HAZARDOUS MATERIALS TRANSPORTATION IN AN AGE OF DEVOLUTION

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The United States has entered an age of devolution. As political responsibility has begun to shift from the federal government back to the states, many questions concerning an appropriate intergovernmental relationship remain unclear. In the area of environmental law, for example, the D.C. Circuit Court of Appeals decided a case, Massachusetts v. U.S. Department of Transportation *(DOT) (1996), that restricted DOT's authority to preempt state bonding requirements for hazardous materials transporters. The court's ruling ignored many precedents indicating that Congress intended to provide broad preemption authority to DOT under the Hazardous Materials Transportation Uniform Safety Act and arguably undermined standards articulated by the U.S. Supreme Court in* Chevron U.S.A. v. Natural Resources Defense Council *(1984). This article explores the court's opinion and asks whether the Massachusetts case represents a deliberate change in federalism principles or whether the holding is an example of a de facto devolution of power.*

Few areas of American law and public policy raise as many federalism questions as environmental law, owing to the character of natural resource degradation and the existence of negative externalities that must be regulated (if they are regulated at all) by the public sector (Hamilton, 1990; Tobin, 1992; Wise & O'Leary, 1997).[1] Because land, air, and water contamination and toxic chemical releases respect no political boundaries and because many environmental disputes are governed by federal administrative regulations that share authority with states and, by extension, municipalities, it is hardly surprising that recent arguments in the never ending debate on the appropriate balance of power in the American regime should focus, to some extent, on the environmental realm (Moya & Fono, 1997). The National Environmental Policy Act (NEPA), one of the earliest statutes enacted during the post-1969 "modern

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era" of environmentalism, clearly envisioned an integral role (although not an absolute one) for the federal government in ensuring "for all Americans safe, healthful, productive, and aesthetically and culturally pleasing surroundings" (1970, § 101; see also Buck, 1996, p. 18).[2]

Environmental issues are especially important because they highlight two contrary impulses in federalism—in this case, the push to decentralize federal authority while simultaneously promulgating national standards for clean air, water, and land. These impulses form the central paradox of the American experience, namely the presence of a strong strain of individualism coupled with a contradictory desire for government control over individual decisions that adversely affect the collectivity. Such tension between individual and collective interests is endemic to federalism. The late Martin Diamond, a leading commentator on the Founding Fathers and the origins of the American republic, succinctly summarized the challenges inherent in a federal system:

> The natural tendency of any political community, whether large or small, is to completeness, to the perfection of its autonomy. Federalism is the effort deliberately to modify that tendency. Hence any given federal structure is always the institutional expression of the contradiction or tension between the particular reasons the member units have for remaining small and autonomous but not wholly, and large and consolidated but not quite. (1973, p. 130)

In the face of this tension, federal authority to regulate environmental issues has been based primarily on the interpretation of two constitutional provisions that generally herald the supremacy of federal law. Under most interpretations of Article I, § 8, Clause 3, of the U.S. Constitution, Congress possesses the authority to govern activities that affect interstate commerce. Although the Tenth Amendment to the Constitution reserves power to the states and the people, generally courts have held that congressional authority to regulate interstate commerce supersedes states' exercise of police powers when the two conflict over matters involving more than intrastate activities. Over time, the definition of interstate commerce has expanded significantly, allowing the national government to regulate almost every activity through the Commerce clause as interpreted by the federal courts.[3] Recognizing the propensity of courts to decide virtually every major issue in American life, Alexis de Tocqueville wryly observed in the 1830s that "scarcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question" (Tocqueville, 1945, p. 288). Perhaps nowhere is the prescience of Tocqueville's remark more evident than in the context of Commerce clause disputes.

Congressional authority extends beyond the power to regulate interstate commerce, however. Under the Supremacy clause, Article VI, Clause 2, of the U.S. Constitution, Congress can preempt state and local laws in the interest of ensuring national uniformity in areas where the federal government is vested with constitutional authority. Despite the ascendancy of bureaucratic government and

the reform liberal movement during the latter half of the 20th century, federal authority under the Supremacy clause is not unchecked (Hoover, 1994, pp. 81-105). Courts assume that the police powers of states should not be preempted by a federal statute unless Congress has a suitable purpose and clearly intends to accomplish that purpose. A clear, unequivocal, unambiguous statement of intent—express preemption—is the most efficacious method of ensuring that congressional purposes are understood and followed.

Nonetheless, express preemption is not always articulated in a statute. In some areas of the law, implied preemption has been found when federal regulation is pervasive and occupies a given field to such an extent that Congress must have intended to preempt state law (field preemption). Alternatively, implied preemption has been found when state law either conflicts with federal law so that it is impossible to comply with both laws (conflict preemption) or when state law is an obstacle to fulfilling previously expressed congressional purposes and objectives (the obstacle test for conflict preemption), which is tantamount to a veto of federal authority (Ferrey, 1997, pp. 130-137; Zimmerman, 1993).

Few areas of environmental law have relied on the doctrine of implied preemption as much as the field of hazardous materials transportation. The transportation industry's task of complying with dozens of different, often conflicting, state laws and regulations regarding labeling, shipping, handling, storing, and disposing of hazardous materials moving through interstate commerce would be too onerous if the implied preemption doctrine were abandoned. In the absence of a uniform national system of regulation, the industry would be hamstrung by the vagaries of state requirements at a time when globalization of markets and rapid technological advancements make the ability to move materials quickly and efficiently a sine qua non for effective competition, whether foreign or domestic (see, e.g., Teske, Mintrom, & Best, 1993).

Given the pervasive use of implied preemption in hazardous materials transportation, disputes over federalism principles naturally arise in this area. As discussed in greater detail later in this article, a decision by the District of Columbia Circuit Court of Appeals, *Massachusetts v. United States Department of Transportation* (DOT) (1996), raised an implied preemption issue under the Hazardous Materials Transportation Uniform Safety Act (HMTUSA) and resulted in a curious anomaly owing to the court's ruling. The case permitted a state bonding requirement for hazardous materials transporters to stand despite numerous precedents to the contrary. Accordingly, whereas it referenced the centuries old debate concerning the proper division of power between states and the federal government, the court failed to reconcile its holding with the body of caselaw on implied preemption in the hazardous materials transportation field. The question arises whether this was an intentional oversight or an example of de facto devolution of authority.

