

# A REPLY TO PROFESSOR REVESZ'S RESPONSE IN "THE RACE TO THE BOTTOM AND FEDERAL ENVIRONMENTAL LEGISLATION"

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## INTRODUCTION

In a recent symposium article,<sup>1</sup> Professor Richard Revesz pays me the tremendous compliment of responding to my own article.<sup>2</sup> I had challenged his ultimate conclusion that the "race-to-the-bottom" rationale for federal environmental regulation is not valid.<sup>3</sup> Unfortunately, his response to my article fails to comprehend the arguments that I advanced. I write to set the record straight and to invite further discussion.

In Part I below, I explain why I did not argue that the mere existence of preemptive federal legislation justifies its own existence. Instead, my article described how federal environmental regulation may appear justified if preemptive federal legislation reflects proper measures of value, and may appear unjustified when different measures of value are applied. Under our constitutional system, opponents of existing federal environmental legislation bear the burden of proving that such legislation is unjustified. Nevertheless, I discussed in my article two independent measures of value that could support federal environmental regulation.

In Part II, I respond to three specific challenges posed by Professor Revesz to my arguments for federal environmental regulation.

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1. Richard L. Revesz, *The Race to the Bottom and Federal Environmental Regulation: A Response To Critics*, 82 MINN. L. REV. 535 (1997).

2. Joshua D. Sarnoff, *The Continuing Imperative (But Only from a National Perspective) for Federal Environmental Protection*, 7 DUKE ENVTL. L. & POL'Y F. 225 (1997).

3. See *id.* at 278-85. Professor Revesz originally addressed the "race-to-the-bottom" rationale in his article *Rehabilitating Interstate Competition: Rethinking the "Race to the Bottom" Rationale for Federal Environmental Regulation*, 67 N.Y.U. L. REV. 1210 (1992). Professor Revesz does not address my criticism (and substantial support) of his later work on interstate externalities. Richard L. Revesz, *Federalism and Interstate Environmental Externalities*, 144 U. PA. L. REV. 2341 (1996); see Sarnoff, *supra* note 2, at 269-78.

Specifically, I explain: (A) why I believe interstate ideologic externalities are significant, even if measured in the way proposed by Professor Revesz; (B) how I acknowledge the validity of preemptive maximum standards; and (C) why I consider pervasive federal regulation to be justified, even though I believe that particular federal environmental laws are inefficient and unconstitutional.

#### I. DETERMINING WHETHER PREEMPTIVE FEDERAL ENVIRONMENTAL LEGISLATION IS JUSTIFIED

In my article, I distinguished between “national evaluative norms” and “state-level values;” that is, between the collective values of the citizens of the entire country (as expressed in preemptive federal legislation) and the collective values of the citizens of particular states.<sup>4</sup> I then explained why the five traditional rationales for federal regulation may appear theoretically valid *assuming that national evaluative norms reflect proper measures of value*. These rationales are: (1) obtaining “economies-of-scale” in standard-setting, implementation, and enforcement; (2) limiting interstate “externalities” of physical pollution, economic losses, and ideological harms; (3) preventing states from suboptimally lowering their environmental standards in response to interstate competition to attract industry (the “race-to-the-bottom”); (4) remedying the “under-representation” of environmental interests in state political processes; and (5) imposing moral “rights” to environmental quality. I also discussed why these rationales may not appear valid if federal regulation is evaluated on the basis of state-level values.<sup>5</sup>

##### A. *Circularity and The Burden Of Proof*

Professor Revesz does not appear to dispute that the collective values of the nation’s citizens differ from the collective values of particular states’ citizens. Nor does he address my arguments that are based on this difference, with three exceptions that I address below.<sup>6</sup> Instead, he takes issue with my definition of “national evaluative

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4. Sarnoff, *supra* note 2, at 232 n.18, 243.

5. *Id.* at 251-91.

6. Curiously, Professor Revesz does not even acknowledge my argument that, under particular conditions, preemptive federal regulation increases social welfare by preventing the very possibility of a race-to-the-bottom. Such regulation is warranted whenever the risks of incrementally suboptimal state regulatory responses to competition (as measured by national evaluative norms) exceed the perceived benefits of preserving state regulatory autonomy (i.e., of promoting normative diversity). *See id.* at 278-85.

norms”<sup>7</sup>: “the measures of value implicitly adopted when preemptive federal legislation is enacted.”<sup>8</sup>

