Reverse Preemption

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Common accounts of federalism and preemption do not envision states as supreme. According to the conventional view, states may share regulatory space with the federal government, carry out federal programs, or operate independently and even exclusively. But in two provisions in federal law, states play a role of supremacy: they are given extraordinary power—what we call “reverse preemption”—to veto federal agency decisions that conflict with state policy. One provision allows states to override federal actions that conflict with state coastal management; another gives states the power to reverse or condition federal licensing decisions that impede state water quality goals. We examine these reverse preemption provisions in this Article and explore their ramifications. We suggest that reverse preemption provisions enhance the power of states with strong environmental preferences through an unexpected form of federalism. We describe the ways in which the provisions allow Congress to check executive branch decision making that could undermine environmental protection, particularly when Congress and the Presidency are held by different political parties. Thus, reverse preemption provisions play an important function in bolstering separation of powers values. Finally, we explore reverse preemption as a mechanism for checking agency capture by regulated parties and make preliminary suggestions for the use of reverse preemption provisions in other policy areas.

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INTRODUCTION

In 1787, in response to worries about an impotent federal government, James Madison unsuccessfully proposed a constitutional provision that would have allowed Congress to exercise a veto over any state legislation.¹ In a contemporary twist, Congress has enacted the converse of Madison’s proposal: in two little-known provisions in federal law, Congress has granted states the power to veto federal agency actions that conflict with state laws and policies. This veto power—what we call “reverse preemption”²—defies two other

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¹ For an explanation of an interesting thought experiment about the Madisonian state veto, see Allison L. La Croix, What Would Have Happened if Madison Won? Imagining a Constitutional World of Legislative Supremacy, 45 Ind. L. Rev. 41 (2012).

² We recognize that the state veto provisions at issue in this Article do not technically constitute preemption in that they do not prevent the federal government from legislating in the field or on the particular issue. Nevertheless, as we will show, the provisions can and do replace a federal agency decision with a state override, thus preemptsing the federal action in the dictionary sense of the word. And the provisions reverse the standard form of preemption in that they allow state policy to trump federal policy rather than the more traditional federal preemption of state law under the Supremacy Clause of the U.S. Constitution. We thus adopt the label while recognizing its technical imprecision. To our knowledge, the term “reverse preemption” is regularly used in only one other circumstance and that is under the McCarran-Ferguson Act, which permits states to tax and regulate foreign insurance companies while exempting the insurance industry from antitrust laws. 15 U.S.C. §§ 1011–1015 (2012). Section 1012(b) of the Act contains the reverse preemption provision and provides that “[n]o Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business,
prominent trends: congressional usurpation of state power in a number of areas, including financial, tort, and environmental laws; and the delegation of vast amounts of power to the executive branch, a trend that has led many to accuse Congress of abdicating its constitutional role as a check on executive power. In defying these trends through the reverse preemption provisions, Congress has both empowered rather than constrained states, and granted them rather remarkable authority to rein in the exercise of specific executive power. These statutory provisions are the focus of this Article.

The reverse preemption provisions, found in the Clean Water Act (CWA) and the Coastal Zone Management Act (CZMA), turn standard stories about federalism and executive power on their heads. Rather than preempting state power; setting up a scheme of cooperative federalism; allowing the federal and state governments to operate in their own spheres (so-called “dual federalism”); or shifting large swaths of authority to the executive branch, Congress has done something entirely different. It has granted power to the states—explicitly—to trump the policy decisions of federal agencies by imposing the states’ own policy choices on federal actors even when those choices conflict with agency decisions. In this Article, we explore how this power was granted to the states, how it has been exercised, and why Congress might choose to limit federal power when state policy choices conflict with the exercise of that power.

We begin in Part I with a discussion of the two statutory provisions at issue. Under the CZMA, a state with a federally approved Coastal Zone Management Plan (CZMP) can veto any federal action inconsistent with the plan, subject to certain limits. For example, a state may challenge the approval of a federal oil and gas lease for exploration in coastal waters as inconsistent with its CZMP. Subject to certain limitations, the state determination will invalidate the lease. The CWA contains a nearly identical provision. Under the


5. 33 U.S.C. § 1342(a), (b) (2006) (“Section 401”).


7. See infra Part II.B.
CWA, if a state determines that a federal license or permit violates a state’s water quality standards or other provisions of the Act, it may refuse to certify the activity unless it meets the state standards. This refusal to certify can be used to override the decision by a federal agency to allow the activity to proceed. These two veto provisions are not mere window dressing: states have used them to block oil leases, place conditions on the relicensing of hydroelectric dams, and veto proposed terminals for Liquefied Natural Gas (LNG) and other fuels.8

In Part II, we explore the constitutional and structural ramifications of the reverse preemption provisions. We argue in this Part that providing states with veto power over federal agency decisions can promote important constitutional values. Congress may, for example, trust states to implement its statutory commands more faithfully than the executive branch in some circumstances. Thus, reverse preemption provisions may bolster separation of powers values by deputizing states to execute federal statutory directives that an executive agency might otherwise fail to implement.9 Congressional desire to limit executive power may be particularly strong in times of divided government.10 A Democratic Congress, for example, may empower states to check the regulatory biases of a Republican executive, reasoning that at least some states will share their policy preferences.11

Allowing states reverse preemption power may also allow Congress to bolster federalism values by granting those with knowledge about local political preferences and particular environmental resources a stronger say in the execution of federal law than federal agencies. This power is especially important for states with strong environmental preferences since the reverse preemption provisions work to implement statutes that provide for environmental protection. Thus, reverse preemption of federal agency actions can be thought of as a way to increase environmental protection, particularly when a federal agency’s central mission includes promotion and protection of other non-environmental values.

Finally, reverse preemption power may guard against federal agency capture by providing an additional check against the power of specialized agencies like the Federal Energy Regulatory Commission (FERC), the Department of Interior (DOI), and the Army Corps of Engineers. These agencies may develop institutional cultures that favor particular interest groups with which they have frequent contact.12 The reverse preemption provisions

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8. See infra Part II.A.
11. Id.
ensure that the voices of states with strong environmental concerns are heard by these specialized agencies.

We conclude by arguing that reverse preemption authority is a powerful but underexamined congressional tool to limit the exercise of executive authority that might otherwise undercut legislative preferences. These provisions defy other more widely noted trends that centralize power in the executive branch of the federal government at the expense of states and Congress. Finally, we offer preliminary thoughts about the extent to which reverse preemption provisions might play a role in other substantive areas with significant federal-state involvement.

I. REVERSE PREEMPTION PROVISIONS IN FEDERAL LAW: CWA SECTION 401 AND THE CZMA

A. State Authority Under Section 401 of the CWA

The reverse preemption provision in section 401 of the CWA differs in important respects from the cooperative federalism arrangements included in many federal statutes. As with many of the major federal environmental laws, the CWA establishes detailed cooperative roles for both the federal and state governments. Most federal environmental provisions allocate specific powers to one level of government or another—for example, by providing the federal government with the authority to set standards and the states with the authority to implement a permitting program to enforce those standards. Indeed, much of the CWA operates in this fashion. By contrast, section 401 grants express veto power to states over certain federal decisions. In order to ensure that licensing and permitting decisions by federal agencies do not conflict with state water quality goals and other provisions of the CWA, section 401 requires an applicant for a federal permit or license whose activity “may result in any discharge into the navigable waters” to obtain state certification. Specifically, the state must certify that the proposed activity complies with key provisions of the Act, including a state’s water quality control standards and the Act’s prohibition against discharges without a permit. If the activity would violate the state’s standards, the state can place conditions on federal approval of the license or permit in order to ensure that the standards are met. If the standards cannot be met through the imposition of conditions, the federal agency “shall not issue such license or permit.”

The state’s water quality standards are part of a comprehensive set of requirements contained in the CWA that set limits on water pollution discharges, establish water quality standards to ensure that individual bodies of

15. Id. § 1341(a)(1).
16. Id. § 1341(a)(2).
water are protected for their intended uses (e.g., swimming, fishing, drinking), and regulate the total amount of pollution specific water bodies can tolerate without violating the water quality standard (called the “total maximum daily load” (TMDL)). The CWA divides authority to implement these requirements between the federal and state governments. The CWA gives the EPA primary responsibility for setting technology-based limitations on discharges by individual “point sources” into the nation’s navigable waters. These limitations are implemented by approved states (or by the federal government for states without delegated authority) through the National Pollution Discharge Elimination System (NPDES). States have the responsibility for setting the level of protection provided by a secondary layer of regulation: section 303 of the Act requires each state to institute comprehensive “water quality standards” (WQS) for all intrastate waters. These state standards provide “a supplementary basis . . . so that numerous point sources, despite individual compliance with effluent limitations, may collectively be further regulated to prevent water quality from falling below acceptable levels.”

Water quality standards may be more stringent than the federal requirements and contain two components: designated uses (e.g., swimming, fishing) and water quality criteria. Water quality criteria may be expressed either as “numerical” limits on various pollutants, or as “narrative” requirements that set broad descriptive goals for various types of water bodies (e.g., “[t]oxic, radioactive, or deleterious material concentrations shall be less than those which may affect public health, the natural aquatic environment, or the desirability of the water for any use”), though criteria for toxic pollutants must, for the most part, be numerical. Section 303 also contains an “anti-degradation” policy that requires states to ensure that bodies of water do not decline in quality even where the ultimate goal of the Act is to improve, not just maintain, overall quality. The CWA also delegates to states the authority to implement a third type of regulation, the establishment of TMDLs for bodies

18. 33 U.S.C. §§ 1252(a), 1311(b).
19. Id. § 1342(a)(b).
20. Id. § 1313(a).
22. 33 U.S.C. §§ 1311(b)(1)(C), 1370; see also 40 C.F.R. § 131.4(a) (2013) (“As recognized by section 510 of the Clean Water Act, States may develop water quality standards more stringent than required by this regulation.”).
that fail to meet WQS. These TMDLs are limits on the total amount of a pollutant that all sources can discharge into a particular body and are to be set at levels that bring the body of water into compliance with the WQS.

