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Intergovernmental Relationships in Costal Land Management

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All levels of government have interests in effective management of coastal lands and should have a voice in deciding how coastal lands will be used. This article discusses the tensions among federal, state, and local governments for control over coastal land management, and argues that, to the extent feasible, primary responsibility for coastal land planning and regulation should be kept at the lowest level of government.

First, the article delineates the sources of regulatory power. Second, it traces the legislative and administrative evolution of California’s and Florida’s coastal programs and discusses recent judicial responses, particularly in Florida. Third, an analytic framework is proposed for assessing coastal land management arrangements, concluding that California’s and Florida’s strong reliance on local governments is sound public policy.

California and Florida provide an instructive comparison because, although the two states have similarities, each being a major, diverse growth state, they initially experimented with different approaches to institutional reform. In some respects, however, their approaches have converged. Both states continue to assign major planning and regulatory roles to local governments, but both maintain a state and regional framework for monitoring the extraterritorial effects of local governmental decisions.

THE FEDERAL ROLE

Historically, the federal government has had a major role in regulation of coastal activities. Until recently it restricted its regulation of sea coasts primarily to activities affecting “navigable” bodies of water. Accordingly, states and their delegates were responsible for regulating areas

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landward of such jurisdictional boundaries as "mean high tide line."\(^2\) Recently, however, the federal regulatory role, both direct and indirect, has increased dramatically.

Several recent trends are noteworthy. Federal-state concurrent jurisdiction has increased, and there is more sharing of power in the same geographical area.\(^3\) A stronger federal role has emerged in areas previously considered primarily, if not solely, within the jurisdiction of state and local governments.\(^4\) Federal power is asserted through grants to the states through programs such as the Coastal Zone Management Act of 1972 (CZMA)\(^5\) and through direct regulatory programs based on the commerce power.\(^6\) The existing and emerging federal-state models are having a significant influence on the design of state-local programs.\(^7\) Through the "consistency clause" of the CZMA, states have gained leverage over federal activity in coastal areas if the state's management program meets federal standards.\(^8\)

History, law, and experience have shown that the commerce clause empowers Congress to enact comprehensive land planning and regulatory programs in the entire coastal zone; indeed, if Congress so chooses, the commerce and supremacy clauses empower Congress to preempt coastal land management entirely.\(^9\) Nevertheless, Congress should be reluctant to expand its existing direct regulatory role in the coastal zone. Instead, Congress should continue to encourage state and local governments to enact coastal land management programs through grant-in-aid programs.

\(^2\) See generally United States v. Sexton Cove Estates, Inc., 526 F.2d 1293 (5th Cir. 1976) (recognizing general application of such boundaries but denying any claim that regulation beyond these boundaries is precluded). See also Federal CLM, supra note 1, at 182, 185-86.

\(^3\) Two examples of federal regulatory programs in which state regulation is still allowed are the Clean Air Act, 42 U.S.C. §§7401-7642 (1982), and the Federal Water Pollution Control Act as amended by the Clean Water Act of 1977, 33 U.S.C. §§ 1251-1376 (1982). This article discusses how Congress intends that, generally, there will be federal-state concurrent jurisdiction in the field of coastal land management.


\(^6\) The Clean Air Act and the Clean Water Act are direct regulatory programs based on the commerce power. For the potential land use control aspects of these acts, see Federal CLM, supra note 1.

\(^7\) As this article discusses, infra, whether the relationship is state-local, as in the California and Florida land management programs, or federal-state, as in the federal environmental programs, e.g., Clean Air Act and Clean Water Act, or the CZMA, the "higher" level of government tends to restrict its role primarily to regulating those significant activities or sensitive natural resources or areas having substantial effects upon citizens residing beyond the boundaries of the "lower" level of government.


\(^9\) See infra notes 11-20 and accompanying text. For an analysis of case law supporting this proposition, see Federal CLM, supra note 1, at 229-39.
such as the CZMA.\textsuperscript{10} Congress is not well-equipped to carry the full burden of experimentation, amendment, and interstitial development of coastal land management programs; other federalist values are also at stake which make a strong, concurrent state role desirable. Preemptive federal programs should be exceptional, and cooperative and concurrent regulatory programs should be encouraged.

