Philanthropy and the Nonprofit Sector in a Changing America

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In recent years, the dominant role of the federal government over environmental regulation has been under attack in the public policy sphere. For example, a recent report commissioned by the Senate and House Appropriations Committees calls for Congress and the EPA to give states, communities, and businesses greater flexibility and autonomy in addressing environmental problems, forging a "new partnership...based on accountable devolution of national programs and on a reduction of EPA oversight when it is not needed." Congress has made some modest moves toward shifting regulatory authority to states, reflected in the Uniform Mandates Reform Act of 1995 and the 1996 amendments to the Safe Drinking Water Act. Similar proposals are under consideration for the Clean Water Act, the Endangered Species Act, and the Superfund statute. But the Environmental Protection Agency is also rethinking the appropriate balance of authority between the federal government and the states.

Critics of decentralization paint a gloomy scenario of these recent developments, arguing that decentralization will reduce social welfare. They maintain that a predominant federal role is necessary as a result of the "race to the bottom," the presence of interstate externalities, and public choice problems resulting in the underrepresentation of environmental interests at the state level.

First, the "race to the bottom" rationale for federal environmental regulation posits that states, in an effort to induce geographically mobile firms to locate within their jurisdictions, will offer them suboptimally lax environmental standards so as to benefit from additional jobs and tax revenues. Second,
that in recent years the center of gravity has been moving from the national to the state and regional level, both with respect to the identity of the recipient and the purpose of the grant. It would be unfortunate if this trend was halted as a result of unfounded concerns about devolution.

Presumption in Favor of Decentralization

My starting point is a rebuttable presumption in favor of decentralization. This presumption rests on three independent grounds. First, the United States is a large and diverse country. It is therefore likely that different regions will have different preferences for environmental protection. Environmental protection entails an important resource allocation question. We can generally purchase additional environmental protection at some price, paid in the currency of jobs, wages, shareholders’ profits, tax revenues, and economic growth. Given the existence of the states as pliable regulatory units, the tradeoff reflecting the preferences of citizens of different regions should not be wholly disregarded in the regulatory process, absent strong reasons for doing so.

In the case of some social decisions, such reasons are present. The example of federal civil rights legislation, which trumped deeply held preferences of a large region of the country, is perhaps most prominent. But while I am sympathetic to the argument that the protection of a minimum level of public health ought to be viewed in quasi-constitutional terms and guaranteed throughout the country, as I explain below, it would stretch this principle beyond its breaking point to say that it calls for the federalization of every decision having public health consequences.

Second, the benefits of environmental protection also vary throughout the country. For example, a stringent ambient standard might benefit many people in densely populated areas but only a few elsewhere. Similarly, a particular level of exposure to a contaminant may be more detrimental if it is combined with exposure to other contaminants with which it has synergistic effects.

Third, the costs of meeting a given standard also differ across geographic regions. For example, a source may have a large detrimental impact on ambient air quality if it is directly upwind from a mountain or other topographical barrier. Similarly, a water polluter will have a far larger impact on water quality standards if it disposes its effluents in relatively small bodies of water. Climate might also play a role; certain emission or effluent standards may be easier (and cheaper) to meet in warmer weather.

In principle, federal regulation could be attentive to these differences. Such a differentiated approach, however, would require a staggering amount of information. Clearly, the federal government does not have a comparative advantage at gathering such information. Thus, not surprisingly, federal regulation generally imposes uniform requirements throughout the country.

Moreover, even when federal regulation imposes uniform standards, the differences are not explainable by the factors discussed above.

This presumption for decentralization should be overcome, however, if there is a systemic evil in letting states decide the level of environmental protection that will apply within their jurisdictions. In the next three sections I examine, respectively, the strength of the race to the bottom, interstate externality, and public choice justifications for federal environmental protection.

The Race-to-the-Bottom Justification

The discussion proceeds in four parts. First, it argues that interstate competition over environmental standards is, in essence, competition for the sale of a good. Second, it shows that the leading economic model of the effects of interstate competition on the choice of environmental standards reveals that interjurisdictional competition leads to the maximization of social welfare, rather than to a race to the bottom. Third, it argues that if game-theoretic interactions among the states lead to a departure from optimality, the result could be overregulation or underregulation; thus, even under this scenario there is no compelling justification for federal minimum standards, which are designed to correct only for underregulation. Fourth, it shows that even if states systematically enacted suboptimally lax environmental standards, federal environmental regulation would not necessarily improve the situation.