Specifically, he challenges as having a “troubling circularity”<sup>9</sup> my argument that federal regulation is more likely to increase social welfare than is state or local regulation when national evaluative norms are applied.<sup>10</sup> “Given this definition, it would appear that every federal regulation would be desirable from the standpoint of a ‘national evaluative norm.’ Otherwise, presumably, state law would not have been preempted.”<sup>11</sup> Consequently, my “formulation does not provide any independent metric by which to judge when federal regulation is desirable.”<sup>12</sup>

I agree. But I did not intend to use the term “national evaluative norms” to provide an “independent metric” to judge whether federal regulation is desirable. Instead, my point was to contrast national evaluative norms with state-level values and to demonstrate how the social-welfare effects of federal environmental regulation appear to vary with the political jurisdiction that specifies the applicable measures of value. I did *not* argue—circularly—that the mere existence of preemptive federal legislation proves that the values reflected in such legislation are objectively valid or that federal legislation necessarily increases social welfare. *Instead, I argued that our constitutional decisionmaking structure shifts to opponents of existing federal environmental laws a substantial burden of proving that these laws do not reflect proper values and thus decrease social welfare.*<sup>13</sup>

More fundamentally, I claimed that we invariably choose which group of citizens’ collective values to use as the metric when evaluating the social-welfare effects of federal legislation. In other words, we must determine whether issues *should be* considered matters of national or of local concern. We normally resolve these political dis-

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7. Revesz, *supra* note 1, at 561-62.

8. Sarnoff, *supra* note 2, at 232 n.18.

9. Revesz, *supra* note 1, at 561.

10. See Sarnoff, *supra* note 2, at 232.

11. Revesz, *supra* note 1, at 561-62. Given the context, I assume that Professor Revesz has not ignored the fact that many federal laws do not expressly preempt state law or contain savings provisions.

12. *Id.* at 562.

13. See Sarnoff, *supra* note 2, at 250 (“Opponents of existing federal environmental laws thus face a substantial normative burden to demonstrate that federal law is no longer warranted. They must convince the representatives of a supermajority of the public that federal legislation imposes values that are not now shared by most of their constituents or that are objectively bad.”) (footnotes omitted; emphasis in original).

putes regarding the proper jurisdiction to specify values by enacting or repealing preemptive federal legislation.<sup>14</sup>

### B. *Independent Measures of Value*

Further, I *did* provide two independent measures to evaluate whether federal environmental regulation is justified. These are (1) empirical evidence regarding twenty-five years of implementing the federal Clean Air Act and (2) self-reported public opinions (polling data) that federal regulation is desirable. This evidence could support the continued existence of preemptive federal environmental regulation, based on its historic stability and consistent public appeal. Nevertheless, I explained why this evidence creates interpretive disputes that typically are resolved through national judicial and political processes.<sup>15</sup>

The starting point for my analysis, moreover, was my rejection of Professor Revesz's preferred metric of value, the willingness of individuals to pay for regulation.<sup>16</sup> That metric—willingness-to-pay—is based on liberal political theory and is the traditional tool of economists.<sup>17</sup> As I pointed out, we cannot *directly measure* such willingness-to-pay, because economic markets do not exist in which individuals pay regulators to regulate.<sup>18</sup> I also noted that we could not *reliably estimate* the social welfare effects of regulation based on willingness-to-pay and cost-benefit analyses, because (1) markets do not exist in which prices are set for many of the goods or services produced by environmental regulation and (2) consumers' economic choices are often rejected as irrational.<sup>19</sup>

I therefore argued that individuals' preferences for regulation invariably are aggregated informally and weighed in national political processes that enact or repeal preemptive federal legislation.<sup>20</sup> I did not mean to suggest, however, that these processes properly aggregate citizens preferences or that enacted legislation reflects objective values. I thus distinguished national evaluative norms from "national values"—which I defined as informal "aggregations based on the preferences of all federal citizens"—and pointed out three reasons

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14. *See id.* at 232 & n.19.

15. *See id.* at 235 & n.30, 291-317.

16. *See id.*, at 231, 240-42; Revesz, *supra* note 1, at 562-63.

17. *See* Sarnoff, *supra* note 2, at 231 n.16, 240 n.53.

18. *See id.* at 240 & n.54.

19. *See id.* at 231 & n.17, 241 & nn.55-58.

20. *See id.* at 241-42 & nn.59-61, 247 & nn.79-80.

why they might not be coextensive.<sup>21</sup> I do not believe that Professor Revesz would dispute these points, even if he would dispute the independent measures of value that I provided to assess whether federal environmental regulation is justified.

