2008

Hothouse Flowers: The Vices and Virtues of Climate Federalism

Jonathan H. Adler

Follow this and additional works at: http://scholarlycommons.law.case.edu/faculty_publications

Part of the Administrative Law Commons, Environmental Law Commons, and the State and Local Government Law Commons

Repository Citation

This Article is brought to you for free and open access by Scholarly Commons. It has been accepted for inclusion in Faculty Publications by an authorized administrator of Scholarly Commons.
HOTHOUSE FLOWERS:
THE VICES AND VIRTUES OF CLIMATE FEDERALISM

by JONATHAN H. ADLER *

INTRODUCTION

In 2002, California authorized the nation’s first regulations governing greenhouse gas emissions from motor vehicles.1 Yet California cannot enforce regulatory limits on vehicular emissions without federal acquiescence. The federal Clean Air Act (CAA) preempts state controls on motor vehicle emissions.2 California alone among the fifty states may seek a waiver of this preemption from the U.S. Environmental Protection Agency (EPA).3 If such a waiver is obtained, other states may then adopt California’s standards as their own.4 Federal approval of California’s regulatory standards is not automatic, however.5 Indeed, California applied for such a waiver of preemption for its greenhouse gas rules only to be rejected by the EPA in December 2007.6 Unless California succeeds in overturning the EPA’s decision in federal court,7 or a subsequent administration reverses course, the Golden State cannot enforce its greenhouse gas rules.

The debate and pending litigation over California’s effort to obtain a waiver of preemption has focused attention on the state role in climate change policy.

* Professor of Law and Director, Center for Business Law & Regulation, Case Western Reserve University School of Law. The author would like to thank Tai Antoine and James Weikamp for their research assistance. Any errors, omissions, or inanities remain those of the author alone.

1. CAL. HEALTH & SAFETY CODE § 43018.5(a) (West 2006).
3. Id. § 7543(b)(1); see also Motor & Equip. Mfrs. Ass’n, Inc. v. EPA, 627 F.2d 1095, 1101 n.1 (D.C. Cir. 1979) [hereinafter MEMA I] (noting that Congress intended California to “act as a kind of laboratory for innovation” with regard to the State’s “pioneering efforts at adopting and enforcing motor vehicle emission standards”).
4. 42 U.S.C. § 7543(e)(2)(B) (providing that other states may adopt California’s standards).
5. See id. § 7543(b) (requiring, inter alia, a finding that the state standard is “at least as protective of public health and welfare” as federal standards before granting a waiver).
7. See Keith B. Richburg, California Sues EPA Over Emissions Rules, WASH. POST, Jan. 3, 2008, at A2 (noting that California has already challenged the EPA’s decision).
California's motor vehicle regulations are the most high-profile state-level climate policy initiative, but they are hardly alone. California itself has adopted other greenhouse gas emission controls, including a greenhouse gas emissions cap and rules requiring electricity providers to obtain thirty-three percent of their power from renewable sources by 2011.\textsuperscript{8} Other states have acted as well, adopting renewable portfolio standards and other measures designed to reduce local emissions of greenhouse gases.\textsuperscript{9} Several states have also indicated their intention to adopt California's motor vehicle rules as their own.\textsuperscript{10} A group of northeastern states have banded together to form the Regional Greenhouse Gas Initiative (RGGI), a collaborative effort to impose regional emission limits and create a multistate emission trading system.\textsuperscript{11}

Although economic theory would predict that states would lag behind federal efforts to control environmentally harmful emissions, there has been far more action on climate change in state capitols than in Washington, D.C.\textsuperscript{12} Without federal action, states have stepped in to fill the policy void on climate change.\textsuperscript{13} State-level action on climate change is unlikely, in itself, to have much impact on atmospheric concentrations of greenhouse gases or projected rates of future warming.\textsuperscript{14} Nonetheless, the level of state activity is significant.

The aggressiveness of state climate policy initiatives, and potential conflict between federal and state regulatory measures, provides an opportunity to reconsider the proper state role in environmental policy. There has been a vigorous debate over the proper division of authority between the state and federal

\textsuperscript{8} See CAL. HEALTH \& SAFETY CODE § 38550 (West Supp. 2008) (providing that the state board will determine what the statewide greenhouse gas emissions were in 1990 and then set a statewide limit that is equivalent to that amount to be achieved by 2020); id. § 38562 (providing that by January 1, 2011, the state board shall adopt greenhouse gas emissions limits).


\textsuperscript{10} See News Release, California Environmental Protection Agency, ARB Approves Greenhouse Gas Rule (Sept. 24, 2004), available at http://www.arb.ca.gov/newsrel/nr092404.htm ("New York, Massachusetts, New Jersey, Vermont, Connecticut, Rhode Island and Maine, as well as the nation of Canada, are expected to consider adopting [California's] regulation for their use.").

\textsuperscript{11} Memorandum of Understanding, Regional Greenhouse Gas Initiative, Dec. 20, 2005, available at http://www.rggi.org/docs/mou_12_20_05.pdf. Given the interstate nature of the RGGI agreement, there is some question whether it constitutes an interstate compact that requires congressional approval before it may be enforced. See generally Katie Maxwell, Comment, Multi-State Environmental Agreements: Constitutional Violations or Legitimate State Coordination?, 15 PENN ST. ENVTL. L. REV. 355, 363-66 (2007) (detailing the constitutional criticisms of RGGI).

\textsuperscript{12} See J.R. DeShazo \& Jody Freeman, Timing and Form of Federal Regulation: The Case of Climate Change, 155 U. PA. L. REV. 1499, 1517-18 (2007) ("At first glance, unilateral state action to address climate change is surprising.").


\textsuperscript{14} Jonathan B. Wiener, Think Globally, Act Globally: The Limits of Local Climate Policies, 155 U. PA. L. REV. 1961, 1963 (2007) ("[It is] well understood that these state-level efforts, even those of large states such as California, will have little impact on global emissions and hence little impact on global climate.").
governments within the academic literature, with many supporting greater state autonomy over environmental policy decisions. The arguments for state primacy