Market Analogy

Race-to-the-bottom advocates must clear an initial hurdle. If one believes that competition among sellers of widgets is socially desirable, why is competition among states, as sellers of a good—the right to locate within their jurisdictions—socially undesirable?

Indeed, states sell location rights because, even though they might not have the legal authority to prevent firms from locating within their borders, such firms must comply with the fiscal and regulatory regime of the state in which they wish to locate. The resulting costs to the firms can be analogized to the sale price of a traditional good. If federal regulation mandating a supracompetitive price for widgets is socially undesirable, why should it be socially desirable to have federal regulation mandating a supracompetitive price for location rights, in the form of more stringent environmental standards than those that would result from interstate competition?

It is easy to identify possible distinctions between a state as seller of location rights and sellers of widgets. These differences, however, do not provide support for race-to-the-bottom claims.

First, if individuals are mobile across jurisdictions, the costs that polluters
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impose on a state's residents will depend on who ends up being a resident of the state; the resulting supply curve is thus far more complex than that of a widget seller. In the context of environmental regulation, however, race-to-the-bottom claims have focused exclusively on the mobility of capital, thereby assuming, at least implicitly, that individuals are immobile. Moreover, it is not clear that individual mobility renders competition among states different from competition among widget sellers. Indeed, even if individuals move in search of the jurisdiction that has the level of environmental protection that they favor, and if there is capital mobility, the choice of environmental standards can nonetheless be efficient.16

Second, while a seller of widgets is indifferent to be effect of the sale price on the welfare of the good's purchaser, a state ought to be concerned about the interests of the shareholders of the polluting firm who reside in the jurisdiction, both as individuals adversely affected by pollution and as owners of capital adversely affected by the costs of meeting regulatory requirements. But this difference does not support race-to-the-bottom arguments. Indeed, if some of the regulated firm's shareholders did not reside in the regulating jurisdiction and if capital were immobile, a state could extract monopoly profits by setting suboptimally stringent standards, benefiting its in-state brothers at the expense of out-of-state shareholders. If capital is mobile, competition eliminates this problem.) Nothing in this account provides support for the opposite proposition: that interstate competition leads to suboptimally lax standards.

Third, states are not subject to the discipline of the market. If a producer of widgets consistently sells at a price that does not cover its average costs, it will eventually have to declare bankruptcy. A state, in contrast, can continue in existence even if it recklessly compromises the health of its residents. This difference merely establishes that a state might undervalue environmental benefits. But such undervaluation can take place even if capital were not mobile; it is a public choice problem rather than a race-to-the-bottom problem.

Fourth, states do not sell "location rights" at a single-component price; they require that firms comply with a variety of regulatory standards and that they pay taxes. The resulting market is thus more complex than one involving the sale of a traditional good. For example, a jurisdiction that imposes a lax worker safety standard but a stringent pollution standard will be desirable for a labor-intensive, nonpolluting firm, whereas a jurisdiction with stringent safety and lax pollution standards will be desirable for a capital-intensive, polluting firm. It is far from clear, however, why the additional complexity in the market would make interstate competition destructive. Instead, the example suggests a desirable sorting out of firms according to the preferences of individuals in the various jurisdictions.

In sum, while the analogy between interstate competition for industrial activity and markets for traditional goods is not perfect, it raises serious questions about race-to-the-bottom claims. At the very least, it should require race-to-the-bottom advocates to bear the burden of identifying relevant differences between the two markets, and explaining why they turn otherwise desirable competition into a race to the bottom.

Economic Models

Quite to the contrary, and contrary to the prevailing assumption in the legal literature and in the legislative debates, the leading economic model of the effects of interstate competition on the choice of environmental standards shows that interjurisdictional competition leads to the maximization of social welfare, rather than to a race to the bottom.21 Professors Wallace Oates and Robert Schwab posit jurisdictions that compete for mobile capital through the choice of taxes and environmental standards. A higher capital stock benefits residents in the form of higher wages, but hurts them as a result of the foregone tax revenues and lower environmental quality needed to attract the capital.22

In their model, individuals live and work in the same jurisdiction and there are no interjurisdictional pollution spillovers. Each jurisdiction produces the same single good, which is sold in a national market. The production of the good requires capital and labor, and produces waste emissions. The various jurisdictions set a total permissible amount of emissions as well as a tax on each unit of capital. Capital is perfectly mobile across jurisdictions and seeks to maximize its after-tax earnings, but labor is immobile.23 Each individual in the community, who is identical in both tastes and productive capacity, puts in a fixed period of work each week, and everyone is employed. Additional capital raises the productivity of workers, and therefore their wages.