## II. SPECIFIC CHALLENGES TO MY ARGUMENTS FOR FEDERAL ENVIRONMENTAL REGULATION

Professor Revesz poses three specific challenges to my analysis of the traditional rationales for federal environmental regulation. First, he rejects as empirically unsupported and intuitively unlikely my argument that federal regulation is justified to prevent ideologic externalities. Second, he suggests that I would not accept my own analysis if it were to result in preemptive federal maximum standards. Third, he claims that my arguments do not support the pervasive level of federal environmental regulation. I respond to each challenge in turn.

### A. *Valuing Ideological Externalities*

First, Professor Revesz criticizes my argument that allowing states to tailor regulatory requirements to local preferences may decrease social welfare, because citizens may derive substantial ideological benefits (positive externalities) from protecting the citizens of other states.<sup>22</sup> Specifically, he claims that I “do not attempt to support [my] hypothesis with any empirical evidence . . . . One could, of course, be asked a question of the following sort: ‘How much would you be willing to pay to reduce the probability that someone in another state whom you have never met would face an increase in the probability of getting cancer from exposure to an environmental contaminant from one in a hundred thousand to one in a million’. My uneducated hunch is that the value given in answer to this question would not be very high.”<sup>23</sup>

I find this criticism perplexing. His criticism wholly ignores my express rejection of willingness-to-pay as a proper metric for value,

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21. *Id.* at 243. First, many federal “citizens” are routinely deprived of a vote, and preemptive federal legislation may be enacted with the support of as little as thirty-one percent of the national electorate. *See id.* at 243 n.62, 248 n.81. Second, I expressly stated that my theoretical analysis assumed away the “public choice” criticism that legislators do not always promote the interests of their constituents. *See id.* at 239-40 & n.51. Third, citizen preferences may change over time, so that the “national evaluative norms” reflected in federal legislation may no longer reflect “national values.” *See id.* at 313-15.

22. *See id.* at 266-73.

23. Revesz, *supra* note 1, at 562-63.

and my repeated statements that we lack any good means to measure whether the public's self-reported opinions regarding the desire for regulation are honestly and intelligently held.<sup>24</sup> Further, I provided evidence that many federal environmental laws were enacted to codify perceived moral rights to minimum levels of environmental quality, *without regard to cost*.<sup>25</sup> But even if Professor Revesz's "uneducated hunch" were correct, the aggregated benefits of satisfying such small preferences could still outweigh the aggregated burdens of avoiding federal regulation, and thus preemptive federal legislation could still increase social welfare.<sup>26</sup>

Consider, for example, the federal Comprehensive Environmental Response, Compensation, and Liability Act ("Superfund"), which allows federal, state, and tribal trustees to bring claims for natural resource damages caused by releases of hazardous substances.<sup>27</sup> The Superfund law provides these claims without regard to whether the state could recover under state law or whether federal trust resources are involved. Significantly, "contingent valuations" of damage to even unexceptional and relatively unknown natural resources can quickly rise to many millions of dollars when aggregated across the entire nation's population.<sup>28</sup> For precisely this reason, academics debate whether contingent valuation methods are valid (whether people honestly and intelligently believe what they report) and legislators debate whether to limit recoveries in natural resource damage cases.<sup>29</sup>

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24. See Sarnoff, *supra* note 2, at 313.

25. See *id.* at 293 & nn.249-50, 294 & n.255.

26. Each citizen would derive benefit from protecting citizens in many other states, but only the citizens living in states that are protected more than they desire would bear the burdens.

27. See 42 U.S.C. § 9607(f) (1995).

28. See Brian R. Binger et al., *The Use of Contingent Valuation Methodology in Natural Resource Damage Assessments: Legal Fact and Economic Fiction*, 89 NW. U. L. REV. 1029, 1035 & nn. 20-22 (1995). See generally Frank B. Cross, *Natural Resource Damage Valuation*, 42 VAND. L. REV. 269 (1989) (describing methods of and problems with valuing natural resources).

29. See, e.g., Richard B. Stewart, *Liability for Natural Resource Injury: Beyond Tort*, in ANALYZING SUPERFUND: ECONOMICS, SCIENCE AND LAW 219, 222 (Richard L. Revesz & Richard B. Stewart eds., 1995); Gordon J. Johnson, *Paying the Piper: Comments on Liability for Natural Resource Injury: Beyond Tort*, 6 ALB. L.J. SCI. & TECH. 265, 281-90 (1996); Superfund Cleanup Acceleration Act of 1997, S. 8, 105th Cong. Title VII (1997); Superfund Acceleration, Fairness, and Efficiency Act, H.R. 2727, 105th Cong. Title VI (1997). See generally Binger et al., *supra* note 28, at 1031 n.8, 1032 n.9 (citing sources evaluating or criticizing the use of contingent valuation).

