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EPCRA'S COLLISION WITH FEDERALISM

NICHOLAS J. JOHNSON*

INTRODUCTION

The Emergency Planning and Community Right to Know Act¹ (EPCRA) has noble goals. It permits local governments and communities to obtain information about potential hazardous substances threats and requires communities to develop plans for addressing hazardous material emergencies. I will suggest here that EPCRA also assaults core principles of federalism protected by the Tenth Amendment and the scheme of limited federal powers embodied in the Constitution.²

I will argue that EPCRA ranges so far outside the boundaries of cooperative federalism that it may be impossible to fit its entire agenda within that construct. I then will examine the impact of the statute on aspects of the state political process. Finally, I will suggest that, if sustained as a model, EPCRA may be the gust that extinguishes any hope of limiting federal power through the Tenth Amendment.

I. THE CORE BREACH

EPCRA generates the same breach of federalism that recently prompted the United States Supreme Court to strike down the take title provisions of the Low-Level Radioactive Waste Policy Amendments Act of 1985, ("Radioactive Waste Act").³ In *New York v. United States*,⁴ the Court struck down the

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1. Title III of the Superfund Amendments and Reauthorization Act (SARA), ch. 116, §§ 1-3, 100 Stat. 1729-58 (1986) (current version at 42 U.S.C. §§ 11000-11050 (1992)). Briefly stated, EPCRA orders state creation of an Emergency Response Commission and Emergency Planning Committees. Through these entities it requires the creation of emergency planning districts and local emergency response plans. It defines regulated substances and entities subject to record keeping and reporting requirements and establishes a system of enforcement penalties. For a detailed description of EPCRA, see Joel R. Burcat & Arthur K. Hoffman, *The Emergency Planning and Community Right-to-Know Act of 1986: An Explanation of Title III of SARA*, 18 ENVIRONMENTAL LAW REPORTER, NEWS & ANALYSIS 10007 (1988). See also *infra* note 15.

2. "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X. Article I, Section 8, gives Congress 18 enumerated powers.

3. Act of 1985, ch. 23, § 102, 99 Stat. 1942 (1986) (current version at 42 U.S.C. § 2021 et. seq (1993)).

4. 112 S. Ct. 2408 (1992). The Court asserts that *New York* is distinct from the unsteady

portion of the Radioactive Waste Act that forced states either to provide disposal sites for low level radioactive waste, or take title to the waste generated within their borders. The fatal step of the Radioactive Waste Act was its flat command that states regulate low level radioactive waste.⁵

In the strongest terms, the Court declared that this direct command violated core principles of federalism protected by the Tenth Amendment:

Congress may not simply 'commandeer the legislative process of the states by directly compelling the states to enact and enforce a federal regulatory program.'⁶

....

[E]ven where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts.⁷

....

Whatever the outer limits of [state] sovereignty may be, one thing is clear: The Federal Government may not compel the states to enact or administer a federal regulatory program.⁸

EPCRA generates precisely the type of violation that compelled the Court to strike down the take title provisions of the Radioactive Waste Act. Eschewing traditional incentives for eliciting state regulation,⁹ EPCRA issues a flat command: "The Governor of each state shall appoint a State emergency response commission."¹⁰ The commission is directed to implement EPCRA through a variety of congressionally designed powers and duties.¹¹ EPCRA provides only one option for a governor who objects to this congressional

path of Tenth Amendment cases involving the application of general federal regulations to core state activities. See *National League of Cities v. Usery*, 426 U.S. 833 (1976); *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985). *New York* examines when "Congress may use the states as implements of regulation." 112 S. Ct. 2420. This question seems subject to less controversy: "Congress may not simply 'commandeer the legislative process of the States by directly compelling them to enact and enforce a federal regulatory program.'" *Id.* But see *infra* text accompanying notes 50-54 (arguing that the distinction between *New York* and the *Garcia* string of cases is not as clear as the Court has suggested).

5. The Constitution does not permit Congress to compel states to create disposal sites. *Id.* at 2428.

6. *Id.* at 2420 (citing *Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 288 (1981)).

7. *Id.* at 2423.

8. *Id.* at 2435.

9. The traditional incentives include punishing recalcitrance by withholding related funding or giving states the choice of regulating or having Congress regulate directly. See *New York*, 112 S. Ct. at 2423. Strictly speaking, it is this latter option the Court calls "a program of cooperative federalism." *Id.* at 2424.

10. EPCRA § 301, 42 U.S.C. § 11001 (1992).

11. See *infra* note 83 (explaining powers and duties that constitute regulation).

order: "If the Governor of any State does not designate a State emergency response commission within such period, the Governor shall operate as the State emergency response commission until the Governor makes such designation."¹²

Just as the Radioactive Waste Act gave New York no choice but to regulate low level radioactive waste, EPCRA gives states no choice but to adopt Congress' regulatory agenda. Indeed, EPCRA's command is more offensive. In *New York*, there was at least a technical, although non-curative, alternative of taking title to radioactive waste.¹³ EPCRA fails to provide even that dubious option. A governor's alternative to creating an emergency response commission to implement the statute is personally to perform the functions of the commission he refuses to create. The state still is required to implement EPCRA.¹⁴

12. EPCRA § 301, 42 U.S.C. § 11001.

13. This alternative underscored rather than validated the congressional coercion. See *New York v. United States*, 112 S. Ct. 2408, 2428 (1992).

14. The broad order to adopt the federal regulatory scheme (EPCRA § 301) is the king root of EPCRA's breach. But various details of implementation contain similar offensive commands. These are clustered primarily in sub-chapter I (§§ 301-05). As described below, sub-chapters II and III are less offensive and, if deemed severable from sub-chapter I, with slight modification might survive a scrupulous Tenth Amendment critique. Whether the statute could function without the offensive provisions from sub-chapter I is questionable. A detailed analysis of that issue is beyond the aim of this Article.

Sub-Chapter I of EPCRA is entitled, "Emergency Planning and Notification." Section 301(b) requires the commission to establish jurisdictional boundaries for "emergency planning areas." Section 301(c) describes in minute detail the membership of the local emergency planning committees that the commission (or the governor) is ordered to create. The same section mandates the internal rules by which the local planning committees shall function:

Such rules shall include provisions for public notification of committee activities, public meetings to discuss the emergency plan, public comments, response to such comments by the committee, and distribution of the emergency plan. The local emergency planning committee shall establish procedures for receiving and processing requests from the public for information under Section 324.

EPCRA § 301(c), 42 U.S.C. § 110001.

Section 302(d) requires the commission (or the Governor) to report to the administrator of EPA the list of regulated facilities.

Section 303(a) orders the local committees to prepare an "emergency plan" and review it on a yearly basis. Section 303(b) orders each committee to "[e]valuate the need for resources necessary to develop, implement, and exercise the emergency plan."

Section 303(c) contains nine subparts that describe what the emergency plan "shall include." Among these are: "methods and procedures to be followed by . . . local emergency and medical personnel to respond to any release of such substances . . . [and] [t]raining programs, including schedules for training of local emergency response and medical personnel." See EPCRA §§303(c)(2), (8). This order, which establishes training programs and develops procedures controlling the actions of local fire departments and rescue teams, is arguably the next most offensive order to regulate. See also *infra* subpart II(B) (arguing that fire department activities are the archetypal core state activities the Court earlier considered immune from federal interference). Section 303(f) adds further details, directing the EPA National Response Team to

II. BEYOND THE LIMITS OF COOPERATIVE FEDERALISM

A. *The Necessity of Choice*

EPCRA clashes violently with the cases and principles that define the limits of "cooperative federalism." In *Hodel v. Virginia Surface Mining Reclamation Ass'n*, the Court characterized cooperative federalism as a valid exercise of congressional power in which states may choose either to implement federal regulations, or suffer direct federal implementation.¹⁵ The absence of a flat command to regulate was controlling in *Hodel*: "There can be no suggestion that the Act commandeers the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program."¹⁶ The federal government would shoulder the full regulatory burden if a state chose not to implement the program. That choice, which is

publish guidance documents for preparation of emergency plans. While such guidance documents generally are binding on EPA field offices (*see, e.g.*, EPCRA § 313 Penalty Assessment Guidance), it is not clear whether they purport to bind local planning committees. Even if the details of guidance documents are viewed only as suggestions, that does not diminish the violation resulting from the general command that the committee develop procedures controlling local fire departments and emergency medical personnel.

Section 303(c) also requires the emergency plan to identify emergency transportation routes; identify adjacent facilities that might contribute risk to a hazardous materials emergency; designate and empower a community emergency coordinator who will help implement the emergency plan; designate procedures for providing notice of a release to the public; describe available emergency equipment and the individuals responsible for it; develop evacuation plans; and develop schedules for exercising the emergency plan.

Section 303(e) creates obligations between the committees and the commission: "[each committee] shall submit a copy of the plan to the commission or the governor."

Sub-Chapter II of EPCRA (§§ 311-13) governs reporting requirements and primarily compels regulated facilities (*e.g.*, those using threshold amounts of listed hazardous substances) to provide federal and state officials with information about hazardous substances used in the production process. Except for provisions in sections 312(e)(3)(A) and (B), requiring commissions and committees to make information provided by regulated facilities publicly available, sub-chapter II is free from obvious commands to regulate.

Sub-chapter III (§§ 321-30) contains EPCRA's enforcement provisions, which are a part of the analysis of subpart II(C) of this Article. Section 324 fits the coerced regulation mold. It provides detailed instructions governing the public availability of the emergency plan and other documents. It also requires public notice of their availability.

These numerous instructions are characteristic of the detail that a responsible principle would provide to a marginally competent agent. They underscore EPCRA's conscription of states into the "federal government's organizational chart". *New York*, 112 S. Ct. at 2434.