15. See, e.g., HENRY N. BUTLER & JONATHAN R. MACEY, USING FEDERALISM TO IMPROVE ENVIRONMENTAL POLICY 64 (1996) (advocating for decentralized control due to the prediction that states will find the most cost-effective means); DANIEL A. FARBER, ECO-PRAgMATISM: MAKING SENSIBLE ENVIRONMENTAL DECISIONS IN AN UNCERTAIN WORLD 179-83 (1999) (emphasizing the need for nimbleness which can be best provided by decentralized environmental regulation); PIETRO S. NIVOLA & JON A. SHIELDS, MANAGING GREEN MANDATES: LOCAL RIGORS OF U.S. ENVIRONMENTAL REGULATION 3-6 (2001) (criticizing centralized control due to its one size fits all approach to environmental regulation); DAVID SCHOENBROD, SAVING OUR ENVIRONMENT FROM WASHINGTON 222-23 (2005) ("To bring environmental governance as close to home as possible, but no closer. Congress should leave pollution control to state governments unless the states would inflict significant harm on outsiders . . . ."); Jonathan H. Adler, Letting Fifty Flowers Bloom: Using Federalism to Spur Environmental Innovation, in THE JURISPRUDENCE OF ENVIRONMENTAL PROTECTION: CHANGE AND THE PRAGMATIC VOICE IN ENVIRONMENTAL LAW 263 (Jim Chen ed., 2004) [hereinafter Adler, Letting Fifty Flowers Bloom] (noting that many who call for environmental reform recognize "excessive centralization as a fundamental problem with the existing regulatory regime"); Wallace E. Oates, A Reconsideration of Environmental Federalism, in RECENT ADVANCES IN ENVIRONMENTAL ECONOMICS 1, 22 (John A. List & Aart de Zeeuw eds., 2002) (advocating for a reduced-federal regulatory role, perhaps limited to providing information and guidance); Richard Revesz, Federalism and Environmental Regulation: A Normative Critique, in THE NEW FEDERALISM: CAN THE STATES BE TRUSTED? 97, 120 (John Ferejohn & Barry R. Weingast, eds., 1997) (concluding that the "race-to-the-bottom argument is an unsound basis for supporting federal minimum standards" for environmental regulation); Daniel C. Esty, Revitalizing Environmental Federalism, 95 Mich. L. Rev. 570, 652 (1996) (arguing for "a recognition that the diversity of environmental problems we face demands a range of regulatory response strategies and levels of governmental activity"); James L. Huffman, Making Environmental Regulation More Adaptive Through Decentralization: The Case for Subsidiarity, 52 U. Kan. L. Rev. 1377, 1378 (2004) (noting that decentralized environmental decision-making is "presumptively better than centralized decision making" because the former better reflects the "values and preferences of those affected," is "more adaptable" to changing knowledge and circumstances, and produces more sustainable results); Bradley C. Karkkainen, Collaborative Ecosystem Governance: Scale, Complexity, and Dynamism, 21 Va. Envtl. L.J. 189, 206 (2002) (arguing for local regulation in order to tie regulation to specific ecosystems); Robert V. Percival, Environmental Federalism: Historical Roots and Contemporary Models, 54 Md. L. Rev. 1141, 1142 (1995) (outlining the contours of the environmental federalism debate and noting that the "recent avalanche of federal regulation is a response to years of state inaction"); Richard L. Revesz, Federalism and Environmental Regulation: A Public Choice Analysis, 115 Harv. L. Rev. 553, 555-56 (2001) (challenging "the dominant view in the legal academy . . . that public choice pathologies cause environmental interests to be systematically underrepresented at the state level relative to business interests"); Richard L. Revesz, The Race to the Bottom and Federal Environmental Regulation: A Response to Critics, 82 Minn. L. Rev. 535, 536-40 (1997) [hereinafter Revesz, Race to the Bottom] (critiquing the race-to-the-bottom criticisms in favor of decentralized control); Richard L. Revesz, Rehabilitating Interstate Competition: Rethinking the "Race-to-the-Bottom" Rationale for Federal Environmental Regulation, 67 N.Y.U. L. Rev. 1210, 1211-12 (1992) (criticizing efforts to forestall state environmental regulation based on the unfounded fear that states will race to the bottom or that federal regulation is an effective remedy should such an unlikely phenomenon actually occur); Paul S. Weiland, Federal and State Preemption of Environmental Law: A Critical Analysis, 24 Harv. Envtl. L. Rev. 237, 238-39 (2000) (arguing that net environmental benefits are maximized by refusing to allow federal preemption to the extent that the federal regulation provides a ceiling "above which the lower level of government may not regulate"). But see, e.g., Kirsten Engel & Susan Rose-Ackerman, Environmental Federalism in the United States: The Risks of Devolution, in REGULATORY COMPETITION AND ECONOMIC INTEGRATION: COMPARATIVE PERSPECTIVES 135, 137 (Daniel C. Esty & Damien Geradin eds., 2001) [hereinafter Engel & Rose-Ackerman, Environmental Federalism] (criticizing the "strong devolution" approach from an economic efficiency perspective); Kirsten H. Engel, State Environmental Standard-Setting: Is There a "Race" and Is it "to the Bottom"?,
are greatest where environmental concerns, and potential solutions, are confined within individual state boundaries. Where there are spillovers, however, the case for state leadership would seem to be less strong. It is somewhat ironic, then, that states have been so aggressive in the context of climate change, where both the environmental concern and many regulatory responses transgress state lines.

This Paper explores the role of state governments in developing climate change policy, with a particular focus on how federalism principles and practice should inform judgments about the division of authority between the state and federal governments. Part I considers the vices of state action, particularly the potential for states to free-ride on the efforts of their neighbors or to externalize the costs of their policy preferences onto other jurisdictions. Principles of institutional “matching” and subsidiarity suggest that states should take a back seat to national, even international, efforts to combat climate change. Yet there are still arguments in favor of allowing states to engage in climate policy experiments. Part II considers the virtues of state action on climate change, including the potential for state leadership to encourage innovation and experimentation in climate policy.

The various policy considerations detailed in Parts I and II may not receive adequate consideration under federal environmental law, which often imposes rigid, standardized requirements across all fifty states. Some state efforts are preempted by federal law irrespective of their policy merits. Under the CAA, the EPA must deny California’s waiver request if the state fails to meet specific criteria. Insofar as these criteria are ambiguous, the EPA is vested with some policy discretion over whether to allow greenhouse experimentation in the Golden State. With this in mind, Part III turns to the specifics of the California waiver and examines the legal basis for the EPA’s decision to reject the waiver request.

The CAA waiver provision is relatively unique in environmental law. Part IV asks what environmental law might look like if the federal government took the idea of environmental waivers more seriously. Whatever the legal or policy merits of California’s pursuit of a waiver for motor vehicle regulations, there is much to the idea that states should be able to seek the waiver of federal rules, preemptive


16. See Thomas W. Merrill, Golden Rules for Transboundary Pollution, 46 DUKE L.J. 931, 932 (1997) (“Given the inherent difficulties in regulation by any single state, transboundary pollution would seem to present a clear case for shifting regulatory authority from local to more centralized levels of governance.”); see also Richard L. Revesz, Federalism and Interstate Environmental Externalities, 144 U. PA. L. REV. 2341, 2346 (1996) (“[T]he rationale for federal regulation premised on the problem of interstate externalities is analytically unimpeachable but has not been effectively redressed in the current pollution-control scheme.”).

