2, 6 & 7.

173 See Hinckley, supra note 170, at 138-39.
candidates’ actual stands as one moves to higher-visibility elections. Voter surveys reveal a notably higher incidence of issue-based knowledge of voters in elections for the Senate than for the House of Representatives. Similarly, in presidential elections one finds an even higher incidence of voters with knowledge about candidates’ stands on the issues.

This research is consistent with greater federal environmental activism because, with the possible exception of state gubernatorial elections, federal legislative elections involve greater advertising and actual voter knowledge of issue stances than do state elections. Voters at low cost to themselves obtain actual information about candidate positions. State legislators, in contrast, use far less mass media advertising or debates and are less likely to be elected based on anything other than their party affiliation.

See id. at 147-48. In higher-visibility elections, such as senate races, exploitation of issue differences may be particularly important in attracting crossover voters usually supporting the opposing party or in attracting independents. See Alan I. Abramowitz, A Comparison of Voting for U.S. Senator and Representative in 1978, 74 AM. POL. SCI. REV. 633, 636-37 (1980) (“While ideological proximity to the incumbent had a negligible impact on candidate choice in House elections, it had a substantial impact on candidate choice in Senate elections among . . . independents and supporters of the challenger’s party.”). Similarly, increased information availability from other sources impacts voters’ issue awareness and anticipated voting behavior. See Bryon St. Dizier, The Effect of Newspaper Endorsements and Party Identification on Voting Choice, 62 JOURNALISM Q. 589 (1985) (exploring the impact of newspaper editorials on voter knowledge and behavior); James W. Dyson & Frank P. Scioli, Jr., Communication and Candidate Selection: Relationships of Information and Personal Characteristics to Vote Choice, 55 SOC. SCI. Q. 77 (1979) (showing how varying degrees of exposure of a study group to an actual campaign debate can influence voters’ choices among candidates).


See Hinckley, supra note 170, at 147-48.

See id. at 132-33 (discussing how differential costs of obtaining information about candidates is a likely explanation for different levels of issue awareness in elections for congressional or senate seats, and suggesting a need for increased media coverage to foster informed voting).

Hinckley notes the small number of studies analyzing state and district samples, but notes that these earlier studies “indicate[] low levels of voter interest in and information about these races . . . .” Id. at 132. For studies showing how increased information availability influences voter choices, see supra notes 170-76 and accompanying text.
State candidates hence have a comparatively weaker incentive than federal candidates to establish their environmental credentials or commit to a particular position on environmental issues. State and federal candidates face an overlapping electorate, but state candidates' personal issue stances are less likely to have impacts on electoral outcomes. Further adding to these different electoral incentives faced by state officials is greater state official concern with attracting or retaining industry. Federal legislators also share an interest in their jurisdictions' economic health, but they are less likely to have direct ongoing contacts with regulated entities impacted by federal legislation.

Despite these greater federal electoral incentives to establish pro-environment credentials, particularly as one moves up the electoral ladder to senate or presidential elections, the preeminent position of the federal government and the EPA as the chief environmental policymaker has lessened as states have gained greater competence and shown greater willingness to enact environmental laws and regulations. As shown above, much of that erosion of the advantaged federal position is explainable by first-mover dynamics. Given states' increased activity and competence, coupled with the view of the normative federalists that, when in doubt, states should be the prime lawmakers for the nation, has the time come for a paradigm shift whereby the federal government surrenders environmental turf to the states? In this history of copycat legislative enactments and alternating innovations, does the evidence support the states assuming the preeminent role? State initiatives actually present a mixed picture and cast substantial doubt on the wisdom of proposals to reduce substantially the federal role in environmental protection.

B. State Stringency or a Preference for Local Enforcement?

Twenty years ago Professor Stewart questioned whether states had the “incentives to assume the administrative and political burdens of carrying out [federal] environmental policies dictated by federal agencies.” If one

179 The concept of “paradigm shifts” was developed by Thomas Kuhn's influential book, 2 THE STRUCTURE OF SCIENTIFIC REVOLUTIONS (1962). Professor Plater similarly has looked at the early history of environmental law as a paradigm shift to the “Rachel Carson Paradigm,” calling human beings to acknowledge the negative effects of their actions, even if such effects are ignored by the marketplace. Plater, supra note 110, at 982.

180 Stewart, Pyramids, supra note 80, at 1202.
thinks federal environmental enactments are unlikely because of concentrated industry opposition and dispersed regulatory beneficiaries, then stringent and unmandated state environmental laws appear to be even more of a democratic miracle. Yet states have sought delegated federal authority under most statutory schemes and have enacted further parallel and sometimes more stringent environmental laws of their own. One magazine recently posited that "the states are forging ahead on their own because the Congress and White House can’t or won’t champion meaningful environmental reform—even on issues such as the greenhouse effect that have causes and consequences far beyond any state’s borders." A federal judge recently questioned the need for an increased federal environmental law role when "[s]tates have a substantial interest in protecting their citizens and state resources." The judge went on to support this assertion of state interests in environmental protection by referring to state "counterparts to CERCLA and the EPA." If these and other similar statements are correct in positing that state politicians and agencies are newly sensitized to the goal of environmental protection, then a federal leadership or supervisory role would appear unnecessary.

Oddly, little in environmental federalism literature has applied basic insights of past analysts of the dynamics of legislation and regulation to examine state activity skeptically to see if apparent environmental zeal of the states may sometimes reflect other motivations of legislators, regulators, or others impacted by the law. This section takes a few first steps to provide such an analysis.