My own “uneducated hunch” is that American citizens attach substantial importance to protecting the welfare of citizens of other states whom they have never met.<sup>30</sup> However, it is difficult to distinguish among individuals’ desires: (1) to benefit others by imposing regulatory protections; (2) to further economic self-interest by subjecting others to competitive economic burdens; or (3) to harm others by imposing regulatory burdens.<sup>31</sup> I know of no good way to distinguish which of these concerns was a proximate cause of preemptive federal legislation. But I did provide examples of federal laws for which many of these concerns likely played a significant role.<sup>32</sup> I also note here that states themselves often seek federal protection, at least to further their economic self-interest.<sup>33</sup>

### B. *Preemptive Federal Maximum Standards*

Second, Professor Revesz suggests that I might not accept the implications of my ideologic externalities analysis if citizens were more concerned with jobs and economic well-being than with the physical environment in other states (and therefore desired to impose federal laws preempting more stringent state environmental standards).<sup>34</sup> In fact, I would, but I did not explicitly make this point when discussing interstate externalities.

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30. Two examples should suffice to make the point. Individuals routinely contribute to out-of-state and out-of-country charitable causes, donating amounts in excess of any associated tax benefits. Voters likely derive significant ideological benefits from preemptive federal legislation that protects children, such as child pornography laws. These voters are likely to expect that such laws will apply principally to individuals who reside in other states. Cf. Sarnoff, *supra* note 2, at 243 n.62 (federal legislators presumably take children’s interests into account because their constituents are concerned about children’s welfare).

31. See *id.* at 266-67 (discussing positive and negative economic and ideologic externalities); *id.* at 268 & n.154 (discussing altruism, self-interest, and spite).

32. See, e.g., *id.* at 295-96 (discussing various rationales for provisions of the federal Clean Air Act that prevent states and localities from allowing their air quality to deteriorate significantly in areas meeting federal minimum ambient standards, which include moral concerns over environmental quality and desires to competitively disadvantage citizens of other states).

33. For a recent example, many northeastern states petitioned the U.S. Environmental Protection Agency (“EPA”) to take action regarding the interstate transport of ground-level ozone pollution. In response, EPA recently proposed regulations to define when upwind states “contribute significantly” to the failure of downwind states to attain national minimum air quality standards. Finding of Significant Contribution and Rulemaking for Certain States in the Ozone Transport Assessment Group Region for Purposes of Reducing Regional Transport of Ozone, 62 Fed. Reg. 60,318 (1997) (to be codified at 40 C.F.R. pt. 52) (proposed Nov. 7, 1997). Presumably, most downwind states could physically achieve the national standards, so the federal regulation of physical externalities is addressed to economic competition or to perceived rights to be free from external pollution.

34. See Revesz, *supra* note 1, at 563.

Instead, I made the point when discussing races-to-the-bottom and races-to-the-top. Specifically, I stated that interstate regulatory competition:

may decrease social welfare if environmental compliance costs are raised so that wage and tax losses outweigh the public health and environmental gains . . . . Critically, if the nation is not ambivalent between the forms of welfare losses, i.e., is selectively risk-averse to state-level value errors, then it will have reason to impose preemptive minimum or maximum standards that limit normative diversity, or both . . . . [I]f the nation is averse to presumably higher environmental quality standards and presumably lower employment, it should establish preemptive maximum standards.<sup>35</sup>

Further, I argued *as an empirical matter* that Americans are more concerned with protecting the environment than they are with obtaining the benefits of wages and taxes. I also suggested reasons why these preferences might change in the future, leading to preemptive maximum environmental standards.<sup>36</sup> The perceived benefits of federal uniformity also may change and could lead to more frequent preemption of state regulation in its entirety.<sup>37</sup>

### C. Pervasiveness of Federal Standards

Third, Professor Revesz argues that pervasive federal regulation of “less stark” environmental risks cannot be justified, even if Americans place a high value on protecting out-of-state citizens from “egregiously high levels of environmental harms.”<sup>38</sup> According to Professor Revesz, my arguments “might justify some federal control over minimum levels of environmental quality rather than the status

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35. See Sarnoff, *supra* note 2, at 279, 284 & n.202 (emphasis added). Such risk-aversion may be based on concerns for the welfare of the citizens of other states or on other concerns.