15. 452 U.S. 264 (1981). The Court upheld the Surface Mining Control and Reclamation Act of 1977 against a Tenth Amendment challenge. It may be imprecise to call state regulation in the face of the Surface Mining Act cooperative. Choosing to regulate against the alternative of completely losing control over what had been considered a core state prerogative seems less than cooperative.

16. *Hodel*, 452 U.S. at 288.

pivotal to the validity of congressional efforts to elicit state regulation,¹⁷ is absent from EPCRA.

Although *District of Columbia v. Train*¹⁸ sliced the question more thinly,¹⁹ the states' choice to regulate was still key. At issue was the validity of Clean Air Act regulations requiring states to enforce federal emissions standards for vehicles they registered. The D.C. Circuit distinguished between requiring states to regulate and requiring states to enforce federal standards if they chose to regulate.²⁰ This distinction presages the Supreme Court's decision in *FERC v. Mississippi*,²¹ which permits even greater federal intrusion into state decision-making, but does not endorse the direct compulsion of the EPCRA model.

In *FERC*,²² the Court permitted the imposition of federal PURPA²³ standards on state utility commissions, reasoning that Congress had the power to preempt the field and that states could choose not to regulate. Central to the outcome was the Court's conclusion that "[t]here is nothing in PURPA directly compelling the states to enact a legislative program."²⁴ The Court found this absence of compulsion in the states' choice of abandoning the field of regulation altogether.²⁵

In a powerful dissent, Justice O'Connor argued that "[t]he Court's 'choice' is an absurdity, for if its analysis is sound, the Constitution no longer limits federal regulation of state governments. . . . Congress could dictate the agendas and meeting places of state legislatures, because unwilling States would remain free to abolish their legislative bodies."²⁶

17. "By either of these two methods [making state regulation the *quid pro quo* for federal funding or giving states the choice to regulate or have Congress regulate], as by any other permissible method of encouraging a State to conform to federal policy choices, the residents of the State retain the ultimate decision as to whether or not the State will comply." *New York v. United States*, 112 S. Ct. 2408, 2424 (1992).

18. 521 F.2d 971 (D.C. Cir. 1975).

19. *Train* actually permitted what the Court tried to characterize as a de minimus federal order requiring state regulation. See *infra* text accompanying notes 94-100 (discussing *Train* as a model for diminishing the impact of *New York*).

20. *Train*, 521 F.2d at 987.

21. 456 U.S. 742 (1982).

22. *FERC* involved a challenge to the Public Utility Regulatory Policies Act of 1978 (PURPA), the aim of which was to promote conservation and reduce electric producers' use of oil and natural gas. PURPA required states to enforce standards promulgated by FERC; directed states to consider specific rate-making standards; and imposed certain procedures on state utility commissions.

23. Public Utility Regulatory Policies Act of 1978 (PURPA), ch. 59, § 115(a), 106 Stat. 2803 (1992) (current version at 15 U.S.C. §§ 3201 et. seq. (1993); ch. 12, § 201, 92 Stat. 3144 (1978); § 643(b), 94 Stat. 770 (1980) (current version at 16 U.S.C. §§ 824(a)-(b)).

24. *Id.* at 765.

25. *Id.* at 766.

26. In *FERC*, Justice O'Connor's dissent emphasized the distinction between compulsion and cooperative federalism. *Id.* at 781-82. Citing *Hodel*, she described the "program of

Justice O'Connor's criticism of the "choice" the majority discovered in *FERC* tells volumes about EPCRA.²⁷ EPCRA provides no "choice." The closest states could come to the *FERC* option of "abandoning the field" would be to extinguish the office of governor.²⁸

There have been a variety of signals pre-*New York* that the Commerce Clause, while bordering on omnipotence, does not permit Congress to commandeer the state legislative process.²⁹ In *EPA v. Brown*,³⁰ the EPA administrator admitted as much.³¹ Although the Court previously has flirted

cooperative federalism validated in that case" (one where a state may choose to regulate in accord with federal instructions or not to regulate at all). Unconvinced that abandoning the field of regulation was a true "choice," O'Connor argued *FERC* did not present a case of cooperative federalism as understood in *Hodel*. *Id.* at 783.

27. See also *South Carolina v. Baker*, 485 U.S. 505 (1988). In *Baker*, the Court reviewed provisions of the Tax Equity and Fiscal Responsibility Act of 1982, which allowed an exclusion for interest on state issued bonds only for "registered state bonds" and eliminated the exclusion for "bearer" state bonds. The Court concluded that the statute did not commandeer the state political process, pointing out that the challenged section, "regulates state activities; it does not as did the statute in *FERC*, seek to control or influence the manner in which States regulate private parties." *Id.* at 514.

See also *Hodel v. Virginia Surface Mining Reclamation Ass'n, Inc.*, 452 U.S. 264 (1981). In *Hodel*, the statute required a federal agency to administer regulations. The federal program was to remain in effect until the state implemented a substitute. *Id.* at 269-70.

28. Indeed, where the governor's obligations would shift by state law to a variety of successors, the state's "choice" would be to eliminate a good portion of its executive branch.

29. See, e.g., *Maryland v. EPA*, 530 F.2d 215, 224 (4th Cir. 1975). "In a nutshell, the EPA has directed Maryland and her legislature to legislate under pain of civil and criminal penalties. . . . If there is any attribute of sovereignty left to the states it is the right of their legislatures to pass or not to pass laws. . . ." *Id.* at 225. "Not far afield is the rejection by the Philadelphia Convention of Charles Pinkney's constitutional plan, which would have enabled Congress to 'revise,' 'negative,' or 'annul' the laws of a state." *Id.*

30. 431 U.S. 99 (1977).

31. *Brown* was the culmination of several state challenges to regulations under the Clean Air Act (CAA), 42 U.S.C. §§ 1857 (1977) (current version at 42 U.S.C. § 7401 et. seq. (1993)) which required states that had not developed approved State Implementation Plans (SIP) to issue regulations enforcing a federal implementation plan. The CAA authorized the administrator to develop a federal implementation plan in the absence of an approved SIP.

EPA attempted to order states to (1) develop inspection and maintenance programs and submit to the administrator state regulations by which the program would be run; (2) develop retrofit programs for older vehicles; (3) designate and enforce preferential bus and car-pool lanes; (4) develop a program to monitor emissions; and (5) adopt certain other programs which varied by state. *Brown*, 431 U.S. at 101.

The case was streamlined by EPA's withdrawal of its request for review of certain issues. EPA conceded that its regulations required modification in order to remove requirements that states "submit legally adopted regulations." *Id.* EPA also contended that its regulations did not attempt to force states to adopt laws; apparently conceding what is clear in *New York* - that such direct commands from the federal to state governments are impermissible. The Court vacated the lower court cases because EPA conceded the error of its attempts to compel states either to legislate or to promulgate regulations. "The federal parties' position now appears to be that, while the challenged transportation plans do not require the enactment of legislation, they do contain, and

with permitting Congress to commandeer state governments,³² *New York* makes clear that temptation, for the moment, has passed.³³

EPCRA is in the same analytical channel as *Hodel*, *FERC* and *New York*. Its *raison d'être* is to order state regulation of users and producers of hazardous materials.³⁴ Absent the choice to regulate, EPCRA is vulnerable to a facial constitutional attack.

B. Congress' Questionable Power to Implement EPCRA Directly

It is also difficult to fit EPCRA within the classic cooperative federalism model because the assertion and existence of commerce power to implement EPCRA directly is cloudy. Congress has not explicitly asserted Commerce Clause authority over the activity enveloped by EPCRA,³⁵ and the statute contains no mechanism for direct federal implementation. Although there have been suggestions that latent commerce power to regulate³⁶ might establish the choice component of cooperative federalism, the *New York* decision does not acknowledge that possibility. Indeed, a latent commerce power analysis would

must be modified to eliminate certain requirements that states promulgate regulations." *Id.* at 103.

In the vacated cases the administrator declared openly that pure necessity compelled an interpretation of the CAA permitting him to force states to enact legislation and promulgate regulations. A similar perceived necessity may also drive EPCRA. See *infra* subpart IV(A) of this Article.

32. *FERC* suggested that Congress' ability to commandeer the state legislative process was an open question: "While this Court has never explicitly sanctioned a federal command to states to promulgate and enforce laws and regulations, there are instances where the Court has upheld federal statutory structures that in effect directed state decision makers to take or to refrain from taking certain actions." *FERC*, 456 U.S. at 761-62 (citing *Brown*, 431 U.S. 99). The Court concluded that "whatever all this may bode for the future" it was unnecessary to resolve the question in the context of the PURPA dispute. *Id.* at 764.

In *Baker*, the Court acknowledged that *FERC* left open whether the Tenth Amendment limits Congress' ability to compel states to regulate, but questioned the extent to which this question survives *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985). As we see in *New York*, the Court now treats *Garcia* and its progeny as a separate line of analysis, but makes clear that Congress cannot commandeer the state legislative process. *New York v. United States*, 112 S. Ct. 2408, 2420 (1992).

33. The *Garcia* dissenters who predicted a shift back toward a substantive Tenth Amendment seem to guide the majority at present.

34. Commanding the governor to legislate seems more offensive than commanding legislatures to do so. Forcing states to administer the program also may be an improper delegation of federal executive branch enforcement authority. This is a more difficult argument, and such delegations (under traditional cooperative federalism model - i.e., giving states a true option) seem common. See, e.g., *EPA v. Brown*, 431 U.S. 99 (1977), which lists a variety of delegations of enforcement authority under the CAA.

35. EPCRA does not contain an explicit congressional assertion of Commerce Clause power, nor does it create a structure through which Congress could implement the statute directly.