A key development requiring analysis is the numerous state enactments that, at least on their face, reveal states are willing to regulate some types of pollution or pollution risks more stringently than required by

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181 For a discussion of why environmental laws are viewed as unlikely, and the genesis of "capture" theories of legislation and regulation, see supra note 101 and accompanying text.
182 Susan Begley et al., E Pluribus, Plures: With Leadership from Washington, the States Set the Environmental Agenda for the Nation, NEWSWEEK, Nov. 13, 1989, at 70 (quoted in Revesz, supra note 82, at 1229). This article is referring to the three jurisdictions that have enacted laws restricting use of CFCs, which threaten protective ozone in the stratosphere. Id.
183 Anspec Co. v. Johnson Controls, Inc., 922 F.2d 1240, 1250 (6th Cir. 1991) (Kennedy, J., concurring) (quoted in Revesz, supra note 82, at 1241 n.109). In Anspec, then-Judge Kennedy addressed whether a federal common law role was appropriate.
184 Revesz, supra note 82, at 1241 n.109.
federal law. In some areas, particularly state protections of ground water supplies and regulation of toxic pollutants, several states’ regulatory standards are more stringent than their federal counterparts. Analysis of the histories of these laws reveals environmental activists and committed politicians, or sometimes committed citizens and reluctant politicians, pursuing goals of environmental and public health protection. Many of

185 See id. at 1227-29.
186 See id. at 1228-29 (citing to areas of stringent state standards). A number of areas of state stringency are actually attributable to concerns other than environmental protection. Other areas of apparently independent state environmental activism appear, upon closer examination, frequently to be attributable either to a state’s particular need to protect a resource or heightened citizen concerns due to a recent past disaster or imminent threat. See, e.g., James E. Beaver et al., Stormy Seas? Analysis of New Oil Pollution Laws in the West Coast States, 34 SANTA CLARA L. REV. 791, 793-96 (1994) (discussing West Coast states’ oil pollution statutes and noting the exposure of Alaska and California to major oil spills in the past); Benjamin R. Vance, Comment, Total Aquifer Management: A New Approach to Groundwater Protection, 30 U.S.F. L. REV. 803 (1996) (discussing ground water protection and stringent regulation by states dependent on ground water). Several states have shown leadership in pollution prevention laws, but those statutes actually only require preparation of pollution prevention plans, not their implementation. See Bert Black & David Hollander, Forced Volunteerism: The New Regulatory Push to Prevent Pollution, 16 Chem. Reg. Rep. (BNA) 1996 (1993). More than half of these statutes followed closely in time behind the federal Pollution Prevention Act of 1990, 42 U.S.C. §§ 13,101-13,109 (Supp. II 1990). See Black & Hollander, supra, at 1996, 2000. Several states’ areas of activism, however, are hard to explain except as reflecting a strong state political will to regulate environmental harms rigorously. See LOWRY, supra note 83, at 53-54, 75-78, 95-96, 115-19; see also Damon M. Chappie et al., Pollution Control 20 Years After Earth Day: A Retrospective on Federal Environmental Programs, 21 Env’t Rep. (BNA) 123, 124 (May 4, 1990) (discussing the existence, as of 1990, of state air toxics programs “above and beyond the federal program”) (citation omitted); Dwyer, Practice, supra note 93, at 1223 (citing California’s leadership in regulating hazardous air pollutants).


California’s Proposition 65, which was passed directly by the electorate in 1986, is an innovative measure that requires industry disclosure of chemical risks posed by the food supply on the environment. Although it was supported at one point by as many as 83% of Californians, industry opposed the initiative, as did both the incumbent governor and a leading candidate for the U.S. Senate. It ultimately passed with the support of 63% of voters. See Seth B. Whitelaw, Proposition 65 v. Industry: David Against Goliath or a
these state enactments are further counter-evidence to proponents of the thesis that regulations will inevitably benefit industry. As with the history of federal environmental laws, at least some state laws appear motivated by electoral incentives and ideological commitment to protect the environment. These laws also cast substantial doubt on overly-strong predictions that states will capitulate to the pressures of local industry, particularly when states confront potential industry flight.\footnote{188}

A contrary group of state laws, however, raise an opposite concern. Professor Organ has critiqued many states’ recent laws prohibiting state regulators from enacting measures surpassing federal standards in stringency.\footnote{189} These state enactments reveal ongoing state concern with regulating so stringently that local industry will be lost to states that are less stringent.\footnote{190} These laws constitute at least a counterweight to the assertion that concerns about a race-to-the-bottom are not a factor impacting the content of state regulation or enforcement. Many states rarely show any environmental leadership and frequently fail even to meet federal requirements.\footnote{191}

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\textit{Misled Public Run Amok}, 44 FOOD DRUG COSM. L.J. 677 (1989) (discussing the history and dynamics of Proposition 65); Paul Kemezis et al., \textit{Proposition 65: As California Goes, CHEMICAL WK.}, Oct. 29, 1986, at 7 (discussing the same proposition). It is thus both an example of the public’s strong support for protection from industrial and environmental hazards and an example of how politicians, confronted with industry opposition and electoral support, may be swayed by industry sentiment. See Whitelaw, supra.

\footnote{188} As Professor Revesz noted in his race-to-the-bottom analysis, more stringent state standards cast doubt on the prediction of state laxity in an area of industry mobility. Revesz, supra note 82, at 1228-29.

\footnote{189} Organ, supra note 107, at 1373.

\footnote{190} See id. at 1388-89 n.74.

In the Brownfields and hazardous waste arena, one finds parallel state and federal enactments. Why would states take on a regulatory task of supervising and approving voluntary cleanups when federal officials avoided such a role? Two previously recognized explanations appear likely, as well as one explanation for state regulatory activity that has not been previously identified.

The first possible explanation can be drawn from the first-mover phenomenon. Later parallel state enactments are consistent with first-mover literature which predicts that entities will have incentives to let others be innovators and pay the price for potential mistakes.\textsuperscript{192} If the regulatory innovation is popular or achieves its goal, later entities can copy the innovator; regulatory innovation is not patentable.\textsuperscript{193} Thus, later parallel state mini-CERCLAs, while frequently explained in terms of state perceptions of the need for even more stringent environmental protection, raised relatively few risks for state legislators seeking to establish their environmental credentials. States may have acted precisely because federal innovations made state copycatting low cost and low risk.\textsuperscript{194}

Second, state activity in the hazardous waste cleanup area is also partially attributable to state fiscal concerns. One goal of parallel state enactments was to ensure adequate state resources to investigate contaminated sites, propose them for inclusion on the CERCLA NPL of contaminated sites, and thereby vie for federal Superfund dollars. States that first enacted mini-CERCLAs had the largest number of sites on the NPL and minimal access to judicial review of participants in the regulatory process, and upholding EPA action disapproving of Virginia's proposed plan); Sierra Club v. Hankinson, 939 F. Supp. 865 (N.D. Ga. 1996) (reviewing Georgia's history of failure to implement CWA provisions requiring strategies to protect water quality); American Lung Ass'n v. Kean, 670 F. Supp. 1285 (D.N.J. 1987), aff'd, 871 F.2d 319 (3d Cir. 1989) (finding state failure to implement a SIP); Natural Resources Defense Council, Inc. v. New York State Dep't of Envtl. Conservation, 668 F. Supp. 848 (S.D.N.Y. 1987) (holding that the state failed to implement a SIP).

