McGeorge Law Review

Volume 27 | Issue 4 Article 3

1-1-1996

Introduction: To Devolve, Or Not to Devolve?: The (D)Evolution of Environmental Law

J. Clark Kelso
University of the Pacific; McGeorge School of Law

Follow this and additional works at: https://scholarlycommons.pacific.edu/mlr

 Part of the Law Commons

Recommended Citation

J. C. Kelso, *Introduction: To Devolve, Or Not to Devolve?: The (D)Evolution of Environmental Law*, 27 Pac. L. J. 1457 (1996).
Available at: https://scholarlycommons.pacific.edu/mlr/vol27/iss4/3

This Symposium is brought to you for free and open access by the Journals and Law Reviews at Scholarly Commons. It has been accepted for inclusion in McGeorge Law Review by an authorized editor of Scholarly Commons. For more information, please contact mgibney@pacific.edu.

To Devolve, Or Not to Devolve?: The (D)Evolution of Environmental Law

J. Clark Kelso*

Issues of federalism have become paramount in national policy debates over the course of the last five years or so. States around the country have openly rebelled against mandates from Washington ranging from voter registration to immigration. The rebellion has been fought in the courts, in the halls of Congress, and in the marketplace of ideas. The court battles have not been particularly successful. Although the Supreme Court has not entirely shut the door to a strong states' rights interpretation of the Tenth Amendment, and there now is some basis for arguing a real limit upon Congress's Commerce Clause powers, it must be admitted even by the most ardent states' rights advocates that these decisions represent only minor victories in skirmishes that are generally at the margins. In the long run, either because states will continue to find resources from Washington too attractive to be refused (notwithstanding the attached strings), or because of Congress's fundamental primacy in setting federal policy (notwithstanding the power of judicial review), the odds favor federal over states rights when Congress chooses to act.

In fact, most of the successful federalism-based challenges to congressional action have been raised by the states through the political, and not the judicial, process. Most recently, the 1994 elections swept into Congress a majority that professed commitment to a reduced federal role in all sorts of government programs. Passage of welfare reform in 1996 is certainly the most dramatic example of a shrinking federal role in the planning and implementation of a major governmental responsibility.

The 1994 elections raised the real possibility of an equally dramatic reduction in the federal government's role in environmental protection since many of the supporters of the new majority in Congress were harsh critics of environmental law and policy. It was this possibility that prompted the Institute for Legislative Practice at the McGeorge School of Law to conduct a symposium titled, "To Devolve, Or Not to Devolve?: The (D)Evolution of Environmental Law."

Environmental law has always been sensitive to issues of federalism. In part, this is because the subject matter of environmental law is both very local and very national in its necessary scope. For example, the regulation of land uses has historically been more of a state and local concern than a national concern. Localized

* J.D., 1983, Columbia University, Professor of Law and Director of the Institute for Legislative Practice, University of the Pacific, McGeorge School of Law.

toxic spills generally have only local effects. Yet, airborne pollutants and contaminated water flow between regions and between states, oblivious to artificially drawn state boundaries. Professor A. Dan Tarlock notes in his article that "[b]iodiversity protection raises especially complex federalism problems because of its site specific nature and the refusal of ecosystems and bioregions to conform to political boundaries."[1]

Federalism issues are also close to the surface in environmental law because economic and political realities have required that front-line enforcement activities be divided between federal, state, and local governments. These different levels of government have been forced to work together in what became known as "cooperative federalism." As Professor Arnold W. Reitze, Jr., explains in his contribution to this symposium, "[t]he ultimate source of the states' power is the fact that environmental programs cannot work without state cooperation."[2]

One of the major themes explored in the articles by Professors Reitze and Thomas O. McGarity is whether cooperative federalism has lived up to its optimistic name in the context of the Clean Air Act. Their assessment is decidedly skeptical. Professor Reitze concludes that "[s]tates that wish to be recalcitrant in meeting their Clean Air Act requirements can and do use the claim of federalism to avoid compliance. . . . It seems fair to say that federalism is faring much better than the effort to protect the environment."[3] Professor McGarity concludes, based upon his exhaustive review of the history of Clean Air Act enforcement, that

> nearly all of [the] progress [in improving air quality in urban areas] is attributable to source control requirements directly or effectively imposed at the federal level and by lawsuits filed by affected citizens and environmental groups aimed at forcing federal, state, and local agencies to fulfill their statutory responsibilities. . . . [C]urrent efforts to accelerate the 'devolution' of federal power to the states, if directed to urban pollution control, could very easily reverse the encouraging trend of the last five years and ensure that millions of American citizens never breathe clean air.[4]

In short, there has been little cooperation in cooperative federalism.

Professor Tarlock presents a different model of federalism—"partnership federalism"—that is still in its gestational stage of development. In partnership

---

1. A. Dan Tarlock, *Federalism Without Preemption: A Case Study in Bioregionalism*, 27 PAC. L.J. 1629, 1631 (1996).

2. Arnold W. Reitze, Jr., *Federalism and the Inspection and Maintenance Program Under the Clean Air Act*, 27 PAC. L.J. 1461, 1463 (1996).

3. *Id.* at 1520.

4. Thomas O. McGarity, *Regulating Commuters to Clear the Air: Some Difficulties in Implementing a National Program at the Local Level*, 27 PAC. L.J. 1521, 1524 (1996).

federalism, state, and local interests are given their due in the formation of initial federal policies which helps to avoid some of the friction that can result from state resistance to federal mandates. As Professor Tarlock explains, partnership federalism "allows states and local governments to define the content of federal mandates [and] is increasingly characterized by multi-party agreements and federal waivers of power rather than preemption."[5] Some might contend that partnership federalism is simply a nice way of describing federal abdication of authority in favor of doing whatever the states want and will agree to. However, the federal government does not need to be a lightweight in these negotiations since the negotiations should take place in the context of what Professor Tarlock describes as "latent federal supremacy."[6]

The as-yet unanswered question is whether partnership federalism will do a better job of protecting the environment than cooperative federalism did in the context of the Clean Air Act. After all, we should assess the merits of models of government not only on the basis of theoretic and political considerations (such as conformity with fundamental notions of due process, equality under the law, and democratic governance), but also on the basis of whether a particular model produces results that, in the long run, are in the best interests of the community.

In closing this brief introduction, I invite you to dedicate some quiet time for a thoughtful reading of the articles in this symposium issue. You will learn important lessons about the past, present, and possible future of environmental law, and about how our divided government does (and sometimes does not) work.

---

5. Tarlock, *supra* note 1, at 1651.
6. *Id.*