\textit{The Commerce Clause}

The commerce clause provides ample authority for Congress to regulate critical coastal resources. The Supreme Court has shown great willingness to uphold wide-ranging economic, environmental, and social regulatory programs under the clause.\textsuperscript{11} The result for coastal land management purposes is a "federal police power" under the commerce clause,\textsuperscript{12} closely analogous to the states' police power reserved under the Tenth Amendment. Clearly "[i]t is no objection [that the exercise of this federal police power] is attended by the same incidents which attend the exercise of the police power of the states."\textsuperscript{13} Under the supremacy clause, irreconcilable conflicts between national and state regulation are resolved in favor of the national government.

In 1981, the Supreme Court outlined the "relatively narrow" scope of judicial review to be applied when courts decide whether a particular exercise of congressional power is valid under the commerce clause. In \textit{Hodel v. Virginia Surface Mining and Reclamation Association},\textsuperscript{14} the

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11. As the author of a comprehensive study of United States Supreme Court cases from 1937 to 1970 concludes:

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Congress, under the authority of the Commerce Clause, is able to reach into every nook and cranny of the highly interdependent American economic system. It has unquestioned control over any business activity which in any way "effects" commerce, regardless of how "local" that activity may be, how remote or "indirect" its effect may be, and how small or insignificant the contribution of a single instance may be if it is representative of "many others similarly situated." Nor is Congress limited to the regulation of subjects which are wholly economic in nature; by virtue of its commerce power it can strike at the primarily moral evils of gambling (Champion v. Ames), prostitution (Hoke v. United States), and racial discrimination in public accommodations (Heart of Atlanta Motel v. United States and Katzenbach v. McClung), the only constitutional requirement being the showing of a connection between the prohibited activity and that commerce or intercourse which "concerns more states than one."
\end{quote}


12. For discussions of federal "police power" under the commerce clause, see, e.g., United States v. Sullivan, 332 U.S. 689 (1948) (misbranded drugs); Gooch v. United States, 297 U.S. 124 (1936) (kidnapping); Hoke v. United States, 227 U.S. 308 (1913) (prostitution); Champion v. Ames, 188 U.S. 321 (1903) (lottery tickets).

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Court upheld the Surface Mining Control and Reclamation Act of 1977 against several constitutional challenges. The following commerce clause test was enunciated:

The court must defer to a congressional finding that a regulated activity affects interstate commerce, if there is any rational basis for such a finding. . . . This established, the only remaining question for judicial inquiry is whether the "means chosen by [Congress] is reasonably adapted to the end permitted by the Constitution." . . . The judicial task is at an end once the court determines that Congress acted rationally in adopting a particular regulatory scheme. 16

Coastal regulation often addresses major conflicts among economic, social, and environmental values. Because of the character of most critical coastal resources, any significant development of these resources affects citizens beyond the boundaries of individual states. The expansive sweep of the commerce power allows the national government to regulate these external effects in major watersheds, wetlands, and beaches if Congress so desires.

The commerce clause cases suggest that Congress is restrained almost exclusively by political considerations in exercising federal regulatory power in the coastal zone. The courts are likely to defer to congressional judgment. 17 For example, in Perez v. United States, 18 the Supreme Court did not even seek to determine whether the cumulative effect of the prohibited activities had an actual relationship in interstate commerce. Instead, the Court seemed to say that a particular activity could be regulated as long as it was part of a class of activities, most of which relate to interstate commerce. "Where the class of activities is regulated and that class is within the reach of federal power, the courts have no power 'to exercise, as trivial, individual instances' of the class." 19

The Spending Power

The national spending power is arguably the most important power in its actual impact on federal and state relationships. 20 Congress, by offering

19. Id. at 154 (emphasis added).
the inducement of federal funds, has been able to implement many national policies having significant regulatory consequences. Conditional grants-in-aid can be traced at least as far back as the 19th century, and they have become increasingly popular in recent years.\textsuperscript{21}

\textit{United States v. Butler} illustrates that exercises of the spending power are tested by a "general welfare" standard. The 1936 case adopts the Hamiltonian view that

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[The clause confers a power separate and different from those later enumerated, is not restricted in meaning by the grant of them, and Congress consequently has a substantive power to tax and to appropriate, limited only by the requirement that it shall be exercised to provide for the general welfare of the United States.\textsuperscript{22}
\end{quote}

Justice Cardozo, in 1937, endorsed \textit{Butler}'s adoption of the Hamiltonian position.\textsuperscript{23} A 1950 case noted that "Congress has a substantive power to tax and appropriate for the general welfare, limited only by the requirement that it shall be exercised for the common benefit as distinguished from some mere local purpose."\textsuperscript{24}

The purposes enunciated by the CZMA are clearly legitimate purposes of national spending. Since Congress can, if it chooses, preempt the entire field of coastal land management,\textsuperscript{25} totally displacing state and local governments, it can then, with even greater reason, enact a federal grant-in-aid program to encourage state and local governments to plan and regulate the uses of coastal lands.