More to the point, the *Massachusetts* decision contravened standards announced by the U.S. Supreme Court in the often-cited case of *Chevron U.S.A.*

v. Natural Resources Defense Council (1984).[4] In *Chevron*, the high court held that an agency can exercise broad discretion in cases where Congress was "silent or ambiguous" on a statutory provision and the agency acted in a "reasonable" manner in interpreting the provision (p. 843). Since it was handed down in 1984, Chevron has become the basis for determining federal agencies' relationship with states and localities, owing to its emphasis on the importance of agency discretion in promulgating a body of consistent federal regulations that governs a variety of fields, including the environment.[5]

Massachusetts v. DOT was a lower court decision; therefore, it did not alter *Chevron* standards as a matter of law. Nonetheless, *Massachusetts* has become an important administrative law opinion due to the D.C. Circuit Court's authority in reviewing federal agency adjudications and rulemaking after all administrative remedies have been exhausted. As a result, the D.C. Circuit's decisions hold great weight in determining the scope of future federal agency action. Accordingly, if *Massachusetts* was a deliberate attempt by the D.C. Circuit to carve out an exception to *Chevron* standards (and this is a debatable point), it represents a major change in the intergovernmental relationship between federal agencies and states, thus contributing to a de facto devolution of power.

SHIFTING FEDERALISM AND DEVOLUTION OF POWER

As the federal government became stronger in the wake of the New Deal programs of the 1930s, commentators began to sound the death knell for American federalism. Recent evidence suggests, however, that such prognostications were premature. The concept of decentralized authority has experienced a revitalization during the past three decades, especially in the 1990s. It is not an exaggeration to say that, as the new millennium arrives, a fundamental revitalization in the way Americans think and speak about the relationship among and between states and the federal government may be underway (Donahue, 1997; Palmer & Laverty, 1996; Peterson, 1995; Schram & Weissert, 1997; Van Dyke, 1996, pp. 76-80). Terms such as "New Federalism" and "devolution" describe this shift of power from federal to state governments and, in some cases, to local governments. Owing in part to the Republican Revolution in the 1994 elections and the proposals set forth by the 104th Congress in 1995-1996, distinct, planned policy changes have occurred in the way goods and services are distributed (Weaver, 1996).

Two types of decentralization of authority have occurred—and continue to occur—in the American regime: planned and de facto devolution. One need only examine the provisions of the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA), signed into law in August 1996, to discover a planned devolution of power from the federal government to the states (although, ironically, the federal government has aggressively used its authority

to accomplish this goal). PRWORA replaces the Aid to Families with Dependent Children (AFDC) program, among others, with a new Temporary Assistance to Needy Families (TANF) program that allows states to exercise greater control in designing public assistance and training programs for needy families with children. In 1995, Congress also considered proposals to convert Medicaid, welfare, child care, child protective services, and other social welfare programs into flexible block grants to states (Urban Institute, 1996, pp. 10-12).

This trend toward planned devolution (if, indeed, the change constitutes a trend) did not commence with the 1994 elections. Since the 1980s, when the Reagan administration championed less federal government responsibility in political decision making, a number of factors have led to decentralization of national authority in favor of states and localities (O'Leary, 1993). In an effort to balance the federal budget, Congress has shifted some social welfare and public assistance programs to states. Matching federal grants have been replaced with nonmatching grants. Many states have requested waivers from federal regulations that have governed Medicaid and other social welfare programs since the 1960s, and increasingly their requests have been granted. In 1996, a majority of states had welfare waivers of one form or another. In turn, states have attempted to absorb increased responsibility for social welfare programs and decreased federal funding by cutting services or by shifting their fiscal difficulties into other areas, such as trimming aid to schools, relying on tuition increases to fund public institutions of higher education, or pushing costs into the future. Moreover, some states have proposed converting state aid programs into block grants and allowing municipalities to operate those programs (Ladd, 1991; Moffitt, 1990; Poterba, 1994, 1995; Urban Institute, 1996).

Planned devolution involving a shift of responsibility to states may have unpredictable consequences for public policy, but ultimately it represents a healthy debate concerning the appropriate scope of government authority, even if practical difficulties arise. Because many states have relatively new constitutional or statutory spending limitations, their inability to pay for programs creates an incentive to shift the burden to localities or, alternatively, to cut services. In turn, state and local taxes may need to be increased to meet obligations required by state and federal regulations—the "unfunded mandates" that state and local officials are always decrying. Nonetheless, because planned devolution is the result of a deliberative process, it retains a semblance of common sense as well as political legitimacy. Perhaps Dwight Waldo explained the ebb and flow of a planned "centralization-decentralization" struggle best in the introduction to the second edition of his landmark work, *The Administrative State* (1984):

> A maxim attributed to Paul Appleby is relevant. That which is to be decentralized must first be centralized. I take this to mean that decentralization must be distinguished from disorder, chaos; and that true decentralization must flow from an order that centralization has established. That this maxim is vulnerable to criticism

> is obvious, but it conveys important truths. It may be true—I think it is true—that (in a sort of dialectical progression) the historical situation in which decentralization could be explored is based upon a historical victory of centralization. (p. xlv)

De facto decentralization, or devolution, however, creates a different set of problems owing to its chronic unpredictability—its "chaos," as Waldo (1984) called it. Entire fields of statutory and common law have grown up around long-established federalism principles.[6] When those principles are altered, especially in an untested, incremental process that lacks a reasoned explanation, the paramount benefits of positivist law, namely its reliable, discoverable characteristics, are undermined. De facto devolution creates unforeseen problems that have the potential to frustrate years of incremental change.

This is not to say that legal rules must remain static. Stare decisis is a tool of construction, and a useful one—not a resurrected form of dead-hand control. Conscious efforts to redefine the relationship between states and the federal government in the context of academic discourse or through a logically consistent devolutionary process where reasons may be articulated by the most authoritative governmental organization available, despite implementation and funding challenges, are a welcome and necessary feature of a pluralistic political system founded on democratic principles.