Section 401 provides states with an added element of both authority and environmental protection by requiring that federal permittees and licensees obtain state certification that their activities comply with state WQS, TMDLs, and other limitations on discharges into waters covered by the Act. State certifications must list any limitations and monitoring requirements necessary to assure that the applicant will be in compliance with various provisions of the CWA, as well as "any other appropriate requirement of State law." Thus, under section 401, a state can withhold the necessary certification unless the applicant agrees to comply with federal and state water pollution requirements. Congress was clear that section 401 certification was included "to assure that Federal licensing or permitting agencies cannot override State water quality requirements . . . ."

Two federal licensing and permitting schemes raise section 401 issues most frequently: Federal Energy Regulatory Commission (FERC) licenses for hydroelectric power plants and Army Corps of Engineers permits to dredge and fill wetlands under section 404 of the CWA. Nonetheless, section 401 is not limited to these sections and could potentially apply to an even wider array of activities. We turn first to a discussion of FERC permits for hydroelectric power and section 401 certification.

1. **Section 401 Certification and FERC**

   a. **Legal Authority Over FERC Permits**

   The application of section 401 state certification to FERC licensing of hydroelectric power plants has generated significant court attention from the U.S. Supreme Court. The Court has made clear that section 401 grants states significant power to condition or even veto FERC licenses.

   Historically, the federal government had strong preemptive power over the states in the regulation of hydroelectric power plants, power acknowledged

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27. 33 U.S.C. § 1313(d).
30. *Id.* § 1341(d).
by the Supreme Court as recently as 1990 in *California v. FERC.*³⁴ In that case, the Court refused to allow the state to impose minimum stream flow requirements on an already existing federally authorized hydroelectric facility, following precedent set in 1940 in *First Iowa Hydro-Electric Cooperative v. Federal Power Commission.*³⁵ But the question of state power to condition permits for new plants is made more complicated by section 401 of the CWA. The Court faced this question in *PUD No. 1 v. Washington Department of Ecology.*³⁶

In *PUD No. 1,* a city and local utility district sought to build a hydroelectric facility on the Dosewallips River in Washington State.³⁷ As proposed, the facility would divert a large portion of the river’s water to generate electricity before returning the water to the river downstream.³⁸ Pursuant to its authority to issue water quality standards under section 303 of the CWA, the state previously had classified the Dosewallips River as “extraordinary,” and designated it for uses including salmon spawning.³⁹ When the city applied for a permit under the CWA, the state refused to certify the project on the grounds that the diversion would not leave enough water in the river’s channel to allow for salmon spawning.⁴⁰ The city appealed, alleging that Washington lacked the authority under section 303 to impose minimum stream flow requirements as a permit condition. After the Washington State Supreme Court affirmed the state’s permit conditions, the Supreme Court granted certiorari.⁴¹

The Court held that section 401(d) of the CWA authorized Washington to require the city to meet the minimum stream flow requirements set by the state under section 303 of the CWA.⁴² The city and water district had argued that such requirements were not covered by section 401 since the minimum stream flow requirements were not regulating a discharge into navigable waters. Recall that Section 401 applies to the activity of any permit applicant “which may result in any discharge into the navigable waters.”⁴³ The parties agreed that the construction of the power plant would result in discharges to the Dosewallips River, but petitioners argued that the condition the state imposed—compliance with minimum stream flows—did not pertain to the discharges.⁴⁴

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³⁵. *First Iowa,* 328 U.S. at 152, 182.
³⁷. *Id.* at 708.
³⁸. *Id.* at 709.
³⁹. *Id.*
⁴⁰. *Id.*
⁴¹. *Id.* at 710.
⁴². *Id.* at 712–13.
⁴⁴. *PUD No. 1,* 511 U.S. at 711.
rejected the argument. Under section 401(d), states may impose a variety of conditions as part of their certification: potential certification conditions are not constrained to discharge limits and may include compliance with state water quality. The state of Washington’s WQS include its designated uses, including protecting salmon, as well as an antidegradation policy preventing the degradation of such uses. Without minimum flow requirements, the dam could destroy the use of the river for salmon spawning. By this reasoning, the Court held that the state was justified in conditioning permit approval on minimum stream flows.

Justice Thomas’s dissent captured the effect of the Court’s decision on the power of sections 303 and 401. He argued that section 401 should be read to limit reverse preemption authority to discharges that otherwise violate the CWA and expressed concern that the majority’s holding provides states a virtual “veto” authority over federal hydroelectric projects. Thomas asserted that this veto authority upends the proper balance between state environmental interests and the national policy empowering FERC to regulate the nation’s energy needs. Thomas noted that FERC is required to conduct its own environmental review before licensing hydroelectric facilities under the Federal Power Act. While he acknowledged that the FERC review is likely to be conducted differently than state review under section 401(d), that difference, in his view, is appropriate: “In issuing licenses, FERC must balance the Nation’s power needs together with [environmental interests]. State environmental agencies, by contrast, need only consider parochial environmental interests.”

Thomas’s concerns echo the Court’s earlier decision preempting the state application of WQS to existing facilities. In First Iowa Hydro-Electric Cooperative, the Supreme Court had warned that if state regulators were given “veto power” over hydroelectric facilities, federal regulatory efforts would be vastly complicated, and national interests might be subordinated to local preferences. The Court in PUD No. 1 ignored those concerns in its interpretation of section 401, empowering states to veto hydroelectric facility licenses as long as the state exercises its authority under the auspices of section 401.

45. Id.
46. Id. at 713–17.
47. Id. at 717.
48. Id. at 734 (Thomas, J., dissenting).
49. Id. at 735.
50. Id.
51. First Iowa Hydro-Electric Coop. v. Fed. Power Comm’n, 328 U.S. 152, 164 (1946) (“To require the petitioner to secure the actual grant to it of a state permit under [state water law] as a condition precedent to securing a federal license for the same project under the Federal Power Act would vest in the Executive Council of Iowa a veto power over the federal project. Such a veto power easily could destroy the effectiveness of the Federal Act. It would subordinate to the control of the State the ‘comprehensive’ planning which the Act provides shall depend upon the judgment of the Federal Power Commission or other representatives of the Federal Government.”).
In an important subsequent decision, *S.D. Warren Co. v. Maine Board Environmental of Protection*, the Court held that state authority under section 401 to issue conditions on federal permits and licenses extends to those seeking relicensing of privately held hydroelectric projects from FERC.\(^\text{52}\) This is particularly consequential because FERC licenses are issued for periods not greater than fifty years.\(^\text{53}\) Thus, states will have the opportunity to review nearly all of the nation’s hydropower dams and either issue strict water quality requirements or deny certification altogether in the coming years.

Although section 401 gives states expansive authority to regulate hydroelectric facilities, that authority is nonetheless limited in a potentially important way: section 401 only authorizes states to condition federal permits on "appropriate" state law requirements.\(^\text{54}\) The Court in *PUD No. 1* declined to specify which state laws might serve as “appropriate” conditions to a CWA permit, noting that, “at a minimum, limitations imposed pursuant to state water quality standards adopted pursuant to section 303 are ‘appropriate’ requirements of state law.”\(^\text{55}\) Thus, states may have the authority under section 401 to condition permits on any number of state laws, in addition to water quality standards issued under section 303. However, even if the scope of “appropriate” state law requirements is found to be limited to WQS under section 303, state authority under section 401 includes the conditioning of federal licenses and even of outright veto and so is nevertheless considerable. This flexibility gives state permitting authorities significant power over the terms and conditions for the operation and re-licensing of hydroelectric facilities.

### b. Evidence of Section 401’s Influence in the FERC Process

Whether the exercise of the section 401 power results in increased environmental protection is, of course, a more difficult question. Two studies cast some light on the question and at least suggest that the reverse preemption provisions result in the addition of a greater number of conditions in FERC licenses. The first, by Cornelius Kerwin, showed the number of environmental requirements in FERC licenses climbing from 1980 to 1986. The study does not provide an explanation for this increase and it occurred during a time when environmental pressures on FERC were increasing as a result of various court decisions.\(^\text{56}\) However, part of the explanation could be that states were more systematically exercising their section 401 certification power. The second

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\(^{53}\) *Id.* at 373–74. For a complete list of issued licenses and their expiration dates, see *Applications for New Licenses*, FED. ENERGY REG. COMMISSION, http://www.ferc.gov/industries/hydropower/gen-info/licensing/app-new.asp (last updated June 6, 2013).


\(^{55}\) *PUD No. 1*, 511 U.S. at 713.

piece of evidence, a recent study of FERC decision making over hydroelectric
dams by Jody Freeman and J.R. DeShazo, found that when a greater number of
public agencies participate in a FERC relicensing process, on average a greater
number of environmental conditions are placed on the new license.57 Their
study counted the participation of federal and state agencies together, focusing
not on the reverse preemption provision but on the effects of other federal
environmental mandates. These included a 1986 law requiring FERC to
balance environmental interests with the need to develop sources of power and
requiring FERC consultation with other federal agencies about the
environmental effects of licensing and relicensing decisions.58 Though the
DeShazo-Freeman study does not disaggregate state from federal participation
in determining the source of permit conditions, it clearly shows that the
involvement of public agencies, including of state agencies, results in the
inclusion of a larger number of environmental conditions.59

c. Section 401 and Wetlands Protection

The other substantive area in which states have potentially significant—
though largely unrealized—power under section 401 is in the protection of
wetlands. CWA section 404 requires any person seeking to dredge or fill
wetlands to obtain a permit from the Army Corps of Engineers. Since any
person seeking a federal permit or license for activity that may result in a
discharge into navigable waters must obtain section 401 certification from the
state in which the project is located, states must certify that a dredge and fill
permit under section 404 is consistent with state water quality laws. Although
virtually all of the states have section 401 certification programs for wetlands
permits, to date, the limited evidence we have suggests that states do not appear
to use their section 401 power very effectively to protect existing wetlands and
connected water bodies.