36. The majority in *FERC* intimates that Congress' latent option, preempting the field of utility regulation entirely, was sufficient to validate the "federal command". *FERC*, 456 U.S. at 764.

seem to consume the existing cooperative federalism standard and dissolve the line established in *New York* through the argument that Congress *could have* created a direct enforcement option in a statute that issues a flat command to regulate.³⁷

More importantly, it is not clear that the current Court would permit Congress to do directly all of the things necessary for EPCRA to function.³⁸ Direct congressional implementation of EPCRA would mean a federal bureaucratic structure duplicating *inter alia* the functions of local fire departments.³⁹ As the Court stated in *National League of Cities v. Usery*,⁴⁰ and as Justice Powell noted again in his dissent in *Garcia v. San Antonio Metropolitan Transit Authority*,⁴¹ local fire and police services are the

37. Congress' latent ability to regulate low level radioactive waste did not save the Radioactive Waste Act. In dissent, Justice White stated, "I do not read [the majority's] opinion to preclude Congress from adopting a similar measure [directly] through its powers under the Spending or Commerce Clauses." *New York v. United States*, 112 S. Ct. 2408, 2445 (1992) (White, J., dissenting).

38. Given the relationships and duties EPCRA creates, independent federal implementation would require mobilization of an army of federal employees running parallel to existing state and local agents. *See, e.g.*, EPCRA §§ 301-03 (creating relationships between regulated entities and local health workers, fire departments, state regulatory agencies, which include a broad range of local players on emergency planning committees, and others. As a practical matter, EPCRA is probably impossible for Congress to implement using only federal resources. *Cf. Maryland v. EPA*, 530 F.2d 215, 227 (4th Cir. 1975) (describing the "[h]ordes of federal employees that would be required to enforce the Maryland implementation plan."); *District of Columbia v. Train*, 521 F.2d 971, 981 n.17 ("If we left it all to the Federal Government, we would have about everyone on the payroll of the United States.").

39. *See, e.g.*, EPCRA §§ 303(c)(2), (8). These provisions requiring development of "training programs" and "methods and procedures" governing the activities of local emergency (fire departments) and medical personnel are central to EPCRA's goal of uniform hazardous materials emergency response. *See also supra* note 14 (describing the types of local government action prescribed by EPCRA).

40. 426 U.S. 833 (1976).

41. 469 U.S. 528 (1985). In *Brown v. EPA*, 521 F.2d 827 (9th Cir. 1975), the court concluded: "To make governance indistinguishable from commerce for purpose of the Commerce power . . . would reduce the states to puppets of a ventriloquist Congress." *Id.* at 839. By raising the distinction between commerce and state power to regulate commerce, the court added a useful gloss to the analysis that is not present in *New York*. The distinction suggests that Congress may regulate "X" without being permitted to order states to regulate "X". This provides a different basis for protecting states' legislative prerogative than merely saying that ability to legislate is at the core of state sovereignty. It permits us to say, that the Commerce Clause does not extend to state regulation of commerce, because that regulation is not itself "commerce." This truly distinguishes *New York* from *National League* and *Garcia*. Absent this distinction, the assertion that the state legislative function is sacrosanct, really is only the strongest rendition of the *National League* (protection of traditional state functions) argument. *But see FERC v. Mississippi*, 456 U.S. 742, 764 (1982), noting that, "A court may invalidate legislation enacted under the Commerce Clause only if it is clear that there is no rational basis for a congressional finding that the regulated activity *affects* interstate commerce, or that there is no reasonable connection between the regulatory means selected and the asserted ends." *See also New York v. United States*, 112 S. Ct. 2408, 2419 (1992) ("As interstate commerce has become ubiquitous, activities once

paradigm "traditional state functions" the Tenth Amendment protects from federal intrusion.

Although *New York* suggests that "commandeering state legislatures" presents an issue different from that faced in *National League* and *Garcia*, it represents a clear shift from the message of *Garcia*,⁴² toward the idea that there is indeed substance to the Tenth Amendment.⁴³ Notwithstanding the Court's suggestion that the issue is the wholly distinct one discussed in *FERC* and *Hodel*,⁴⁴ critical evaluation prompts the conclusion that there is a confluence of these two lines of cases that might prohibit Congress from implementing EPCRA directly. I reach this conclusion in two steps. The first is the observation that *New York*'s limitation of *Garcia* is analytically indistinguishable from the test in *National League*. The second is the argument that protection of the core state functions identified by *National League* might prohibit Congress from implementing EPCRA directly. I will discuss these two steps in turn.

1. *Constriction of Garcia Toward Revival of National League.*—In *Garcia*, the majority suggested that states are protected from federal overreaching through their participation in the national political process rather than by any substantive limits imposed by the Tenth Amendment. Commenting on the difficulties with a self-policing Congress,⁴⁵ Justice Powell's dissent in *Garcia* observed that the majority did not identify any aspect of state sovereignty that could not be invaded by an assertion of ostensible Commerce Clause power.⁴⁶ From this perspective, the protective boundary *New York* erects around the state legislative process is a clear limitation on *Garcia*.

considered purely local have come to have effects on the national economy, and have accordingly come within the scope of Congress' commerce power.") (emphasis added).

42. *Garcia* reversed *National League* over the vigorous dissent of Justice O'Connor, who wrote for the majority in *New York*. *Garcia*, 469 U.S. 528. The majority in *Garcia* concluded that there was no special body of state activities protected by the Tenth Amendment. Instead, the Court concluded that the states' participation in the national political process established a procedural safety net. Importantly, the *Garcia* decision lamented the struggle prompted by *National League* in defining protected "traditional state government functions." Calling it unworkable, the Court abandoned this "historical standard." The Court then flirted briefly with a "necessity standard," which identified functions that seem essential for state or local governments to provide. *Id.* at 545. The Court rejected the necessity standard, seemingly because the range of protected functions would be too narrow. *Id.* at 544. But even within that "too narrow" standard, the emergency services regulated by EPCRA seem to fit easily. This is illustrated by the utter impracticability of the federal government providing such services. See *infra* notes 71-76; 81-83 and accompanying text.

43. "This case presents no occasion to apply or revisit the holdings of any of these cases, as this is not a case in which Congress has subjected a State to the same legislation applicable to private parties." *New York*, 112 S. Ct. at 2420.

44. *Id.*

45. See *Garcia*, 469 U.S. at 565 n.12, 575 (Powell, J., dissenting).

46. *Id.* at 579.

Examination of the guiding principle of *National League* illustrates its confluence with *New York*. In *Hodel*,⁴⁷ the Court aptly summarized *National League* as distinguishing between permissible regulation of individuals, and impermissible regulation of states *qua* states.⁴⁸ Direct orders to legislatures and local agencies prescribing how they must perform their missions look a great deal like regulation of states *qua* states. Indeed, commandeering the state legislative process may be closer to the core of such prohibited regulation. In *New York*, the Court established the state legislative process as sacrosanct, just as *National League* attempted to insulate ill-defined "traditional government functions." The only real difference between the two cases is that *New York*'s prohibition against commandeering the legislative process is a brighter line. True, *New York* did not involve the application of a generally applicable statute to core state functions. However, the guiding question—have core state functions been invaded?—remains the same. The only difference is the style of the invasion.⁴⁹

2. *Prohibiting Federal Implementation.*—A critique of EPCRA against the backdrop of *New York* invites a revival of *National League*'s protected state prerogatives.⁵⁰ *New York* suggests that the state legislative process is one of the core activities protected by the Tenth Amendment. The open question is what other activities stand with the legislative process inside this protective boundary?⁵¹ The confluence between *National League* and *New York* suggests it is fair to identify *National League*'s paradigm "traditional state

47. 452 U.S. 264, 293 (1981).

48. The question in *National League* was whether Congress could subject states, exercising traditional state functions, to generally applicable statutes that it clearly had the power to promulgate under the Commerce Clause. The Court gives this illustration of integral state government functions: "While there are obvious differences between schools and hospitals involved in *Wirtz* and the fire and police departments affected here, each provides an integral portion of those governmental services which the States and their political subdivisions have traditionally afforded their citizens." *National League of Cities v. Usery*, 426 U.S. 833, 855 (1976).

49. See generally *New York v. United States*, 112 S. Ct. 2408, 2435 (1992) (White, J. dissenting).

50. Justice O'Connor's dissent in *Garcia* suggests an ultimate return to the principles of *National League*. See *Garcia*, 469 U.S. at 589 (O'Connor, J., dissenting).

51. The Court has intimated that the protective boundaries of the Tenth Amendment go beyond prohibiting coerced state regulation. "Whatever the outer limits of [state] sovereignty may be, one thing is clear: The Federal Government may not compel the States to enact or administer a federal regulatory program." *New York*, 112 S. Ct. at 2435. If this statement is predictive, it is fair to consider federal duplication of local fire departments and state legislatures to be equally offensive. If, however, the Court wishes to narrow the impact of *New York* in the future, it might distinguish federal intrusion into the state legislative process by labelling it especially offensive. On the heels of such a distinction, federal duplication of local fire departments might be tolerated.