Unfortunately, as Publius recognized in *The Federalist Papers* (Hamilton, Madison, & Jay, 1787/1961), the inherent ambiguities of language in general, and federalism in particular, sometimes lead to anomalies that defy common law precedents, rules of statutory construction, or other reasonable tools for discerning the legal meaning of constitutional principles. In those cases, the limitation on federal authority is not a deliberate attempt to return power to the states, thereby reinvigorating state sovereignty, but an inconsistency to be reconciled with the body of law governing a given field. In such cases, de facto devolution can be detrimental to a regime (Hamilton et al., 1787/1961, p. 229).

One field that courts have consciously nationalized in modern times is hazardous materials transportation. The desire for uniform, consistent rules of handling, transporting, and disposing of materials potentially harmful to human and environmental health has led to passage of a remarkably consistent body of statutory and administrative law aimed at preempting state authority in an area that might otherwise fall under the states' Tenth Amendment authority to protect the health and welfare of citizens (O'Leary, 1997; Wise & O'Leary 1992, 1997). Common law rules interpreting those statutes and regulations generally have supported implied preemption in hazardous materials transportation cases, despite the judiciary's predilection against preemption unless the applicable statute expressly states an intent to obviate state law.

In 1996, however, the D.C. Circuit Court of Appeals seemed to disregard a multitude of precedents in an apparent attempt to curtail implied preemption in the hazardous materials arena. Yet the court failed to explain its reasoning fully or convincingly. Thus, with the court's decision to allow a state bonding requirement

for hazardous materials transporters to stand in *Massachusetts v. DOT*, an important federal question arose and remains unresolved. Did the court's holding in that case represent a conscious revision of federalism principles by deliberately undermining the standards of judicial review for administrative agencies articulated in *Chevron*—a planned devolution of power—or was the ruling an isolated misapplication of law in one circuit, that is, an unconscious de facto devolution of power by an activist judiciary that failed to consider attendant consequences? If the former explanation proves to be true, the court did not provide ample reasons for the change. If the latter is true, the court erred. Under other circumstances, the U.S. Supreme Court might address the issue specifically and more guidance would be forthcoming; however, for reasons discussed later in this article, DOT chose not to risk an appeal. In light of the D.C. Circuit's power of judicial review over federal agency decision making, the *Massachusetts* opinion has assumed an importance far beyond the narrow question of a state bonding requirement for hazardous materials transporters. The question of whether the decision represents a major change in state and federal relations in the hazardous materials transportation field remains muddled, leading to confusion for federal regulatory agencies and private interstate waste haulers alike.[7]

HMTUSA: ORIGINS AND PURPOSES

General Provisions

The federal law governing hazardous materials transportation is contained in Title 49, Chapter 51, of the United States Code, and was most recently modified in the HMTUSA of 1990. Under HMTUSA, federal law generally preempts state laws and regulations governing hazardous materials transportation if complying with the state, tribal, or local requirement and simultaneously complying with federal law is impossible, or if the state, tribal, or local requirement is an obstacle to complying with federal law. This second requirement, commonly called the obstacle test, historically has served as the most effective means of preempting state laws that conflict with federal statutes (see, e.g., *California Coastal Commission v. Granite Rock Company*, 1987; *Ray v. Atlantic Richfield*, 1978).

The original Hazardous Materials Transportation Act (HMTA) was enacted in 1975 to create a consistent federal framework for transporting hazardous materials along the nation's highway system. A year later, the act was amended (HMTA, 1976). In 1990, the act was further amended and renamed. By adding the word *uniform* to the 1990 amendments, Congress arguably sought to establish broader provisions for transporting hazardous materials in a consistent manner.[8]

Congressional findings for the 1990 amendments clearly indicated an intent to create a body of national law because "consistency in law and regulations

governing the transportation of hazardous materials is necessary and desirable." Moreover, HMTUSA defined "commerce" to include trade or transportation of an interstate nature anywhere within the United States (§ 5102[1]). Under 49 *Code of Federal Regulations* (1993), the secretary of transportation was vested with broad powers to regulate all aspects of hazardous materials transportation to ensure the safety and welfare of the public. Court cases interpreting HMTUSA's broad grant of authority generally have held that the act preempts state laws inconsistent with the purpose of creating uniform safety rules for interstate hazardous materials transportation, as discussed later in this article.

§ 5125: Preemption

As the Commerce clause generally is interpreted, state or local legislation or regulations are unconstitutional if they interfere materially, directly or indirectly, with interstate commerce. In any Commerce clause analysis, three issues are crucial to determining the outcome of the case: (a) whether the statute or regulation discriminates against out-of-state articles of commerce, (b) whether the state has a proprietary interest in the regulated activity, and (c) the impact of the statute or regulation, directly or indirectly, on interstate commerce weighed against the state's justification for the statute or regulation and the legitimate local interest (Ferrey, 1997, pp. 130-131).

HMTUSA's preemption provision, contained in 49 U.S.C.A. § 5125, is extremely detailed and has been subject to numerous court challenges since it was written and interpreted under the HMTA. Section 5125 generally has been held to preempt state and local laws and regulations unless specific language in HMTUSA allows state or local determination. Subsection (b), in particular, suggests that it is important for the DOT secretary to establish federal standards in several areas:

> (A) The designation, description, and classification of hazardous material; (B) The packing, repacking, handling, labeling, marking, and placarding of hazardous material; (C) The preparation, execution, and use of shipping documents related to a hazardous material and requirements related to the number, contents, and placement of those documents; (D) The written notification, recording, and reporting of the unintentional release in transportation of hazardous material; and (E) The design, manufacturing, fabricating, marking, maintenance, reconditioning, repairing, or testing of a package or container represented, marked, certified, or sold as qualified for use in transporting hazardous material.

In limited instances, a state, political subdivision, or Indian tribe may prescribe, issue, maintain, and enforce any regulation, law, standard, or order if it is substantively the same as the provisions referenced in § 5125(b).

HMTUSA allows affected states and tribes to designate permissible routes for hazardous materials shipments provided that certain conditions are met (§ 5112). Entities concerned about the possibility of DOT preemption may apply

to the secretary of transportation for a decision on whether a state, local, or tribal requirement is preempted. Notice of the application must be published in the *Federal Register.* Judicial review is unavailable until after the secretary has ruled on the application or until 100 days have passed, whichever occurs first. In lieu of applying for a preemption determination, however, an affected party may seek judicial review under § 5125(d)(3). The secretary also has authority to waive preemption if he determines that the state or local requirement provides the public at least as much protection as the requirements in the statute and it does not unreasonably burden interstate commerce.