Wetlands are extraordinarily important biologically but vitally threatened
by coastal development. They provide habitat for thousands of species; serve
important flood control functions; protect water bodies from pollution; and
provide recreational opportunities for birdwatchers, hikers, boaters, and
anglers.60 For centuries, however, governments failed to recognize their
biological and human value, leading to the loss of more than half of the
country’s wetlands by the mid-1980s. A number of states have lost more than
90 percent of their wetlands, a loss concentrated in heavily populated or

57. See J.R. DeShazo & Jody Freeman, Public Agencies as Lobbyists, 105 COLUM. L. REV. 2217,
58. Id.
59. Id.
60. See EPA, WETLANDS OVERVIEW 1–2 (2004), available at http://water.epa.gov/type/
wetlands/outreach/upload/overview.pdf.
industrialized coastal states such as California and Louisiana.\textsuperscript{61}

The principal legal protection for wetlands is section 404 of the CWA. Under that section, anyone seeking to discharge “dredged or fill material into the navigable waters of the United States” is required to obtain a permit from the Army Corps of Engineers unless the state in which the wetlands are located chooses to administer its own permit program. To date only two states have opted to do so, Michigan and New Jersey.

Though section 404 does not require it, the policy of the United States since the George H.W. Bush Administration has been to administer the program so that it results in no net loss of wetlands.\textsuperscript{62} To achieve this goal, the Army Corps of Engineers prohibits wetland filling where possible. For those projects for which wetlands are filled, section 404 permittees must offset any wetlands loss with the replacement of an equal or greater amount of wetlands acreage.\textsuperscript{63} The preferred mechanism for compensatory mitigation, by federal regulation, is participation in a wetlands mitigation bank.\textsuperscript{64} Wetlands mitigation banks require federal approval and allow a permittee whose project will result in wetlands loss to replace the lost wetlands with wetland restoration performed by the mitigation bank.\textsuperscript{65}

Many observers have criticized the performance of compensatory mitigation programs, arguing that the wetlands used to replace those to be dredged and filled are frequently of inferior quality.\textsuperscript{66} After evaluating a number of mitigation sites, researchers concluded in one 2004 study that more than half of them did not adequately replace the wetlands lost.\textsuperscript{67} Other studies

\begin{footnotesize}
\begin{enumerate}
\item For an excellent overview of the implementation of section 404, see J.B. Ruhl & Jim Salzman, “No Net Loss”—Instrument Choice in Wetlands Protection, in MOVING TO MARKETS IN ENVIRONMENTAL REGULATION: LESSONS FROM TWENTY YEARS OF EXPERIENCE 323 (Jody Freeman & Charles D. Kolstad eds., 2006).
\item For the regulatory guidance on wetlands mitigation, see Compensatory Mitigation, EPA, http://water.epa.gov/lawsregs/guidance/wetlands/wetlandsmitigation_index.cfm (last updated Feb. 22, 2013).
\item Id.
\end{enumerate}
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have reached similar conclusions.68

The inadequacy of compulsory mitigation occurs despite the fact that states have the power to condition or even veto federal section 404 permits under section 401. Indeed, in an extensive review of wetlands permits under sections 401 and 404, researchers concluded that states appear to use this power largely to rubber stamp decisions already made by the Army Corps.69

Despite the states’ apparent failure to exercise their power effectively under section 401 in the context of wetlands permits, every state in the country has a wetlands 401 certification program.70 Through those certification programs, states could engage in more substantial oversight of wetlands permits and compensatory banking programs to better protect their wetlands. They could do so by either vetoing a permit altogether or conditioning a wetlands permit to ensure that permitees do not degrade or violate water quality standards, a condition that seems particularly well-suited to permits authorizing the dredging and filling of wetlands. The power of the CWA reverse preemption provision to enhance the protection of wetlands subject to section 404 permitting, in short, seems significant but largely unrealized.

B. Reverse Preemption Under the CMZA

The CMZA contains a reverse preemption provision nearly identical to section 303 of the CWA. Indeed, Congress explicitly modeled the CZMA provision after the CWA version.71 Before describing its operation and implementation, we provide background about the origin and operation of the CZMA.

In the years preceding the passage of the CZMA, Congress commissioned a comprehensive study of coastal ecosystems and found that economic activity

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69. See Ambrose et al., supra note 67, at 1.
71. Staff of S. Comm. on Commerce, 94th Cong., Legislative History of the Coastal Zone Management Act of 1972, at 254 (Comm. Print 1972). In floor statements upon the passage of the CZMA, Senator William B. Spong made the following statement: “I would be remiss if I failed to thank the committee and especially the distinguished Senator from South Carolina for accepting the suggestion I offered during the committee’s consideration of the bill to require State certification of activities requiring a Federal license or permit. This provision parallels a requirement in the Federal Water Pollution Control Act that applicants needing a Federal license or permit must obtain a certificate from the State water pollution control agency that there is reasonable assurance that the activity in question will not violate applicable water quality standards. It seems entirely reasonable to have a comparable provision in this legislation to guard against development that is inconsistent with the coastal zone management program.” Id.
and a lack of comprehensive land use planning along the nation’s coastline had caused the irreversible loss of “important ecological, cultural, historic, and aesthetic values in the coastal zone.”  

Just prior to the Act’s passage, a devastating oil spill off the Santa Barbara coast in 1969 brought the dangers posed by oil and gas development into stark focus. In response, in 1972 Congress passed the CZMA.

The CZMA sought to entice coastal states to use their traditional authority over land use to further the national interest in comprehensive coastal management. Unlike other environmental regulatory regimes, states are “encouraged,” but not obligated, to participate in the program. To participate, states must first create a Coastal Zone Management Plan (CZMP) that complies with several federal requirements. Each state’s CZMP must define its “coastal zone”; provide a program for nonpoint-source water pollution; identify land uses that may cause or contribute to the degradation of coastal waters; and provide for ongoing implementation and enforcement. Once adopted by the state, the CZMP is subject to joint review by the Secretary of Commerce (the Secretary) and the Administrator of the Environmental Protection Agency (EPA or the Administrator). If the Secretary and Administrator both agree that a CZMP meets the statutory requirements of the CZMA, the plan “shall” be approved.

The CZMA is unusual among federal environmental statutes because it does not preempt any state authority or coerce participation by threatening federal intervention in nonparticipating states. In fact, the legislative history indicates that there was “no attempt to diminish state authority through federal preemption” in the CZMA. Instead, “the intent of [the Act was] to enhance state authority by encouraging and assisting the states to assume planning and regulatory powers over their coastal zones.”

At its inception, the CZMA provided the states with two federal incentives: money and power. First, participating states were made eligible for

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73. Cal. Coastal Comm’n v. Norton, 331 F.3d 1162, 1165–67 (9th Cir. 2002). “President Richard Nixon personally viewed the damage and agreed that the Santa Barbara spill ‘frankly touched the conscience of the American people.’” Id. at 1167. “Of particular relevance here, the federal Coastal Zone Management Act and California’s Coastal Act followed in the wake of the spill and both provided California substantial oversight authority for offshore oil drilling in federally controlled areas.” Id.
75. See 16 U.S.C. § 1452(2). Congress sought to “encourage and assist the states to exercise effectively their responsibilities in the coastal zone through the development and implementation of management programs to achieve wise use of the land and water resources of the coastal zone . . . .” Id.
76. Id. § 1455b(a), (b).
77. Id. § 1455b(e)(1).
78. Id. § 1456(b).
80. Id.
The second, more unusual incentive, referred to as the “consistency requirement,” gave participating states a measure of authority over federal land use decisions that may affect the states’ coastal zones. The consistency requirement is what we refer to as a reverse preemption provision.

Like section 401 of the CWA, the CZMA’s reverse preemption provision allows states to exert influence over federal agencies acting under the authority of other federal statutes. The consistency requirement provides that any federal agency activities or any private activities requiring a federal permit or federal funding that “affects any land or water use or natural resource of the coastal zone shall be carried out in a manner which is consistent to the maximum extent practicable with the enforceable policies of approved [CZMPs].”

The consistency requirement works differently in its application to federal activities versus federal licensing, permitting, or funding of private activity. For federal agency activities, the acting federal agency must furnish the state agency charged with administration of the CZMP with a “consistency determination” explaining why the federal action is consistent with the CZMP “to the maximum extent practicable.”

For private activities seeking federal approval, the applicant is required to request certification from the state that the project is consistent with the CZMP. In this respect, the private activity consistency requirement is nearly identical to the CWA reverse preemption provision in the CWA. In the case of both federal activities in the coastal zone and permits and licenses, if the state finds that the action is consistent with the CZMP, the action may go forward. If, by contrast, the state finds that the action is inconsistent, the action is effectively blocked unless the state’s finding is overturned on administrative appeal by the Secretary or vetoed by the President, as explained below.

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81. 16 U.S.C. §§ 1454–1455. These financial incentives are rather unremarkable: Congress frequently attaches conditions to the receipt of federal fund, and the Supreme Court long ago deemed such conditional grants constitutional, provided that the conditions bear some rational relationship to the purpose of the legislation. See New York v. United States, 505 U.S. 144, 167 (1992).

82. 16 U.S.C. § 1456(c). Over time, the amount of funding provided to states under the CZMP has weaned, and the consistency requirement has become comparatively more important as an incentive. JOSEPH J. KALO ET AL., COASTAL AND OCEAN LAW: CASES AND MATERIALS 192 (West. Group ed., 2d ed. 2002).

83. 16 U.S.C. § 1456(c)(1), (3)(A). The CZMA regulations define “maximum extent practicable” as “fully consistent with such programs unless compliance is prohibited based upon the requirements of existing law applicable to the Federal agency’s operations.” 15 C.F.R. § 930.32 (2013).


86. Id. If the state does not reply within three months to a “certification” submitted by a private applicant for a federal permit, then the state’s concurrence is conclusively presumed. Id.

87. Id. § 1456(c)(1)(B), (3)(A).
1. The Consistency Appeals Process

Unlike the CWA reverse preemption process, a state’s finding of inconsistency under the CZMA is not a final death-knell for a federal activity or permit. Federal agencies and permit applicants are entitled to administratively appeal a state’s decision to the Secretary of Commerce. If the appeal fails, the President may veto the state’s finding of inconsistency. As we demonstrate, this appeals process is time-consuming and presidential vetoes are extremely rare. Thus, while the state’s decision is not final, the time-consuming appeals process gives the state significant leverage when bargaining for conditions or mitigation for a proposed project.