\textsuperscript{192} See Rose-Ackerman, supra note 83, at 594, 604-05.

\textsuperscript{193} See id.; Ayres, Supply-Side Inefficiencies, supra note 104, at 541.

\textsuperscript{194} CERCLA was, however, chronologically preceded by similar, although less strong and less funded, state "spill" statutes in two states. See supra note 26.
therefore were eligible for federal dollars. Similarly, without establishment of mini-CERCLA laws and new funding sources for site investigations and cleanups, state fiscal resources would have been threatened by emergency cleanup expenditures.

A different type of fiscal concern explains other areas of apparent state environmental activism, particularly in states choosing to regulate car pollution more stringently than required by federal law. State choices to regulate stringently sources of pollutants regulated under National Ambient Air Quality Standards ("NAAQS") are driven largely by federal CAA requirements that states meet NAAQS or face federal sanctions. Several other areas of stringent state regulation are attributable to federal CAA NAAQS. Thus, while states may not always be required to regulate particular sources more stringently than under federal standards, the choice to control stringently one pollution source rather than another has often been driven by federal NAAQS requirements.

A third and perhaps novel observation can be drawn from state

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195 New Jersey, the first state to pass a state superfund statute, had the most sites (62) on the NPL. Minnesota, also among the first states with such a law, ranked second with 46 sites. See Denise Gambino, Tar Creek Drops to 50 on Most Dangerous Waste List, DAILY OKLAHOMAN, Dec. 21, 1982, available in 1982 WL 2386506; see also Charles Bartsch & Richard Munson, Restoring Contaminated Industrial Sites, ISSUES SCI. & TECH., Mar. 22, 1994, at 74 (discussing state legislators' support for mini-CERCLAs to allow investigation of sites and have them placed on the NPL).

196 Even with the passage of mini-CERCLAs, all of which utilized a broad variety of funding sources, many states lacked adequate resources to supervise or undertake all contamination cleanups. See, e.g., Indiana Getting a Handle on Its Toxic-Waste Sites, ENGINEERING NEWS-REC., June 25, 1987, at 12 (reporting that only $2.8 million remains in Indiana's Hazardous Substances Trust Fund, but noting that the new state Superfund statute gave Indiana power to sue pollution generators for cleanup costs and treble damages).

197 For example, the northeast states decided to adopt the more stringent automobile emission limitations strategies that were required only in California. See LOWRY, supra note 83, at 1.

198 In nonattainment areas for ozone and carbon monoxide, reduction in car pollution is a key strategy. States face a choice of regulating cars or other sources to meet federal standards. See supra note 191 and accompanying text (citing and discussing cases involving SIP implementation failures).

voluntary cleanup and mini-CERCLA enactments. While new state environmental laws and regulations add a new layer of law for industry to heed, they may paradoxically be intended to reduce or displace enforcement threats posed by federal regulators. These enactments do not legally preclude ongoing parallel federal enforcement. As a practical matter, however, they have an additional impact of substantially reducing the likelihood of unsought federal intervention at sites of concern. As discussed above, states have explicitly sought federal commitment to forbear any ability to revisit state-supervised voluntary cleanups. Notions of comity, coupled with limited federal dollars and excessive legal burdens on EPA, make federal activism substantially less likely once states enact parallel regulatory schemes and act at sites that would otherwise be of possible federal concern.

State parallel activity here therefore may be explainable in part by the following dynamic. Once industry confronts the inevitability of environmental regulation, state regulators offer several advantages; key among them is a greater sensitivity to local industry’s needs. Concern with capital exit might lead state regulators to go easier on liable parties than would federal regulators, particularly in states where enforcement officials are not insulated from political pressure. Furthermore, any explicit or de facto delegation of authority to an agent (here the states), allows for some “slippage” or “drift” from the principal’s ideal goal. In the context of Brownfields efforts, regulation of contaminated sites, and voluntary cleanup schemes, the federal government seldom has delegated authority to the states, but state activity as a practical matter has displaced most potential federal activity, even if a state’s decisions might be different from what federal officials would make on their own.

Parallel state environmental enactments thus create several potential

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200 See supra notes 54-60 and accompanying text.
201 See supra notes 58-60 and accompanying text.
202 Professor Lowry observes that state institutional structures impact the zeal with which state officials enforce state environmental laws. See LOWRY, supra note 83, at 7, 53-54. He also observes that in the process of environmental enforcement, efficient state permitting processes are a source of pride. See id. at 49 (describing Wisconsin’s air pollution control scheme).
204 See id. at 433-34, 439, 443-44 (discussing principal-agent issues and the problem of “policy drift”).
benefits to state legislators. State legislators can take electoral credit for enactment of facially pro-environment laws. While state officials may at times feel significant industry pressure, federal and state officials both have electoral incentives to respond to similar public pro-environment sentiment.\(^\text{205}\) State legislators also can respond to industry desires for local regulation over federal regulation,\(^\text{206}\) if regulation of an activity is inevitable even without state intervention.\(^\text{207}\) Especially in the context of contaminated real property, once entities interested in such properties confront potential liability under federal law, any state regulatory activity reducing the degree of uncertainty about liability is attractive.\(^\text{208}\) Thus, support for state mini-CERCLAs and voluntary cleanup initiatives at least in part results from the preceding existence of potential federal law-based liability.\(^\text{209}\)

Furthermore, a considerable body of empirical and theoretical literature posits that officials within bureaucracies will act to seek expansion of agency turf and budgets.\(^\text{210}\) The universality or dominance of this phenomenon has been questioned because of other incentives confronted by

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\(^\text{205}\) However, as discussed above, state legislators probably feel fewer electoral incentives than federal legislators to establish their environmental credentials.

\(^\text{206}\) Were state regulation to involve an area of national production and high costs of varied compliance standards, industry might in fact prefer a uniform legal obligation over diverse state approaches. *See* Stewart, *Pyramids*, *supra* note 80, at 1215.

\(^\text{207}\) *See* Mintz, *supra* note 109, at 23 (discussing how early EPA pursuit of industry was opposed by state officials acting on behalf of industry).

\(^\text{208}\) *Cf.* Lowry, *supra* note 83, at 47-53 (reporting that Wisconsin’s streamlining of the permitting process for stationary air pollution sources was an area of state pride and perceived competition).