Each jurisdiction makes two policy decisions: it sets a tax rate on capital and an environmental standard. Professors Oates and Schwab show that competitive jurisdictions will set a net tax rate on capital of zero (the rate that exactly covers the cost of public services provided to the capital, such as police and fire protection). For positive net tax rates, the revenues are less than the loss in wages that results from the move of capital to other jurisdictions. In contrast, net subsidies would cost the jurisdiction more than the increase in wages that additional capital would generate.

In turn, competitive jurisdictions will set an environmental standard that is defined by equating the willingness to pay for an additional unit of environmental quality with the corresponding change in wages. Pollution beyond this level generates an increment to wage income that is less than the value of the damage to residents from the increased pollution; in contrast, less pollution creates a loss in wage income greater than the corresponding decrease in pollution damages. Professors Oates and Schwab show that these choices of tax rates and
environmental standards are socially optimal. With respect to tax rates, one condition for optimality is that the marginal product of capital—the increase in the output of the good produced by an additional unit of capital—must be the same across jurisdictions. Otherwise, it would be possible to increase aggregate output, and, consequently, aggregate social welfare, by moving capital from a jurisdiction where the marginal product of capital is low to one where it is high. Because capital is mobile, the market will establish a single rate of return on capital. This rate is equal to the marginal product of capital minus the tax on capital. The choice by competitive jurisdictions of a net tax of zero equalizes the marginal product of capital across jurisdictions and is therefore consistent with optimality.

With respect to environmental standards, competitive jurisdictions equate the marginal private cost of improving environmental quality (measured in terms of foregone consumption) with the marginal private benefit. For net tax rates of zero, the marginal private cost is, as noted above, the decrease in wage income produced by the marginal unit of environmental protection. This decrease is also the marginal social cost, since it represents society’s foregone consumption. Thus, instead of producing a race to the bottom, competition leads to the optimal levels of environmental protection.

Non-Optimality as a Result of Game-Theoretic Interactions

So far, the inquiry has not revealed support for the claim of systematic environmental underregulation in a regime without federal intervention. It is possible, however, that in particular instances, the game-theoretic interactions among the states would lead to underregulation absent federal intervention. In such cases, federal minimum standards would be desirable. But it is equally plausible that in other instances the reverse would be true; that the game-theoretic interactions among the states would lead to overregulation absent federal intervention. In such cases, federal regulation would be desirable as well, but in such cases federal maximum standards would be called for.

Accordingly, there is no compelling race-to-the-bottom justification for across-the-board federal minimum standards, which are the cornerstone of federal environmental law.

As an example of such game-theoretic interactions, consider, in the Oates and Schwab model, a situation in which states decide to impose a positive net tax rate on capital, perhaps because they cannot finance the provision of public goods through a non-distortionary tax, such as a head tax. In such a situation, environmental standards will be suboptimally lax because the jurisdiction will continue to relax these standards beyond the optimal level in order to benefit from the additional net tax revenue that results from attracting additional capital.

A corollary, however, is that environmental standards will be suboptimally stringent if a jurisdiction, perhaps because of the visibility that attaches to attracting a major facility, chooses a tax rate on capital that is less than the cost of the public services that capital requires. Under this scenario, the optimal strategy for the jurisdiction is to strengthen the environmental standards beyond the optimal level so as to reduce the negative fiscal consequences.

Similarly, recent studies relax the assumptions of constant returns to scale and perfect competition, which are a cornerstone of the Oates and Schwab model. Instead, they consider the effects of state regulation on an industry that exhibits increasing returns to scale, a condition generally associated with imperfect competition. The conclusions of the model are that, depending on the levels of firm-specific costs, plant-specific costs, and transportation costs, interstate competition can produce either suboptimally lax or suboptimally stringent levels of pollution.

Alternatively, if a firm has market power enabling it to affect prices, it will be able to extract a suboptimally lax standard. Conversely, if a state has market power, the reverse will be true. In summary, just as there are game-theoretic situations in which interstate competition produces environmental underregulation, there are other plausible scenarios under which the result is overregulation.

Futility of Federal Regulation

But even if, left to their own devices, states systematically enact suboptimally lax environmental standards, federal environmental regulation would not necessarily improve the situation. Race-to-the-bottom arguments appear to assume, at least implicitly, that jurisdictions compete over only one variable—in this case, environmental quality. Consider, instead, the problem in a context in which states compete over two variables—for example, environmental protection and worker safety. Assume that, in the absence of federal regulation, State 1 chooses a low level of environmental protection and a high level of worker safety. State 2 does the opposite: it chooses a high level of environmental protection and a low level of worker safety protection.