Still, to say that Congress has the power totally to displace state and local governments is not to say that Congress can enact programs without any regard for the effects on state sovereignty. The 1976 \textit{National League of Cities v. Usery} decision,\textsuperscript{26} although enunciating a limitation on the commerce power, underscored the importance of this distinction. In a footnote to the majority opinion, the Court noted:

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"[W]e express no view as to whether different results might obtain if Congress seeks to effect integral operations of state governments by exercising authority granted it under other sections of the Constitution such as the spending power, Art. I, Sec. 8, cl. 1, or Sec. 5 of the Fourteenth Amendment."\textsuperscript{27}
\end{quote}

\begin{itemize}
\item \textsuperscript{21} \textit{Id.} at 236.
\item \textsuperscript{22} 297 U.S. 1, 65-66 (1936).
\item \textsuperscript{23} Helvering v. Davis, 301 U.S. 619 (1937). See generally GUN THER, supra note 20, at 235.
\item \textsuperscript{24} United States v. Gerlach Live Stock Co., 339 U.S. 725, 738 (1950).
\item \textsuperscript{25} See supra notes 11-19 and accompanying text. For an analysis of case law supporting this proposition, see Federal CLM, supra note 1, at 229-39.
\item \textsuperscript{26} 426 U.S. 383 (1976).
\item \textsuperscript{27} \textit{Id.} at 852 n. 17. But see Equal Employment Opportunity Comm'n v Wyoming, — U.S. —, 103 S. Ct. 1054 (1983); Federal Energy Regulatory Comm'n v. Mississippi, 456 U.S. 742 (1982); and Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264 (1981), which indicate that \textit{National League} will be tightly constrained where the commerce clause is the source of federal law.
\end{itemize}
The Supreme Court has long recognized the possibility that conditional grants-in-aid might intrude unduly on state autonomy. Justice Cardozo questioned in 1937 whether the Social Security Act, although held constitutional, nevertheless involved "the coercion of the States in contravention of the Tenth Amendment or of restrictions implicit in our federal form of government."28 Although the Supreme Court has hinted at this reserved judicial check on the spending power, actual challenges to federal spending conditions on state autonomy grounds have not succeeded. For example, in Oklahoma v. United States Civil Service Commission,29 the Court refused to invalidate the conditioning of federal highway funds on the state's compliance with provisions of the Hatch Act.30

Concerns about the effects of undue federal intrusion should be heeded in evaluating the effectiveness of the CZMA and other federal regulatory programs in the coastal zone. Decisions concerning how coastal resources are allocated and used should reflect the varied needs of a diverse population. They should be made within an institutional setting that leaves maximum latitude for private initiative and experimentation. The imple-

29. 330 U.S. 127 (1947). See also Bell v. New Jersey, ___ U.S. ___, 103 S. Ct. 2187 (1983) (upholding federal right to demand return of misapplied funds). "Requiring States to honor the obligations voluntarily assumed as a condition of federal funding before recognizing their ownership of funds simply does not intrude on their sovereignty." Id. at 2197.
30. 330 U.S. at 129 (citing the Hatch Activity Act, 53 Stat. 1147 amended by 54 Stat. 767 (1940)). Conditional grants have become increasingly popular in recent years, and the number and types of criticisms have increased accordingly.

In 1975, the presidents of Harvard and Yale deplored, in the Yale president's words, the "dangerously fashionable" trend of using "the leverage of the government dollar to accomplish objectives which have nothing to do with the purposes for which the dollar is given." Address by Kingman Brewster, Jr., President, Yale University, Annual Dinner of the Fellows of the American Bar Foundation, Chicago, Ill. (Feb. 22, 1975). Both administrators noted how government regulation of postsecondary education had grown, particularly, Harvard's president noted, in such areas as "employment practices, admissions procedures, student records, safety requirements, and even the conduct of research." Introduction to President Derek C. Bok's 1974-75 Annual Report to the Harvard University Board of Overseers, 19 Harv. Today 1 (1976). Each had admonitions worth considering, because many of the values of localism, voluntarism, and diversity that are threatened by unnecessary restrictions of university autonomy are similarly threatened by unnecessary restriction of state and local governmental autonomy. President Bok reported to the members of the Harvard Board of Overseers:

Because of the value of autonomy and diversity, there are obvious costs in attempting to influence universities through government rules. By limiting the discretion of university personnel, rules diminish initiative and experimentation. . . . Because regulations must be reasonably uniform in nature, they also threaten to impinge upon the diversity of the system. . . . [F]ederal intervention can have a levelling effect which fails to take due account of the special contribution that particular institutions should make in a diversified system. . . . For these reasons, the government would be wise not to impose rules unless it is clear that significant problems exist which cannot be rectified by universities themselves or resolved by subsidies, incentives or other less drastic methods of intervention.

Id. at 10.
mentation of the CZMA has thus far been reasonable: the conditions have been reasonably related to the purposes of the act, and there has been no serious indication that the CZMA has been administered in a manner that intrudes unduly on state autonomy.  

Balancing and Preemption

The states and their delegates may continue to regulate coastal land use even if the regulation incidentally affects interstate commerce; courts, however, will have to decide at what point the state’s regulation of its local affairs unreasonably burdens interstate commerce. The basic test, originally formulated in Cooley v. Board of Wardens, is whether the subject matter of the state legislation is “in [its] nature national, or admit[s] only of one uniform system, or plan of regulation.” Of course most federal-state land use conflicts are not likely to pose such a clear case for “one uniform system, or plan of regulation.”

A common Supreme Court approach for reconciling local and extra-territorial interests is the “balancing” test enunciated in 1942 in Parker v. Brown and summarized in the 1970 case, Pike v. Bruce Church, Inc., as follows:

Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. . . . If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.

To determine whether local regulation interferes with commerce, courts

31. This was the author’s conclusion when Federal CLM, supra note 1, was published, and the author has found no condition or administrative practice that refutes this position.
32. 55 U.S. (12 How.) 299 (1851).
33. Id. at 319.
35. 397 U.S. 137, 142 (1970). A classic example of the Court’s application of the balancing test was Southern Pacific Co. v. Arizona ex rel Sullivan, 325 U.S. 761 (1945), which involved an Arizona statute regulating the length of interstate trains. The Court weighed the local benefit of the law as a safety measure and the national interest in keeping interstate commerce free from serious interference and concluded that the “slight and dubious” local advantage was “outweighed by the interest of the nation in an adequate, economical, and efficient railway transportation service.” Id. at 783-84. See also Arkansas Electric Coop. Corp. v. Arkansas Pub. Comm’r, ___ U.S. ___, 103 S. Ct. 1905 (1983) (discusses the “general trend in our modern commerce clause jurisprudence to look in every case to the nature of the state regulation involved, the objective of the state, and the effect of the regulation upon the national interest in commerce.”) Id. at 1915. Held: burden on commerce, although having incidental effect, not clearly excessive. Id. at 1918.
must consider the questions: (1) What, if any, burden is imposed on interstate commerce by the questioned legislation? (2) How substantial is this burden? (3) Is the interest sought to be served by the legislation a legitimate local concern? (4) Is the legislation a reasonable means of reaching the end desired? (5) Are there reasonable and adequate alternatives available?

The balancing test has recently been undergoing considerable refinement. One can only conjecture whether the courts will apply a consistent theory. Some recent lower federal court cases suggest that in coastal land management conflicts, the balancing approach may virtually be ignored because of the tendency to presume the validity of state and local legislative judgments in matters having complex environmental, social, and economic implications. The cases reflect the courts' application of the first four questions, see, e.g., Proctor & Gamble Co. v. City of Chicago, 509 F.2d 69 (7th Cir. 1975), cert. denied, 421 U.S. 978 (1975). For an application of the fifth question, see Dean Milk Co. v. City of Madison, 340 U.S. 349 (1951). The Court has summarized the analytic approach of Pike v. Bruce Church Inc., 397 U.S. 137, 142, as follows:

Under that general rule, we must inquire (1) whether the challenged statute regulates evenhandedly with only "incidental" effects on interstate commerce, or discriminates against interstate commerce either on its face or in practical effect; (2) whether the statute serves a legitimate local purpose; and, if so, (3) whether alternative means could promote this local purpose as well without discriminating against interstate commerce.