This distinction would be unremarkable. By any measure, federal duplication of state legislative activities is more troublesome than duplication of local fire departments. But if such a distinction is made, it may mean the state legislative process is the only thing *New York* protects.

functions" as core state activities eligible for the same Tenth Amendment protection.⁵²

If these activities are protected to the same extent *New York* protected the state legislative process, Congress arguably is prevented from usurping state control by regulating them directly. *New York* illustrates that, regardless of the tactic employed, Congress simply cannot force states to adopt a regulatory program. If community decisions about fire, emergency and police response services are accorded the same protection as legislative decisions, it should not make a difference whether Congress orders states to create a regulatory structure imposing federal procedures on local fire departments, attempts to usurp those community/state functions by imposing response procedures directly on fire departments and emergency teams, or duplicates those functions with federal personnel.⁵³ Limiting Congress in this way would begin to mark the territory that is protected from the seemingly omnipotent Commerce Clause. This demarcation may be essential if the Court is serious about maintaining a substantive Tenth Amendment.⁵⁴

52. EPCRA transmits federal commands to local fire departments concerning the types of preparation they must do to meet local emergencies. See, e.g., EPCRA § 303. It dictates implicitly how state and local governments will choose to fund their emergency response programs. *Id.* Further, it imposes federal penalties for breaches of the federally mandated relationship between regulated entities and local government agencies. *Id.* § 325. EPCRA, Sections 301 and 303 require action by local health workers, fire departments, state regulatory agencies (including a broad range of local players on emergency planning committees) and others. See *supra* note 14. Certain sections of EPCRA are particularly vulnerable to this criticism. Reading sections 301 through 303 of EPCRA conjures up images of a federally mandated "town hall." See EPCRA § 301(c) for a good illustration of federal directions to local planning committees. Some of the most intrusive examples appear in section 303(c), which mandates the establishment of training programs and response procedures "local emergency and medical personnel must follow." See also *id.* § 303 (requiring the state commission to assert jurisdiction over covered facilities and to identify those facilities to the administrator); *id.* § 324 (requiring committees to collect, store and make data available to the public and limiting other states' use of this data).

Not all portions of EPCRA get caught in the potential snare cited by the *Garcia* dissenters. Section 313 for example is largely a direct federal order to private parties to report certain information to federal and state officials. It might, in small part, breach the *New York* prohibition against coerced state legislation because it implies that states must have a place to receive and store this information.

53. *Cf. Pennsylvania v. EPA*, 500 F.2d 246 (3rd Cir. 1974) (direct federal implementation of transportation control plans would be no less an intrusion on state sovereignty than ordering states to implement federal standards).

54. In his *New York* dissent, Justice White suggests *Garcia* offers the better test: "Any substantive restraint on the exercise of Commerce Clause powers must find its justification in the procedural nature of this basic limitation, and it must be tailored to compensate for possible failings in the national political process rather than to dictate a 'sacred province of state autonomy.'" *Id.* at 2443-44 (citing *Garcia*). Whether the ribbon of theoretical protection *Garcia* offers would require invalidation of EPCRA is beyond the scope of this analysis.

C. *Can the EPCRA be Saved by Characterizing its
Command to States as Merely Directory?*

We might attempt to distinguish EPCRA from the legislation invalidated in *New York* by suggesting that it really does not commandeer the state political process at all; that the federal command is directory rather than mandatory.⁵⁵ The court in *District of Columbia v. Train*⁵⁶ made this distinction in construing a Clean Air Act provision. The *Train* court construed the mandate requiring states to submit implementation plans to be directory rather than mandatory.⁵⁷ Pivotal to this conclusion was the Clean Air Act's federal implementation option that was activated if states chose not to submit a state implementation plan. The court characterized the statute's ostensibly mandatory language as directory in the context of a classic cooperative federalism choice.⁵⁸

The option of direct federal implementation is not contained in EPCRA. Absent that alternative, it is difficult to suggest that Congress' command to governors is only a *Train*-style suggestion.

EPCRA's enforcement provisions also show that the congressional command is not just a poorly phrased request. Section 326 of EPCRA⁵⁹ explicitly authorizes civil actions against the administrator, regulated entities and state officials. Section 326(a)(1)(C) authorizes citizens to sue a governor or a commission for "failure to provide a mechanism for public availability of information in accordance with section 324(a)." Construed broadly, this language authorizes a variety of actions, including one against a governor who refuses to implement EPCRA.⁶⁰

55. "[T]he governor of each state shall. . ." EPCRA § 301; 42 U.S.C. § 11001.

56. 521 F.2d 971, 986 (D.C. Cir. 1975).

57. *Id.* The *Train* court supported this conclusion on the grounds that the statute read as a whole, did not intend to force legislatures (on the threat of civil penalties) and municipal governments to enact legislation and regulations.

58. The CAA authorized federal implementation if the state refused.

59. 42 U.S.C. § 11046.

60. EPCRA is distinct from the Radioactive Waste Act in that the sanction applied to recalcitrant states is nominal. In comparison, the fiscal impact of taking title to low-level radioactive waste looms large. Failure to comply with EPCRA generates at most civil enforcement and mandamus actions, and liability for attorney's fees. See *infra* text accompanying notes 61-62.

Given that sanctions for a state's failure to comply with EPCRA are less severe than those in *New York*, it is tempting to say EPCRA, despite its language, really does not coerce anything; that either the statute is directory rather than mandatory, or it will be treated as such by the EPA. While the absence of severe sanctions may say something about how serious Congress considered the problems EPCRA addresses, it is not a license to reinterpret the congressional command.

The statute at issue in *FERC* (PURPA) was similar. No penalties attached if state agencies failed to meet PURPA standards by the deadline. *FERC v. Mississippi*, 456 U.S. 742 (1982). PURPA gave private parties certain procedural rights before state utility commissions. *Id.* It did not contain any direct statutory penalty that would punish the utility commission for failure to respect those procedural rights. A commission that failed might be subjected to the same type of

Interestingly, while the statute prescribes a remedy in actions against the administrator or against a facility owner under section 326(a), it does not prescribe a remedy against a governor or a commission in suits brought under section 326(a)(1)(C).⁶¹ One might construe the absence of a prescribed remedy as an indication that the command to governors is only directory. But that faces its own obstacle.

Section 326(g) of EPCRA provides: "Nothing in this section shall restrict or expand any right which any person (or class of persons) may have under any Federal or State statute or common law to seek enforcement of any requirement or to seek any other relief (including relief against the Administrator or a State agency)." If authorization were needed, this language seems to permit enforcement through a common law mandamus action.⁶²

If a party brings a mandamus action, or if she brings a common law or statutory action under section 326(a)(C), the United States retains the right to intervene.⁶³ This power to intervene raises the possibility of the administrator standing before a judge and successfully arguing that a recalcitrant governor

mandamus action that is an enforcement mechanism under EPCRA. There was no contention that the absence of monetary penalties or other sanctions against a noncompliant utility commission made the statute directory.

61. However, pursuant to section 326(f) of EPCRA, a governor who loses such an action must pay plaintiff's attorney's fees. *Cf.* EPCRA § 325 (setting \$25,000 per day penalties for reporting violations by covered facilities).

EPCRA authorizes monetary penalties against state officials or agents, although not as a sanction for refusing to implement the program. Section 325(d)(2) imposes a \$20,000 fine or imprisonment against "any person who knowingly . . . divulges [protected trade secret information]" received from a regulated facility.

Conceivably, this could result in a criminal sanction issued against a state official who would have chosen not to become involved with EPCRA. However, this provision is merely a detail of implementation. These penalties would not apply if a state simply refused to implement EPCRA. They are not within the mold of the "take title" penalty addressed in *New York*. Indeed, they appear more closely related to the generally applicable federal requirement that the Court critiqued in *National League and Garcia*.

62. Before a court will issue a writ of mandamus, a defendant must fail to perform the act in question, the plaintiff must have the right to demand relief, and there must be no alternative remedy. *Timken Co. v. United States*, 893 F.2d 337 (Fed. Cir. 1990). Mandamus is an extraordinary writ, which lies to compel performance of a ministerial act or a mandatory duty where there is a clear legal right in the plaintiff, and a corresponding duty in the defendant. *Jones v. Packel*, 342 A.2d 434 (Pa. Commw. Ct. 1975).

At least to the extent that the governor acting as the commission constitutes "a state agency", section 326 of EPCRA explicitly authorizes a mandamus or other action against him. It also authorizes citizens to bring available common law actions against the state commission or committees who refuse to follow the federal commands in EPCRA.

True, a mandamus action might not be brought or might be unsuccessful. But the same is true for EPA enforcement actions under a variety of statutes. The possibility that any particular EPA enforcement action may be more likely to succeed than an EPCRA mandamus action is a difference of degree rather than substance.

63. EPCRA § 326(h); 42 U.S.C. § 11046.

should be forced to comply with EPCRA.⁶⁴ It is then difficult to view EPCRA's orders to regulate as unenforceable requests.

D. Is it Curative if the EPA Treats the Congressional Command as a Request?

Suppose EPA, by administrative fiat, treats EPCRA's command to governors as if it were discretionary?⁶⁵ Initially, there are practical problems with this approach. The first is whether such a commitment is reliable. We already know from *EPA v. Brown*⁶⁶ that the agency has, arguably with less justification, attempted to treat similar language as if it were mandatory.⁶⁷ Second, such a commitment does nothing to prohibit a citizen's suit pursuant to section 1046 of EPCRA.⁶⁸

But there is a deeper problem. Endorsing curative non-enforcement by EPA sanctions a dangerous shift of authority away from Congress to bureaucrats. It allows EPA to disregard Congress's explicit instructions, perhaps usurping the role of courts in statutory interpretation, and to pursue its own remedial policy. If this "solution" is not troubling, it suggests we are much more comfortable with the shift of decision-making to non-elected administrators than we ought to be.⁶⁹

Even with the enormous expansion of Congress' ability to delegate legislative power, nothing so far suggests that agencies may disregard legislative commands that seem to be problematic, thereby "curing" constitu-

64. Not surprisingly, EPA is given no power to assess penalties directly against governors who refuse to comply with the congressional command. The Clean Air Act challenges that culminated in *EPA v. Brown*, 431 U.S. 99 (1977), demonstrate the folly of that approach. See, e.g., *Maryland v. EPA*, 530 F.2d 215, 224-25 (4th Cir. 1975) ("In a nutshell, the EPA has directed Maryland and her legislature to legislate under pain of civil and criminal penalties . . . if there is any attribute of sovereignty left to the states it is the right of their legislatures to pass, or not to pass, laws.") The "take title" provisions in the Radioactive Waste Act, struck down in *New York*, were just a slightly more subtle variation of the same thing. See also EPCRA § 325(c) (explicitly exempting government entities from civil penalties for reporting violations).