Both states are in a competitive equilibrium, with industry not migrating from one to the other.

Suppose that federal regulation then imposes on both states a high level of environmental protection. The federal scheme does not add to the costs imposed upon industry in State 2, but it does in State 1. Thus, the federal regulation will upset the competitive equilibrium, and unless State 1 responds, industry will migrate from State 1 to State 2. The logical response of State 1 is to adopt less stringent worker safety standards. This response will mitigate the magnitude of the industrial migration that would otherwise have occurred.

Thus, if a race to the bottom exists, federal environmental standards can have adverse effects on other regulatory programs, in this case, worker safety. On this account, federal environmental regulation is desirable only if its...
benefits outweigh the costs that it imposes by shifting to other programs the permiscuous effects of interstate competition.

More generally, the presence of such secondary effects implies that federal regulation would not be able to eliminate the negative effects of interstate competition, if such negative effects existed. Recall that the central tenant of race-to-the-bottom claims is that competition will lead to the reduction of social welfare, the assertion that states enact suboptimally lax environmental standards is simply a consequence of this more basic problem. In the face of federal environmental regulation, however, states will continue to compete for industry by adjusting the incentive structure of other state programs. So, for example, if states cannot compete over environmental regulation, they will compete over worker safety standards. One might respond by saying that worker safety should also be (and is) the subject of federal regulation. But states would then compete over consumer protection laws or tort standards, and so on. And even if all regulatory functions were federalized, the competition would simply shift to the fiscal arena, where the competition would lead to the underprovision of public goods. Thus, the reduction in social welfare implicit in race-to-the-bottom arguments would not be eliminated.

The race-to-the-bottom rationale for federal environmental regulation is, therefore, radically underinclusive. It seeks to solve a problem that can be addressed only by wholly eliminating state autonomy. In essence, then, race-to-the-bottom arguments are frontal attacks on federalism. Unless one is prepared to federalize all regulatory and fiscal decisionists is far from clear that federal intervention in the environmental arena would mitigate the adverse social welfare consequences of a race to the bottom, if such a race existed.

The Interstate Externalities Justification

The presence of interstate externalities provides a compelling argument for federal regulation under conditions in which Coasian bargaining is unlikely to occur.26 A state that sends pollution to another state obtains the labor and fiscal benefits of the economic activity that generates the pollution, but does not suffer the full costs of the activity. Thus, a suboptimally large amount of pollution will cross state lines.

Several reasons might explain why transaction costs are sufficiently high to prevent the formation of interstate compacts. First, the deadlines are not well defined in the current legal regime. Does an upstream state have the right to send pollution downstream unconstrained? Alternatively, does the downstream state have the right to enjoin all upstream pollution? Second, for different pollution problems, the range of affected states will vary, making less likely the emergence of conditions favoring cooperation. For example, in the case of air pollution, the states affected by a source at a particular location will depend to a large extent on the nature of the pollutant and the height of the stack. Third, the causation questions are not likely to be straightforward. Considerable scientific work needs to be undertaken in order to determine what sources of pollution are having an impact on the downwind state, and it makes little sense for these determinations to be replicated with respect to each compact.

The fact that interstate externalities provide a compelling justification for intervention, however, does not mean that all federal environmental regulation can be justified on these grounds. For environmental problems such as the control of drinking water quality, there are virtually no interstate pollution externalities; the effects are almost exclusively local. Even with respect to problems for which there are interstate externalities, such as air pollution, the rationale calls only for a response well-targeted to the problem, such as a limit on the amount of pollution that can cross state lines, rather than the control of pollution that has only in-state consequences.

The analysis of the effectiveness of the environmental statutes at remedying interstate pollution spillers proceeds by reference to the Clean Air Act—the statute designed to deal with the pollution that gives rise to the most serious problems of interstate externalities.27 The discussion focuses on the statute’s ambient and emission standards, which are the core of the regulatory effort, and deals in the margin with its acid rain provisions and interstate spillover provisions, which are more directly targeted to the problem of interstate externalities. It shows that federal regulation has been both ineffective and potentially counterproductive.28 The core of this Clean Air Act consists of a series of federally prescribed ambient standards and emission standards. Ambient standards determine the maximum permissible concentration of particular pollutants in the ambient air, but do not directly constrain the behavior of individual polluters. Emission Standards, in contrast, determine the maximum amount of a pollutant that can be discharged by an individual source.