17. See George A. Bermann, Taking Subsidiarity Seriously: Federalism in the European Community and the United States, 94 COLUM. L. REV. 331, 338 (1994) (defining “subsidiarity” as “[t]he notion that action should be taken at the lowest level of government at which particular objectives can adequately be achieved”).

and otherwise. This Part outlines the basic case for granting states access to waivers throughout federal environmental law and briefly details what such a waiver provision might look like.

I. THE VICES OF CLIMATE FEDERALISM

There is a strong case for greater decentralization in environmental law.\(^{19}\) As a general structural matter, it is more efficient and effective to address environmental problems through institutions of equivalent scope and scale with the problem in question. Environmental protection efforts are most likely to be optimal where those who bear the costs and reap the benefits of a given policy determine how best, and even whether, to address a given environmental concern. This ensures a "match" between the environmental problem and the responsible political entity.\(^{20}\) Where the scope of a given environmental problem does not match that of the responsible institution, however, "the cost-benefit calculus will be skewed and either too little or too much environmental protection will be provided."\(^{21}\)

Under the principle of "subsidiarity,"\(^{22}\) environmental problems should be addressed at the lowest level at which they can be practically addressed. Because most environmental problems are local or regional in nature; applying this principle to existing environmental laws would result in transferring primary authority over many environmental problems to the state and local level.\(^{23}\) Climate change is anything but a local or regional problem, however. To the contrary, global climate change is just that—a global environmental concern. As a consequence, the traditional arguments for decentralization of authority over local drinking water,
land use, and the like do not apply with equivalent force. Under the principle of subsidiarity, the global nature of climate change would counsel greater centralization of policy decisions into national, if not international, hands and less authority for state and local governments.

State or local jurisdictions wishing to combat global climate change are confronted with an archetypal “commons” problem. The global climate is a vast global commons to which everyone contributes greenhouse gas emissions. Emissions anywhere on the globe contribute to the increase in atmospheric concentrations of greenhouse gases and the eventual warming of the atmosphere. Any state that reduces emissions within its jurisdiction will bear the costs of such reductions, but not reap equivalent benefits. Whatever benefits accrue from greenhouse gas emission controls accrue globally. As a consequence, states have every incentive to “free ride” on the efforts of their neighbors, rather than suffer costs that will yield few internal benefits. Absent cooperation or the imposition of federal (or international) requirements, state and local efforts are unlikely to provide anything approaching the optimal level of greenhouse mitigation measures. Put simply, “local action is not well suited to regulating mobile global conduct yielding a global externality.”

The disincentive for states to take meaningful action to address climate change is even greater than in the typical commons context, however. No state, acting alone, is even capable of adopting emission controls that would make a dent in global emissions, let alone global atmospheric concentrations, of greenhouse gases. Even with state-level policies adopted to date working together, states are not capable of reducing projected climate change and its anticipated effects to any meaningful degree. This may help explain why, outside of California, most state-level climate-change policies are largely symbolic. Few impose meaningful and enforceable emission targets in the short term. “Existing state-level measures are currently minimal and uncertain, but even if they were more developed, their potential effectiveness in the absence of a federal regime remains speculative at best.”

While state-level climate measures cannot produce direct climate benefits of any significant degree, Professor Wiener suggests that actions taken by individual states could be counterproductive if it results in “leakage.” Leakage would occur

27. Id. at 1962.
28. Id. at 1966 (“[N]o state could effectively control its own ambient level of carbon dioxide or other GHGs, because that ambient level is determined by the worldwide concentration of GHGs in the atmosphere.”); Engel & Orbach, supra note 13.
29. See DeShazo & Freeman, supra note 12, at 1522 (“Few states have set clear emissions reductions targets, and fewer still have designed policies to achieve them.”).
30. Id. at 1538.
31. Wiener, supra note 14, at 1963 (“[S]tate-level efforts could be not only ineffectual, but counterproductive, increasing net global emissions and undercutting a wider effort to constrain global
if state-level emission controls result in offsetting emission increases elsewhere.\textsuperscript{32} If a state imposes costly emission controls on local industry, for instance, this could encourage firms to migrate to other jurisdictions, resulting in increased emissions.\textsuperscript{33} State-level measures to control electricity sector emissions could produce leakage insofar as they encourage utilities to obtain power from out-of-state sources that are not subject to such controls.\textsuperscript{34} Few state policies even attempt to address such concerns, and any that do may be vulnerable to constitutional challenge under the Dormant Commerce Clause.\textsuperscript{35} While it may be unlikely that leakage would result in a net increase in global emissions, the potential for leakage caused by state-level regulatory measures could be an additional vice of state-level climate policies.

States are more likely to adopt meaningful emission reductions if they can externalize the costs of such measures on other jurisdictions. Such regional rent-seeking has been well documented in environmental law\textsuperscript{36} and may occur in the climate context as well.\textsuperscript{37} Consider the various public nuisance lawsuits filed by state attorneys general against out-of-state firms.\textsuperscript{38} State officials who file such suits get the political benefits of appearing to take action against climate change, without having to bear the costs of imposing economic burdens on in-state firms.

In the case of a nationally or globally dispersed pollutant, state regulation will often be less efficient than available alternatives. Localized measures are also likely to be more costly, and less cost-effective, than national measures.\textsuperscript{39} A local cap-and-trade system, for example, will cover a more limited set of sources, and fewer savings opportunities, than a national system with a broader base.\textsuperscript{40} Subjecting businesses to a variety of state standards may also be less efficient than a standardized federal regulatory regime.\textsuperscript{41}

\textsuperscript{32.} Id. at 1968-69.
\textsuperscript{33.} Id. at 1971 ("If leakage exceeds 100%, the subglobal regime would actually increase global emissions.")
\textsuperscript{34.} Id. at 1969.
\textsuperscript{35.} DeShazo & Freeman, supra note 12, at 1532.
\textsuperscript{39.} Wiener, supra note 14, at 1967 (noting a national emissions control regime "forfeits the greater cost savings obtainable in a larger allowance trading market encompassing more countries").
\textsuperscript{40.} Id.
\textsuperscript{41.} DeShazo & Freeman, supra note 12, at 1531 ("Firms operating in multiple states may well find that the states are adopting different approaches to achieve the same objective, making compliance confusing and potentially costly."); Peterson, McKinstry & Dernbach, supra note 9; Wiener, supra note 14, at 1974 ("Differences across state policies may impede collaborative linking among states . . . ").
State regulation of products sold in national markets can be particularly inefficient.42 Where a given product is bought and sold in national markets, and will travel throughout interstate commerce, it is less costly to design and produce the product so as to conform with a single national standard.43 For instance, if California and several northeastern states adopt more stringent emission standards for automobiles, and this produces a de facto national standard that increases production costs, consumers in other states may end up bearing a portion of the costs of more polluted states' preference for cleaner vehicles.44 Such costs may be less significant today than at the time when most federal environmental statutes were adopted.45 Nonetheless, the loss of economies of scale in national production of products sold in national markets is a potential vice of state-level regulation that warrants consideration.