65. There is certainly precedent for this. See, e.g., *Les v. Reilly*, 968 F.2d 985 (9th Cir. 1992). In *Les*, the court ordered EPA to enforce the Delany Clause (part of a scheme of federal pesticide regulations), which prevents processing food from containing any cancer-causing pesticides. *Id.* at 988. EPA had, by administrative fiat, reinterpreted and ignored (on the grounds that it was impractical) what the court found to be clear statutory language. "The EPA in effect asks us to approve what it deems to be a more enlightened system than that which Congress established. . . . Revising the existing statutory scheme is neither our function nor the function of the EPA." *Id.* at 990.

66. 431 U.S. 99 (1977).

67. See *supra* note 31.

68. It is also unclear whether such a commitment would translate into an obligation to intervene in support of the position that the statute's commands are not mandatory.

69. Many of us were troubled during the Iran/Contra affair by the idea of the legislature being supplanted by a group of people who "knew better than Congress" how to address a different type of problem.

tional infractions. Indeed, in a recent criticism of EPA's effort to "correct" a statute regulating pesticides, the Ninth Circuit confirmed what we should know already: "The EPA in effect asks us to approve what it deems to be a more enlightened system than that which Congress established. Revising the existing statutory scheme is neither our function nor the function of the EPA."⁷⁰

So long as we believe regulations and regulators derive from Congress, the rationalization that EPA will, by regulation or practice, "cure" Constitutional breaches by ignoring or reconstructing plain statutory language is insufficient and repugnant.

III. STEAM-ROLLING STATE CONSTITUTIONS

EPCRA's collision with state governmental structures and constitutional principles underscores its breach of federalism.

A. Separation of Powers

The emergency response commission that EPCRA orders governors to create has many obligations and powers.⁷¹ The commission is required to create and supervise local emergency planning committees that have even broader duties.⁷² It is difficult to avoid the conclusion that the commission and the committees are state regulatory agencies limited by long-standing state constitutional principles.⁷³

70. *Les v. Reilly*, 968 F.2d 985, 990 (9th Cir. 1992).

71. See EPCRA § 301(a); 42 U.S.C. § 11001(9). See *infra* note 73, which includes a description of some of the duties and obligations of the commission.

72. See EPCRA §§ 301(b), (c); 42 U.S.C. §§ 11001(b), (c).

73. These entities have considerable power to alter the legal rights and duties of facilities covered by EPCRA. Both state and federal courts have used these factors to characterize action that constitutes lawmaking. See *Immigration & Naturalization Serv. v. Chadha*, 462 U.S. 919, 952 (1983) (defining lawmaking as "altering the legal rights, duties, and relations of persons"); *Commonwealth v. Sessoms*, 532 A.2d 775 (Pa. 1987) (using alteration of legal rights and duties as a guide for defining legislative activity that must be considered lawmaking).

The legislature may not delegate its legislative function, but it may authorize an agency to carry out legislative intent described in general terms through rules, regulations and standards established by the agency. *Bortz Coal Co. v. Air Pollution Comm'n*, 279 A.2d 388 (Pa. Commw. Ct. 1971). Agency rules and regulations, when properly adopted, have the force and effect of law. *Commonwealth v. State Conference of State Police Lodges of the Fraternal Order of Police*, 520 A.2d 25 (Pa. Commw. Ct. 1987). Regulation has the same legal force and effect as a statute. *Commonwealth v. A.J. Wood Co.*, 431 A.2d 367 (Pa. Commw. Ct. 1981). The Pennsylvania legislature has acknowledged by statute that the state surrogate for the EPCRA commission will "regulate." See PA. STAT. ANN. tit. 35 § 6022.213 (1990).

Numerous provisions of EPCRA illustrate that the commission and committees act as traditional state regulatory agencies whose powers must derive from the legislature. The commission is directed under section 301(a) to appoint an official to coordinate information provided under the program's guidelines. See 42 U.S.C. § 11001(a).

Where the authority to create statutes enabling and funding regulatory agencies is vested in the legislature, EPCRA's breach of federalism is compounded.⁷⁴ By ordering governors to create and fund state regulatory agencies,⁷⁵ EPCRA forces the executive branch to exercise legislative powers in violation of core state separation of powers principles.⁷⁶

The committees are formed for purposes of facilitating "preparation and implementation of emergency plans." See 42 U.S.C. § 11003(b). Section 301(b) of EPCRA generally requires the commission to establish jurisdictional boundaries in the form of emergency planning districts. See 42 U.S.C. § 1100(b). Section 303(1)(b) directs the committees to identify facilities subject to the jurisdiction of the emergency plan and to define methods to be used by facility owners and emergency personnel to respond to a release. It directs the committees to designate emergency coordinators who "shall" make decisions necessary to implement the plan and to develop procedures for giving public notice of covered releases. See 42 U.S.C. § 11003(c).

Planning committees are required by section 301(c) to establish internal rules of governance covering public notice of committee activities, public comments, discussion of emergency plans, committee responses to citizens' inquiries and distribution of the emergency plan. See 42 U.S.C. § 11001(c).

The committees are required to develop an emergency plan. The parameters of that plan are designated in the statute. Facilities that fail to provide the committee with information required to prepare the plan are subject to civil penalties and enforcement actions by EPA. See EPCRA § 325; 42 U.S.C. § 11045(a).

74. Pennsylvania law illustrates these constraints. See *Bloomingtons By Mail, Ltd. v. Commonwealth Dep't of Revenue*, 516 A.2d 827 (Pa. Commw. Ct. 1986) (Agencies are creatures of statute and cannot exercise powers not explicitly given them by the legislature.); *Borough of Blawnox Council v. Olszewski*, 477 A.2d 1322, 327 (Pa. 1984) ("the power and authority exercised by administrative commissions derives from legislative grant of power"); *Pennsylvania Human Relations Comm'n v. St. Joe Minerals Corp. Zinc Smelting Div.*, 357 A.2d 233 (Pa. Commw. Ct. 1976) (The power of an administrative agency must be sculpted precisely so that its operational figure strictly resembles its legislative model.).

75. These include the commission directly and the committees, through the delegation of dubiously derived executive power to the commission. See *infra* Section III.B. of this Article for a discussion of the problems with delegation of federal power to governors to create state agencies.

76. EPCRA apparently anticipates that governors will implement its commands by executive order. Indeed, at its inception EPCRA was implemented almost exclusively by executive order. See CENTER FOR POLICY RESEARCH, NATIONAL GOVERNORS' ASS'N, EMERGENCY PLANNING AND COMMUNITY RIGHT TO KNOW ACT: A STATUS OF STATE ACTIONS (1988) [hereinafter NGA REPORT]. This publication describes the details of the initial implementation of EPCRA in each state.

The basis for initial implementation in Pennsylvania was Executive Order No. 1987-8 (1987). Although no one formally objected, this ranged well beyond the legitimate use of executive orders. In *Shapp v. Butera*, 348 A.2d 910 (Pa. Commw. Ct. 1975), the Pennsylvania Commonwealth Court described the limitations on executive orders. There are three classes of orders. The first two, proclamations and orders in the nature of requests to subordinates, are legally unenforceable. The third category may have legal effect, but must be "based upon the presence of some constitutional or statutory provision which authorizes the executive order either specifically or by way of necessary implication. . . . The Governor's power is to execute the laws and not to create or interpret them." *Id.* at 913-14.

There was no statutory authorization for executive order 1987-8. See 71 PA. CONS. STAT. § 241 (1992). It is difficult to find anything in the enumerated powers of the Executive in the Pennsylvania Constitution that authorizes an executive order implementing EPCRA. PA. CONST.

B. Delegation

EPCRA collides with state delegation doctrine in at least two ways. First, it may require states to give regulatory agencies powers that are beyond the scope of legitimate delegation of state legislative authority. While the non-delegation doctrine may be a dead letter at the federal level, it survives as a principle of state law that prohibits assignments of lawmaking authority.⁷⁷ It is a state constitutional decision whether particular powers should be given to any administrative agency.⁷⁸ EPCRA usurps states' decisions about the things that should be undertaken through direct legislation rather than by non-elected bureaucrats.⁷⁹ It seems simply to presume either that state constitutional law mimics federal delegation principles, or should be ignored in lieu of federal principles.

Second, absent an explicit grant of power from the state legislature, the committees' or a commission's rule-making activity again violates state delegation principles. It is a state legislative decision whether to create state regulatory agencies with the powers of the commission and committees. Because EPCRA does not generate a state statute from which their authority

art. IV. Indeed, there is no mention in the Constitution of Executive Orders. *Shapp*, 348 A.2d at 912. See also *National Solid Wastes Management Ass'n v. Casey*, 600 A.2d 260 (Pa. 1991) (The *Casey* court ruled that a state constitutional right to a clean environment did not authorize the governor to legislate through an executive order limiting permits for new landfills.).

Pennsylvania's separation of state government functions is typical. It separates the legislature's power to create regulatory agencies and the executive's power to direct agency execution of legislative instructions. See Nicholas J. Johnson, *There May be Cracks in the Foundation: An Analysis of Pennsylvania's Current Approach to Legislative Review of Agency Rulemaking*, 94 DICK. L. REV. 637 n.16, 26 (1990).