The federal emission standards are not a good means by which to combat the problem of interstate externalities. These standards constrain the pollution from each source, but do not regulate the number of sources within any given state or the location of the sources. Similarly, the various federal ambient air quality standards also are not well targeted to address the problem of interstate externalities, because they are both overinclusive and underinclusive. From the perspective of constraining interstate externalities at a desirable level, ambient standards are overinclusive because they require a state to restrict pollution that has only in-state consequences. Concern about interstate externalities can be addressed by limiting the amount of pollution that can cross interstate borders. Because some air pollution has only local effects, such externalities can be controlled even if the upstream state chooses to have poor environmental quality within its borders.

Conversely, the federal ambient air quality standards are also underin-
exclusive from the perspective of controlling interstate externalities because a state could meet the applicable ambient standards but nonetheless export a great deal of pollution to downwind states because the sources in the state have tall stacks and are located near the interstate borders. In fact, a state might meet its ambient standards precisely because it exports a great deal of its pollution.

The federal ambient and emissions standards could perhaps be justified as a second-best means by which to reduce the problem of uncontrolled interstate externalities. One might believe that by reducing pollution across the board they reduce interstate externalities proportionately.

Such a view, however, is incorrect as a matter of both theory and empirical observation. The amount of aggregate emissions is not the only variable that affects the level of interstate externalities. In particular, no other factors play important roles. The first is the height of the stack from which the pollution is emitted. The higher the stack, the lesser the impact close to the source and the greater the impact far from the source. Thus, absent a federal constraint, states have an incentive to encourage their sources to use tall stacks, as a way to externalize both the health and environmental effects of the pollution, as well as the regulatory costs of complying with the federal ambient standards.

Second, the level of interstate externalities is affected by the location of the sources. In the eastern part of the United States, where the problem of interstate pollution is most serious, the prevailing winds blow from west to east. Thus, states have an incentive to induce their sources to locate close to their downwind borders so that the bulk of the effects of the pollution is externalized. They can induce this result, for example, through the use of tax incentives or subsidies, or through permitting and zoning decisions.

The best evidence that states do indeed encourage sources to use tall stacks can be found in the provisions of the SIPs adopted by at least fifteen states in response to the enactment of the Clean Air Act in 1970. These SIPs allowed sources to meet the NAAQS by using taller stacks rather than by reducing emissions. In those SIPs, the permissible level of emissions was an increasing function of the height of the stack. If the stack was sufficiently high, the effect would be felt only in the downwind states and would therefore have no impact on in-state ambient air quality levels. Through these measures, the states created strong incentives for their firms to externalize the effects of their sources of pollution.

It is true that states had an incentive to externalize pollution even before the enactment of the Clean Air Act in 1970 because, by encouraging tall stacks, states could make other states bear the adverse health effects of pollution. The 1970 provisions, however, created an additional incentive. By encouraging the use of tall stacks, states could also externalize the regulatory impact of the standards, thereby avoiding them, for example, of the opportunity to attract additional sources without violating the NAAQS.

The Public Choice Justification

I have not yet tackled in any comprehensive way the public choice analysis of issues concerning federalism and environmental regulation. I have taken a
somewhat skeptical view, however, of the assertion, largely unchallenged in the legal literature, that federal regulation is necessary to correct for the systematic underprotection of environmental quality at the state level.14

First, it is not enough to say that state politics processes undervalue the benefits of environmental regulation, or overvalue the corresponding costs. Federal regulation is justifiable only if the outcome at the federal level is socially more desirable, either because there is less underregulation or because any overregulation leads to smaller social welfare losses.

Second, given the standard public choice argument for federal environmental regulation, it is not clear why the problems observed at the state level would not be replicated at the federal level. The logic of collective action would suggest that the large number of citizen-beholders, each with a relatively small stake in the outcome of a particular standard-setting proceeding, will be overwhelmed in the political process by concentrated industrial interests with a large stake in the outcome. But this problem could occur at the federal level as well.

In fact, the logic of collective action might suggest the underrepresentation of environmental groups would be more serious at the federal level. The cost of organizing on a larger scale magnifies the free-rider problems faced by environmental groups. Moreover, because environmental concerns vary throughout the country, there will be a loss in the homogeneity of the environmental interests when they are aggregated at the federal level, thereby further complicating the organizational problems. For example, environmentalists in Massachusetts may care primarily about air quality whereas environmentalists in Colorado may rank the environmental implications of water allocation as most important. Other things being equal, state-based environmental groups seeking, respectively, better air quality in Massachusetts and a more environmentally sensitive allocation of water in Colorado are therefore likely to be more effective than a national environmental group seeking, at the federal level, better environmental quality with respect to both of these attributes.