II. THE VIRTUES OF CLIMATE FEDERALISM

Despite the vices of state-level climate policies, state-level experimentation and involvement in climate change could still have significant virtues. Among other things, state initiatives may serve as useful experiments on the efficacy of various climate policy measures and do a better job addressing local preferences and information about sources of climate emissions and the relative costs and benefits of mitigation strategies. In addition, insofar as the threat of climate change calls for greater consideration of adaptation, state and local governments may be particularly well-situated to develop such measures.

The best and most cost-effective way to reduce greenhouse gas emissions is not self-evident. Assuming agreement on how much to reduce emissions from a given sector, there is still a myriad of different ways to implement such controls. Some regulatory designs will entail greater transaction costs while others may facilitate transparency or enforcement.46 An emission-trading regime may help focus emission reductions on those firms capable of cutting emissions at lowest cost. At the same time, a trading regime may be more costly and time-consuming to implement and enforce. Even if such problems are overcome, questions remain

42. Engel & Rose-Ackerman, Environmental Federalism, supra note 15, at 137 ("Uniform national regulation may produce economies of scale of production and distribution for firms selling nationally."). See also NIVOLA & SHIELDS, supra note 15, at 17 ("Business interests, not without justification, often prefer nationwide regulatory standards to a hodgepodge of local rules: broad scope and standardization may lower uncertainty and increase efficiency."); SCHOENBROD, supra note 15, at 218 (defending federal regulation of pesticide safety because pesticides are "nationally distributed").

43. See Oates, supra note 15, at 21 ("It would obviously be very costly for auto manufacturers to have to produce 50 different variants of cars to satisfy the particular emissions standards of each state.").

44. See PAUL TESKE, REGULATION IN THE STATES 17 (2004) (noting adoption of emission regulations in California may "force" automakers to comply with the standard nationwide since it is not feasible to produce two separate sets of cars").

45. See Adler, Jurisdictional Mismatch, supra note 19, at 149-50 ("[S]ummarizing production advances that may lower costs of regional customization.").

about the ideal manner to allocate emission credits and account for various mitigation measures, such as the creation of carbon sinks.

Allowing individual states to act as environmental “laboratories” can produce useful information about the relative cost-effectiveness of various mitigation measures.47 If states are free to experiment with competing policy designs, other states and the federal government can learn from state policy successes. Several federal environmental statutes are modeled, at least in part, on state programs.48 Even where such experiments fail, useful information will result.49 Experience in other contexts has shown that interjurisdictional competition can encourage policy innovation as policymakers seek to meet the economic, environmental, and other demands of their constituents.50 In this way, state experimentation in the climate context could improve federal climate policies.

Some advocates of more aggressive climate policy measures note that the adoption of state environmental measures has often prompted the enactment of federal policies.51 If a state initiative is particularly successful, it may encourage federal regulation. Even if state measures are not so successful, they may still create incentives for federal action, even if only to preempt state rules with a uniform federal standard. As has occurred in the past, state greenhouse gas regulations could prompt industry support for national standards that would preempt variable state controls.52

One problem with overly centralized regulatory systems is that they tend to be overly rigid and poorly tailored to the specific environmental and economic

47. FARBER, supra note 15, at 182 (discussing importance of states as policy “laboratories”). The laboratories metaphor comes from Justice Brandeis. See New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (“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.”).


49. See TESKE, supra note 44, at 240 (noting that, even when state experiments “fail, they provide important information for other states and for national policy”); Robert B. McKinstry, Jr. & Thomas D. Peterson, The Implications of the New “Old” Federalism in Climate-Change Legislation: How to Function in a Global Marketplace when States Take the Lead, 20 PAC. MCGEORGE GLOBAL BUS. & DEV. L.J. 61, 88 (2007) (“An innovation in a particular state that fails will have less of an impact on the national economy than a federal experiment that fails. Innovative state programs can provide examples of what to do or what not to do.”).

50. See generally Charles M. Tiebout, A Pure Theory of Local Expenditures, 64 J. POL. ECON. 416 (1956) (presenting a solution for determining the level of expenditures for local public goods which better reflects population preferences than at the national level).

51. See, e.g., E. Donald Elliott, Bruce A. Ackerman & John C. Millian, Toward a Theory of Statutory Evolution: The Federalization of Environmental Law, 1 J.L. ECON. & ORG. 313, 326 (1985) (citing federal air pollution statutes in the 1960s which were passed because the automobile and soft coal industries were not satisfied with state and local environmental laws).

52. See id. at 330 (discussing California’s adoption of emission standards for new motor vehicles in the 1960s, which prompted the U.S. auto industry to support federal emission standards that would preempt state rules). See generally DeShazo & Freeman, supra note 12, at 1533-38 (discussing the “success” of state environmental initiatives in stimulating federal regulation).
conditions of local jurisdictions. The inability of centralized systems to take into account local environmental conditions, let alone local tastes, preferences, and economic conditions, leads to "one size fits all" policies that fit few areas well, if at all. The ecological and economic diversity of the nation requires local knowledge and expertise that is often unavailable at the federal level. A more decentralized system is better able to overcome this "knowledge problem" and ensure that regulatory measures take account of local conditions. Although global climate change is a global problem, the most efficient or cost-effective policy measures may still vary from place to place. Depending on the relative mix of emission sources in a given location, and the relative cost of emission controls or other mitigation measures, a different policy mix will be optimal.

Professor Ann Carlson suggests that a related benefit of allowing state experimentation in climate policy is that state measures may encourage technological innovation insofar as they are effective at inducing private investment in the development of technologies and other measures to meet local emission controls. Such measures might be particularly effective at inducing local investment if firms believe that state-level measures are likely to be replicated in other states or at the national level. States might also believe that they can obtain a "first-mover" advantage by adopting regulatory standards that are likely to be adopted elsewhere.
State and local governments may also have a comparative advantage in developing climate adaptation measures. Particularly given the impossibility of adopting enforceable emission controls that will have any appreciable effect on projected warming over the next few decades, some measure of adaptation to projected climate changes is essential. Optimal adaptation strategies will be anything but uniform, however. While global climate change is a global phenomenon, it will produce variable regional effects. Insofar as predictions of likely climatic changes are possible, it is understood that such changes will vary substantially from place to place.

Consider the likely effects on precipitation and water supplies. Insofar as a gradual warming of the earth’s temperature alters precipitation patterns, rainfall is likely to increase in some places, while declining in others. The timing and intensity of precipitation events will also be affected, but in a non-uniform manner. The same is true for snowmelt, evaporation, and so on. Such changes will vary regionally. As the 2007 report of the Intergovernmental Panel on Climate Change concluded: “Freshwater resources will be affected by climate change across Canada and the U.S., but the nature of the vulnerabilities varies from region to region.”

