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## Constitution and Pollution: Federalism at Work

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# The Constitution and pollution: Federalism at work

DAVID HODAS

Our Constitution has proven to be a remarkable document that has created a durable, resilient governance structure for our vast nation of 50 states and more than 310 million people.

Most people think of the Constitution as the protector of important individual rights from government deprivation. These rights, such as freedom of speech, freedom of religion, freedom from unreasonable searches and seizures, privacy, equal protection of the law, the right against self-incrimination are essential protections of the individual against the power of government.

The Constitution also provides the necessary structure for our democracy so the nation and its citizens can cooperate and prosper. Our governmental system divides power and responsibility between the national government and the federal states.

The Founders created a powerful national government composed of quasi-sovereign states. According to Supreme Court Justice Anthony Kennedy, "[Federalism] was our Nation's own discovery. The Framers split the atom of sovereignty."

Under our federal system the Constitution, treaties, and federal statutes are the supreme law of the land, preempting conflicting state laws.

Yet, some people argue that federal law should not trample states; others observe that national problems demand national solutions. Of course, national solutions generally require local imple-



mentation. Tensions arise when federal law commands state legislatures or officials to carry our federal mandates. The Supreme Court has made clear that the national government cannot command state government to fulfill the federal mandate.

The federal government can ask states to help – it cannot force them to “volunteer.” This brings us to the concept of “cooperative federalism.” Let us consider cooperative federalism in the context of pollution. Rivers and streams carrying pollution from one state to another; air-pollution does not stop at state boundaries.

The Constitution prohibits the federal government from ordering states to clean up pollution with each state. Yet, pollution comes from local activity. It would be hard for federal regulators sitting in Washington, D.C., or even regional offices scattered about the country to know about local pollution, local conditions, and to oversee hundreds of thousands of polluters. But many states do not have the resources or the scientific capability to set standards necessary to protect human health and the environment for a wide array of pollutants, dischargers, and

local and regional ecologies.

Congress' solution was to craft a system of cooperative federalism. Congress set national goals and policies and general nationwide standards, and authorized Environmental Protection Agency to use its scientific and technical expertise to establish pollutant specific rules, and to implement and enforce the law.

At the same time, in statutes such as the Clean Water Act and the Clean Air Act, Congress protected the States' primary responsibility to control pollution and to plan the use of non-federal land and water. To achieve this balance, Congress allowed states to volunteer to administer the law themselves, using state laws that met the minimum federal requirements, state agencies, state environmental staff and state lawyers. If a state agreed to do this, then EPA would step aside and give the state primary responsibility to administer the law its own way.

Since EPA would not need a major presence in such a state, EPA would send the state money that EPA would otherwise have spent on permitting and enforcement. Under this system of cooperative federalism, the federal government set national standards but states could implement the law in a way that best fit with the states unique circumstances.

EPA would only step in if a state failed to meet its commitment to implement the law. If a state does not wish to administer the federal law, it need not. In that case the federal government

will. States were also given the power to set standards more stringent than the federal minimum. In other words, if a state wanted to have more protection of public health and its environment than the federal law required, it could, and that more protective law would, by Congress' command, trump the less protective national standards.

This approach, with its own set of issues, has proven to be remarkably successful. Rivers no longer burn; towns and cities no longer routinely discharge raw sewage into our rivers, streams and lakes; air no longer routinely burns our eyes and throats. When hazardous wastes were discovered leaching from old landfills across the country in the mid-1970s, Congress enacted federal hazardous waste and clean-up laws using the cooperative federalism model. Hazardous wastes are now properly and safely disposed of; old contaminated sites are being cleaned-up and reused and new contaminated sites are rare.

Cooperative federalism harnesses the respective strengths of the federal government and the states. Indeed, the Constitution has proven to be a remarkable document. As John Marshall held in *McCulloch v. Maryland* (1819), the Constitution was “intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs.” (emphasis original).

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