In contrast, the situation is likely to be different for industry groups. For many environmental problems, an important portion of the regulated community consists of firms with nationwide operations. For such firms, operating at the federal level poses no additional free-rider problems or loss of homogeneity.

It is possible, however, that the additional organizational problems faced by environmental groups at the federal level are outweighed by benefits arising from the fact that the clash of interest groups takes place before a single legislature, a single administrative agency, and, in part, as a result of the exclusive venue of the D.C. Circuit over important environmental statutes, in a single court. One can imagine models under which public choice problems are indeed ameliorated at the federal level—a task that none of my critics has taken on. The problem, though, is that such models are unlikely to provide a good account of reality.

For example, if one assumed that beyond a certain threshold, additional resources do not increase a group’s probability of being successful in the political process, and if this threshold at the federal level is sufficiently lower than the sum of the corresponding thresholds at the state level, it may be that environmental groups would not be at a disadvantage at the federal level even if they were at a disadvantage in the states. In this case, the economies of scale of operating at the federal level would more than outweigh the increased free-rider problems.

The assumptions behind such a model, however, are not particularly plausible. The threshold concept might properly describe certain costs associated with effective participation in the regulatory process. For example, with respect to the regulation of a particular carcinogen, each group might need to hire a scientist to review the regulator’s risk assessment. It may well be the case that a certain minimum will secure the services of a competent scientist and that adding additional resources to the problem would be of little, if any, use. Thus, for costs of this type, the marginal benefit of additional expenditures is zero, or close to zero, regardless of the other party’s expenditures.

The structure of other costs, however, is likely to be quite different. For example, with respect to access to the legislative process, the standard public choice account is that the highest bidder prevails. Thus, the benefit that a party receives from its expenditures is a function of the expenditures of the other party. Unless the costs of this type are quite small, the economies of scale of operating at the federal level are unlikely to outweigh the additional free-rider problems.

Finally, if the relevant public choice interactions are characterized as involving the diffuse interests of breathers or other environmental beneficiaries on one side and the concentrated interests of industrial firms on the other side, the debate over which forum is relatively better for the environmentalists’ interests is not of great practical importance. What is important, instead, is that both fora are bad for these interests as a result of the diffuse nature of their interests. As a result, given this characterization of this problem, it is difficult to explain, in public choice terms, why there would be any environmental regulation at all.15

For this reason, the most plausible public choice explanations for environmental regulation posit that regulated firms obtain benefits from such regulation in the form of rents and barriers to entry, or that certain regions in our country can obtain from the regulatory process advantages relative to other regions. An extensive public choice literature suggests that the impetus for environmental regulation sometimes comes, implicitly or explicitly, from the regulated firms themselves, which can obtain rents and barriers to entry that give them an advantage over their competitors. At other times, the advocates
are particular regions of the country, which hope to obtain a comparative advantage with respect to other regions.\textsuperscript{39}

When the relevant interactions are seen in this manner, the case for federal regulation on public choice grounds is considerably weakened. A more definitive conclusion, however, must await further sustained analysis.

**Toward Desirable Federal Intervention**

The preceding discussion shows why the three principal justifications for federal intervention are unlikely to justify an absolute displacement of state authority.\textsuperscript{40} Nonetheless, there is an important role for federal intervention to correct various pathologies that otherwise would result.

1. **Interstate Externalities**: The preceding discussion has focused on pollution externalities, particularly air pollution that crosses state lines, and shown why the existence of such externalities provides a compelling reason for federal regulation. Other externalities that merit federal regulation arise with respect to different environmental problems. For example, to the extent that certain endangered species are located in a particular state, the costs of protection are largely concentrated in that state. The benefits of preservation, however, accrue nationally, or, for that matter, globally.

Similarly, out-of-state citizens place value on the existence of certain natural resources—even resources that they never plan to use. Such existence, or nonce, values provide a powerful justification for federal control over exceptional natural resources such as national parks.

2. **Economies of Scale**: Advocates of federal regulation often maintain, though with much empirical support, that centralization has strong economies of scale advantages. The economies of scale argument is most plausible in the early stages of the regulatory process, particularly with respect to the determination of the adverse effects of particular pollutants through risk assessment. Indeed, there is little reason for this determination to be replicated by each state.