Hughes v. Oklahoma, 441 U.S. 322, 336 (1979) (an Oklahoma statute facially discriminated against interstate commerce, thereby invoking the "strictest scrutiny of any purported legitimate local purpose and of the absence of nondiscriminatory alternatives.") Id. at 337. Held: repugnant to the commerce clause. Although recognizing that Oklahoma could still protect and conserve wild animal life within its borders, "States may promote this legitimate purpose only in ways consistent with the basic principle that 'our economic unit is the nation.'" Id. at 339 (quoting H.P. Hood & Sons Inc. v. Dumond, 336 U.S. 525, 538 (1949).

36. For an application of the first four questions, see, e.g., Proctor & Gamble Co. v. City of Chicago, 509 F.2d 69 (7th Cir. 1975), cert. denied, 421 U.S. 978 (1975). For an application of the fifth question, see Dean Milk Co. v. City of Madison, 340 U.S. 349 (1951). The Court has summarized the analytic approach of Pike v. Bruce Church Inc., 397 U.S. 137, 142, as follows:

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509 F.2d at 80. See also Construction Indus. Ass'n v. City of Petaluma, 522 F.2d 897 (9th Cir. 1975), cert. denied, 424 U.S. 934 (1976) (where the Ninth Circuit court refused to consider the federal right-to-travel issue upon which the district court had rested its decision in finding unconstitutional the "Petaluma Plan" for controlling the influx of new residents). (The plaintiffs had not met the "zone of interest" requirement of Warth v. Seldin, 422 U.S. 490 (1975)). The court also considered due process and commerce clause issues, on which the appellants had standing.

On the latter, the court concluded that its ruling that "the Petaluma Plan represents a reasonable and legitimate exercise of the police power obviates the necessity of remanding the case for consideration of appellants' claim that the Plan unreasonably burdens interstate commerce." 522 F.2d at 909. The court applied the Huron Cement test, see Huron Cement Co. v. Detroit, 362 U.S. 440, 448 (1960), that "a state regulation validly based on the police power does not impermissibly burden interstate commerce where the regulation neither discriminates against interstate commerce nor operates to disrupt its required uniformity." 522 F.2d at 909. Thus the court followed a line of authorities that arguably make it improper for a court "to review state legislation by balancing..."
unwillingness to attempt to balance factors that are not commensurable. The Supreme Court’s decision in *City of Philadelphia v. New Jersey*\(^39\) indicates, however, that the Court will be quick to strike down state legislation that implements parochial economic protectionist goals by means that ostensibly further environmental protection.

The increase in legislative activity in the coastal zone portends additional conflicts between state and federal legislation on the same subject matter, thereby implicating the doctrine of federal preemption. Preemption, functionally related to the burdening of commerce, is conceptually separate.\(^40\) The doctrine allows courts to determine (1) that Congress has occupied a field, thereby foreclosing the operation of state legislation in the same field even if there are gaps in the federal legislation, and even if the state legislation is not in conflict with the federal scheme; or (2) that state legislation cannot stand because it is in conflict with federal

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104 S. Ct. 2237 at 2247 (1984); *Sporhase*, 458 U.S. at 956.

The doctrine is based on the supremacy clause and is relevant in resolving the difficult problem that arises when the state seeks to forbid an activity even though it would be allowed by the federal government.

Scholarly efforts to find consistent doctrinal bases for preemption decisions usually conclude that these decisions simply reflect the prevailing attitudes of a majority of the Court toward federalist values and the nature of the subject matter regulated. Nevertheless, preemption cases are of value for understanding the federal courts' potential role in shaping coastal land management programs. The cases also aid in gleaning, as in the interference-with-commerce cases, some notion of the judicial policies favoring either exclusive or concurrent federal jurisdiction where congressional intent is unclear.

The 1963 Supreme Court case of Florida Lime and Avocado Growers, Inc. v. Paul suggests an important principle for resolving most coastal land management preemption questions: federal legislation affecting land use, because it occurs in a field traditionally subject mainly to state and local control, should be subjected to a presumption against federal preemption. This presumption may gain particular strength before the current Court. A recent study of the preemption doctrine concludes that a trend toward a solicitous spirit with respect to federal interests during the Warren Court era has shifted back to a sympathy with state interests under the Burger Court.