\(^\text{209}\) As stated by a B.F. Goodrich official about the legal “layering” of federal and state regulations, “closer is better. Industry can accept the concept of control becoming more palatable and sensible as it gets closer to the regulated industry.” *See* William C. Becker, *Out of the Federal Frying Pan*, *Chemical Wk.*., June 10, 1981, at 5.

Nevertheless, concerns about job security, patronage, and responsiveness to desires of local industry create strong reasons for state officials, both in the legislature and within agencies, to favor state assumption of environmental regulatory turf in lieu of federal regulators handling similar tasks. Such state incentives are especially strong if the underlying laws and regulations leave regulators with room for discretionary judgments.\textsuperscript{212}

Contrasting federal resistance to involvement in voluntary cleanup initiatives is traceable, among several interrelated factors, to relatively greater rewards for local governments as sites are returned to productive reuse and become job or tax-producing facilities.\textsuperscript{213} Federal officials would confront little more than new work, in which the risk of error and public outcry would be substantial.\textsuperscript{214} If, as others have posited, agency officials will usually seek turf expansion and increased budgets, such a goal for federal officials was apparently overwhelmed by concerns about risk and lack of positive political incentives.\textsuperscript{215}

To put the previous paragraphs’ points differently, states’ activism and increased competence in the environmental area are largely traceable to the federal first-mover and the benefits of vertical federal-state competition.

\textsuperscript{211} See Buzbee, Remembering Repose, supra note 1, at 82-96 (discussing and critiquing the bureaucratic expansion hypothesis in the context of EPA’s reluctance to assume greater responsibility for overseeing and approving voluntary contamination cleanups); see, e.g., Peter H. Aranson, Theories of Economic Regulation: From Clarity to Confusion, J.L. & Pol. 247, 279-82 (1990); Ronald N. Johnson & Gary D. Libecap, Agency Growth, Salaries and the Protected Bureaucrat, 27 Econ. Inquiry 431, 448 (1989); Louis De Alessi, On the Nature and Consequences of Private and Public Enterprise, 67 Minn. L. Rev. 191, 206 (1982).

\textsuperscript{212} See supra note 143 and accompanying text (citing to authorities discussing the general lack of state interest in assuming delegated authority to administer the CWA "dredge and fill" responsibilities because of the inflexibility and political riskiness of such decisions); infra notes 218-22.

\textsuperscript{213} See Buzbee, Remembering Repose, supra note 1, at 113-14.

\textsuperscript{214} Part of EPA’s reluctance to take on such a task is rooted in EPA’s own history. In the 1980s, lax cleanup approvals led to substantial congressional oversight and accusations of “sweetheart deals” between EPA and impacted industry. EPA officials have explicitly attributed EPA reluctance to the “sweetheart deal” debacle. See id. at 81 (quoting an EPA official’s statement that “folks will be all over our backs if we make a mistake” as occurred in the 1980s).

\textsuperscript{215} See id. at 82-96 (discussing the budgetary expansion hypothesis and countervailing forces that may create disincentives for agency officials to take on new tasks or regulatory turf).
for political credit. States benefited from copying (with some variation) federal schemes, and passed their own first-mover innovation of voluntary cleanup schemes, in part to reduce uncertainty and liability fears resulting from federal law. States also increased in competence and expertise due to delegated federal programs and access to federal databases about pollution control strategies. Thus, state activity is at least partially the result of preceding federal initiatives. If, as posited above, state environmental activity is in part intended to create a *de facto* displacement of federal enforcement, or at least to reduce the likelihood of federal intervention, then these state laws cannot be assumed to reflect independent or durable state commitment to environmental protection.\footnote{See *supra* notes 182-84 and accompanying text (quoting statements assuming state environmental initiatives are always intended to strengthen environmental protection if they appear to do so).}

Nevertheless, retained spheres of state sovereignty, or at least areas of state implementation discretion, still provide regulatory benefits. As others have predicted about the dynamics of federalism, especially state versus state competitive federalism, once one state created a legal innovation attractive to industry interested in investing in Brownfield sites, other states passed similar measures.\footnote{Each state's voluntary cleanup scheme varies, but they have many common provisions. *See* Buzbee, *supra* note 1, at 118-22 (setting forth a table summarizing attributes of state voluntary cleanup schemes); *see also* Geltman, *supra* note 1, at 4 (setting forth a similar table summarizing state voluntary cleanup and related Brownfields initiatives).} Without retained state authority to create innovative strategies, states would not have created these schemes reducing incentives to abandon Brownfield sites.

Given substantial state interest in attracting or retaining industry, one would expect even facially stringent state laws to provide some room for state officials involved with the implementation or enforcement process to respond to industry concerns. A provocative United States General Accounting Office Study supports the soundness of such an expectation.\footnote{U.S. GEN. ACCOUNTING OFFICE, SUPERFUND: HOW STATES ESTABLISH AND APPLY ENVIRONMENTAL STANDARDS WHEN CLEANING UP SITES (1996).} This study reviewed how states establish and apply environmental standards in cleaning up contaminated sites, with a particular focus on states with more protective standards than under federal law.\footnote{See *id.*} Greater stringency was found under portions of several states' laws, but under most more protective soil...
cleanliness requirements, state authorities linked that stringency with flexibility to modify obligations in the process of implementing those standards.\textsuperscript{220} Similarly, after the first wave of mini-CERCLAs, states cut back on the stringency of those laws by adding provisions responsive to industry concerns.\textsuperscript{221} Analogous sensitivity to industry concerns is found in the funding sources for most states’ mini-CERCLAs; such state laws draw on a larger number of funding sources than their federal CERCLA counterpart, which is funded primarily by taxes on the most polluting industries.\textsuperscript{222} These observations are consistent with the thesis that states will enact environmental laws either in response to democratic pressure or to take electoral credit, but also seek through the implementation process or an amendment process to show sensitivity to industry concerns.

A remaining question is whether more immutable differences in state

\textsuperscript{220} See id. at 2-3, 11-13, 17. Unlike soil standard requirements, states are less willing to allow implementation flexibility in dealing with ground water contamination, although there too some states allow implementation to modify presumptively applicable requirements. See id. at 15, 18-20. As discussed above regarding first-mover dynamics, federal regulations, practices, and requirements are still utilized by most states as at least the starting point for state regulatory decisionmaking. See id. at 12, 15 (presenting tables showing that a substantial number of states utilize federal requirements or risk assessment assumptions, with few deviations).