First, before a federal agency can appeal a state finding of inconsistency, the CZMA mandates that all “serious disagreements” between the state and federal agency be submitted to mediation. Such mediation must take place with the cooperation of the Executive Office of the President, and must include public hearings held in the area affected by the federal action or permit.

If mediation is unsuccessful, the applicant or federal agency can appeal to the Secretary. If the Secretary “finds, after providing a reasonable opportunity for detailed comments from the Federal agency involved and from the state, that the activity is consistent with the objectives of [the CZMA], or is otherwise necessary in the interest of national security,” then the action may go forward despite the state’s disagreement. In considering appeals, the Commerce Department applies a balancing test. First, Commerce must determine whether the project furthers a “national interest” in a “significant and substantial manner.” If it finds a national interest in the activity, the Department then balances the national interest in the project against any environmentally detrimental effects to the coastal zone. In practice, Commerce almost always finds that a significant and substantial national interest is present, particularly in the case of energy or transportation projects. Critics of the appeals process argue that the subjectivity inherent in weighing factors such as the value of biodiversity and energy independence has yielded inconsistent opinions, with

88. Id. § 1456(h).
89. Id.
90. Id. § 1456(c)(3)(A).
92. Id. at 576–77. There is a palpable tension between the interests of environmental protection and economic development that runs throughout the CZMA. This tension is manifest in the CZMA’s “statement of policy,” which declares the national interest in “effective management, beneficial use, protection, and development of the coastal zone.” 16 U.S.C. § 1451(a).
93. Hutchins, supra note 91, at 576 (citing OFFICE OF OCEAN & COASTAL RES. MGMT., CONSISTENCY APPEAL OF JESSIE W. TAYLOR FROM AN OBJECTION BY THE STATE OF SOUTH CAROLINA (1998) (holding that a strip mall furthers a “national interest” in small business and economic development)).
little adherence to the principle of stare decisis. 94

Even if the harmful environmental effects of a contested action outweigh the national interests in it, the action may proceed if there are “no reasonable alternatives” that “meet the primary purpose of the project.” 95 Alternatives are considered by their “consistency with the state’s coastal management program, specificity, availability, and reasonableness.” 96 The state contesting the action must first show that an alternative is consistent with the CZMP and adequately specific. 97 The burden then shifts to the federal agency or permit applicant, which must show that the alternative is either “unavailable or unreasonable.” 98 Alternatives are “unreasonable” if they do not achieve the project’s “primary purpose,” which is defined by the federal agency or permit applicant. 99

If the Secretary overrules the state’s finding of inconsistency on appeal, only the state has standing to challenge the Secretary’s decision in a judicial action under the APA. 100 If a federal court issues a final judgment declaring a federal action or permit inconsistent with a state’s CZMP, the process is still not over. The Secretary can certify that the mediation procedures are not likely to bring the federal action into compliance. The CZMA then allows the President, upon written request from the Secretary, to exempt the activity from the consistency requirement. 101 A presidential exemption, however, is only allowed if the federal activity is “in the paramount interest of the United States.” 102 To date, the presidential exemption power has been used just once, in 2008, when President Bush exempted the United States Navy’s use of mid-frequency sonar off the coast of Southern California. 103

94. Id. at 576–77
95. Id. at 577 (citing OFFICE OF OCEAN & COASTAL RES. MGMT., CONSISTENCY APPEAL OF DAVIS HENIFORD FROM AN OBJECTION BY THE SOUTH CAROLINA COASTAL COUNCIL 14 (1992)).
96. Id. (citing OFFICE OF OCEAN & COASTAL RES. MGMT., CONSISTENCY APPEAL OF MILLENNIUM PIPELINE COMPANY, L.P. FROM AN OBJECTION BY THE STATE OF NEW YORK 23 (2003)).
97. Id.
98. Id.
99. Id. Critics have argued that this balancing test unfairly favors the federal agencies and permit applicants, as the initial burden on states is substantial, while the subsequent burden on the project proponent is much less onerous. See generally Martin J. LaLonde, Note, Allocating the Burden of Proof to Effectuate the Preservation and Federalism Goals of the Coastal Zone Management Act, 92 MICH. L. REV. 438 (1993).
100. Courts have found that the CZMA’s “zone of interest” does not extend to private parties or local governments. See City of Sausalito v. O’Neill, 211 F. Supp. 1175, 1187 (N.D. Cal. 2002) (holding that a city lacks standing to challenge a state’s consistency determination); Lopez v. Cooper, 193 F. Supp. 2d 424, 434 (D.P.R. 2002) (“[N]o provision is made in the CZMA or [15 C.F.R. pt.] 930 . . . for private or local entities and individuals to substitute their own interests and judgments for that of the reviewing state agency.”).
102. Id.
103. President Bush’s memo followed the California Central District’s opinion in Natural Resources Defense Council v. Winter, 530 F. Supp. 2d 1110, 1112 (C.D. Cal. 2008), in which the District Court determined that the Navy’s use of sonar did not comply with California’s CZMP and was not exempted; the District Court granted an injunction which disallowed further use of sonar off the coast of California. The Ninth Circuit reversed the injunction and remanded the case, without evaluating...
2. The Scope of the Reverse Preemption Provision: Judicial Interpretation and Legislative Amendment

The scope and application of the CZMA are exceptionally broad, extending not just to a state’s own coastal zone but also to activities that could affect it. Congress clarified this broad scope after a Supreme Court decision construing state jurisdiction more narrowly, as we describe below.

Coastal states own the land in their “territorial sea,” which includes “all lands permanently or periodically covered by tidal waters . . . seaward to a line three geographical miles distant from the coast line of each such state.”104 The lands beyond the states’ territorial seas—the outer continental shelf, or “OCS”—are owned by the federal government.105 The Outer Continental Shelf Lands Act of 1953 granted the Secretary of the Interior the authority to lease the OCS for oil and gas exploration and drilling.106 Absent the CZMA, states would not be able to affect federal management of OCS lands.107 Given that the CZMA was inspired in part by the Santa Barbara oil spill of 1969, it is unsurprising that most of the major disputes over the consistency requirement have involved the federal leasing of tracts on the OCS—and thus outside a state’s coastal zone—for oil and gas exploration or extraction.108

As originally enacted in 1972, the CZMA provided only that “[e]ach Federal agency conducting or supporting activities directly affecting the coastal zone shall conduct or support those activities in a manner which is, to the maximum extent practicable, consistent with approved state management programs.”109 Litigation in the 1980s contested the geographical scope of the “directly affecting” clause.110 In Secretary of the Interior v. California, the U.S. Supreme Court construed the scope of the consistency requirement narrowly, confining its application to activities that took place directly within the geographical confines of the “coastal zone.”111 At issue was the leasing of

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105. Id. § 1302.
107. States would be relegated to lodging public comments in an environmental impact statement prepared pursuant to the National Environmental Policy Act for federal actions on the outer continental shelf, or exerting indirect political influence.
111. Id. at 315.
OCS tracts for oil and gas exploration. Though the OCS leases were outside California’s coastal zone, the state protested them on consistency grounds, arguing that the leases for oil and gas exploration would trigger a chain of events that would lead to the eventual development and transportation of oil and gas, which would in turn threaten the state’s coastal zone.

The Supreme Court disagreed with California, concluding that “section 307(c)(1)’s ‘directly affecting’ language was aimed at activities conducted or supported by federal agencies on federal lands physically situated in the coastal zone.” The Court also construed the “directly affecting” standard of CZMA section 307(c)(1) strictly, by requiring a close causal connection between the challenged federal activity and the potential effects to the coastal zone. Because the sale of leases for resource exploration was too far removed from activities that would actually threaten the coastal zone (namely, the drilling of wells for the development of oil and gas), the Court found that the federal lease sale did not require a consistency determination.

Congress quickly overturned the Supreme Court’s narrow interpretation of the CZMA with the Coastal Zone Management Act Reauthorization Amendments of 1990. The 1990 amendments altered the language of the consistency requirement, explicitly extending it to actions outside of the coastal zone that affect the coastal zone itself. The 1990 amendments also specifically provided that federal OCS leases for energy development under the Outer Continental Shelf Lands Act must comply with a state’s CZMP. These amendments extended state power under the CZMA markedly, beyond the Supreme Court’s narrow interpretation in Secretary of the Interior. Not only did the amendments make clear that the reverse preemption provision extends to the OCS, but because states can require a consistency determination for any

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112. Id.
113. Id. at 319.
114. Id. at 330.
115. Id. at 342–43.
116. Id.
activity that affects the coastal zone, states can require consistency of federally-approved activities that take place wholly within another state. NOAA has established regulations that govern these interstate applications of the consistency requirement, and requires federal approval of any state request for an interstate consistency certification.

Judicial opinions since Secretary of the Interior have interpreted the CZMA to expand state authority without preempting any of the states’ original police powers. Courts have held that even the federal suspension of oil and gas exploration leases in the OCS affects the coastal zone and therefore must be consistent with a state’s CZMP. Because oil and gas companies seek lease suspensions to extend their duration pending the discovery of viable oil or gas resources, state review over suspensions can substantially disrupt ongoing exploration efforts on existing OCS leaseholds.