Caselaw

Prior to the HMTUSA amendments in 1990, hazardous materials transportation cases sometimes upheld state and local regulations despite the HMTA, although in other cases preemption was allowed (see, e.g., *City of New York v. Ritter Transport, Inc.*, 1982).[9] In *New Hampshire Motor Transport Association v. Flynn* (1984), an opinion written by now-Associate Supreme Court Justice Stephen Breyer, the court noted that whereas the HMTA called for "a general pattern of uniform, national regulations," the issue of fees levied by states was a "close question" (pp. 46-48). The state may have legitimate concerns as part of its mandate to protect health and public safety. Thus, Judge Breyer found that "the Commerce Clause does not prevent states from charging for services they provide," and he noted that DOT can render advisory opinions on the preemptive effect, if any, of federal law (p. 50). Although Judge Breyer's opinion was written prior to the adoption of HMTUSA, which more clearly stated the congressional intent for national uniformity in hazardous materials transportation than did the HMTA, the decision remains a powerful statement of the presumption against preemption in the First Circuit.

Another early case, *City of New York v. United States Department of Transportation* (1983), held that U.S. DOT could preempt state and local laws requiring nuclear materials to be shipped via barge when beltways or perimeter highways were unavailable in metropolitan areas. The importance of uniform laws for shipping nuclear materials outweighed states' and municipalities' desire to route nuclear materials along specific corridors in that case. The court was careful to explain that the case was factually distinct from other hazardous materials cases, owing to the potentially severe consequences of nuclear material releases compared to releases from other hazardous, nonnuclear materials.

Since the 1990 HMTUSA amendments were enacted, the courts' emphasis on states' rights has declined. In fact, since 1990, the First, Eighth, Ninth, and Tenth Circuits consistently have interpreted congressional intent to establish uniform hazardous materials transportation regulations as the grounds for preempting state and local laws and regulations, although occasionally judges have expressed reservations about the negative consequences for federalism. Despite the reluctance of some jurists to interpret implied statutory language in favor of

broadening federal authority, however, the trend has been toward implied preemption in hazardous materials transportation cases (see, e.g., *Colorado Public Utilities Commission v. Harmon*, 1991; *Northern States Power Company v. Prairie Island Mdewakanton Sioux Indian Community*, 1993).

One important case from the Ninth Circuit Court of Appeals, *Chlorine Institute, Inc. v. California Highway Patrol* (1994), supported preemption, albeit in a qualified manner. In that case, the chlorine industry's trade association brought suit against the state of California, alleging that some of the state's regulations on transporting hazardous materials were preempted by federal hazardous materials regulations. The court held that the requirements were preempted, specifically finding that Congress had been explicit on this issue in enacting the 1990 amendments (p. 497, citing 49 U.S.C. app. § 1801 note [1993]). Thus, under HMTUSA, "the DOT is far better equipped to make a determination of the impact of proposed state regulations than are the federal courts" (p. 498). Because Congress had explicitly supported uniform regulations, the court held that all California regulations at issue were preempted (p. 498).[10] According to the majority decision,

> In amending the HMTA in 1990 through the enactment of the HMTUSA, Congress reiterated this interest in establishing uniform standards: many states and localities have enacted laws and regulations which vary from Federal laws and regulations pertaining to the transportation of hazardous materials, thereby creating the potential for unreasonable hazards in other jurisdictions and confounding shippers and carriers which attempt to comply with multiple and conflicting registration, permitting, routing, notification, and other regulatory requirements. . . . In order to achieve greater uniformity and to promote the public health, welfare, and safety at all levels, Federal standards for regulating the transportation of hazardous materials in intrastate, interstate, and foreign commerce are necessary and desirable. (pp. 496-497)

In the wake of the *Chlorine Institute* case, the only avenue open to a state was to request that DOT waive preemption, assuming that the state regulation in question did not unreasonably burden interstate commerce (p. 498).

Judge O'Scannlain's special concurrence in *Chlorine Institute* raised a point that continually recurs in preemption cases. The judge reluctantly agreed that preemption was necessary owing to the existence of an explicit, controlling precedent (*Southern Pacific Transportation Company v. Public Service Commission of Nevada*, 1990). Nonetheless, he expressed "regret [for] the result and the implications it carries for federalism" (p. 498). In Judge O'Scannlain's opinion, even a strong indication by Congress that state statutes and regulations can be preempted in the quest for national uniformity should not be sufficient to achieve the congressional objective. In other words, express preemption should be required because implied preemption is too vague and therefore damaging to state sovereignty. " 'Necessary' should entail a higher hurdle than a mere stated desire for uniformity because the diminution of states' rights does not come

without a cost," the judge concluded (p. 498). It was in the context of this trend—increased federal authority based on implied preemption despite the cost to states' rights—that the D.C. Circuit Court of Appeals considered *Massachusetts v. DOT* (1996). Judge O'Scannlain's reservations clearly resonated with a three-judge panel on the D.C. Circuit.

MASSACHUSETTS v. DOT

Facts of the Case

In *Massachusetts v. DOT* (1996), the D.C. Circuit Court of Appeals restricted DOT's authority to preempt state bonding requirements for hazardous materials transporters. Despite contrary decisions by the First, Eighth, Ninth, and Tenth Circuits (as well as the *Chevron* standards previously discussed), the D.C. Circuit's opinion became the first decision since HMTUSA was enacted to overturn a DOT preemption determination (E. H. Bonekemper III, personal communication with Thrower, January 31, 1997). Owing to the department's decision not to appeal the ruling, the case stands as a curious anomaly in the ever-shifting terrain of federal-state relations. The question of why the D.C. Circuit decided the case against precedents that supported implied preemption remains muddled.

The case arose from a commonplace fact setting. When hazardous materials are transported along the nation's highways, states sometimes insist that transporters post a bond in addition to fulfilling the terms and conditions of existing liability insurance requirements. Theoretically, this bond requirement ensures that adequate resources exist if hazardous materials are released into the environment, thereby posing a threat to public health and welfare. States contend that such a requirement is a reasonable exercise of their Tenth Amendment authority to protect the general welfare of their citizens. The salient issue becomes a problem of interpreting the nature of the transportation and the essential purpose of the statute. If the material was transported solely within the borders of one state, the activity appears to be within the scope of traditional state authority. If the activity involves interstate commerce or if instate and out-of-state transporters are treated differently, federal preemption authority probably will be upheld as a valid exercise of federal authority. Courts examine a variety of factors to determine congressional intent in preemption cases, including statutory language, legislative history, the underlying purpose of the act, and judicial rules of construction and interpretation (Ferrey, 1997, p. 131).[11] The last factor was especially important to the judges in the *Massachusetts* case.