The force of the rationale, however, is far less compelling at the standard-setting phase. At this stage, not only are the savings from eliminating duplication of efforts likely to be much lower, but centralization will have serious social costs as a result of the difficulty of setting standards that are responsive to the preferences and physical conditions of different regions.\textsuperscript{41}

3. **Uniformity**: As previously discussed, federal environmental standards are generally minimum standards. The states remain free to impose more stringent standards if they wish. Some standards that apply to pesticides and mobile sources such as automobiles,\textsuperscript{42} however, are both floors and ceilings: they preempt both more stringent and less stringent state standards. Uniformity of this sort can be desirable for products with important economies of scale in production. In such cases, disparate regulation would break up the national market for the product and be costly in terms of foregone economies of scale.

The benefits of uniformity, however, are less compelling in the case of process standards, which govern the environmental consequences of the manner in which goods are produced rather than the consequences of the products themselves. Indeed, unlike the case of dissimilar product standards, there can be a well-functioning common market regardless of the process standards governing the manufacture of the products traded in the market.

4. **Protection of Minimum Levels of Public Health**: There is a powerful notion, informed in part by constitutional considerations, that a federal policy should ensure all its citizens a minimum level of environmental protection. At some level, this justification is compelling: a minimum level of health ought to count as a basic human right, in the same manner as minimum levels of education, housing, or access to employment. There are two major problems, however, with justifying federal environmental regulation in this manner. First, federal environmental regulation seeks to limit the risk of exposure to particular pollutants or from particular sources, rather than limiting aggregate levels of environmental risk. As a result, such regulation is both overinclusive (it regulates more than that which has a claim to quasi-constitutio
tinal legitimacy) and underinclusive (it makes no effort to determine aggregate exposure levels; therefore some individuals may in fact be below the minimum). Second, because environmental risks are only one component of health risks, it is difficult to understand why the federal government should have such a preeminent role in environmental regulation when it does relatively little with respect to the provision of general health care. In fact, investments in preventive measures such as immunizations or prenatal care would have a far larger impact on health than investments in environmental regulation. Thus, the justification for federal regulation based on the need to guarantee a minimum level of health calls for a radically different form of regulation than that currently in effect: one that focuses on aggregate environmental health risks and the interactions between environmental health risks and other health risks.\textsuperscript{43}

One cogent commentator has observed that "American environmentalism is both defined and limited by the philanthropy that supports it."\textsuperscript{44} If the trend toward devolution of responsibility over environmental regulation continues, philanthropies will need to become even more involved in funding environmental action that has only regional, state, or local scope. This essay should, at least in part, dispel the concern that such efforts are unlikely to succeed. At the same time, however, philanthropies should focus their attention at the federal level on three areas that the federal government has under-regulated: the control of different kinds of interstate externalities; the provision of scientific information necessary for regulation, such as the preparation of risk assessments; and the guarantee of a minimum level of public health.
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Notes
4. For example, there have been calls for the Endangered Species Act to show greater respect for state water laws by allowing states "...nullify water rights acquired by federal agencies to protect species," "Property Rights Compensation, Funding Focus of Senate Hearing on Rewrite Bill," 28 Env't Rep. (BNA) 1000, 1000.8j (Sept. 26, 1997). Additionally, reform proposals have sought to expand the involvement of the states in the development of species recovery plans. See, id.; S. 1180, 105th Cong. §3(b) (1997). Proposals that would increase the role of states in attaining the goals of the Superfund statute have included exemptions from Superfund enforcement actions by anyone other than states for sites being cleaned under state voluntary programs, as well as modes of delegating authority over sites on the National Priorities List to the states. See "Republican Reiterates Commitment to Comprehensive Reform of Superfund," 28 Env't Rep. (BNA) 18, 18-19 (May 2, 1997); "Interested Parties Hail Markup Delay at Talks on CERCLA Reform Resume," 28 Env't Rep. (BNA) 843, 843-44 (Sept. 12, 1997).
5. See sources cited infra note 17.
7. See, e.g., Testimony of the Natural Resources Defense Council, Inc. Before the Senate Comm. on Governmental Affairs (April 26, 1994).

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Lowry, The Dimensions of Federalism (1992); Evan Rieppel, Environmental Protection at the State Level (1993).
11. I am conducting this analysis using the Foundations Grants database, which can be found on Dialog.
12. This section relies heavily on Revesz, "A Response to Critics," supra note 6, at 536-38.
13. See infra text accompanying notes 42-43.
16. For example, the Clean Air Act imposes disfavored ambient standards, determined by whether an area is covered by the Prevention of Significant Deterioration (PSD) or nonattainment programs. See 42 U.S.C. §§7473, 7502(c)(2), 7503(3)(A) (1994). These differences turn on what ambient air quality standards regions had at a particular time, rather than differences in preferences, benefits, or costs.