In California Coastal Commission v. Granite Rock Co., the Supreme Court held that the CZMA does not preempt other state land use requirements on federal land within the coastal zone. Granite Rock—a mining enterprise—applied for a permit to conduct mining activities on federal land that lay within the geographical limits of California’s coastal zone. The Forest Service had already approved the project when the California Coastal Commission alerted Granite Rock that it would require a state permit for the activities. Granite Rock sued for declaratory relief from the state permit requirements, arguing that the CZMA preempted state regulation of activities on federal lands. Granite Rock pointed to the fact that the CZMA expressly excludes federally owned lands from the definition of the “coastal zone,” suggesting congressional intent to preempt state regulation of those lands. The Supreme Court disagreed, holding that “the CZMA does not automatically pre-empt all state regulation of activities on federal lands,” and that absent express conflict with federal land use laws, the state’s “land use” regulations

120. See OFFICE OF OCEAN & COASTAL RES. MGMT., INTERSTATE CONSISTENCY FACT SHEET (2011), available at http://coastalmanagement.noaa.gov/consistency/media/consistencyfact090111.pdf; see also 15 C.F.R § 930.1 (2013). NOAA notes that “[i]nterstate consistency does not affect the sovereignty of State B; it does not give State A authority to review the laws or policies of State B. It only allows State A to review the proposed federal authorization in the other state.” OFFICE OF OCEAN & COASTAL RES. MGMT., supra.

121. OFFICE OF OCEAN & COASTAL RES. MGMT., supra note 120.

122. Cal. Coastal Comm’n v. Norton, 331 F.3d 1162, 1173 (9th Cir. 2002).

123. Noble Energy, Inc. v. Salazar, 671 F.3d 1241, 1243 (D.C. Cir. 2012). The Noble Energy court discussed the impact of California Coastal Commission v. Norton: “For the first time, states and their coastal management programs obtained a degree of influence over the suspension process. This newfound influence arguably made it more difficult for lessees to acquire suspensions. It undoubtedly interfered with ongoing leasehold activities—the government directed many lessees to cease operations pending a review of their prior suspension requests.” Id.


125. Id. at 576.

126. Id.

127. Id. at 577.

128. Id. at 590–91.
were not preempted.129 The Fifth Circuit has further held that, while states are empowered by the CZMA to review activities for consistency, they need not do so in all circumstances.130

In short, through judicial interpretation and state efforts, the consistency provision has come to be applied very broadly: the requirement applies not only to areas outside the geographical confines of the Coastal Zone such as the OCS, but even areas expressly excluded from the Coastal Zone. Further, after Granite Rock, the CZMA is understood to not preempt other state land use requirements over even federal lands.

3. The Consistency Requirement in Practice

Many states appear to use their reverse preemption power under the CZMA robustly and successfully to challenge federal actions as inconsistent with their coastal plans. Although states find that proposed projects are consistent with the applicable CZMP about 95 percent of the time, findings of inconsistency have been used to block a significant number of large energy infrastructure projects. Even when a consistency finding is appealed as described above,131 many appeals are settled before final determination. Given the lengthy appeals process, these settlements are likely to be on terms favorable to the state. Thus, for large projects with significant effects on the coastal zone, the consistency requirement can be an effective tool for states to bargain for mitigation, or even to block the project altogether.

According to NOAA, “[s]ince approval of the first CMP in 1978, tens of thousands of federal license or permit activities, OCS oil and gas activities, and federal financial assistance activities have been reviewed for consistency. States have concurred with approximately 95 percent of these actions.”132 Those actions that states have contested are subject first to mediation—for which we have few data to evaluate the effects of state involvement.133 It

129. Id. at 593.
130. See Coastal Habitat Alliance v. Patterson, 385 Fed. Appx. 358, 360 (5th Cir. 2010) (holding that Texas need not conduct a consistency review for a privately developed wind farm in the state’s coastal zone). The reasoning of Coastal Habitat is somewhat unclear. It could be construed as holding that a state’s CZMP need not provide for consistency review at all for certain classes of activities, though such a holding would stretch the statutory language of the CZMA. A more conservative interpretation suggests that plaintiffs did not have standing to challenge the lack of consistency review because they held no procedural rights under the CZMA and/or that a state need not provide for public notice and comment during its consistency reviews.
131. See infra text accompanying notes 88–103.
133. As the Associate Deputy Assistant Administrator of NOAA noted in the Senate hearings on reauthorization of the CZMA in 2005: “Some will argue those statistics [indicating state findings of consistency in 95 percent of consistency reviews] leave out a number of cases where States have used consistency as leverage to bring people to the table to get some things done that the applicant or the Federal agency might not otherwise have wanted to do. Our response to that is that is the purpose of [the consistency provision] of the CZMA.” Reauthorization of the Coastal Zone Management Act: Hearing Before the S. Comm. on Commerce, Sci., and Transp., 109th Cong. 7 (2005) (statement of Dr. Thomas
seems fair to assume, however, that successful mediation efforts result in states achieving at least some mitigation of the likely effects of an action subject to the consistency requirement. States would appear to have the upper hand in a mediation proceeding given their unilateral power to condition or veto a project (subject to appeal). It seems unlikely that if a state is willing to issue a determination of inconsistency in the first instance, the state would then simply back down during mediation and find a project to be consistent. Instead, our supposition is that mediation results in project applicants agreeing to mitigate the most deleterious effects of their projects on a state’s coastal zone.

For those determinations of inconsistency that are not resolved via mediation, project applicants can choose the long path of appeal. As of March 2010, 144 determinations had been appealed. Of those 144, sixty-four were settled or withdrawn, thirty-two were dismissed on procedural grounds, and forty-four resulted in a formal decision by the Secretary. Of the forty-four appeals that yielded an administrative decision, thirty were resolved in favor of the state appellants. States challenged oil and gas plans on the OCS, natural gas pipelines, and LNG terminals in nineteen of the forty-four appeals; ten of these energy-related appeals were resolved in favor of the states. The lower success rate in energy-related appeals likely reflects the national interests in energy development, which weighs against the state in the balancing test Commerce applies.

It is difficult to extrapolate from these numbers to broad conclusions about the extent of state power under the consistency requirement. On the one hand, the relatively small number of appeals (only 5 percent of all actions reviewed by states) and the even smaller number of state victories may suggest that the actual significance of the consistency requirement is relatively minimal. However, states’ success in blocking ten major energy projects, despite opposition from DOI and other federal agencies, is not insignificant. States may also have challenged many of the unfavorable appeals decisions in litigation, resulting in more favorable settlement agreements or judicial rulings.

Furthermore, the success rate of state appeals does not provide a complete picture of the influence wielded by states through consistency review. Just as states undoubtedly wield power through the mediation process described above, they also likely did so in the sixty-four appeals that were settled prior to resolution by the Secretary, as well as countless projects that were not formally

Kitsos, Associate Deputy Administrator, National Ocean Service, National Oceanic and Atmospheric Administration).

135. Id.
136. Id.
137. Id. Appeals not involving energy projects generally concern construction projects that involve the filling of wetlands, and so require a permit under section 404 of the CWA. The Army Corps of Engineers generally opposed the states in such appeals. Id.
138. See discussion at notes 91–95, supra, for a description of the balancing test.
appealed. The appeals process can take longer than four years to resolve—a fact that gives states substantial leverage in negotiating modifications or mitigation to undesired projects.139 In fact, during the Senate hearings preceding the reauthorization of the CZMA in 2005, the oil and gas industry’s primary complaint was the length of appeals.140

It is also worth noting that not all states that participate in the CZMA process appear to use it uniformly. Thirty states and five U.S. territories currently have CZMPs in place (including states such as Ohio whose coastline is not an ocean but a lake).141 Of those thirty-five jurisdictions, ten states and one territory (Puerto Rico) have been involved in Commerce Department appeals.142 California, unsurprisingly, has led the way with nine challenges, but South Carolina and North Carolina have also been active, with seven South Carolina projects appealed and six in North Carolina.143 Though it is possible that a state may use its consistency power aggressively and not be subject to appeal, it seems logical to assume that the more aggressive users of the provision are those that are also subject to the appeals challenge.

The CZMA appears to grant states quite significant power to stop coastal activity that will negatively affect their coastal resources. The reverse preemption provisions in both the CWA and CZMA, then, provide a rather remarkable amount of power to states willing to assert it. They also tell a story about Congress and constitutional values that has to date gone unnoted. We turn next to that story.

II. REVERSE PREEMPTION AND CONSTITUTIONAL VALUES

Rather than abdicating responsibility to the executive branch, or preempting state power, or even allowing states and the federal government to exercise overlapping power as recent accounts of federalism suggest, Congress has used the reverse preemption mechanism to give states overt power over federal actions. This mechanism has multiple effects.

First, the provisions promote federalism ideals by elevating state power at the expense of federal executive authority, but only to the degree such power advances environmental protection. Second, the provisions play an interesting role in advancing separation of powers values. By providing a check against the exercise of executive power that might run roughshod over environmentally protective federal laws, the reverse preemption provisions deputize state agents to enforce federal law. Finally, the reverse preemption provisions can counter the power of strong interest groups within particular agencies, reflecting

139. Reauthorization of the Coastal Zone Management Act, supra note 133, at 51 (statement of Tom Fry, President, National Ocean Industries Association).
140. Id.
143. Id.
congressional concern about agency capture. Evidence suggests that the provisions result in more environmentally protective outcomes, suggesting that when state actors have a formal role in executive branch decision making, the substance of the decisions changes.

We explore each of these effects—environmentally enhancing federalism, separation of powers bolstering, and protection against agency capture—below.

A. Preemption Trends

Many scholars have—appropriately—focused on congressional preemption of state power in a variety of substantive areas, including financial regulation, tort law, and the setting of national product standards. Federal preemption of state power appears to be on the increase, continuing and perhaps accelerating a trend toward federal usurpation of state power that began in the 1960s. The environmental field has seen congressional efforts to preempt state power (though states retain large swaths of authority in most environmental areas), and several court decisions have held that Congress has either expressly or impliedly occupied areas of environmental law. The Clean Air Act, for example, preempts all states except California from regulating emissions from automobiles and from regulating fuels. The Federal Fungicide, Insecticide and Rodenticide Act preempts state “breach of duty to warn” claims. Several successive federal bills regulating appliance efficiency standards preempt states from issuing their own standards. And one federal court has limited California’s right to measure compliance with emissions standards using fuel economy under the Energy Policy and Conservation Act while another has preempted local building standards as inconsistent with the Energy Policy and Conservation Act.

Against this backdrop of increasing federal preemption, reverse preemption appears both to have gone largely unnoticed while defying congressional trends. What might explain why Congress would enact legislation—and subsequently strengthen it in the case of the CZMA—that weakens federal power at the expense of state preferences?