Implicit in EPCRA is also a command to provide the funding its agencies require. Section 324(a) requires that the state have facilities to create the emergency plan and make collected information available. Section 324(b) requires the committee to publish a notice regarding the availability of the emergency plan and MSDS sheets each year. Pennsylvania's legislative response to EPCRA makes clear that fulfilling these and other commands requires state funding. See *infra* note 114. The executive summary of the NGA report is critical of the statute because it created funding obligations, but provided no dollars. It reflects the fact that EPCRA imposed funding obligations on governors beyond their powers, emphasizing that EPCRA's timetables conflicted with governors' schedules for sending budgets to the legislature. NGA REPORT, *supra* at 7.

77. Some assert that federal administrative agencies have exceeded their power to administer and enforce legislative instructions. They argue that agencies are exercising quasi-legislative power under enabling statutes almost completely devoid of standards. See, e.g., Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452 (1989). This erosion of the principles constraining delegation of legislative power has been resisted at the state level. See *Gilligan v. Horse Racing Comm'n*, 422 A.2d 487 (Pa. 1980); Johnson, *supra* note 76.

78. See, e.g., *Gilligan*, 422 A.2d 487.

79. If a state legislature decided that it would not delegate legislative power at all—that it would have no administrative agencies—would EPCRA reverse that fundamental choice?

derives, any action by these agencies is an invalid exercise of regulatory authority.⁸⁰ The revolution in state constitutional law that would validate assignment of federal legislative power, through governors, to state regulatory agencies would signal the demise of the federal system.⁸¹ Under such a scheme, asking whether the state agency had exceeded its authority would require the *ultra vires* determination to be gauged against a *federal* statute. Unless we are prepared to permit Congress completely to supplant state legislatures, a delegation of federal legislative power to a state chief executive is insufficient to empower state regulatory agencies.

C. Pennsylvania's Response Highlights EPCRA's Intrusion

One state's reaction to the statute further illustrates EPCRA's breach of federalism. Reflecting the prerequisites to creating state regulatory agencies like the commission and committees, the Pennsylvania legislature enacted the Hazardous Material Emergency Planning and Response Act ("Act").⁸² It establishes a state legislative framework for implementing EPCRA's directives. Through provisions that fund and delegate legislative power to surrogates for the commission and committees,⁸³ the Pennsylvania statute highlights the fact

80. The legislature may delegate enforcement authority to administrative agencies of the executive branch so long as those delegated powers are controlled by adequate standards. See generally *Tosto v. Nursing Home Loan Agency*, 331 A.2d 198 (Pa. 1975). Legislation must contain adequate standards that will guide and restrain the exercise of delegated administrative functions to withstand attacks based upon alleged delegations of legislative power. See *Chartiers Valley Joint Schools v. County Bd. of School Directors of Allegheny County*, 211 A.2d 487 (Pa. 1965). The legislature may not delegate its legislative function but it may authorize an agency to carry out legislative intent described in general terms through rules regulations and standards. See *Bortz Coal Co. v. Air Pollution Comm'n*, 279 A.2d 388 (Pa. Commw. Ct. 1971). An administrative agency, being a creature of the legislature, is vested only with those powers conferred by statute. See *Demarco v. Commonwealth Dep't of Health*, 397 A.2d 61 (Pa. Commw. Ct. 1979).

If EPCRA attempted to generate legitimate state authority for creation of these agencies, its violation of federalism would be underscored. Such a "curative" step would require a congressional command directly to state legislatures, ordering them to delegate state legislative authority to agencies Congress wishes to create. As the Court explained in *New York*, Congress is prohibited from commandeering state legislatures as vehicles for implementation of the federal regulatory agenda. See *New York v. United States*, 112 S. Ct. 2408, 2420 (1992).

81. Another rendition of this problem combines state rulemaking and federal enforcement. EPCRA forces states to create state agencies and then usurps their enforcement authority. In order to prepare emergency plans required under section 303(b), committees have the power to request necessary information from covered facilities. However, where a covered facility fails to provide that information, EPA is given jurisdiction over the enforcement and penalty action. Collected penalties of up to \$25,000 per violation go into the federal treasury, not the state treasury. See 42 U.S.C. § 11045.

82. PA. STAT. ANN., tit. 35, § 6022.101 et. seq. (1990).

83. Section 102 of the Emergency Response Act designates the Pennsylvania Emergency Management Council as the emergency response commission and establishes districts and committees in each county of the commonwealth in accordance with EPCRA. It empowers the

that EPCRA commands governors to act within the exclusive domain of state legislatures.

State attempts to pursue the goals of EPCRA through legislative channels do not eliminate EPCRA's violations of federalism. Regardless of a state's response, EPCRA's commands to create and fund regulatory agencies remain invalid.⁸⁴ Indeed, in at least one aspect, states like Pennsylvania have failed to comply with EPCRA because the legislature, rather than the governor, has created the emergency response commission.⁸⁵ Moreover, in states where the legislature has not pursued EPCRA's goals through valid legislation, the statute stands in its most offensive posture, with states having acquiesced to the federal intrusion and sacrificed their constitutional principles.⁸⁶

council to "carry out the responsibilities assigned to the commonwealth by [EPCRA]" and gives the council state regulatory authority to meet the federal obligations to administer emergency planning committees.

Section 102(d) authorizes reimbursement of members of the council for actual expenses. This recognizes the need for state funding of these federally ordered state agencies.

Section 102(g) authorizes the council to carry out all duties and responsibilities required of the commission under EPCRA including promulgation of *required regulations* to ensure that local committees meet federal standards, and to do all other things necessary for implementation of EPCRA.

Section 201(h) establishes a separate operating budget to provide necessary funding, which the governor could not authorize.

Section 203(g) requires the council to set up procedures for complying with responsibilities EPCRA assigns to planning committees.

Section 203(k) identifies state emergency plan requirements by reference to the EPCRA plan requirements.

Section 207(a) creates a fund to carry out the purposes of EPCRA. A minimum of seventy percent of revenue shall be given to the committees as grants to support the activity at the county level. The dollars come from a variety of new fees imposed on state residents.

Section 208 sets up a "grant" fund (seventy percent of the council's funding must be spent on these grants) to pay the costs of "developing . . . emergency response plans required by [section 303 of EPCRA], . . . performing public information functions as required by [section 324 of EPCRA], and collecting, documenting and processing chemical inventory forms and other documents required by [EPCRA]."

Section 213 directly acknowledges that the council will "regulate."

84. See *supra* text accompanying notes 2-14.

85. See PA. STAT. ANN. tit. 35, § 6022.201 (1990). Through Pennsylvania Executive Order No. 1987-8 (1987), Pennsylvania originally attempted to comply with the letter of EPCRA. Note 76 discusses the state constitutional violation generated by that order. One is tempted to say "So what, why should we care about such trivial procedural burrs when the goal of safer communities is achieved?" But it is precisely this tension that is an unyielding danger in the larger constitutional context. If federalism becomes merely a trivial, procedural concern, then it evaporates as a barrier to a federal government that can go anywhere and do anything. True, unlimited federal power may have enormous utility in solving increasingly complex problems. Nevertheless, as the framers recognized, such plenary power can be wielded for good or ill.

86. Initially, most states attempted to comply with EPCRA through constitutionally suspect executive orders. See *supra* note 76. Several states now have statutes providing explicit legislative authorization for implementing EPCRA. See, e.g., DEL. CODE ANN. tit 16, § 6310 (1992); FLA. STAT. ANN. § 252.81 *et. seq.* (1991); MASS. GEN LAWS ANN. ch. 21E, § 1 *et. seq.*

State acquiescence does not cure EPCRA. As the Court explained in *New York*, Congress' constitutional authority cannot be expanded by the "consent of the governmental unit whose domain is narrowed State officials thus cannot consent to the enlargement of the powers of Congress beyond those enumerated in the Constitution."⁸⁷

Acquiescence by states might indicate that EPCRA is a good thing, or at least is harmless.⁸⁸ But the Constitution repels the idea that Congress' power is unlimited so long as it is exercised for arguably noble goals.

D. EPCRA's Non-preemption Clause: An Impotent Savior?

Section 321(a) of EPCRA says that nothing in the statute shall preempt any state or local law. The temptation is to conclude that this validates EPCRA by diffusing its coercive commands. However, even giving this provision broad reading does not cure the fundamental problem—*i.e.*, that the statute commands states to regulate. It is the Tenth Amendment and the United States Constitution that EPCRA primarily assaults. EPCRA's non-preemption clause does nothing to avoid that violation.

Moreover, if EPCRA truly will not preempt state law, then it may be self-canceling. Deference to the above-described state law principles⁸⁹ may mean that EPCRA's structure collapses, that the commands to governors cannot stand, and that the assignment of functions to the commission and committees is invalid.

Even if the congressional command were issued to the body with authority to create regulatory agencies, the most offensive aspect of EPCRA—congressionally coerced state regulation—would remain. That Congress' command would issue to the legislature rather than the governor would make no difference.

By feigning respect for state autonomy, the non-preemption clause causes the statute to stumble over other aspects of state governmental structure that underscore EPCRA's collision with federalism. In Pennsylvania, for example, there are various prerequisites to agency rulemaking, including a rule review process.⁹⁰ Through its non-preemption section, EPCRA apparently bows to this process. Pennsylvania rule review would require the proposed rules of

(1989); N.D. CENT. CODE § 37-17.1-07.1 (1991); S.D. CODIFIED LAWS § 34A-12-21 (1992); VA. CODE ANN. § 44-146.34 (1993).