Because the unavoidable consequences of climate change will vary from state to state, and region to region, so too will the optimal mix of adaptation measures. Some jurisdictions may need to prepare for potential rises in sea level. Others may need to prepare for the possibility of drought. Still others may need to plan for both. In the case of emission controls, local jurisdictions do not bear the costs, and are not capable of capturing the benefits, of locally imposed measures. Yet this is not the case with adaptation.

III. THE CASE OF THE CALIFORNIA WAIVER

California’s effort to adopt the nation’s first greenhouse gas emission controls on new motor vehicles has prompted renewed debate over the proper state role in climate change. The outcome of this debate, and California’s efforts to obtain a waiver of preemption for its regulations, could have a significant and lasting effect on climate change policy in the United States. It may also inform future debates on

likely to lead to the formation of emission markets, first movers will be able to generate tradeable credits for use in future markets.”).

61. See Roger Pielke Jr. et al., Lifting the Taboo on Adaptation, 445 Nature 597, 597 (2007) (noting that adaptation “is crucial to deal with the unavoidable impacts of climate change to which the world is already committed”).


63. Id. at 335.

64. INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2007: IMPACTS, ADAPTATION AND VULNERABILITY 627 (Martin Parry et al., eds., 2007).

65. See, e.g., Darren Goode, Suggestion of State Preemption Sets Off Warning Bells, CONGRESS DAILY, Feb. 26, 2008 (noting that “[t]he state pre-emption issue is a major component of discussions in congressional efforts to address climate change” since California proposed a statewide limit on greenhouse gas emissions).
the respective roles of the federal and state governments in environmental policy more generally. As a consequence, the waiver controversy warrants fuller examination.

In July 2002, the California state legislature enacted Assembly Bill 1493, directing the California Air Resources Board (CARB) to “develop and adopt regulations that achieve the maximum feasible and cost-effective reduction of greenhouse gas emissions from motor vehicles.” Pursuant to this legislation, CARB approved regulations amending its existing “Low-Emission Vehicle (LEV II)” program to establish declining fleet average greenhouse gas emission standards in September 2004. The regulations apply to four greenhouse gases—carbon dioxide, methane, nitrous oxide, and hydrofluorocarbons—but are enforced by reference to the carbon-dioxide equivalent of a vehicle’s emissions. Under CARB’s regulations, the emission standards are to take effect beginning with the 2009 vehicle model year and decline in subsequent model years. By 2016, new vehicle emissions must decline by nearly thirty percent. If allowed to proceed, California’s rules will not remain California’s alone, however. Several other states have announced their plans to follow California’s lead, adopting the regulations as their own.

In December 2005, CARB submitted a formal request for a waiver of CAA preemption to the EPA. At the time, there was some legal uncertainty as to whether the EPA could grant the waiver because the EPA then maintained that it lacked authority over greenhouse gases under the CAA. After the Supreme Court’s decision in Massachusetts v. EPA, holding that the EPA did indeed have such authority, many assumed that a waiver would issue shortly. Testifying before the Senate Committee on the Environment and Public Works in May 2007, California Attorney General Edmund G. Brown Jr. declared, “If EPA follows the law, there’s no question that it must grant California’s waiver.” Yet the actual

66. A.B. 1493, ch. 200, § 3(a) (Cal. 2002) (codified CAL. HEALTH & SAFETY CODE § 43018.5(a) (West 2006)).
71. See News Release, California Environmental Protection Agency, supra note 10 (“New York, Massachusetts, New Jersey, Vermont, Connecticut, Rhode Island and Maine, as well as the nation of Canada, are expected to consider adopting [California’s] regulation for their use.”).
73. Id.
75. Id. at 1462-63; see also Jonathan H. Adler, Warming up to Climate Change Litigation, 93 VA. L. REV. IN BRIEF 61, 70-71 (2007), available at http://www.virginialawreview.org/inbrief/2007/05/21/adler.pdf (discussing the legal implications of Massachusetts v. EPA).
case for California's waiver request is less clear than Brown would suggest.\textsuperscript{77} Even some who have been sharply critical of the waiver denial on policy grounds acknowledge the plausibility of the EPA's legal position against the waiver.\textsuperscript{78}

Waiver requests are governed by Section 209 of the CAA. Section 209(a) provides that no state may adopt or enforce "any standard relating to the control of emissions from new motor vehicles or new motor vehicle engines" subject to regulation under the Act.\textsuperscript{79} The purpose of this provision is to maintain a national market for motor vehicles by providing for uniformity in vehicle emission standards.\textsuperscript{80} Any motor vehicle produced anywhere in the United States may be sold anywhere else in the country so long as it complies with federal emission control regulations.\textsuperscript{81} A uniform national standard prevents the balkanization of the national automobile market that could result if automakers were subject to different regulatory requirements in different states. The U.S. Court of Appeals for the D.C. Circuit, in \textit{Motor \& Equipment Manufacturers Ass'n (MEMA) v. EPA},\textsuperscript{82} explained the necessity of a uniform standard in response to an industry challenge to EPA's approval of a prior waiver request:

Congress' entry into the field and heightened state activity after 1965 raised the spectre of an anarchic patchwork of federal and state regulatory programs, a prospect which threatened to create nightmares for the manufacturers. Acting on this concern, Congress in 1967 expressed its intent to occupy the regulatory role over emissions control to the exclusion of all the states all, that is, except California.\textsuperscript{83}

\begin{flushleft}
Edmund G. Brown, Jr., Att'y Gen. of California). Environmental law experts were more circumspect. Speaking to the Associated Press, Sean Hecht of the UCLA Environmental Law Center commented that, after \textit{Massachusetts v. EPA}, "it's clear EPA has to consider California's waiver request now," but "that doesn't mean it's a foregone conclusion with respect to the waiver request." Samantha Young, \textit{EPA Revives California Emissions Rule}, ASSOCIATED PRESS, Apr. 4, 2007, available at http://www.boston.com/news/nation/articles/2007/04/04/epa_revives_california_emissions_rule/.


79. 42 U.S.C. § 7543(a) (2000). This provision provides:

\begin{quote}
No State or any political subdivision thereof shall adopt or attempt to enforce any standard relating to the control of emissions from new motor vehicles or new motor vehicle engines subject to this part. No State shall require certification, inspection, or any other approval relating to the control of emissions from any new motor vehicle or new motor vehicle engine as condition precedent to the initial retail sale, titling (if any), or registration of such motor vehicle, motor vehicle engine, or equipment.
\end{quote}

\textit{Id.}.

80. \textit{Id.} § 7543(b)(2).


82. 627 F.2d 1095 (D.C. Cir. 1979).