144. See, e.g., Buzbee, supra note 3, at 1561–62, 1570–72; Hills et al., supra note 3, at 1389–98; Sharkey, supra note 3, at 227.
1. *Reverse Preemption as an Enticement*

The first explanation is a straightforward one. With respect to the CZMA, Congress appears to have enacted the reverse preemption provision in order to entice states to prepare CZMPs. As we explained above, Congress was reluctant to mandate land use planning given the long-standing respect for state and local control over land use decisions, making clear that the CZMA makes “no attempt to diminish state authority through federal preemption.”\(^\text{150}\) Instead, as the Senate Report accompanying the bill explained, “the intent of this legislation is to enhance state authority by encouraging and assisting the states to assume planning and regulatory powers over their coastal zones.”\(^\text{151}\) Despite its intent to respect local land use authority, the CZMA recognized that many states did not systematically protect coastal resources, a failure the Act sought to reverse through the enticement of the consistency determination (along with federal funding, since diminished).

2. *Respect for Environmental Federalism*

The initial impetus for inclusion of the reverse preemption provision in the CZMA does not, however, explain the inclusion of such a provision in the CWA or Congress’ expansion of states’ jurisdictional power under the CZMA in the 1990 amendments. A straightforward explanation for the reverse preemption provisions is that Congress may actually value federalism in particular substantive areas, especially when federalism aligns with the ideological preferences of Congress or serves practical ends.

There is a vigorous debate about which branch of the federal government should be entrusted to protect federalism values. These values are well-known and include encouraging policy experimentation and diversity, respecting local preferences, and taking advantage of local knowledge and information about the area of regulation.\(^\text{152}\) The debate about the degree to which Congress actually respects federalism values is a vibrant one that often focuses on whether the judiciary should review—or review robustly—cases involving the division of powers between the federal government and the states.\(^\text{153}\) Scholars


\(^\text{151}\) S. REP. NO. 92-753, supra note 150, at 1.


\(^\text{153}\) Herbert Wechsler’s article is a seminal one in the debate about federalism and political safeguards. See Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 547 (1954) (arguing that institutional design choices like the composition of the U.S. Senate, with two representatives from each state regardless of population, protects the interests of States in the federal political system); see also Jesse H. Choper, *Judicial Review and the National Political Process* 175 (1980) (arguing that courts need not engage in robust judicial review of federalism cases because the political process protects federalism values); Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of*
divide on the question of whether Congress has any institutional commitment to federalism values, with the divide very basically coming down to whether the structure of Congress and political parties that produce our congressional officials provide political safeguards for federalism. Those who believe that Congress has institutional features that are federalism-enhancing generally advocate a limited judicial role in the review of cases involving the appropriate division of power between states and the federal government, while those who doubt that Congress systematically respects federalism values are in favor of more robust judicial review.154

Setting aside the larger structural and institutional questions about the degree to which Congress’ institutional design systematically protects states from federal aggrandizement, we argue here simply that reverse preemption provisions themselves promote the interests of state and local officials at the expense of federal agencies, and therefore promote federalism. Moreover, as we describe below, the fact that the reverse preemption provisions are federalism-promoting does not seem particularly surprising, given that they cover subject matters that the federal government did not traditionally regulate and that were long within state control.

The CWA represented a massive federal foray into an area traditionally regulated by the states. Indeed, President Eisenhower vetoed an early bill to consolidate power over water pollution on the grounds that water pollution control was within the exclusive jurisdiction of the states.155 In the CWA itself, Congress explicitly acknowledged the traditional role of states in water pollution control, stating in the Congressional Declaration of Goals and Policies section of the CWA that

[i]t is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration,

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154. See sources cited supra note 153. For an argument that members of Congress are rarely motivated by a desire to strengthen the power of the federal government at the expense of states, see Levinson, supra note 4.

preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this chapter.156

Additionally, despite conventional wisdom that the states had not sufficiently protected their water resources, by the mid-1950s virtually every state in the country had a staff of water pollution professionals, and by the end of the 1960s, most states required water pollution controls on sewage treatment plants and on industrial users, though enforcement was quite weak.157

Moreover, Congress had already required states to develop WQS in the 1965 Water Quality Act, and by 1970, all fifty had done so.158 Thus, the states possessed significant regulatory expertise at the time the federal CWA was enacted in 1972. As William Hines concludes,

Congress’ decision in the 1972 CWA to retain the traditional deference to the states to implement the new requirements was wise. . . . It was . . . based on the very practical recognition that, at that point in U.S. water pollution control history, nearly all the technical expertise and professional personnel needed to reach the ambitious new federal goals were located within the state programs.159

Nevertheless, despite the widespread involvement of states in regulating water pollution, their efforts were viewed widely as a failure.160 Though the states had adopted WQS, only half had standards that were federally approved.161 And by virtually all accounts the standards were poorly set, subject to manipulation by industry and woefully unsuccessful in actually cleaning up polluted water.162

Congress had already increased federal involvement by the time of the passage of the contemporary CWA, but the 1972 Act dramatically escalated that involvement. The most significant changes were to grant EPA the power to set effluent limitations on traditional point sources like paper mills, chemical plants and so forth, and to require permits of polluters who discharged into the nation’s water bodies.163 This was a substantial (and very intentional) move away from the traditional water quality/ambient approach as the dominant means of regulation.164

Nevertheless, given their long-standing role in regulating water pollution

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158. Id. at 5.
159. Id. at 5–6.
160. Id. at 5.
162. Id. at 10,531–33 (describing failure of water quality approach).
163. See id.
164. Id. Houck provides numerous examples of statements by members of Congress cataloguing the failure of water quality standards and the substitution of such standards with an effluent limitation/technology-based approach as the centerpiece of the 1972 amendments.
(albeit weakly), states retained significant authority both to implement the limitations through delegated authority and to continue to set ambient WQS. Indeed, states lobbied hard to retain their authority to set WQS. This history of long-standing state authority over water quality, combined with escalating federal involvement in setting technology based standards, may help explain why Congress included the reverse preemption provision in the 1972 amendments.

The CZMA is even more explicitly designed to preserve state authority over land use decisions within a state’s coastal zone, given that the statute includes no mandates or minimum standards. Instead, the entire statutory structure is about providing incentives to states to engage in good coastal planning rather than about exerting federal power over coastal resources. Again, congressional intent to protect state power is clear:

The key to more effective protection and use of the land and water resources of the coastal zone is to encourage the states to exercise their full authority over the lands and waters in the coastal zone by assisting the states, in cooperation with Federal and local governments and other vitally affected interests, in developing land and water use programs for the coastal zone, including unified policies, criteria, standards, methods, and processes for dealing with land and water use decisions of more than local significance.167

The idea that states and local governments have authority over land use issues has been noted by courts,168 policy makers,169 and scholars.170 Indeed, Congress considered “nationalizing” land use policy during the period of robust federal environmental expansionism in the early 1970s but rejected Senator Henry Jackson’s National Land Use Policy Act. Part of the rationale for its defeat was the incursion of federal authority into an area of local control.171 Thus, in both the CWA and the CZMA, Congress not only expressed policy sentiment in favor of federalism values, but did so in policy areas that had a long history of local domination.

The reverse preemption provisions, however, go beyond respecting state and local policy choices about how to implement coastal or water pollution control policy. As we explain below, the provisions privilege state and local

166. See Houck, supra note 161, at 10,533.
168. See Village of Euclid v. Ambler, 272 U.S. 365, 389 (1926) (endorsing the idea that zoning is a local issue).
169. The text of the CZMA itself makes this clear. See infra text accompanying note 82.
171. See Ostrow, supra note 150, at 111 n.43.
decisions that protect the environment, bolstering them through federal law. Our conclusion, then, is that the provisions promote environmental federalism by granting authority to states willing to use it to advance environmental objectives. The reverse preemption provisions, in other words, appear to be federalism-enhancing in favor of a particular outcome: stronger environmental protection.

3. Promotion of Federalism with a Twist

The reverse preemption provisions privilege federal statutory requirements that mandate state standards (in the case of the CWA) and encourage coastal planning (in the case of the CZMA). Once the states have established the required standards or plans, the reverse preemption provisions provide those states that have strong environmental preferences and effective bureaucracies an additional mechanism to ensure that their standards and plans are not overridden by federal agencies. Thus, the reverse preemption provisions enhance the power of only those states that are willing to exercise their authority to ensure the application of strong environmental standards against federal licensees or permittees.172

When both reverse preemption provisions were adopted in the 1970s, congressional concern for the environment was at its apex. Indeed, as the Senate Committee on Public Works explained in rebuffing an amendment to weaken section 401 of the CWA, “[a]ll we ask is that activities that threaten to pollute the environment be subjected to the examination of the environmental improvement agency of the State for an evaluation and a recommendation before the Federal license or permit be granted.”173 Thus the explanation that in adopting the reverse preemption provisions Congress sought to enhance federalism values seems too simple. Congress instead sought to enhance federalism values as long as state authority was used to enhance environmental protection.

Yet even the environmental federalism explanation seems insufficient to explain the strength of the reverse preemption provisions in allowing states to veto executive decisions. After all, the cooperative federalism arrangements in both the CWA and Clean Air Act, for example, in requiring states to meet minimum standards while granting them authority to determine how to meet those standards, can also be explained on the grounds of environmental federalism. Like reverse preemption schemes, cooperative federalism also allows states to enforce environmental standards more rigorously, while providing a minimum floor of regulation. Something other than just the promotion of environmental values seems to be motivating the reverse

172. See Buzbee, supra note 3, at 1586–87 (making the same point with respect to cooperative federalism schemes).

preemption provisions. We explore two additional effects of the reverse preemption provisions below.