87. *New York v. United States*, 112 S. Ct. 2408, 2432 (1992). Federalism is a protection of individuals, not state governments or state officials. This division of power reduces the risk of federal and state tyranny and abuse. *Id.*

88. Struggling companies faced with up to \$25,000 civil penalties per violation for true paperwork infractions may have a different view.

89. See Section III, parts A and B of this Article, which describe EPCRA's clash with state separation of powers and delegation principles.

90. See *supra* Johnson, note 76.

committees and the commission to pass through the Independent Regulatory Review Commission (IRRC). One function of the IRRC is to prompt disapproval of *ultra vires* agency regulations. By design, every action by a commission or a committee would emerge without state statutory authorization, inviting disapproval by the IRRC or a successful challenge by affected citizens.⁹¹

The non-preemption provision causes EPCRA to stumble into this and other procedural blackholes.⁹² Such knots are signals that EPCRA improperly intertwines state and federal political structures.

IV. UNDERSTANDING EPCRA AS A MODEL AND WHAT IT PORTENDS FOR FEDERALISM

A. *Perceived Necessity*

A substantial obstacle to a conclusion that Congress cannot impose EPCRA (either directly, or by commandeering states) is the perception of necessity that grows from a continually expanding definition of national problems that simply must be solved. The power of this perception of necessity is particularly apparent in critiques of environmental statutes⁹³ and

91. In states where EPCRA is implemented by executive order, an *ultra vires* challenge to commission and committee actions may be the best avenue of attack.

92. See, e.g., Johnson, *supra* note 76 (describing similar rule review mechanisms in other states).

93. In *Maryland v. EPA*, 530 F.2d 215 (4th Cir. 1975), the court rejected EPA's bold assertion that the agency should have the power to order state regulation because "it is clearly necessary that [these efforts] be carried out at the state and local level." *Id.* at 225.

In *Pennsylvania v. EPA*, 500 F.2d 246 (3rd Cir. 1974) (the only decision approving EPA's efforts to force states to issue regulations implementing the CAA), the court accepted the necessity argument, concluding that a flood of federal counterparts to traditional state traffic control authorities would not violate state sovereignty any more than ordering states to regulate. The court noted:

[U]nder the CAA, states retain responsibility for design and enforcement, subject to approval and enforcement by the administrator. We believe that this approach represents a valid adaption of federalism principles to the need for increased federal involvement. The only alternative implementation would be for the Federal Government to assume some of the functions of traffic control and vehicle registration and directly enforce the programs contained in the various transportation control plans. The Administrator has determined that this would not be a practicable way of attaining national air quality standards . . . and we fail to see how this would represent less of an intrusion upon state sovereignty.

Id. at 262-63.

Even in *New York*, the Court seems in places almost apologetic in striking down the offensive act. *New York v. United States*, 112 S. Ct. 2408 (1992). Justice White's dissent in *New York* is driven significantly by necessity justifications. He notes that "[t]he imminence of a crisis in low level radioactive waste management cannot be overstated." *Id.* at 2436 (White, J., dissenting). This statement is relevant on the floor of Congress, but it is arguably irrelevant to the constitutionality of the statute.

ultimately may be sufficient to consume constitutional principles as subtle as federalism.

The decision in *District of Columbia v. Train*,⁹⁴ is instructive. The D.C. Circuit in *Train* upheld in part the requirement that states enforce (under a Clean Air Act federal implementation plan activated in the absence of a state implementation plan) federal emissions standards. The court used a de minimis burden analysis to validate the federal requirement, finding that the "state may comply . . . merely by requiring applicants for vehicle registration to submit a certificate of compliance obtained from federal officials or from private sources not manned by state personnel."⁹⁵ This still required state enabling legislation and a change in administrative regulations. Most importantly, it was absolutely mandatory. States could not opt out and place the entire regulatory burden upon Congress.

The court was sensitive to the fact that by this very small concession in the area of registration it was permitting Congress to compel state regulation. It also is apparent that the court was apprehensive about its concession and wished to avoid a headlong slide down this slippery slope:

[The remaining transportation regulations seek] under the guise of the commerce power, to substitute compelled state regulation for permissible federal regulation Actually, in extending the commerce power to the tremendous limits it has been pressed in recent years, the Congress and the Courts are most probably exceeding the intent of those who wrote the Constitution.⁹⁶

Given the court's clear apprehensions about expansion of the Commerce Clause power and the corresponding diminution of state autonomy, the minor concession to federal coercion may be explained as bald capitulation to the

See also *FERC v. Mississippi*, 456 U.S. 742, 770 (1982) (noting in dicta that requiring states to apply federal standards if they choose to be in a field is especially appropriate in the environmental area). It is not clear why the substantive area of regulation should make a difference, unless it is perceived that the "necessity" of cooperative regulation in that area is especially acute. *See also infra* subsection IV(B), entitled "Political Coercion" (arguing that standing against "necessary" problem solving on the basis of constitutional principles is a recipe for being demonized).

In her dissent in *FERC*, Justice O'Connor quotes Justice Harlan:

Times of international unrest and domestic uncertainty are bound to produce temptations and pressures to depart from or temporize with traditional constitutional precepts or even to shortcut the process of change that the Constitution establishes.

It is the special responsibility of lawyers, whether on or off the bench, to see to it that such things do not happen.

456 U.S. at 786.

94. 521 F.2d 971 (D.C. Cir. 1975).

95. *Id.* at 991-92.

96. *Id.* at 992 (quoting at length from an 1829 letter from James Madison to J.C. Cabell).

perception of necessity raised by the administrator.⁹⁷ Similar perceptions of necessity ultimately might lead the Supreme Court back to the position that Congress "simply must be permitted" to commandeer state legislatures.⁹⁸

A substantial measure of perceived necessity seems to drive EPCRA. The very idea of a massive federal bureaucracy running parallel to every local fire department and county government is preposterous. EPCRA ignores the possibility that such direct regulation may be the only legitimate way to achieve Congress' goals.⁹⁹ It also illustrates Congress' reluctance to acknowledge practical limits on federal power.

EPCRA's breach of federalism can be understood as the path of least resistance in the face of perceived necessity for a federal solution to local hazardous materials emergencies. Congress has three options when faced with either practical or constitutional limitations on its power: (1) acknowledge the limitation and not attempt a federal solution; (2) address the limitation by beginning the process of a constitutional change that would legitimately broaden its power; or (3) finesse the limitation or ignore it, and hope that the Court and others are moved by the necessity of the legislation to do the same. The first two paths are the most difficult. The EPCRA model travels the third, which is the path of least resistance.¹⁰⁰

B. Political Coercion

No one expects Congress to obliterate the states, at least in one fell swoop. If there is any danger, it lies in the tyranny of small decisions - in the prospect that Congress will nibble away at state sovereignty, bit by bit, until someday essentially nothing is left but a gutted shell.

-Laurence Tribe¹⁰¹

If we do a few small things—for example, (1) view EPCRA's coercive command as directory only; (2) ignore that EPCRA has traditional teeth to force state compliance; (3) ignore EPCRA's collision with state political structures;¹⁰² or (4) merely push the Tenth Amendment toward the scrap

97. See *supra* note 93.

98. See also *supra* notes 33-34.

99. But see *supra* subsection II(B) (arguing that even this may not be a legitimate option). That critique suggests the purchase of state cooperation through the connection of EPCRA-style regulation to related federal funds may be the only legitimate alternative. This Article will not examine whether the requirement that the funds be related to the regulatory scheme would pose any substantial barrier to implementation. See *New York v. United States*, 112 S. Ct. 2408, 2423 (1992).

100. But see *Maryland v. EPA*, 530 F.2d 215, 227 (4th Cir. 1975) ("[C]onstitutional principles may not be violated for administrative expediency.")

101. See *FERC v. Mississippi*, 456 U.S. 742, 774-75 (1982) (Powell, J., concurring in part, dissenting in part) (quoting LAURENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW* 302 (1978)).

102. See *supra* section III of this Article.

pile—EPCRA may become the model for eliciting the result presaged by Professor Tribe.

EPCRA's meager enforcement provisions do not explain states' acquiescence to the statute. The explanation lies instead in the political coercion EPCRA brings to bear. It is this political coercion that makes the EPCRA model a powerful threat to federalism.

Political coercion emerges most obviously in "good works legislation,"¹⁰³ of which EPCRA is archetypical. Under EPCRA, if the governor refuses to create the mandated committees and commissions, she becomes personally responsible for implementing the statute. Given the undeniable good intentions of EPCRA and the obscure role of federalism in popular debate, federal political leverage over a recalcitrant governor is substantial. A governor would face the charge that she has refused to comply with a "balanced, sensible"¹⁰⁴ effort to spare communities from the ravages of black hat industrialists. The ease with which she could be characterized as sacrificing public safety to petty concerns about her own power is plain.¹⁰⁵ In *New York*, the Court describes generally and laments this danger. Indeed, "[t]he facts of this case raise the possibility that powerful incentives might lead both federal and state officials to view departures from the federal structure to be in their personal interests."¹⁰⁶

Enacted in the wake of the highly publicized Bhopal, India disaster, EPCRA was sold as a mechanism for avoiding similar events in the United States.¹⁰⁷ At best, it would have been politically naive to object to such a well-intentioned measure on the basis of a technicality such as federalism.¹⁰⁸

The wonderful¹⁰⁹ (or terrible)¹¹⁰ thing is that there is nothing to sug-

103. In *FERC*, Justice O'Connor seems to acknowledge the double-edged nature of such legislation, quoting from former Attorney General Edward Levi, who warned against Congress "loving the states to their demise." *FERC*, 456 U.S. at 787 (O'Connor, J., dissenting).