83. \textit{Id.} at 1109.
Indeed, it is well documented that the major automakers themselves supported adoption of federal vehicle emission controls in order to preempt the proliferation of variable state standards.84

The CAA contains one exception to this general policy of preemption. Recognizing California's particularly severe air pollution problems, and the Golden State's pioneering efforts to control mobile source air pollution, Congress adopted Section 209(b), authorizing a waiver of preemption for California.85 This provision effectively grandfathered California's pre-existing emissions controls and authorized a potential exemption for additional emissions controls adopted there in the future.86 Once the EPA grants a waiver, other states are permitted to adopt California's regulations as a part of their own air pollution control programs under CAA Section 177,87 but they are never allowed to adopt vehicle emission standards of their own. As a consequence, there can never be more than two sets of vehicle emission standards—those set by the EPA, and those set by California.

Waivers of preemption for California are not automatic. Rather, waiver requests must satisfy specific statutory criteria enumerated in CAA Section 209(b).88 Section 209(b)(1) provides that, before California can receive a waiver, it must make a threshold determination that its proposed standards "will be in the aggregate, at least as protective of public health and welfare as applicable Federal standards."89 Once California has made such a determination, and seeks a waiver, Section 209(b) provides that the EPA must deny a waiver if the EPA finds that: "(A) the determination of the State is arbitrary and capricious, (B) such State does not need such State standards to meet compelling and extraordinary conditions, or (C) such State standards and accompanying enforcement procedures are not consistent with section 202(a) of this part."90 An EPA finding that any one of these three criteria is met requires the rejection of California's waiver request.

EPA review of a California waiver request is fairly deferential. As the D.C. Circuit held in MEMA I v. EPA, "California's regulations, and California's determination that they comply with the statute, . . . are presumed to satisfy the waiver requirements and that the burden of proving otherwise is on whoever

84. See Elliott, Ackerman & Millian, supra note 51, at 330 (discussing automakers' roles in the adoption of federal vehicle emission standards).
85. 42 U.S.C. § 7543(b).
86. Section 209(b)(1) provides, among other things, that:
   The Administrator shall, after notice and opportunity for public hearing, waive application
   of this section to any State which has adopted standards . . . for the control of emissions
   from new motor vehicles or new motor vehicle engines prior to March 30, 1966, if the State
   determines that the State standards will be, in the aggregate, at least as protective of public
   health and welfare as applicable Federal standards.
42 U.S.C. § 7532(b)(1). As California was the only state to adopt vehicle emission standards prior to
March 30, 1966, this provision operates as a special provision for California only.
87. 42 U.S.C. § 7507(2).
88. Id. § 7543(b).
89. Id. § 7543(b)(1).
90. Id. § 7543(b)(1)(A)-(C); see also MEMA I, 627 F.2d at 1111 ("[I]f the Administrator makes any
one of these findings with respect to a waiver request involving California 'standards' he must deny the
request.").
attacks them."91 Nor does the EPA have any authority to consider criteria beyond those enumerated in Section 209(b) when making a waiver determination.92

Up until now, the EPA had accommodated California's efforts to adopt more stringent vehicular air pollution controls. Indeed, prior to 2007, the EPA had never completely denied a waiver request under Section 209(b).93 However, until now, California had always sought waivers for measures that addressed the state's notoriously severe local air pollution problems, such as those that have plagued the southern portions of the state.94 A waiver application for control of greenhouse gas emissions raises some distinct issues.95

EPA Administrator Stephen Johnson announced he would deny California's request for a waiver of preemption on December 19, 2007.96 According to Johnson, California's regulations were not eligible for a waiver of preemption under the CAA.97 Explaining the decision in a letter to California Governor Arnold Schwarzenegger, Johnson noted the differences between greenhouse gases and other motor vehicle emissions subject to regulation under air pollution laws:

Unlike other air pollutants covered by previous waivers, greenhouse gases are fundamentally global in nature. "Greenhouse gases contribute to the problem of global climate change, a problem that poses challenges for the entire nation and indeed the world. Unlike pollutants covered by the other waivers, greenhouse gas emissions harm the environment in California and elsewhere regardless of where the emissions occur. In other words, this challenge is not exclusive or unique to California and differs in a basic way from the previous local and regional air pollution problems addressed in prior waivers.98

While Johnson noted his policy preference for the adoption of nationally uniform motor vehicle emission regulations, he grounded his explanation of the permit denial in California's failure to meet the second criterion listed in Section 209(b).99 Specifically, he found that California does not "need" its regulations "to meet compelling and extraordinary conditions."100

In March 2008, the EPA elaborated on its reasons for denying California's waiver request.101 The EPA explained that Section 209(b) of the CAA was

91. MEMA I, 627 F.2d at 1121.
92. Id. at 1119.
93. Carlson, supra note 59, at 293. As Professor Carlson notes, however, the EPA "has sometimes denied part of a waiver or delayed implementation of California emissions standards." Id.
94. Id. at 296-97.
95. Id.
96. Letter from Stephen L. Johnson to Arnold Schwarzenegger, supra note 6, at 2.
97. Id.
98. Id. at 1.
99. Id. at 2.
100. See id. (declaring that California regulations do not have to meet compelling and extraordinary conditions).
101. California State Motor Vehicle Pollution Control Standards, supra note 6.
designed to enable California to adopt vehicular regulations “to address pollution problems that are local or regional,” and not global environmental concerns. Therefore, the Agency reasoned, California was not entitled to the same degree of deference as with more traditional air pollution control measures. While explicitly recognizing that “global climate change is a serious challenge,” and that warming was likely to have adverse effects in California, such threats were not “compelling and extraordinary compared to the effects in the rest of the country.”

As the Agency explained, “Atmospheric concentrations of greenhouse gases are an air pollution problem that is global in nature, and this air pollution problem does not bear the same causal link to factors local to California as do local or regional air pollution problems.”

While there is room to debate whether or not the EPA should have granted California’s waiver request as a matter of policy, there is ample statutory basis for Administrator Johnson’s decision as a matter of law. Section 209 seeks to strike a balance between the desire for a nationally uniform regulatory regime for motor vehicles and the need of California (and other states) to adopt more stringent pollution controls in order to protect the health and welfare of their citizens. The presumption in Section 209 is that motor vehicle emission standards should be nationally uniform. This is the basis for the broad preemption contained in Section 209(a). This presumption of preemption is not unassailable, however. Section 209(b) balances the federal interest in uniform regulation with California’s historic need for more stringent emission controls to combat California’s particularly difficult air pollution problems. As noted above, Section 209(b) requires EPA to reject California’s waiver request if the Agency determines that California “does not need such State standards to meet compelling and extraordinary conditions.” Thus, California can obtain a waiver of preemption unless the state does not “need” more stringent regulations to meet the state’s own air pollution problems. Where such a need exists, this need may outweigh the federal interest in preemption. Where such a need is lacking, such as where California’s air pollution problems are not particularly severe, or where a regulatory measure will not address California’s environmental ills, the national interest in regulatory uniformity predominates.