\textsuperscript{221} New Jersey’s innovative ECRA statute was “reformed” in response to industry concerns that New Jersey’s regulatory burdens were creating “an anti-industrial climate in New Jersey.” David Gill, The ECRA Threat, BUS. J. N.J., Feb. 1, 1989, at 68, available in 1989 WL 2579435 (also including a statement by a corporate executive that, while “few companies will say it publicly, many refuse to locate any new industrial operation in New Jersey”). New Jersey subsequently enacted ISRA, amending ECRA. See Brent Bowers, New Jersey Loosens Environmental Noose, but Some Firms Still Gag, WALL ST. J., July 28, 1993, at B2. Minnesota, another state mini-CERCLA leader, also softened its mini-CERCLA statute in subsequent amendments, and enacted a comprehensive voluntary cleanup approval scheme. See John B. Casserly, Comment, Minnesota’s Land Recycling Act: Solving Problems by Evolving Superfund, 2 WIS. ENVTL. L.J. 261 (1995).

\textsuperscript{222} See WILLIAM H. RODGERS, JR., ENVIRONMENTAL LAW § 8.1(B)(3) (2d ed. 1994) (discussing the Superfund and its funding primarily from the likely polluting industries); EPA, 50-STATE STUDY, supra note 26, at 16-23 (discussing the variety of sources used for funding state mini-CERCLAs); Frank P. Grad, A Legislative History of the Comprehensive Environmental Response, Compensation and Liability (“Superfund”) Act of 1980, 8 COLUM. J. ENVTL. L. 1, 12-13 (1982) (discussing funding of the federal Superfund). Similarly, state pollution prevention laws, while evidence of state leadership and innovation, actually require little or no action apart from analysis of pollution prevention techniques. See Beaver et al., supra note 186.
and federal governments may nonetheless lead to a preference for a predominant federal or state role in environmental regulation, assuming the goal is achievement of stated environmental objectives. Several tentative conclusions can be drawn about relative state and federal suitability to act as an environmental policymaker. Federal authorities likely will be less sensitive to concerns of local industry and citizens’ needs than will state and local regulators.\textsuperscript{223} Federal officials will generally be indifferent to industry threats to move from one state to another. At the standard or regulation-setting stage, however, the recent history of state activism, at a minimum, calls into question overly-rigid assumptions about state laxity.\textsuperscript{224} As much as federal officials seek to capitalize on electoral interest in environmental protection, state officials face similar but somewhat weaker incentives. In higher-visibility legislative or rulemaking battles, any state official capitulation to industry could be noted and lead to allegations that capitulating officials were anti-environmental.\textsuperscript{225}

In lower-visibility contexts, however, such as negotiations over cleanup obligations at a particular site, state officials would again face strong incentives to retain or attract industry, but would face a lower likelihood of public scrutiny or a negative electoral reaction.\textsuperscript{226} At times, zealous local interest in a particular site would reduce the odds of capitulation, but state officials would still be more vulnerable to industrial migration threats than

\textsuperscript{223} See Houck & Rolland, \textit{supra} note 142, at 1311.

\textsuperscript{224} As stated \textit{supra} note 101 and accompanying text, some stringent state environmental laws and regulations cannot be explained away as the result of some variant on industry capture of state political processes.

\textsuperscript{225} These observations are consistent with political science literature finding issue-based voting going up as information costs go down. See \textit{supra} notes 171-76 and accompanying text. In addition, as Professor Revesz argues, precluding lower state environmental standards would merely force competing jurisdictions to offer other regulatory or tax advantages to industry. See Revesz, \textit{supra} note 82, at 1245-46.

\textsuperscript{226} Professor Anthony has made an analogous observation in criticizing agency over-reliance on interpretive rules and policy statements in lieu of notice and comment rules. See Robert A. Anthony, \textit{Interpretive Rules, Policy Statements, Guidance, Manuals, and the Like—Should Federal Agencies Use Them to Bind the Public?} 41 DUKE L.J. 1311, 1319 (1992) (stating that nonlegislative documents “may enable the agency to operate at a lower level of visibility, with greater discretion and with fewer checks from the public and the courts”).
would be federal officials.\textsuperscript{227} This likely difference in concern about industry threats is an immutable characteristic of state and federal governments under our Constitution. Even without the benefits of alternating innovations in a federalist scheme, some federal oversight role would reduce the likelihood of state or local surrender to industry demands.

The nature of the environmental amenity or medium to be regulated or protected may also influence the appropriate mix of federal and state authority. Federal regulation of nationally marketed pollution sources, like cars or paints, makes great sense, and in fact is supported by industry to avoid diverse and burdensome state requirements.\textsuperscript{228} Furthermore, by regulating a consumer product, no government faces a significant threat of capital flight. In contrast, in the context of stationary sources of air and water pollution, Professor Lowry observes that "the presence of economic pressure . . . makes . . . state supersede [or exceedance] of federal standards rare."\textsuperscript{229} In the area of hazardous waste cleanups, particularly when dealing with persons who may be making elective choices about where to invest their capital and whether to become involved in a contamination cleanup, the relatively immobile nature of the contamination itself does not eliminate concerns about interjurisdictional competition leading to relaxed regulatory treatment. Concern with attracting or retaining capital investment will heighten the sensitivity of state officials to the desires of potential Brownfields investors.\textsuperscript{230}

\textsuperscript{227} As I have previously argued, this disparity in political influence may prevent state officials from even knowing about citizen concerns. The race-to-the-bottom rationale critiqued by Professor Revesz assumes that state officials know of citizens' political preferences, but sacrifice them in light of industry threats of migration; it is unclear if the disparate stakes of citizens and industry will reduce officials' awareness of citizen sentiment. See Buzbee, Remembering Repose, supra note 1, at 114-16.


\textsuperscript{229} See LOWRY, supra note 83, at 47.

\textsuperscript{230} But see Clifton J. McFarland, Federalism and CERCLA Programs, NAT. RESOURCES & ENVT'Y, Summer 1994, at 29, 30-31 (discounting the "business flight problem" as a rationale for federal intervention in cleanup of contaminated sites because "a company cannot relocate hazardous substances that have previously been disposed"). Mr. McFarland's discounting of the capital mobility problem fails to acknowledge its continued relevance in the context of elective investors considering whether to become involved in Brownfield sites.
C. Assessing the Brownfields Policy Options

EPA's track record of resistance to involvement in approving voluntary cleanups makes one pessimistic that EPA will assume any increased role at sites not already identified as federal priority sites. Indeed, federal Brownfields initiatives to date offer dollars, give greater assurance to categories of PRPs that they will not be pursued, and may eventually offer state and local governments assurances of federal noninterference. No federal site-specific or programmatic oversight is yet in place or offered.