At issue were regulations promulgated by Maryland, Massachusetts, and Pennsylvania that required bonding for hazardous materials transporters who either picked up or dropped off such materials within their respective jurisdictions. In Massachusetts, for example, waste transporters were required to post a $10,000 bond, from which the commonwealth or a locality could draw in the

event of a spill necessitating an emergency response action. In 1991, the bonding requirement was challenged by the National Solid Wastes Management Association in *Application by National Solid Wastes Management Association for a Preemption Determination Concerning Maryland, Massachusetts, and Pennsylvania Bonding Requirements for Vehicles Carrying Hazardous Wastes* (57 Fed. Reg. 58848, 1992).

The Research and Special Programs Administration (RSPA) of the DOT subsequently determined that the bonding requirements were preempted by federal law based on the HMTUSA precedents cited above. Any party "aggrieved" by RSPA's decision on the preemption application may file a petition for reconsideration within 20 days (57 Fed. Reg. 58848, 1992). Massachusetts and Pennsylvania moved for reconsideration. After DOT denied their petition, the states jointly filed suit in federal district court, as allowed by applicable regulations as well as the Administrative Procedure Act. The U.S. District Court upheld RSPA's decision, although the court did not apply *Chevron* deference to the agency's preemption determination (*Massachusetts v. DOT*, 1996, p. 892).

Massachusetts appealed the district court's decision in June 1995. On August 27, 1996, a three-judge panel of the D.C. Circuit Court of Appeals, Judge Sentelle presiding, sided with Massachusetts and reversed the decision of the lower court (*Massachusetts v. DOT*, 1996, 897). The court of appeals ruled that, despite the apparent congressional intent in enacting the statute, and notwithstanding RSPA's preemption decisions in similar cases, Massachusetts's requirement passed muster "in light of the powerful and well-established presumption against extending a preemption statute to matters not clearly addressed in the statute in areas of traditional state control" (*Massachusetts v. DOT*, 1996, 896).

In refusing to apply the *Chevron* standards in the *Massachusetts* case, the court intentionally or unintentionally sent a powerful message to federal agencies facing judicial review of administrative actions. According to the opinion, the D.C. Circuit Court of Appeals will not defer to agency decision making in fields that traditionally have been under state control absent a statutory provision that clearly and unambiguously expresses congressional intent. In other words, the D.C. Circuit subtly shifted the meaning of the *Chevron* standards. In lieu of deferring to an agency's interpretation of a vague or ambiguous statutory provision, as *Chevron* required, the court, and not the agency, henceforth will determine the reasonableness, or lack thereof, of the provision. Whether this heightened scrutiny by the D.C. Circuit is a triumph for devolution because it allows the courts to shift political power from the federal government back to states in areas traditionally within the purview of the state or whether it reflects a turf battle between two unelected political forces (the judiciary and an executive-branch agency), which potentially undermines democratic values, depends on whether one agrees with the court's policy goals (Wise, 1998). According to commentators Wise and O'Leary (1997), courts are determined to play an active role in shaping environmental policy when that policy holds implications for federal-state relations:

> The courts have made it clear that Congress can legislatively arrange the relationships in most environmental regulatory areas, even to preempting state authority in areas where the states have long been active. However, the courts have also said that Congress must express preemption explicitly and specifically. State courts have generally been more deferential to federal schemes. The Supreme Court has recently taken pains to set out a broader framework for environmental federalism that limits how far Congress can go in commandeering the states as the "operational arm" of federal environmental policy. (p. 158)

Reaction to the Court's Decision

Whatever else it accomplished, the D.C. Circuit raised the hackles of public administrators, many of whom administer complex regulations with little time for reflections on abstract theories of federalism. From RSPA's perspective, the court did not consider practical difficulties that can arise when the precedential effect of case law is accorded less status than canons of statutory construction. For its part, the court reasoned that because the affected materials either would have to originate in, or arrive within, the Commonwealth of Massachusetts to fall under the bonding requirement, the material was not in the stream of interstate commerce in this case; therefore, it was appropriately regulated by Massachusetts (*Massachusetts v. DOT*, 1996, p. 893). For the agency, this distinction meant that additional states might follow Massachusetts's lead, eventually resulting in a plethora of confusing and conflicting state laws that would hinder interstate hazardous materials transportation.

RSPA requested a rehearing before the full D.C. Circuit Court of Appeals, but the agency's motion was denied. Afterwards, DOT declined to appeal the decision to the U.S. Supreme Court (E. H. Bonekemper III, personal communication with Thrower, January 31, 1997). The agency's reasoning was unclear, but officials may have been unwilling to risk an adverse Supreme Court ruling on the preemption issue in toto, as opposed to the more narrow bonding requirement (Hilton, 1996). This supposition seems especially perspicacious when one considers that Stephen Breyer has been elevated to the U.S. Supreme Court since he first pronounced preemption in hazardous materials transportation cases "a close question" in a 1984 case, *New Hampshire Motor Transport Association v. Flynn*. In an age of devolution, when Washington was filled with rhetoric calling for decentralized authority and the high court appeared less amenable to supporting federal authority than at any time in recent years, DOT officials probably wanted to avoid bringing a case that not only would vitiate the remaining implied preemption authority under HMTUSA, but might serve as a forum for a broader debate on devolutionary principles.

Despite the D.C. Circuit's anti-*Chevron* decision, RSPA recognized that the repercussions could be muted owing to other avenues available to the agency. Edward H. Bonekemper III, RSPA's assistant chief counsel, said in a 1996 interview with *BNA Chemical Regulation Daily* that the *Massachusetts* case left a precedent that potentially would impede DOT's ability to establish uniform and

consistent hazardous materials transportation laws. Nonetheless, Bonekemper remarked that the department "[could] live with the decision" although it "[was] significantly flawed," because DOT could address the need for uniform hazardous materials transportation laws through other means.