In prior waiver requests, California was able to argue that more stringent controls on vehicular emissions were necessary due to California’s uniquely severe urban air pollution problems, the difficulty some California metropolitan areas would otherwise have meeting applicable National Ambient Air Quality Standards, and the comparatively large contribution made by mobile source emissions to California’s air pollution problems. None of these arguments are applicable in the context of global climate change, however.

102. Id.
103. Id.
104. 49 U.S.C. § 7543(b).
105. Of some relevance, other federal statutes also preempt state regulations of motor vehicles, but lack any waiver preemption. See 49 U.S.C. § 32902 (2006) (balancing the federal interest in uniform regulation with California’s historic need for more stringent emission controls).
107. Id.
108. Adler, Golden State Waiver, supra note 77, at 77.
The argument that climate change cannot satisfy the second criterion of Section 209(b) is not based upon any skepticism about humanity's contribution to climate change. Nor is it dependent upon rejecting predictions that increases in global temperature brought about by anthropogenic emissions of greenhouse gases could have negative ecological and other effects in California. As a coastal state, California may be threatened by sea-level rise in a way that land-locked states cannot be. California's unique geography and ecological conditions mean that temperature increases will trigger different types of secondary effects there than elsewhere. Yet Section 209(b) almost certainly requires that California do more than show that anthropogenic emissions are causing an increase in atmospheric concentrations of greenhouse gases that, in turn, contribute to a gradual warming of the climate, and that such warming could have negative effects.

To read the second criterion of Section 209(b) so as to require only that global warming is a serious, even "compelling and extraordinary" environmental concern is to make this waiver condition wholly redundant with the CAA standard for setting federal emissions standards in the first instance. CAA Section 202(a)(1) requires the EPA to adopt controls on emissions from new motor vehicles that, in the judgment of the EPA Administrator, "cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare." This is the standard for adopting federal controls on vehicular emissions of a given pollutant. Section 209(b) provides for a waiver of preemption for California regulations controlling pollutants that are already subject to regulation under Section 202(a). Therefore, to justify a waiver under Section 209(b), California must demonstrate something more than that the accumulation of greenhouse gases in the atmosphere will contribute to global warming that, in turn, may have some deleterious effects in California that could "endanger public health or welfare." If Section 209(b) authorized the EPA to grant a waiver for any pollutant that could have such effects it would, by definition, apply to every pollutant for which there is a standard under Section 202(a). Assuming the language of Section 209(b) serves some purpose within the Act, it must create a different and more demanding standard than that which triggers federal regulation under Section 202(a).

The most sensible reading of Section 209(b) is that California must be able to show that California needs more stringent standards than those provided by the

---


110. Id.

111. Id.

112. 42 U.S.C. § 7521(a)(1). The provision provides that: The Administrator shall by regulation prescribe (and from time to time revise) in accordance with the provisions of this section, standards applicable to the emission of any air pollutant from any class or classes of new motor vehicles or new motor vehicle engines, which in his judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare.

113. Id.

114. See id. § 7543(b) (stipulating waiver criteria).

115. Id.
EPA to meet specific conditions or concerns in California. The environmental problem California wishes to combat must be "extraordinary"—that is, it cannot be the typical sort of air pollution problem and must vary in either kind or degree from environmental conditions elsewhere. Yet because global climate change is, by definition, a global phenomenon, California cannot claim that it faces a unique problem as distinct from that faced by the nation as a whole. Thus, California's greenhouse gas waiver request does not satisfy the plain meaning of Section 209(b). Even if one were to conclude that this is not the plain meaning of Section 209(b), and that the meaning of the legislative language is somewhat ambiguous, this would not undercut the EPA's legal authority to deny California's waiver request, as courts must defer to the agency's reasonable interpretation of ambiguous statutory text under the Chevron doctrine.116

CARB argues that "California need not demonstrate . . . that the state faces unique threats from greenhouse gas emissions" and that it is enough that the state faces "extraordinary and compelling conditions generally."117 The basis for this argument is that the EPA has traditionally evaluated California waiver requests as applied to emissions control programs as opposed to individual standards.118 According to CARB, "[T]he relevant inquiry under Section 209(b)(1)(B) is whether California needs its own emission control program to meet compelling and extraordinary conditions, not whether any given standard is necessary to meet such conditions."119 Because it is clear that California does experience the sort of "compelling and extraordinary conditions" that justify a California-specific emissions control program, CARB reasons, the greenhouse gas emissions controls must be permitted as well.120

There is some merit to CARB's argument. As interpreted by the EPA, Section 209(b) does not authorize or require the EPA to analyze separately each individual component of each program for which CARB seeks a waiver of preemption. Rather, the EPA may look at programs as a whole, recognizing that the waiver provision is designed to enable California regulators to tailor a set of standards to California-specific pollution concerns and make different trade-offs than those embodied in relevant federal standards.121 But this does not mean—indeed, cannot mean—that once California had adopted its first vehicular emissions control program, it would be able to adopt any and all emissions control standards from that point forward that satisfied the remaining 209(b) criteria. Here, California seeks to adopt a new set of standards to address a previously unregulated environmental concern. The mere existence California's preexisting emissions control program, for which preemption was waived, does not require a waiver for

---


118. Id.

119. Id. at 15.

120. Id. at 15-16.

121. Id. at 16.
the new standards as well, and the EPA would be wholly justified—if not required—to ensure that California's greenhouse gas emissions controls satisfy Section 209(b)(1)(B), as have those measures adopted before it.

Nor can California claim that it needs its greenhouse gas emissions controls to "meet" the threat posed by climate change, as adoption of these measures will not have any meaningful (if even measurable) effect on global climate change, let alone the specific effects of climate change about which Californians are concerned. Even were all developed nations to fully comply with the greenhouse gas emissions reduction targets established by the Kyoto Protocol and maintain such controls through 2100, this would only change the predicted future warming by 0.15°C by 2100. Such emissions reductions would be several times greater than the complete elimination of all greenhouse gas emissions from the U.S. transportation sector, let alone any realistic estimate of emissions reductions to be achieved from the imposition of regulatory controls on new motor vehicles nationwide, let alone in California and a handful of other states. California cannot "need" its greenhouse gas regulations to meet the compelling threat of climate change as the regulations would make no difference to the projected effects of climate change in the state.

It is certainly possible that the EPA could have interpreted the language of Section 209(b) in a manner more favorable to California's waiver request. Under such an interpretation, any state measure designed to combat the "compelling and extraordinary" threat posed by global climate change that meets Section 209(b)’s other criteria would be eligible for a waiver of preemption. This would appear to be a permissible interpretation of the statutory text, but it is difficult to argue that this is the clear and unambiguous meaning of Section 209(b). As a consequence, the EPA's decision to deny California's waiver is almost surely based upon a permissible reading of the relevant language and should be upheld in federal court.