If one views hazardous waste cleanups as largely a local issue, generally not involving an interstate pollution problem, and if one of the goals of federalism is to further democratic accountability, why should federal tax dollars in the form of subsidies or grants pay for such efforts? One reason is simply tied to an ability to pay: federal tax proceeds give the federal government substantial capability to underwrite and encourage hazardous waste cleanups. In addition, although quite paltry to date, federal Brownfields and cleanup initiatives allow federal politicians to show both their interest in environmental protection and in economic renewal.

231 In her opinion in New York v. United States, 505 U.S. 144 (1992), Justice O'Connor explained the Court's striking down of the "take title" provision of a federal law because if federal law could "commandeer" state processes for federal ends, "the accountability of both state and federal officials [would be] diminished . . . [the responsible level of government should] suffer the consequences . . . [and] bear the brunt of public disapproval." Id. at 168-69.

232 This rationale is akin to the explanation Professor Macey offers for why federal officials will use our federalist structure and delegate enforcement or implementation tasks to the states. He posits that federal officials may maximize net benefits to themselves by allocating certain tasks to state or subordinate officials, much as legislators may benefit by delegating difficult tasks to administrators. See Jonathan R. Macey, Federal Deference to Local Regulators and the Economic Theory of Regulation: Toward a Public-Choice Explanation of Federalism, 76 VA. L. REV. 265, 267 (1990). Here, by providing funding instead of micromanaging or directly overseeing Brownfields rehabilitation efforts, federal officials may maximize benefits to themselves, either in the form of political credit or perhaps avoidance of criticism. Alternatively, federal officials may be making a public-regarding decision about how best to foster Brownfields reuse. See Mashaw, supra note 119 (questioning the hypothesis that broad delegations to agencies are solely motivated by political self-interest). See also Rubin, Public Choice, supra note 101, at 36, 44 (questioning the re-election maximizer hypothesis because of its failure to acknowledge complicated motivations of politicians, and stating that "[t]o view legislators as motivated solely by self-interest is to deny them the level of humanity that scholars claim on their own
Brownfields grants present a quintessential win-win situation for federal authorities. First, consistent with political rhetoric of EPA’s critics and advocates of regulatory reform, current federal Brownfields programs entail reduced federal micromanagement and greater deference to state and local decisionmakers. In addition, even if these grants are ineffective, their ineffectiveness will be revealed years later. If these grants succeed in catalyzing local and industry Brownfields efforts, federal officials could legitimately share credit for a more productive economy and cleaner environment. If, however, states perceive private momentum to cleanup Brownfield sites, it is doubtful that federal dollars are needed. States will offer monetary, environmental, and tax benefits to attract industry, as they have for decades. Nevertheless, state perceptions of interjurisdictional battles for industry might deter Brownfields expenditures from state funds, much as states have historically been wary of expenditures for the dwindling social welfare safety net programs.

On balance, federal subsidization of Brownfields rehabilitation efforts, coordinated principally by state and local governments, is appropriate. State and local governments have much greater familiarity with local market and political dynamics and a higher proportionate stake in the success of Brownfields rehabilitation than do federal authorities. Federal subsidies are “harnessing” natural political incentives of state and local governments to further ends shared by federal and state officials. In addition, because federal dollars are spent on Brownfields initiatives, it is less likely that the federal government would take any enforcement steps that could stigmatize a contaminated site and thereby jeopardize the benefits

233 See Houck & Rolland, supra note 142, at 1311 (noting political momentum for greater delegation of environmental authority to states and reduction in size of the federal government).

234 See Been, “Exit,” supra note 38, at 513-14 (describing state and local government concessions to attract or retain industry).

235 See Richard B. Stewart, Federalism and Rights, 19 GA. L. REV. 917, 925-26 (1985). Professor Stewart has also spoken of federal intervention as justified because of the existence of a “fiscal commons” problem, under which states would fear providing a public benefit if other states could forego such expenditures and thereby gain an economic and associated political advantage. See Stewart, Pyramids, supra note 80, at 1214 n.73.

236 See Buzbee, Remembering Repose, supra note 1, at 41 & n.16, 55-56 & n.59 (asserting that an effective regulatory scheme must harness beneficial tendencies and control harmful tendencies both of regulators and regulated entities).
sought in federal monetary support. In effect, federal Brownfields grants further move hazardous waste law toward a *de facto* cooperative federalism scheme, reducing the degree of liability uncertainties. Given concerns about risks of agency capture and even government corruption at all levels, however, dollar grants or subsidies should be accompanied by oversight and post-expenditure review.\(^{237}\) The many failures of past and current urban renewal efforts following federal grants support the need for the tracking of any grant dollars.\(^{238}\)

In addition, if a national goal of protection from hazardous substances remains, limited federal oversight of Brownfields and state cleanup initiatives is appropriate. The current situation of parallel state and federal schemes unavoidably leads to discounting of the value of Brownfield sites, due to lingering liability risks. Federal abdication of authority at such sites, however, would be ill-advised. Rather than requiring dual state and federal review of each contaminated site, programmatic federal review of state efforts would make sense to avoid undue taxpayer expenditures for potentially duplicative efforts.\(^{239}\) Such a programmatic review has numerous

\(^{237}\) See supra note 101 and accompanying text.

\(^{238}\) Government programs that are rooted in social welfare and housing programs seeking to staunch the flow of capital out of older industrial areas have generally seen only limited success. Urban redevelopment projects have floundered. See, e.g., *Are Development Zones Oversold?*, N.Y. TIMES, Aug. 10, 1996, at A22 [hereinafter Development Zones] (discussing how various development and enterprise zone programs “have not been the economic stimulus they were expected to be” and also reporting New York State Comptroller discovery of exaggerated claims of job creation); Nicholas Lemann, *The Myth of Community Development*, N.Y. TIMES, Jan. 9, 1994, (Magazine), at 27. Municipal redevelopment agencies frequently have difficulty retaining industry—even industry recently attracted by the promise of tax breaks and special legal treatment. See John Greenwald, *A No-Win War Between the States*, TIME, Apr. 8, 1996, at 44-45 (discussing state versus state competition for business and reporting instances of businesses provided with special treatment later moving despite such treatment). Urban empowerment or enterprise zones proposed and initiated in recent years seek to jump-start stagnant urban neighborhoods, but have achieved only limited success. See, e.g., Development Zones, *supra*; Lemann, *supra*, at 27. For a general overview of several related “public/private partnership” initiatives aimed at spurring redevelopment, see generally CHARLES M. HAAR & MICHAEL ALLEN WOLF, LAND-USE PLANNING: A CASEBOOK ON THE USE, MISUSE, AND RE-USE OF URBAN LAND 942-64 (1989).