29. For example, the California regulations that were struck down in Natural Resources Defense Council v. EPA, 469 F.2d 390, 403-11 (9th Cir. 1974), rev'd on other grounds sub nom. Train v. Natural Resources Defense Council provided that, for sulfur dioxide, allowable emissions could be proportional to the cube of the stack height, for stacks under 300 feet, and proportional to the square of the stack height for stacks over 300 feet. See California Rules and Regulations for Air Quality Control § 270-5-24.022(c) (1972). A similar formula applied to particulate emissions. See id. § 270-5-24.022(d). Thus, a sufficiently high stack would eliminate the need for any emissions reductions.

30. The savings can be substantial. For example, a study in the early 1970s, when tall stack credits were most prevalent showed that the cost of complying with regulatory requirements were between $686/kw and $1300 kw for a new lime scrubber, as compared with between $486 kw and $1086 kw for a tall stack. See E. Ayres, "A Critical Perspective of Local Public Expenditures," 49 Economic Letters 713 (1991).


32. In a companion, unpublished manuscript, they argue that their conclusion that competition among states produces efficient outcomes holds even if individuals are mobile. See supra note 19. Individuals are mobile, they will sort out, as in the Tiebout model, to those with the most protective environmental policies. Individuals who are willing to trade off a great deal in wages for better environmental quality will move to jurisdictions that impose stringent controls on industry; individuals who attach less importance to environmental quality will go to dirtier areas.

33. There is no consensus in the academic literature on whether, on average, states and localities tax or subsidize capital. See Peter Mieszkowski and George R. Zodrow, "A Taxation and the Tiebout Model: The Differential Effects of Head Taxes, Rates on Land Votes, and Property Taxes," 27 J. Law. & Econ. 1098 (1984).


35. In contrast, if the transaction costs were sufficiently low to permit such bargaining, there would be no efficiency-based reason for federal regulation.

36. This section relies heavily on Revesz, " Interstate Externalities," supra note 6; Revesz, "A Normative Critique," supra note 6, at 107-20.

37. Similar criticisms can be raised against the Clean Water Act, which is designed to combat an environmental problem for which the interstate sell spillovers are also salient. See Revesz, " Interstate Externalities," supra note 6, at 2370, n.105.


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the straightforward public choice analysis presented here, the puzzle remains
how environmental protection ever succeeds in the political process." Id. at 109.
38. See Nathaniel O. Krehange, Richard L. Revesz, and Robert N. Stavins,
40. This section relies heavily on Revesz, "A Normative Critique," supra note 6, at 121–25; Revesz, "A Response to Critics," supra note 6, at 543–45.
41. See supra text accompanying notes 12–16.
sources).
43. Some federal role with respect to environmental regulation might also be
justified by the federal government's responsibility to implement obligations
flowing from international treaties.
44. Mark Dowie, Losing Ground: American Environmentalism at the End of
the Twentieth Century 41 (1995).

CHAPTER TWENTY-ONE

Philanthropy and Outcomes

Dilemmas in the Quest for Accountability

Gary Walter and Joan Cosslett

The call for a greater focus on outcomes in philanthropic giving has gained
increasing prominence and adherents during the 1990s. A review of founda-
tion annual reports indicates that the word "outcomes" is used more widely
and more often in this decade than in the preceding two decades. There are
panels and forums on outcomes at most every foundation conference that
involves philanthropy.

Grantees report that never before have grant negotiations with foundation
staffs been so focused on specifying outcomes. Some foundations have em-
ployed consultants to work with their staffs so that inputs, operational pro-
cesses, intermediate and long-term outcomes and impacts are specified and
differentiated. A number have added evaluation departments to their organi-
izational structure. Small and medium sized foundations who have previously
focused their giving exclusively on direct services are now asking for and
funding evaluations, so that they may know with objectivity and rigor if the
projected outcomes are achieved.

The national office of United Way—whose local chapters raised $5.2
billion in 1997—initiated several years ago a major project to both emphasize
the importance of specifying outcomes in local giving, and to provide assis-
tance to local chapters on how to go about determining the outcomes of
individual grants.

At first blush this "outcomes movement" seems like an unreservedly good thing. Who can be against a more careful specification of what grants are
intended to achieve, and more rigorous and objective efforts to assess exactly
what they do achieve? Especially in a sector that is often criticized for its