104. This seems to be the current mantra. Others will emerge with the same impact.

105. In popular forums, where this debate would occur, the imagery of Bhopal against the abstraction of federalism would be a pitiful mismatch.

106. *New York v. United States*, 112 S. Ct. 2408, 2432 (1992).

107. "[EPCRA] was enacted in response to growing concern over toxic chemical accidents, particularly the 1984 Bhopal, India disaster." NGA Report, *supra* note 76, at 3.

108. This presents a fundamental dilemma. How do we respect a structure based upon limited government power, where there is always a way to suggest using that power to do "good works" and where objecting to extensions of power is a quick way to be demonized.

109. Wonderful to those who would gladly give Congress the power to "do something" about everything. This may slightly overstate the case. However, as noted in *Train*, Congress' appetite to legislate seems to be greater than both its constitutional power and its practical resources. *District of Columbia v. Train*, 521 F.2d 971, 993 (D.C. Cir. 1975).

110. Terrible to those who think that scrapping inconvenient constitutional provisions (even those we don't like) is a recipe for the demise of others we really do like. Given the sordid history of the "states rights" battle cry, I am ambivalent about a strong revival of the Tenth Amendment. However, my fear is that, inconvenience being the test, other provisions that I like better, are headed for the same scrap heap as the Tenth Amendment. See Nicholas J. Johnson,

gest the Court would invalidate EPCRA-style political coercion standing alone.¹¹¹ Such coercion seems to be in the same phylum as the incentives the Court has long approved for obtaining "voluntary" state regulation—for example, tying federal funding to state implementation of federal standards and giving states a choice either to regulate or suffer federal regulation.¹¹²

Consequently, if we care about federalism, attention to the details that trigger EPCRA's constitutional infractions is crucial. If these are swept away as petty technicalities, substantive limits on federal power also may be swept away on the wings of other EPCRA-style, good-works legislation.

There is, however, a chance that despite its substantial coercive powers, the EPCRA model will wither from self-inflicted blows. It is not only state officials' fear of being cast in the black hat that makes political coercion work. An allied factor is general state dependency upon the federal purse.¹¹³ However, with increasing strains on the federal treasury, Congress may become less a source of fiscal benefits and more a source of fiscal burdens. Increasingly, congressional mandates to states come without accompanying

Beyond the Second Amendment: An Individual Right to Arms Viewed Through the Ninth Amendment, 24 RUTGERS L.J. 1 (1992). Some of the more popular provisions may be headed the same way. See, e.g., Steven Yarash, *Operation Clean Sweep: Is the Chicago Housing Authority Sweeping Away the Fourth Amendment?*, 86 NW L. REV. 1103 (1992).

111. Where states introduce their own legislation in an effort to properly comply with statutes like EPCRA, the combination of an offensive statute and political coercion has its most sinister effect.

112. See *New York v. United States*, 112 S. Ct. 2408, 2423-24 (1992).

113. Congress' ability to coerce state action through the power of the federal purse may be consequence of the pitfall that noted Texas politician Coke Stevenson warned his fellow Texans against. Author Robert A. Caro recounts Stevenson's views about the role of government:

[I]t was always tempting to have government come in and solve problems, but every bit of government help came with strings of bureaucratic regulation attached, and every string was a limitation on the most important thing we possess and have to leave to our children—the thing that made Texas and America great. Freedom. Individual liberty. Every time you accept a government program you are giving up some of your freedom for a temporary gain; you're selling your birthright for a mess of pottage.

ROBERT A. CARO, *MEANS OF ASCENT: THE YEARS OF LYNDON JOHNSON* 167 (1990).

federal funding.¹¹⁴ If this continues, Congress' power to elicit compliance with EPCRA-style statutes may diminish as well.¹¹⁵

V. CONCLUSION

EPCRA forces the creation of state regulatory agencies by governors whose guiding instructions come from the federal legislature. Indeed, under certain sections, federal instructions come not from Congress, but from a federal agency acting under a delegation of congressional power.¹¹⁶ This is a model for transformation of states into mere branches of the federal bureaucracy. It is this model that the Supreme Court has found so offensive to federalism.¹¹⁷

114. This reduces the tacit coercive power of the federal purse. In *Brown v. EPA*, 521 F.2d 827, 940 (9th Cir. 1975), the court discussed the phenomenon of voters losing control over state spending through federal legislation mandating state spending for federal programs.

Section 305 of EPCRA authorizes an appropriation of five million dollars per year for fiscal years 1987-1990 to the Federal Emergency Management Agency (FEMA). FEMA is directed to make grants to support programs of state and local governments, and to support university sponsored programs, which are designed to improve emergency planning, preparedness, mitigation, response, and recovery capabilities. Such grants may not exceed eighty percent of the cost of any such program. The remaining twenty percent of such costs shall be funded from non-federal sources. See EPCRA § 305(a)(2).

Even if a state program is lucky enough to obtain its maximum eighty percent allocation, there is no opting out of the expenditure to cover the remaining twenty percent. Even in the best case, Congress has forced those remaining expenditures into the state budget. It is instructive to compare this to Justice O'Connor's summary of the statutory scheme upheld in *Hodel*: "That statute is 'a program of cooperative federalism,' because it allows the States to choose either to work with Congress in pursuit of federal surface mining goals or to devote their legislative resources to other mining and land use problems." *FERC v. Mississippi*, 456 U.S. 742, 782 (1982) (O'Connor, J., dissenting).

A primary complaint at EPCRA's inception, was the fiscal burden it imposed. See generally NGA REPORT, *supra* note 76. A recent statement by a coalition of state and local government organizations contains numerous descriptions of congressional actions fueling a growing state and local discontent with federal mandates unaccompanied by funding. See Statement Before the National Press Club, by representatives of the U.S. Conference of Mayors, National Association of Counties, National League of Cities and City/County Management Association, announcing their effort to end costly mandates imposed by the federal government, but not funded in the federal budget. (Transcript on file with author).

115. In the war of sound bites, "You gave us a great idea, but no money to implement it" stands up well against, "This is a balanced sensible statute." Cf. *supra* note 105.

116. Under Section 303(f) of EPCRA, federally designated national response teams issue guidance to the committees governing the development of emergency plans.

Within the agency, instructions in EPA guidance documents are generally considered compulsory. See, e.g., 1988 and 1992 EPCRA Penalty Policy Guidance. It is not clear whether the Emergency Plan Guidance referenced in section 303 is intended to have the same compulsory impact upon emergency planning committees. If the guidance is considered compulsory, it would further illustrate how far EPCRA goes in commandeering the states as branch offices of the federal bureaucracy.

117. See *New York v. United States*, 112 S. Ct. 2408, 2434 (1992) ("State governments are

Where then is the parade of opposition to EPCRA? Perhaps it is absent because EPCRA is so well-intentioned. It may be that we have experienced such an erosion of federalism and growth of federal power that Tenth Amendment objections to congressional "good works" seem petty.¹¹⁸ The danger is that tolerating these breaches may destroy the foundation meant to stand against the evils that grow from concentrations of power.¹¹⁹

neither regional offices nor administrative agencies of the Federal Government. The positions occupied by state officials appear nowhere on the Federal Government's most detailed organizational chart."). The take title provisions of the Radioactive Waste Act were less offensive in this respect. Those provisions did not tread so heavily upon state separation of powers and delegation principles. They gave states the nominal "option" of not legislating by incurring a penalty.

118. Justice O'Connor at least, would disagree that federalism is an archaic formality. *See New York*, 112 S. Ct. at 2418 (citing a scholarly discussion of the continuing benefits of federalism). *See also* *FERC v. Mississippi*, 456 U.S. 742, 789 (O'Connor, J., dissenting) (characterizing states as laboratories of regulation producing useful models like Florida's stringent oil spill legislation).

Arguably it is irrelevant that the only function of federalism is to impair worthy political goals. The Court has shown in rhetoric if not in deed, that constitutional principles may not be sacrificed to political exigency. *See* *Chadha v. Immigration Naturalization Serv.*, 462 U.S. 919 (1983). *Cf. supra* subsection IV(A) of this Article, which discusses "perceived necessity."

119. In closing the opinion in *New York*, Justice O'Connor gives a rich summary of the tension between well-intentioned efforts to solve undeniable problems and constraints upon government power meant to preserve our constitutional structure. *New York*, 112 S. Ct. at 243-35. *See also* O'Connor's dissent in *FERC*, quoting Justice Harlan's description of the framers' deep suspicions of "every form of all powerful central authority. To curb this evil they both allocated governmental power between state and national authorities, and divided the national power among three branches of government. Unless we zealously protect these distinctions, we risk upsetting the balance of power that buttresses our basic liberties." *FERC*, 456 U.S. at 786 (O'Connor, J., dissenting) (quoting John M. Harlan, *Thoughts at a Dedication: Keeping the Judicial Function in Balance*, 49 A.B.A. J. 943 (1963)).

Can a black scholar embrace these ideas without tripping over the racist baggage of "states rights?" I think so. Black folks have experienced instructive shifts in allies. In our early history in this country, certain states were relative havens, but the federal government was not a friend. In a subsequent shift, the federal government became (sometimes reluctantly) our savior from particular states. During a significant period, the federal judiciary was our savior. Over the last decade, the Court has become less friendly to the traditional civil rights agenda, and many of us have looked to the legislature as our new ally.

Given these shifts, it seems foolhardy to believe that our friends always will have influence in Washington. It seems equally foolhardy to deny the possibility that the growing power of the federal government might sometime be wielded by activists on the extreme right in ways decidedly against our interests. It takes no great effort to imagine the very troublesome exercises of plenary federal power by a radical right regime with a mandate to "restore America to the traditions that made it great."