36. See *id.* at 284 & n.202 (“The nation’s citizens are more risk-averse to losing their lives from pollution than from starving. The direction of American risk-aversion may be highly rational, given the tremendous wealth of our country and (at least until recently) the relentless expansion of the welfare state. If we deplete our resources, our values and thus our laws may change.”).

37. *Cf. id.* at 252 & n. 96. Many analysts distinguish between regulation of products and of processes. See, e.g., Richard B. Stewart, *International Trade and Environment: Lessons From the Federal Experience*, 49 WASH. & LEE L. REV. 1329, 1333-37, 1340-45 (1992). Federal environmental legislation frequently preempts state products regulation in order to achieve uniformity. See, e.g., 7 U.S.C. 136v (1994) (preemption of state and local regulation of pesticide labeling). But federal environmental laws also preempt state regulation of processes. See, e.g., *Illinois v. City of Milwaukee*, 406 U.S. 91, 107 & n.9 (1972) (holding the federal interest in uniformity of interstate or navigable water pollution laws preempted state nuisance laws).

38. Revesz, *supra* note 1, at 563.

quo of extensive centralized regulation.”<sup>39</sup> This is because only “minimal levels of health ought to count as a basic human right” and because existing federal laws either are excessive or are insufficient to assure these minimal levels.<sup>40</sup>

Again, I find Professor Revesz’s criticism perplexing. I argued that pervasive federal environmental regulation—even uniform federal standards—may be justified: (1) if legal protection were not limited to “significant” transboundary harms;<sup>41</sup> (2) as a “second-best” regulatory strategy to address interstate pollution externalities, given political impediments to allocating the costs of preventing such harms;<sup>42</sup> or (3) if existing federal laws codify moral rights to minimum levels of environmental quality.<sup>43</sup> One premise of my article was the lack of agreement as to what constitute “minimal” environmental rights, and whether “rights” are the best moral framework for resolving disputed environmental values.<sup>44</sup> Further, I noted that public opinion supports expanding federal environmental protections at even greater costs, which suggests that existing legal rights are insufficient to protect perceived moral rights to environmental quality.<sup>45</sup> By highlighting the under-inclusiveness of existing federal protections for “minimal levels of health,” Professor Revesz only provides arguments to more fully federalize and more pervasively regulate all aspects of human life.

Although I *did* suggest many reasons why I believe the status quo of pervasive federal regulation is beneficial, I clearly did *not* suggest any support for the status quo of existing federal environmental laws, or for the implementation of federal policies by states. I also did not suggest that uniform standards were beneficial, but rather that they were beneficial only if the costs of tailoring requirements to local conditions (rather than to local preferences) outweighed the benefits.<sup>46</sup>

Instead, I reiterated the claim that “[w]hile we all might agree that the current structure of regulation produces undesirable results, [recent academic criticism] does next to nothing to show that the

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39. *Id.*

40. *Id.* at 544-45.

41. *See* Sarnoff, *supra* note 2, at 269-73.

42. *See id.* at 273-78.

43. *See id.* at 290 & n.230.

44. *See id.* at 288-91, 319.

45. *See id.* at 235 & n.30.

46. *See id.* at 253 & n.105, 255-57.

source of the problem is the *federalness* of the regulations.”<sup>47</sup> Similarly, I noted that federal oversight costs likely outweigh any relative economies of scale to be obtained from state implementation, but that this fact “does not in any way suggest that existing federal regulation cannot be made more efficient.”<sup>48</sup> Finally, in another article, I argued that federal environmental statutes may unconstitutionally delegate legislative powers to federal agencies and to states through federal agencies.<sup>49</sup>

#### CONCLUSION

In sum, Professor Revesz’s response to my article simply misses the point. Given his tremendous contributions to the field, I hope that he will respond again to my article. I would particularly welcome his thoughts on a useful approach to resolve the moral debates over value that underlie federalism disputes.

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47. *Id.* at 233 n.23 (quoting Daniel C. Esty, *Revitalizing Environmental Federalism*, 95 MICH. L. REV. 570, 637 (1996)). See also Joshua D. Sarnoff, *Risk Assessment Policy Under Superfund and RCRA*, in ENVIRONMENTAL DESKBOOK 1997 1 (Morgan, Lewis & Bockius LLP 1997) (criticizing EPA’s extremely conservative risk assessment policies for hazardous wastes and hazardous substances).

48. Sarnoff, *supra* note 2, at 266 n.146.

49. See Joshua D. Sarnoff, *Cooperative Federalism, the Delegation of Federal Power, and the Constitution*, 39 ARIZ. L. REV. 205 (1997).