4. Protection of Congressional Power

a. Reverse Preemption Provisions as Separation-of-Powers Enhancing

One effect of the reverse preemption provisions is that they shift the balance of power between Congress and the executive branch. They do so by augmenting state power while reducing that of the executive in order to promote proper implementation of federal legislative requirements. In this respect, reverse preemption provisions bolster congressional power over executive power by deputizing state agents to carry out federal statutory provisions. These provisions, then, enhance the separation of powers between Congress and the executive branch, allowing Congress to check executive authority indirectly.174

Though states, not Congress, are the agents responsible for using the power granted to them by the reverse preemption provisions, they are doing so in a way that is consistent with federal statutory provisions enacted by Congress and in a way that limits federal agency discretion. The CZMA reverse preemption provision allows states to further coastal protection according to congressional directives while constraining discretionary executive branch decisions. The CWA allows a state to condition a federal permit to require a permittee to comply with its WQS, standards required by a congressionally enacted statute. Thus the reverse preemption provisions allow Congress to ensure that its directives are not ignored by the executive branch.

The Madisonian idea of separating powers through competitive branches of government in order to check the concentration of power in one branch has long occupied constitutional thinking in both the courts and academic scholarship.175 Reverse preemption could be viewed as a mechanism that does precisely what Madison envisioned: checking the exercise of executive power by making Congress more powerful. Many scholars have cast doubt on the accuracy of the Madisonian theory, noting that the legislative branch has both acquiesced in and explicitly granted large amounts of power to the executive.176 The reverse preemption provisions appear to defy this trend.

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174. We do not explore in detail here the values promoted by the separation of powers, but they include accountability and democratic responsiveness. See Bulman-Pozen, supra note 9, at 463.


176. As Levinson and Pildes put it, “There is some tension, to put it mildly, between the assumption that Congress is perpetually engaged in cutthroat competition for power with the Executive and the reality of massive congressional delegations of authority to the executive branch.” Levinson &
Indeed, at the time of the passage of both reverse preemption provisions, executive agencies dominated the decision making over the permitting of oil drilling and licensing of hydroelectric dams. The reverse preemption provisions afforded Congress an opportunity to exert some control over the executive branch’s dam licensing and oil permitting. Both topics became increasingly controversial during this period as their environmentally damaging consequences became more evident. The heightened public attention provided Congress with incentives to exert more control over executive branch decisions.

The building of hydroelectric dams across the United States from the 1940s through the 1960s was extraordinary both in scale and in feats of engineering. Increasingly, however, as the Bureau of Reclamation proposed a number of federal dams on the Colorado River, environmentalists began to protest.\textsuperscript{177} David Brower, the legendary Executive Director of the Sierra Club in the 1950s and ’60s, led the charge to block dams proposed in Dinosaur National Monument.\textsuperscript{178} Though the Sierra Club acquiesced in the construction of Glen Canyon Dam in the late 1960s, the organization succeeded in killing two dams planned in the Grand Canyon.\textsuperscript{179} These very public battles over the environmental consequences of dam-building occurred just before the passage of the modern CWA. To be fair, the very public battles over the Grand Canyon dams were about federal dams built by the Bureau of Reclamation rather than about the nonfederal dams that must seek licenses from FERC. Nonetheless, the battles highlighted the environmental consequences of dams in the public’s eye. The reverse preemption provision of the CWA allowed Congress to check FERC power to license or relicense dams without adequate environmental protection.

Similarly, the deleterious consequences of oil drilling came to a fore with the 1969 oil spill off the coast of Santa Barbara, California.\textsuperscript{180} The spill catalyzed public opinion and broadly influenced the direction of the environmental movement. Significantly for the CZMA’s reverse preemption provision, the oil spill also highlighted the lax oversight exercised by DOI. Indeed the Secretary of the Interior at the time accepted some responsibility for the spill.\textsuperscript{181} The CZMA reverse preemption provision, like its CWA counterpart, allowed Congress to exercise indirect control over DOI oil leasing

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\textsuperscript{179} \textit{supra} note 177, at 184–85.


\textsuperscript{181} \textit{Id}.
decisions. The timing of the 1990 amendments to the CZMA—overturning the Supreme Court decision holding that the consistency requirement did not apply to oil and gas leases on the Outer Continental Shelf—also supports the theory that the reverse preemption provisions were meant to bolster congressional power over executive branch decision making. The amendments followed a very contentious decade in which President Ronald Reagan’s first Secretary of the Interior, James Watt, embarked on a massive program to lease almost a billion acres of offshore land for oil drilling over a five-year period. Though Watt succeeded in dramatically expanding drilling, legal and political backlash allowed to him to achieve only a quarter of his initial goal. Congressional response was particularly strong. The Democratic House of Representatives imposed repeated moratoriums on the budget of the Republican DOI that had the effect of prohibiting new leases in areas other than the Gulf of Mexico and Alaska. The Reagan expansion of offshore drilling was so politically controversial that in 1991 President George H.W. Bush cancelled numerous oil and gas sales authorized by the Reagan DOI in California, Oregon, Florida, and other states. Against this backdrop, the extension of the consistency requirement of the CZMA to OCS oil and gas leases again allowed Congress to check the expansive exercise of executive power over a controversial environmental issue.

b. Reverse Preemption to Enhance Congressional Power During a Period of Divided Government

While we believe the reverse preemption provisions provide evidence that Congress sought to bolster its power vis-à-vis the executive branch, a more contemporary account of congressional behavior also provides a persuasive explanation of the reverse preemption provisions. Daryl Levinson and Richard Pildes question the degree to which Congress possesses either the institutional mechanisms or motivations to protect and enhance its own power at the expense of the executive, significantly undermining Madison’s assertion that the separation of powers would check executive power. They suggest instead that individual members of Congress work to improve their own electability and to advance the ideological goals of their political parties rather than to augment the institutional power of the branch in which they serve. Put bluntly, members of Congress simply “lack any interest in the power of

183. See id. at 66–67.
184. See id.
185. See id. at 67.
186. See Levinson & Pildes, supra note 10, at 2347.
187. Id.
branches qua branches." Instead, this account asserts that, particularly as party identity and ideological coherence among elected officials in Congress has intensified, members of Congress work to advance the interests of their parties, not their branch of government. Levinson and Pildes predict that if members of Congress are in fact driven by party loyalty, efforts to cabin executive power should be most apparent during times of divided government, when Congress is held by one party and the Presidency by another. In those circumstances, Democratic Congresses will pass legislation to constrain Republican presidents and vice versa.

The reverse preemption provisions are consistent with this view. Both provisions constraining executive power through reverse preemption were adopted by Democratic Congresses during a Republican presidency. Section 401 of the CWA was adopted in the 1972 Clean Water Act, codifying and expanding upon a similar provision first adopted in 1970 in the Water Quality Improvement Act. Richard Nixon was President in both years and Democrats held both houses of Congress. Section 401 was amended in 1977 to clarify that its coverage included WQS, a slight expansion of state power. The Democrats held both houses of Congress and the Presidency at the time of the 1977 amendments.

The consistency provisions of the CZMA were enacted in 1972, again a time when the Democrats held both houses of Congress and a Republican sat in the White House. Congress’s 1990 amendments expanded state power over federal actions to include actions that directly affect a state’s coastal zone even if they occur outside of it, including federal OCS energy leases. These amendments were passed by a Democratic Congress when Republican George H.W. Bush was President.

With the exception of minor expansionary amendments to section 401 of the CWA in 1977, then, the enactment and subsequent expansion of reverse preemption provisions fits the Levinson-Pildes prediction that Congress will limit executive authority during times of divided government.

c. Deputizing States to Enhance Congressional Power

Jessica Bullman-Pozen has posited a related theory that states play an

188. Id. at 2316.
189. Id. at 2326–27.
192. See Composition of Congress, supra note 190.
194. See Composition of Congress, supra note 190.
195. Id.
196. See id.
important role in safeguarding separation-of-powers values through schemes of cooperative federalism.\footnote{Bulman-Pozen, supra note 9, at 461.} In our view, reverse preemption provisions are a much more direct mechanism to safeguard separation-of-powers values than cooperative federalism schemes, as we describe below.

Observers have long recognized that just as the division of power among the three federal branches of government is designed to balance and check power, dividing authority between the federal government and states has similar effects.\footnote{See, e.g., Akhil Reed Amar, Of Sovereignty and Federalism, 96 YALE L.J. 1425, 1495 (1987).} Bullman-Pozen’s argument is related but distinct. Under cooperative federalism schemes, Congress has delegated authority to states to implement federal law. Thus, states are acting not as independent sovereigns but instead as agents of the federal government. As she puts it, “cohabiting a statutory scheme with the federal executive, states frequently challenge not the raw exercise of federal power, as traditional accounts of federalism would have it, but rather the faithfulness of the executive to the statutory scheme.”\footnote{Bulman-Pozen, supra note 9, at 462.} If the executive branch is resisting the implementation of a federal law, she argues, states can step in and execute congressional will through their delegated powers. Cooperative federalism schemes virtually guarantee circumstances akin to permanent divided government: there will always be state governments led by the party not in control of the Presidency, allowing for state “resistance” to the exercise or failure to exercise executive power under statutes that establish cooperative federalism schemes.\footnote{Id. at 462–63.}

The cooperative federalism mechanism works at best haphazardly to enhance separation of powers, however. Indeed, a more common problem with cooperative federalism is that many states routinely thwart congressional will by failing to implement even statutorily mandated requirements.\footnote{See, e.g., Oliver Houk, The Clean Water Act Returns (Again): Part I, TMDLs and the Chesapeake Bay, [2011] 41 Envtl. L. Rep. (Envtl. Law Inst.) 10,208, 10,209 (describing decades of state and EPA failure to implement WQS and TMDLs); Charles Duhigg, Clean Water Laws are Neglected, at a Cost in Suffering, N.Y. TIMES (Sept. 12, 2009), http://www.nytimes.com/2009/09/13/us/13water.html?pagewanted=all&_r=0.} Reverse preemption provisions, by contrast, are a quite tailored means to counter the exercise of executive power when that power may be used to undermine statutory goals. By requiring permit or license applicants to gain certification that a particular project will meet state water quality goals, for example, Congress empowers states as their agents to cabin executive decisions that would undermine the CWA. In providing states with the authority to determine that federal agency actions undermine coastal plans prepared in accordance with federal standards, again Congress uses states to check executive decisions that could thwart the CZMA.