> If we at RSPA decide that the bonding issue is important to us, that it's really causing conflicts with our goal of uniformity, we can always issue a rulemaking that tells states which kinds of bonding requirements are unacceptable to us. But no decision has been made about whether we're going to do that. I'm just laying out the options. . . . Now [while] the court has said it will take a narrow view of what we're pre-empting when we're silent, we still have the power to make clear exactly what we mean through regulations. ("Court Rejects DOT Request," 1996, p. 25)

Although proponents of states' rights arguably could view the *Massachusetts* case as another step in the devolution of power from the federal level back to the states, hazardous waste industry representatives joined DOT in expressing their displeasure with the court's opinion because it seemed to ignore the body of statutory and regulatory law governing the transportation of hazardous materials in interstate commerce. In a memorandum dated September 1, 1996, Cynthia Hilton, executive director of the Association of Waste Hazardous Materials Transporters (AWHMT), a specialized trade association for the hazardous materials industry, wrote:

> These non-federal bonding requirements unreasonably burden commerce while not affording a greater level of public protection. What the court has said about § 5125 is wrong. How the court interpreted state's [*sic*] rights regarding hazardous waste transportation is wrong. How the court has limited the applicability of the "obstacle" test is frightening. (pp. 10-11)

A subsequent analysis of the case in a memorandum prepared by the law firm Mayer, Brown & Platt for AWHMT concluded that one reason for the D.C. Circuit's confusion about the appropriate scope of the HMTUSA preemption provision was that the court failed to distinguish between the transportation of hazardous materials and the management and disposal of hazardous waste.[12] HMTUSA applies in the former case, whereas the Resource Conservation and Recovery Act (RCRA, 1982) applies in the latter. All the cases cited by the court, however, relied on RCRA, not HMTUSA, in resolving the issues. The memorandum concluded,

> The result, if the D.C. Circuit's decision stands, is that in no area of the agency's jurisdiction to make HMTA preemption determinations, except perhaps for the "covered subjects" in § 5125(b), will the agency be left with any real authority to carry out Congress's purposes to ensure safety and avoid a regulatory patchwork that will confuse the industry (Mayer, Brown & Platt, 1996, p. 10).

RSPA assistant chief counsel Bonekemper's remark that DOT could accomplish congressional goals through rulemaking begs the question of how power between states and the federal government should be divided in the hazardous materials transportation field and does not necessarily ensure that congressional intent will be followed in a clear, consistent manner. If federal power is to be "unpacked" so that states may assume more political responsibility, the issue should be addressed directly, and in a manner that is either consistent with, or rationally distinguished from, prior caselaw. Thus, although Bonekemper may be correct that the issue can be resolved, to some extent, through rulemaking, the possibility of a legal challenge to future rules that conflict with the D.C. Circuit Court's decision—as well as costly delays in implementing new regulations—may result in a Pyrrhic victory for the department if DOT engages in rulemaking to circumvent the court's opinion.

CONCLUSION: HAZARDOUS MATERIALS TRANSPORTATION AND DEVOLUTION

Planned devolution of power from large, centralized government to smaller, decentralized political units, which are ostensibly closer to the people, is hardly surprising in light of the American political tradition. Since the earliest days of the republic, Americans have been suspicious of too much power wielded by too few hands too far away in space and temperament from citizens. The great champion of states' rights, Thomas Jefferson, explained the need for "a beautiful equilibrium" established by the division of sovereignty between states and the federal government envisioned in the Constitution.

> I do not think it for the interest of the general government itself, and still less of the Union at large, that the State governments should be so little respected as they have been. However, I dare say that in time all these as well as their central government, like the planets revolving around their common sun, acting and acted upon according to their respective weights and distances, will produce that beautiful equilibrium on which our Constitution is founded, and which I believe it will exhibit to the world in a degree of perfection, unexampled but in the planetary system itself. The enlightened statesman, therefore, will endeavor to preserve the weight and influence of every part, as too much given to any member of it would destroy the general equilibrium. (Padover, 1939, p. 52)[13]

Whether Jefferson's insight was a valuable articulation of federalism or an anachronism even before his death depends on one's point of view. Ultimately, with the birth of reform liberalism from the New Deal period until the present day, the states have become far more dependent on the federal government than the Founders understood from the confines of the 18th century (Hoover, 1994, pp. 81-105). For strict constructionists and liberatarians, the principles of New

Federalism may represent a long overdue swinging of the pendulum back toward the beautiful equilibrium that Jefferson desired.

Unfortunately, de facto devolution, because it is not the result of a reasoned, deliberative process but an occurrence occasioned by the convergence of many cultural, historical, social, and political forces, gives rise to unintended, potentially harmful, consequences. As states assume greater responsibility for programs originally administered by the federal government, much of this responsibility is shifted to local governments owing, in some cases, to a lack of adequate state resources. This may be one reason why local taxes have risen faster than state taxes since the mid-1980s (Gold, 1995; Poterba, 1994). Because it represents an unconscious process—the triumph of inertia over deliberation, delaying a problem in lieu of resolving a problem—de facto devolution is an ineffective, long-term means of reforming government.

Congress has decided that some fields of environmental law, including hazardous materials transportation, require centralized, uniform controls if they are to function efficiently and effectively. In an effort to realize this goal, Congress has balanced the need for uniformity in the hazardous materials transportation field against the need to protect state sovereignty and found that the former objective outweighs the latter.[14] One reason for the rise of the administrative state during the 20th century has been because the increasing technological and scientific complexity of public policies demanded expertise by those persons who would administer policies in an appropriate manner (Rosenbloom, 1989). Hazardous materials transportation is precisely the kind of issue that Congress has delegated to federal administrative agencies.

In the absence of unambiguous expressions of congressional intent, federal courts have not always upheld centralized authority in the area of environmental law and policy. Inconsistent rulings should not be surprising, according to commentators Wise and O'Leary, because environmental law is complex and involves a multitude of local, state, federal, commerce, and scientific issues. The only clear trend is the courts' willingness to become "an increasingly stronger player in arranging power over environmental decisions" (Wise & O'Leary, 1997, p. 158).