If California is to have the freedom to adopt its own greenhouse gas emissions controls on new motor vehicles, a new administration must adopt a new approach to Section 209, or Congress should intervene on the Golden State's behalf. Testifying before the Senate Environment Committee in May 2007, California Attorney General Brown, himself a former governor, suggested that, if the EPA refuses to grant a waiver, "Congress has to allow California to blaze its own trail with a minimum of federal oversight." As he suggested, perhaps inadvertently, if Californians really want freedom from federal preemption and a change in federal climate policy, they are better off getting Congress to act than seeking relief from

123. See id. at 2288 ("The Protocol . . . can be considered as only a first and relatively small step towards stabilizing the climate. The influence of the Protocol would, furthermore, be undetectable for many decades.").
124. This is a normative statement and not a prediction of what reviewing courts will actually do.
the EPA. The extent to which states are free to deviate from federal environmental policies is ultimately up to Congress.

IV. TAKING WAIVERS SERIOUSLY

The debate over California’s request for a waiver of preemption under the CAA highlights the rigidity of federal environmental law. Section 209(b) is one of the few federal environmental statutory provisions that allows a state meaningful relief from federal regulatory controls, and it still may not be enough to grant California the flexibility it wants. While many federal environmental statutes allegedly embody a “cooperative federalism” approach to environmental policy, in practice most federal environmental programs impose top-down regulatory requirements that are rigidly applied throughout the nation.\(^{126}\)

California may well deserve a waiver of preemption so that it may continue to experiment with potential greenhouse gas emissions control policies. Yet any serious policy argument for granting California a waiver in this instance would also justify authorizing waivers for other states to experiment in other areas in environmental law. The policy arguments for increased flexibility in the development of drinking water protection programs or local waste-site cleanup are far stronger than those for individual state regulation of products manufactured for national markets to address a globally dispersed pollution concern. The problem, however, is that CAA Section 209 authorizes potential waivers for California’s air pollution control strategies, but waiver provisions in other environmental laws are few and far between.\(^{127}\) If policymakers wish to see California and other states experiment here, they should be willing to authorize broader experiments throughout much of the rest of environmental law.

One way to provide states with greater authority to experiment in environmental law would be to allow for waivers from federal environmental laws across the board. Elsewhere, this author has proposed a policy of “ecological forbearance,” under which states could petition federal agencies for waivers from federal requirements.\(^{128}\) The model for this proposal is section 160 of the Telecommunications Act of 1996.\(^{129}\) This provision was added to federal communications law because Congress recognized the difficulty of adopting a uniform regulatory structure for the dynamic and fast-changing telecommunications industry.\(^{130}\) Section 160 created a mechanism through which

\(^{126}\) See Jody Freeman & Daniel A. Farber, Modern Environmental Regulation, 54 DUKE L.J. 795, 805-37 (2005) (discussing the current debates regarding who should have the power to regulate the environment).


\(^{128}\) Adler, Letting Fifty Flowers Bloom, supra note 15, at 272-81; see FARBER, supra note 15, at 194-98 (suggesting a similar proposal).


the Federal Communications Commission (FCC) could respond to changes in technology or market conditions by removing regulatory controls on firms that applied for such relief.  

Specifically, Section 160(a) provides that “the Commission shall forbear from applying any regulation or any provision” of the Communications Act to a telecommunications company or service (or class thereof) “in any or some of its or their geographic markets” if the FCC determines that (a) “enforcement of such regulation or provision is not necessary” to ensure that rates “are just and reasonable and are not unreasonably discriminatory,” (b) “enforcement of such regulation or provision is not necessary for the protection of consumers,” and (c) “forbearance from applying such provision or regulation is consistent with the public interest.” In making this determination, the FCC is further instructed to consider the impact on “competitive market conditions” and is explicitly permitted to equate an increase in competition among service providers with the public interest. Regulated firms seeking forbearance are required to provide supplemental information supporting their claim for relief, and the FCC is required to act upon such petitions in a timely fashion. Further, FCC decisions to grant or deny a forbearance request are final agency actions subject to judicial review under the Administrative Procedure Act, requiring the commission justify its decisions with reasoned decision-making.

A policy of “ecological forbearance” would replicate this process in the environmental realm. The one key difference is that states, rather than individual regulated firms, would submit the forbearance petitions. Under this proposal, states would petition the EPA Administrator by seeking the forbearance of a standard or requirement imposed by or pursuant to an environmental statute administered by EPA. One state might seek permission to adopt a different drinking water standard, whereas another might seek more flexibility in the implementation and enforcement of air pollution permitting rules. Still another might seek a waiver of preemption of a federal regulatory standard that would otherwise impose a uniform federal rule throughout the nation. Once a petition was received, the EPA would be required to determine whether granting states the regulatory flexibility they seek would be consistent with the protection of public health and the environment in the context of a notice-and-comment rulemaking. This would allow other states, “public interest” groups, and other affected parties to assess the proposal and raise concerns before the agency. As with Section 160, EPA forbearance determinations would be subject to judicial review.

The primary benefit of an ecological forbearance mechanism is that it would broaden the debate and discussion over the proper roles of the federal and state

---

132. Id.
133. Id. § 160(b).
134. Id.
136. The primary difference between the ecological forbearance proposal described herein and that suggested by Professor Farber is the emphasis here on state-based forbearance proposals. See FARBER, supra note 15, at 194-98.
governments in environmental protection. Both levels of government have a role to play, but there is little reason to believe that the existing statutory framework comes anywhere close to the ideal division of authority. To the contrary, the current allocation of regulatory authority under federal environmental statutes is quite arbitrary and more the result of historical accident than conscious design.\textsuperscript{137} Reforming this system cannot be done overnight, and there is great value in utilizing policy experimentation to identify the proper balance and improve environmental protection efforts. Allowing for greater use of state waivers from federal environmental statutes is one way to achieve this goal.

\textbf{CONCLUSION}

It is somewhat ironic that the contemporary debate over whether to allow states greater freedom to innovate in environmental law occurs in the context of climate change. The case for state leadership in the climate case is arguably weaker than in any other major area of environmental law. Nonetheless, the failure of the federal government to take significant action to address global warming fears has left a vacuum that some state governments have opted to fill. Whether such efforts are optimal, and whether some can proceed under existing federal law, these are the climate policies we have thus far. And whether state efforts can produce significant progress toward the mitigation of climate change, state actions may help spur a broader reconsideration of the respective roles of the federal and state governments in environmental law. If so, state climate policies will have done something important to improve the climate of environmental policy in the United States.

\textsuperscript{137} Adler, \textit{Jurisdictional Mismatch}, supra note 19, at 178.