\(^{239}\) See SCHAPIRO, *supra* note 83, at 77-78 (discussing concerns with duplicative efforts potentially fostered by the dual governmental authorities under the United States federalist scheme). Professor Markell has explored the tradeoffs of moving to a delegated authority scheme under CERCLA, but based on his interviews with state officials, questions if states would support such a structure because of the inevitability of ongoing federal oversight. See
precedents under other federal environmental statutes.\textsuperscript{240} Impacted citizens and institutions should also retain the right to participate in the cleanup and rehabilitation decisionmaking process and petition federal authorities to intervene if a problem arises at a state-supervised cleanup. Such a petition trigger would serve much of the same function as ongoing governmental oversight, but at lesser cost and with less bureaucracy.\textsuperscript{241}

Whether these various Brownfields rehabilitation programs will actually work is uncertain because of the many non-environmental factors contributing to the creation of such sites.\textsuperscript{242} Private transactional dynamics would often create context-specific incentives for private cleanups if repose were possible. Providing such repose would be a major step in the right direction.\textsuperscript{243} Some cleanups, however, are simply too costly to make economic sense and will not occur unless a private party exists who can be forced to undertake or finance a cleanup. The many ills of old urban industrial sites make long-term private investment questionable.

It seems equally obvious, however, that local, state, and federal officials, as well as owners of contaminated sites, attorneys, and consultants, all have strong incentives to support Brownfields rehabilitation efforts. Society would also benefit if Brownfield sites were returned to reuse. The substantial emphasis on Brownfields rehabilitation in the months preceding publication of this article, in the form of government publications, conferences, and several newsletters, reflects the political and economic bonanza such efforts may promise. All of these individuals and institutions can gain political or economic advantage from such programs, even if they may ultimately fail because of other disincentives to reuse such sites. Hence, I conclude that Brownfields programs will be with us unless proven ineffective, will actually benefit some industrial ventures, and will aid clean


\textsuperscript{240} \textit{See supra} notes 92-95 and accompanying text (discussing cooperative federalism programs).


\textsuperscript{242} \textit{See infra} Part I.B.

\textsuperscript{243} I have explored elsewhere in greater detail how allowing legal repose could harness private transactional dynamics to further the federal goal of hazardous waste cleanups at minimal expense to the taxpayer. \textit{See} Buzbee, \textit{Remembering Repose}, \textit{supra} note 1, at 96.
up of the environment; but they also will be doomed to frequent failure because of the many non-environmental deterrents to Brownfields reuse.

D. A Note on Institutional Determinism

In this review of the history and dynamics of local, state, and federal environmental, hazardous waste, and Brownfields regulation, one finds different institutions at different points in time appearing innovative or inflexible, dedicated or lax, active or lethargic. At times politicians passed laws and amendments that benefited industry but at other times enacted stringent laws that simply did not fit easily into a capture theory of legislation and regulation. Similarly, states enacted both stringent laws and laws that in other contexts appear largely intended to reduce the likelihood of federal intervention. Several states have actually precluded more stringent state regulation of environmental hazards. In the Brownfields context, however, all institutions and individuals involved have strong incentives to pursue rehabilitation efforts, even if these efforts are of uncertain long-term efficacy.

Instead of our being able to predict federal, state, or industrial behavior based on a deterministic or static appraisal of the nature of the institution involved, the particular context in which each institution acted appears to be at least an equally significant factor in the content of regulatory enactments. Several decades ago, economics Nobel laureates George Stigler and Gary Becker wrote a provocative article showing how, even without individuals’ tastes (or preferences) changing, their choices would change and appear to reflect changing tastes as other variables, particularly information, changed and modified individuals’ assessment of costs and benefits.244

Consistent with Stigler and Becker’s hypothesis, the mere fact of increased state environmental activity does not necessarily mean that state officials’ preferences or concerns have changed so that federal incentives or

244 See George J. Stigler & Gary S. Becker, De Gustibus Non Est Disputandum, AM. ECON. REV., Mar. 1977, at 76. Others such as Professor Carol Rose argue that the law influences behavior and preferences through its teaching function. See, e.g., Carol M. Rose, Environmental Faust Succumbs to Temptations of Economic Mephistopheles, or, Value by Any Other Name Is Preference, 87 MICH. L. REV. 1631, 1636 (1989) (reviewing MARK SAGOFF, THE ECONOMY OF THE EARTH (1988), and arguing that private preferences are “surely educable” and thus influenced by public discussion); Carol M. Rose, Rethinking Environmental Controls: Management Strategies for Common Resources, 1991 DUKE L.J. 1, 38 (1991) (stating that “our laws are not just our controllers, but our teachers”).
oversight are no longer necessary. States and state officials may only be reacting to the changed circumstances wrought by the active and ever-changing dynamics of several decades of state and federal environmental policymaking.\(^{245}\) For example, as discussed above, much of the federal government’s preeminence and later state innovations could largely be the result of first-mover phenomenon dynamics, rather than the result of some major change in the nature of state and federal governments. Similarly, information that is now widely distributed about pollution threats and regulatory strategies has changed political, institutional, and electoral incentives. Particularized contextual analysis, or what Professor Rubin has called the “microanalysis of institutions,” will more likely shed light on appropriate policymaking choices than would a more static view of how state or federal legislators or administrators will act.\(^{246}\) Rather than reflecting a linear progression to greater regulatory wisdom or some correct and stable allocation of federal and state authority, the history of environmental federalism shows changing federal and state roles. The efficacy of the distribution of environmental regulatory authority is inevitably dynamic and ever-changing. No one correct balance can ever be a static goal.