Increased judicial activism means that well-established federalism standards applied in technically complex fields, if they are changed at all, must be modified carefully and deliberately. The *Chevron* standards requiring courts to defer to agency discretion in reviewing administrative actions were designed to allow agencies to exercise their expertise in matters delegated to them by Congress, except in egregious circumstances where their actions were arbitrary and capricious. *Massachusetts v. DOT*, intentionally or unintentionally, undermined those standards to some extent, at least in the all-important D.C. Circuit. When courts wrest authority from agencies and serve as final arbiters of the agencies' discretionary authority, they alter the balancing approach that has evolved over time for determining which matters are appropriately within the province of agencies and which matters should be left to states. The D.C. Circuit Court of

Appeals' decision seemed to take issue with this balancing approach, but the opinion was incomplete and unconvincing in its explanation of precedent.

Another troubling problem almost always arises when public policy is hammered out by courts through case-by-case adjudication that does not fully consider the larger societal implications of the courts' decision making. This problem sometimes is identified as a "collective action" dilemma. The political science literature is filled with research in this expanding area (see, e.g., Ostrom, 1998; Tarrow, 1994; Traugott, 1995). Perhaps the most famous articulation of this problem in the environmental field was made in 1968 by Garrett Hardin, when he wrote of "the tragedy of the commons" in a now famous article.

According to Hardin (1968), individual users of a resource that is not privately owned (a "common pool resource," in economists' terms) have an incentive to use as much as they can, even to the point of exhausting the resource, to satisfy their individual desires with little regard for future uses by other parties. Unfortunately, by taking a short-term view of their actions, individuals risk destroying the resource for everyone in the long term. Hardin's article has been influential because it explains why so many people carelessly destroy the natural environment through littering, industrial pollution, overuse, and resource exploitation (Rodgers, 1994, p. 39). The American regime emphasizes the importance of individual rights and liberties—often without instilling in its citizens a sense of collective responsibility. In essence, the long-term collective interest is sacrificed to the short-term individual interest.[15]

The theory of collective action, according to one commentator, "is the central subject of political science" and "the core of the justification of the state" because the state seeks to allocate resources in such a manner that the collective good benefits to some degree (Ostrom, 1998, p. 1). If this is a persuasive analysis, then courts deciding cases involving environmental risks must look not simply at the facts in the case, but at the larger ramifications. Specifically, courts reviewing hazardous materials transportation cases involving fundamental questions of federalism must examine each case with an eye toward determining which level of government—the states or federal agencies—most appropriately protects the common good to the extent possible in a political and legal system based on safeguarding individual rights. As always, addressing the issue requires decision makers to balance individual and collective interests. Under this collective action analysis, federal agencies are better positioned to regulate matters involving interstate transportation of hazardous materials because generally they are responsible for regulating a broader jurisdiction than courts, which must consider the interests of individual litigants.

When a court modifies well-established rules of federalism, it is incumbent on the judges to explain matters in detail, especially when their actions affect the collective good. Judge Sentelle stated that *Chevron* deference standards did not apply in *Massachusetts v. DOT* because "traditional tools of statutory construction" precluded preemption under the facts of the case (*Massachusetts v. DOT*, 1996, p. 896). This analysis reveals a faith in the efficacy of state authority, but

fails to consider the costs to hazardous materials transporters and, by extension, to society as well. Whether the court's decision represents a devolution of federal authority by deliberately altering *Chevron* or a simple misstep remains to be seen as new cases and controversies arise. Until that time, the issue of hazardous materials transportation in an age of devolution should be reexamined in the broader context of the continuing debate over principles of federalism. This article has attempted to take an incremental step in such a reexamination.

NOTES

1. Not every environmentalist has called for federal or interstate solutions to environmental problems. In *Using Federalism to Improve Environmental Policy* (1996), Henry N. Butler and Jonathan R. Macey contend that the federally dominated system of environmental protection has wasted billions of dollars while concomitantly destroying innovative state and local environmental protection programs in a misguided, one size fits all effort to enact pollution control laws and other environmental measures. The authors argue that an "economic theory of federalism" makes sense where state and local governments are assigned responsibility for addressing environmental problems in their own jurisdictions (Butler & Macey, 1996).

2. In § 101(b), for example, The National Environmental Policy Act (NEPA, 1970) provided a broad grant of authority: "In order to carry out the policy set forth in this Act, it is the continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate federal plans, functions, programs and resources."

3. Commerce clause cases are invariably complex and fact determinative. Because a detailed discussion of the tension between the plenary power of Congress to regulate interstate commerce and the Tenth Amendment limitation on federal power to regulate is beyond the scope of this article, suffice it to say that this is an area of the law that continues to evince great change. See, for example, *Hodel v. Indiana* (1981), *Hodel v. Virginia Surface Mining and Reclamation Association, Inc.* (1981), *New York v. United States* (1992), *United States v. Lopez* (1995), and *Printz v. United States* (1997).

4. The case subsequently was reaffirmed and elaborated on in *Chemical Manufacturers Association v. Natural Resources Defense Council* (1985).

5. The U.S. Supreme Court also refined standards for judicial review of administrative decision making in *Citizens to Preserve Overton Park, Inc. v. Volpe* (1971), *Vermont Yankee Nuclear Power Corporation v. Natural Resources Defense Council* (1978), and *Motor Vehicles Manufacturers Association v. State Farm Mutual Automobile Insurance Company* (1983).

6. Although an extended discussion of Supreme Court cases involving federalism is beyond the scope of this article, areas where federalism principles have been established gradually throughout the history of the polity include cases involving the Contract Clause (Article I, § 10); interstate commerce, as discussed herein; the power of Congress to tax, spend, and act in ways "necessary and proper" under Article I, § 8; and the incorporation of selected Bill of Rights provisions through the Fourteenth Amendment, to mention only a few.