Given the current ideological make-up of our political parties, the reverse
preemption provisions are particularly well-suited to ensure that, during Republican presidencies, states governed by Democrats (or Republicans with a political preference for stronger environmental protection than the President is willing to afford) can use their reverse preemptive power to overrule federal agency decisions that do not respect congressional mandates for environmental protection. Indeed one could imagine a reverse preemption provision designed by Republicans during a Democratic Presidency that allowed states to promote other values (say economic) at the expense of environmental values. States could be empowered, for example, to trump EPA enforcement of a Clean Air Act provision on the grounds that enforcement would hinder state economic goals. The point here is that the tool of reverse preemption can help protect the ideological and policy goals of Congress when the Presidency is in the hands of the opposing party.

B. Agency Capture and Reverse Preemption

Not only do the reverse preemption provisions promote separation-of-powers values, they also help counterbalance the influence of regulated parties in agencies that may be prone to interest group dominance or agency capture by regulated parties. The dominance or capture of administrative agencies by regulated industry is a widely recognized phenomenon.

Three agencies are most regularly affected by the reverse preemption provisions, each of them potentially subject to undue domination by regulated industry. Section 401 certifications, as we outlined above, are typically used in the licensing and relicensing of hydroelectric power plants performed by the FERC. They are also used—though less vigorously—in the permitting process to dredge and fill wetlands under section 404, a process overseen by the Army Corps of Engineers. CMZA consistency determinations most often involve offshore oil drilling, liquid natural gas terminals and other energy-related infrastructure and exploration. These activities are typically overseen by DOI


203. Canonical texts include Samuel Huntington, The Marasmus of the ICC, 61 YALE L.J. 467 (1952) and George Stigler, The Theory of Economic Regulation, 2 BELL J. ECON. 3 (1971) (“A central thesis of this paper is that, as a rule, regulation is acquired by industry and is designed and operated primarily for its benefit.”). For an excellent summary of the literature, see Bagley & Revesz, supra note 12, at 1285–86.
and FERC (for LNG pipeline and terminal siting).

Unlike the Environmental Protection Agency, the core mission of these agencies is not solely, nor even principally, environmental. FERC’s central tasks are to regulate the interstate transmission of electricity sources; oil and natural gas; and the siting of hydroelectric power plants, liquefied natural gas terminals, and LNG pipelines. For years, FERC (and its predecessor agencies) had virtually no responsibility to consider the environmental effects of its actions. Today, FERC does face explicit environmental responsibilities through the Electrical Consumers Protection Act of 1986, which included a provision stating that:

in addition to the power and development purposes for which licenses are issued, [FERC] shall give equal consideration to the purposes of enhancement of fish and wildlife (including related spawning grounds and habitat), the protection of recreational opportunities, and the preservation of other aspects of environmental quality.

Though FERC continues to face criticism for its failure to protect environmental resources sufficiently, its mission has clearly become less singular over the last two decades. Nevertheless, it is not centrally or even partially an environmental agency.

DOI’s responsibilities are more varied and include some that are principally environmental. For example, DOI manages the public’s lands, including national parks, and also administers a portion of the Endangered Species Act through the Fish and Wildlife Service. Nonetheless, despite its mission to manage public lands, much of DOI’s work involves the sale and leasing of federal lands for mining, exploration, drilling, and other commercial activity. Indeed, prior to the BP Deep Water Horizon drilling disaster, the Minerals Management Service (MMS) oversaw the licensing and permitting of those activities while deriving their budget from fees paid by the regulated industries. After the disaster, the Secretary of the Interior dismantled the MMS on the grounds that these dueling responsibilities led the service to maximize its revenue-raising function at the expense of environmental protection and safety. Criticisms of DOI’s failure to protect environmental


208. See Interior Department Completes Reorganization of the Former MMS, supra note 207.
resources have continued since the BP spill: environmental groups sued the
department over the first post-Deepwater Horizon five-year OCS leasing plan.\textsuperscript{209}

Finally, the Army Corps of Engineers, which administers the wetlands
provisions of the CWA, has hardly viewed its mission historically as
environmental, even though its activities have had major environmental
consequences. The Corps was established in 1802 to engage in both military
and civil construction.\textsuperscript{210} The Corps played a major role in developing the
nation’s canals and river resources for navigation,\textsuperscript{211} including in constructing
dams to provide flood control and electric power.\textsuperscript{212} It has dredged harbors,
redirected rivers, and built dams.\textsuperscript{213} Responsibility for issuing dredge and fill
permits for wetlands protection rests with the Corps because of its historical
role in preventing the dumping and obstruction of the nation’s rivers and
harbors in order to maintain them for navigation.\textsuperscript{214} Though the Army Corps
now views its role as including environmental protection, it is also “the nation’s
largest water resources developer.”\textsuperscript{215} The Army Corps’ record in protecting
wetlands has been mixed. On the one hand, the country is clearly doing a more
effective job in meeting national goals of no net wetlands loss.\textsuperscript{216} On the other
hand, critics argue that the no-net-loss policy allows the replacement of
wetlands lost to development with wetlands of inferior quality.\textsuperscript{217}

The reverse preemption provisions ensure that environmental
considerations will be included in licensing and permitting decisions made by
agencies whose missions are not centrally environmental and which may be
vulnerable to agency capture. Evidence suggests that with respect to FERC and

\textsuperscript{209}. \textit{See Center for Sustainable Economy vs. Bureau of Ocean Energy Management, DC Circuit
Court, CIV: 12-1431, CENTER FOR SUSTAINABLE ECONOMY, http://www.sustainable-
economy.org/main/news/56 (last visited Aug. 24, 2013).}

\textsuperscript{210}. \textit{See U.S. Army Corps of Engineers: A Brief History, The Beginnings to 1815, U.S. ARMY
(last visited Aug. 24, 2013).}

\textsuperscript{211}. \textit{See U.S. Army Corps of Engineers: A Brief History, Improving Transportation, U.S. ARMY
CORPS ENGINEERS, http://www.usace.army.mil/About/History/BriefHistoryoftheCorps/Improving
Transportation.aspx (last visited Aug. 24, 2013).}

\textsuperscript{212}. \textit{See U.S. Army Corps of Engineers: A Brief History, Multipurpose Waterway Development,
MultipurposeWaterwayDevelopment.aspx (last visited Aug. 24, 2013).}

\textsuperscript{213}. \textit{See U.S. Army Corps of Engineers: A Brief History, Environmental Activities, U.S. ARMY
CORPS ENGINEERS, http://www.usace.army.mil/About/History/BriefHistoryoftheCorps/Environmental
Activities.aspx (last visited Aug. 24, 2013).}

CORPS ENGINEERS, http://www.usace.army.mil/About/History/BriefHistoryoftheCorps/Water
ResourcesDevelopment.aspx (last visited Aug. 24, 2013).}


\textsuperscript{216}. \textit{See Salzman & Ruhl, supra note 62, at 3–8 (describing pressures from developers to ease
wetlands mitigation requirements through banking programs).}
DOI, the provisions have this effect. The evidence about the effectiveness of the CWA reverse preemption provision in the wetlands permitting process is less clear. Nevertheless, reverse preemption provisions are a powerful mechanism to elevate environmental concerns in federal licensing and permitting. They promote the environmental preferences of states, provide a means for Congress to check Executive decisions that might otherwise ignore federal statutory directives and counterbalance the power of regulated parties in agencies not historically sensitive to environmental concerns.

CONCLUSION

As we have argued, reverse preemption provisions upend conventional accounts of federalism by codifying state supremacy into federal law through state vetoes of certain federal agency decisions. They also provide Congress with a novel and overlooked mechanism to enhance its oversight of executive branch decisions, promote environmental values that comport with local expertise and preferences, and check potential agency capture by regulated interests.

One obvious and open question, then, is why these provisions appear to be confined to just two environmental policy areas, water quality and coastal protection. Relatedly, what policy areas might benefit from granting states veto power to check federal agency decision-making? Without fully answering these questions, we suggest very preliminarily that several factors may make certain policy areas well-suited for reverse preemption provisions. First, reverse preemption provisions at least to date apply only when a federal agency is tasked with granting permission to engage in behavior through licensing or permitting. Other areas in which federal permitting or licensing occur include broadcasting, banking, grazing and Medicare-approved facilities, to name a few examples. Thus the federal government’s involvement in granting permission to engage in a broad array of activity suggests that reverse preemption could expand beyond the narrow confines we have identified.

Second, reverse preemption seems well-suited to policy areas in which

218. See supra text accompanying notes 57–60, 133–145.
219. See supra text accompanying notes 70–71.
states have overlapping jurisdiction with the federal government and where the values of federalism—local preferences, specialized knowledge and information about local conditions, etc.—are important. The delivery of health care through Medicaid and Medicare seems to be a good example.

Third, reverse preemption provisions may work especially well in checking agency behavior where there are real concerns about regulatory capture or industry dominance. Regulation of financial services is a paradigmatic example.

Fourth, Congress may seek to employ reverse preemption provisions in times of divided government where Congress believes the executive branch may run roughshod over statutory requirements. One can imagine reverse preemption provisions being employed both by Democratic Congresses, as in the case of the environmental provisions we analyze, as well as Republican Congresses seeking to ensure that their legislative objectives are carried out. Medical cost containment could be an example of such an issue.

And finally, from the few substantive areas in which reverse preemption provisions operate, states appear to have played a more aggressive role in using their preemptive power where the number of licensing and permitting decisions to be reviewed is relatively small. Thus the provisions work better for FERC hydroelectric dam licensing and relicensing and for CZMP consistency than for providing a meaningful check on the thousands of wetland permits issued each year.

These are only preliminary suggestions and applying these factors to areas outside the environmental examples we have evaluated here is beyond our scope. Nevertheless, reverse preemption appears to offer a twist on our standard conceptions of federalism, one that authorizes a role for states that can strengthen the implementation of federal law, enhance congressional power and oversight over the executive, and counterbalance the influence of regulated parties. Its expansion to substantive areas outside of water quality and coastal protection deserves further inquiry.