The distinction drawn here perhaps can be analogized usefully to changing paradigms in the field of ecology. Analysts of federalism and proponents of greater state roles sometimes describe heavy reliance on federal authority in recent decades as a mistaken experiment and speak of a shift back to a more appropriate and dominant role for the states.\(^{247}\) The underlying conception seems to be one of moving toward a more stable and

\(^{245}\) See Elliot et al., supra note 121 (suggesting that federal environmental laws evolve in phases, with each phase influencing incentives of actors and succeeding developments); Rubin, Institutional Analysis, supra note 101, at 473 (pointing out how similarly structured federal agencies facing similar interest groups may nonetheless exhibit drastically different cultures and competence).


\(^{247}\) See, e.g., Hearings Before the Senate Env’t and Pub. Works Subcomm. on Superfund, Waste Control, and Risk Assessment, 104th Cong. (1995) (statement of John C. Shanahan, Policy Analyst, The Heritage Foundation), available in 1995 WL 10384003 (“Hazardous waste sites are, at their core, a local problem. If there is any federal environmental law for which a legitimate case can be made for devolving authority back to the states, it would be CERCLA.”); Patton, supra note 107, at 16 (stating that “[o]ver the past few years, some members of Congress and state officials have ... advocate[d] substantially diminishing the federal role in protecting environmental quality—the devolution revolution”).
correct balance of authority.\textsuperscript{248} Similarly, until the 1980s, the dominant ecological paradigm was that ecosystems, while sensitive to interruptions or disturbance, naturally progressed or succeeded to a best and highest state.\textsuperscript{249} In essence, a sound and undisturbed ecosystem progressed to a biologically determined balance. This previously dominant paradigm is now in disfavor. Instead, ecosystems are viewed as constantly dynamic and in flux, with ecosystem elements and species changing in reaction to other changes in complex and often unforeseeable ways.\textsuperscript{250} Modern ecologists now reject the idea of progression toward or back to a natural balance or stasis.

The view of federalism offered here is analogous to this modern view of ecosystems. Rather than searching for a single correct allocation of authority, or viewing a need for changed relationships as reflecting a mistaken past, we should instead acknowledge that the ever-shifting balance of federal and state authority is highly contextual and contingent on what has come before.\textsuperscript{251} No determined static and correct balance will ever be achievable.

\textsuperscript{248} In the context of constitutional federalism scholarship and political debate, the pendulum analogy is sometimes used to describe changing federalism conceptions. See Ronald J. Bacigal, The Federalism Pendulum, 98 W. VA. L. REV. 771 (1996); Annual Chief Justice Earl Warren Conference on Advocacy in the United States, The Courts: The Pendulum of Federalism (1979). This article's analysis of the history of environmental federalism indicates that, at least in the context of an instrumental federalism analysis, that analogy is inapposite; state and federal roles are not moving toward a stable and fixed endpoint, as will a pendulum in the absence of a continued application of force, but are constantly adjusting.


\textsuperscript{250} See id. at 869; see also Jonathan Baert Wiener, Law and the New Ecology: Evolution, Categories, and Consequences, 22 ECOLOGY L.Q. 325 (1995) (exploring implications of the new ecological paradigm). The "search for stasis is inevitably frustrated by nature's dynamic reality." Id. at 340.

\textsuperscript{251} The shift in federal and state authorities has occurred here without any notable judicial enforcement or protection of state sovereignty. The progression to greater state authority buttresses the view of the majority of the Supreme Court in Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985). In that case, the Court concluded that a state's interests would be protected by state representatives acting within the federal political system. In contrast, in New York v. United States, 505 U.S. 144 (1992), the Court once again stepped into the political arena to forbid what could be viewed as a self-coercive agreement of state representatives acting within the federal legislature forcing the states to take part in the handling of low level radioactive waste. See generally Rubin & Feeley, supra note 73, at 930-31 (criticizing New York and the Court's federalism jurisprudence and stating that "the Act that the Court invalidated on federalism grounds was actually a compact among the
achieved. Instead, ongoing changes in relationships and interactions are inevitable. Ecosystems will not reach a particular highest and best state; similarly, under our federalist system, no single allocation of authority between federal and state authorities will be correct or stable. Different allocations may best achieve certain goals at particular times, but predicting how to best allocate authority requires far more analysis than mere identification of the relevant institutional players.

All institutions now appear eager to develop Brownfields initiatives. How politically durable that eagerness will be is questionable. If states develop a successful track record and vigorously protect the environment while returning such sites to reuse, a fairly stable cooperative federalism approach may result. If, however, states tend to sacrifice cleanup protectiveness to attract industry, a wholly different dynamic shifting enforcement authority back to the federal government may follow. Such a shift back to greater federal authority would be especially likely if environmental justice advocates’ concerns were ignored by states. Were federal officials to conclude (in my view erroneously) that overlapping federal authority was no longer necessary in light of state environmental activity, the contextual dynamics of environmental federalism would lead one to predict a reduction in the stringency of state environmental enforcement.

IV. CONCLUSION

The history of Brownfields and hazardous substances policies, and environmental federalism more generally, shows shifting federal and state roles and innovations. The federal government’s long-term environmental preeminence cannot be assumed to reflect some inherent institutional superiority, but instead is partly the product of the federal government’s advantage as the first-mover in enacting substantive environmentally protective laws. That federal leadership may be attributable largely to different electoral incentives faced by federal and state legislators. Different state and federal sensitivity to benefits offered by industry, as well as threats of migration or bypassed investment opportunities by industry, are also more immutable differences that explain greater state interest in accommodating industry concerns. Recently increased environmental competence and stringency of many states do not, however, justify broad federal

states that they had fashioned by using their undiminished political power”).
relinquishment of an ongoing role in reviewing state environmental activities, particularly in the Brownfields area. Much of the recent state activity is the direct result of preceding federal innovations and requirements. Recent state contaminated site and voluntary cleanup enactments may not solely reflect newfound environmental sensitivity, but instead reveal a preference of state officials and industry for more local implementation and enforcement once federal regulation is the alternative. Nevertheless, giving states the predominant role in choosing which Brownfields to seek to rehabilitate is a sound step to avoid wasteful spending on sites that might otherwise soon be abandoned again. Brownfields initiatives have the potential to provide a substantial societal benefit, but also confront numerous significant non-environmental barriers to new investments. Current political support for Brownfields initiatives, therefore, still should be viewed somewhat skeptically; federal and state initiatives may offer more political and transactional benefits to involved institutions and individuals than they will produce actual long-term rehabilitation of Brownfield sites.