7. On October 15, 1996, the Department of Transportation (DOT) requested an en banc (full-judge panel) rehearing in the *Massachusetts* case, but the D.C. Circuit Court of Appeals declined to grant the request ("Court Rejects DOT Request," 1996, p. 24). A casual observer might ask why the adverse decision is a cause for great alarm owing to the possibility that it will be reversed, modified, or vacated in subsequent cases. Because it represents a marked departure from cases decided in other circuits and because the U.S. Supreme Court is not likely to review a case with similar facts anytime soon, *Massachusetts v. DOT* represents the kind of piecemeal adjudication that Congress was trying to avoid in enacting the Hazardous Materials Transportation Uniform Safety Act (HMTUSA). For

this reason, hazardous materials transporters are concerned that they will face more state bonding requirements in the near future and the D.C. Circuit's decision will continue to present problems. As an example, a bill originally introduced into the California Assembly in 1998, AB 2192, included a $25 million state bonding requirement for transporters of certain specified radioactive materials. AB 2192 passed the California Senate after being amended by a 23-8 vote on August 27, 1998, and the Assembly passed the bill by a 50-26 vote the following day. Governor Pete Wilson later vetoed the bill because it was "unnecessary, would blur the lines of authority" and, moreover, the measure "unnecessarily overlaps and duplicates existing requirements." Despite the governor's veto, AB 2192 is one example of the possible proliferation of state laws imposing bonding requirements on interstate hazardous materials transporters.

8. Four years later, the Congressional Office of Law Revision Counsel undertook formal revisions, which were codified at Pub. L. 103-272, § 1(d), July 5, 1994, 108 Stat. 758, as part of the recodification of Title 49, Transportation, of the United States Code.

9. In *Jersey Central Power & Light Company v. Township of Lacey* (1985), a case involving spent nuclear fuel and high-level radioactive waste transportation, the Third Circuit held that an ordinance enacted by a township prohibiting importation of spent fuel was preempted by the Atomic Energy Act of 1954 and the Hazardous Materials Transportation Act (HMTA) because "the public risks in transporting these materials by highways are too low to justify the unilateral imposition by local governments of bans and other severe restrictions on the highway mode of transportation" (p. 1113, quoting 46 Fed. Reg. at 5299).

10. The HMTUSA was explicit in calling for national uniformity in hazardous materials regulations, but it stopped short of articulating an express preemption standard, hence the continued debate over implied preemption. The HMTUSA drafters probably did not provide for express preemption because the act seemed to clarify congressional intent sufficiently as it was written.

11. Courts have proven adept at characterizing activities in ways that allow them to favor or disfavor preemption, depending on the desired outcome. Thus, in *Pacific Gas & Electric Company v. State Energy Resources Conservation & Development Commission* (1983), the court held that Congress impliedly intended for federal regulations under the Atomic Energy Act to leave no room for state involvement in nuclear safety issues and yet, paradoxically, the court found that a specific state statute fell outside the impliedly occupied field of nuclear safety regulation because the statute managed a nuclear utility as a matter of utility planning and management, not as a matter of nuclear safety. Yet, in an apparently contradictory result, the court held in *Ray v. Atlantic Richfield* (1978) that the state of Washington's safety requirements (such as double-hulling ships) were preempted by the federal Ports and Waterways Safety Act because they frustrated the "evident Congressional intent" of the act, which was designed to establish uniform federal laws governing oil tankers. Commentators have suggested that the apparent inconsistency may be the result of different types of cases involving implied preemption. The *Pacific Gas* case was an instance of implied field preemption, whereas the *Atlantic Richfield* case involved implied conflict preemption. Whether this distinction withstands sustained scrutiny is an open question. Suffice it to say that the outcome of cases involving implied preemption turns on the courts' characterization of the factual circumstances.

12. Another reason for the court's confusion about the appropriate statutory basis for regulating hazardous materials transportation may have been because lawyers and judges almost always have a difficult time calculating risks and deciding how they should be regulated. The court's view of the risks associated with transporting hazardous materials was never directly stated in *Massachusetts v. DOT* (1996), but an undercurrent of risk aversion seemed to be implicit in the opinion. In fact, by allowing Massachusetts to impose a bonding requirement on hazardous materials transporters, Judge Sentelle apparently wanted to protect the state against the possibility of having to respond to a hazardous materials spill without requisite funding to pay for the cleanup: "Because this bond provides a surety only for the Commonwealth, and is not a general fund against which other parties may seek indemnity for their claims against the transporter, the bonding requirement is distinct from other forms of liability insurance requirements, which Massachusetts governs through a separate

regulation" (p. 892). Yet, despite the judge's concern for ensuring that state resources would be available in the event of an accident, he may not have decreased the risks associated with transporting hazardous materials. Judges and lawyers often approach the complex issues inherent in any discussion of risk management from a misunderstanding of the scientific realities involved in calculating risk. As a result, lawyers and judges almost always respond to perceived problems by overregulating areas deemed too risky. One commentator summarized the issue this way:

> The legal system's almost obsessive preoccupation with public risks is, in my view, entirely misguided. . . . First, public risks are progressive—they improve the overall state of our risk environment—whenever the incremental risk created is smaller than the quantum of existing privately-created risk that is displaced. The point may seem obvious, but the fact that a large number of judges and legal commentators ignore it suggests otherwise. Second, the judicial system is, for a variety of reasons, incapable of engaging in the aggregate calculus of risk created and risk averted that progressive public-risk management requires. (Huber, 1985, p. 278)

Thus, not only did the court misunderstand the statutory provisions involved in the *Massachusetts* case, but it may have been confused about the risks associated with transporting hazardous materials. As DOT contended in the case, the need for uniform and consistent hazardous materials transportation laws and regulations arguably outweighs the interests of a state in imposing a bonding requirement.

13. Despite Jefferson's well-known affinity for states' rights, he was not merely a naive opponent of federal authority with complete faith in the benevolence of states. "But the true barriers of our liberty in this country are our State governments," he wrote in 1811, "and the wisest conservative power ever contrived by man is that which our Revolution and present government found us possessed" (Padover, 1939, p. 52). In other words, the existence of states was not a panacea for problems associated with an oppressive authority wielded by an obdurate political entity; however, federalism, because it divided government into distinct sovereign units competing with each other for political power, ensured that a fragmented republic could not evolve into a tyrannical regime. Power would be balanced against power and liberty would be protected as a direct and proximate result.

14. Of course, in the future, Congress could avoid problems associated with implied preemption by expressly providing for preemption in hazardous materials transportation statutes.

15. This preference for short-term individual interests when the natural environment is concerned is hardly surprising in light of Americans' Judeo-Christian heritage, which emphasizes man's individuality as well as his dominion over nature, rooted in Genesis and the works of western philosophers such as Plato, St. Augustine, Descartes, and Hume, among others (see, e.g., Rosenstand, 1998, pp. 58-68; White, 1967, pp. 1203-1207).

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