42. Cf., e.g., Note, Preemption Doctrine, supra note 40, at 651-54.

43. 373 U.S. 132 (1963). The three-step approach is to determine whether (1) there is a federal law in effect in the same field as the challenged state law; (2) the federal law was either expressly or by necessary implication intended to be exclusive; (3) the state law nevertheless "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Hines v. Davidowitz, 312 U.S. 52, 67 (1941). In Florida Lime, the challenged California statute had the effect of excluding as immature six out of every 100 Florida-grown avocados shipped to California. The Florida avocados satisfied a federal regulation designed to ensure the maturity of avocados. This was the first step. In the second step, finding no inevitable collision between the two schemes of regulation, id at 143, the Court asked "Does either the nature of the subject matter, namely the maturity of avocados, or any explicit declaration of congressional design to displace state regulation, require [the California statute] to yield to the federal marketing orders?" Id. Finding that "the maturity of avocados is a subject matter of the kind this court has traditionally regarded as properly within the scope of state superintendence," id. at 144, the Court applied the "settled mandate . . . not to decree such a federal displacement 'unless that was the clear and manifest purpose of Congress.'" Id. at 146 (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)). Then the third test, whether the state regulation stands as an obstacle, was applied, and the majority opinion answered in the negative. Id. at 141. Four justices dissented, concluding that the federal legislation and regulations "leave no room for this inconsistent and conflicting state legislation." Id. at 160. The dissenting opinion emphasized that in Parker v. Brown, 317 U.S. 341 (1943), the federal regulatory scheme was partial and incomplete. Also, the dissent was concerned that "there is no indication that the state regulatory scheme has any purpose other than protecting the good will of the avocado industry." Florida Lime, 373 U.S. at 169.

44. Note, Preemption Doctrine, supra note 40 at 623. The principal cases relied on for this conclusion were: Goldstein v. California, 412 U.S. 546 (1973) (denying the constitutional exclusivity
Land use decisions are unique; they have multiple and often hidden effects. Special attitudes about land may consciously or unconsciously affect preemption decisions. Because of the wide geographic and far-reaching substantive effects of land use decisions, there is often a need for multiple decision points. Thus, for reasons of administrative feasibility and political theory, good coastal land management is not likely to be provided by exclusive federal regulatory programs.

In 1954, Professor Henry Hart drew attention to the result of uniformity, "to thrust upon Congress a burden of exclusive responsibility for the interstitial development of legal doctrine—a burden which it is wholly unequipped to bear." He correctly predicted that the trend would pass, pointing out two reasons why a procrustean solution of perfect national uniformity would not find wide favor:

The first is the workaday reason of administrative feasibility . . .
The second reason is more basic. Common sense and the instinct for freedom alike can be counted upon to tell the American people never to put all their eggs of hope from governmental problem-solving in one government basket. 47

The trend toward an increased federal voice in land use decisionmaking calls for reconsideration of the values of a federal system that have been eloquently described by Professor Herbert Wechsler as follows:

In a far flung, free society, the federalist values are enduring. They call upon a people to achieve a unity sufficient to resist their common perils and advance their common welfare, without undue sacrifice of their diversities and the creative energies to which diversity gives rise. They call for government responsive to the will of the full national constituency, without loss of responsiveness to lesser voices, reflecting smaller bodies of opinion, in areas that constitute their own legitimate concern. 48

Wechsler’s essay emphasized James Madison’s belief that the composition of Congress and the political processes are better adapted to containing authority than are the courts. 49 Federal intervention as against the states, Wechsler argued, is primarily a matter for congressional, not judicial, determination. 50

This federalist philosophy, particularly relevant in a field as diverse as planning and regulation of land use, suggests that the courts should be generally reluctant to find congressional preemption. Rather, the judiciary should leave it to Congress expressly to shift the historically decentralized land management process to a higher level, if such exclusive federal jurisdiction is needed, or to enact uniform policies, if uniformity among the states is needed. The commerce clause and preemption cases indicate that such a philosophy of decentralization and experimentation is being encouraged by various judicial techniques for deferring to state and local legislative judgments.

THE STATE APPROACH

California 51

California’s coastal program embodies a philosophy of intergovernmental relationships strikingly similar to the philosophy of the American

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47. Id. at 540.
49. Id. at 558-59.
50. Id.
Law Institute’s (ALI) Model Land Development Code;\textsuperscript{52} that is, that land development regulation should occur, to the extent feasible, at the local government level. The California, Florida, and ALI Code approaches, however, all recognize that land use regulation in sensitive coastal areas cannot be left entirely to the unfettered choices of local government officials.\textsuperscript{53}

Several features of California’s Coastal Act of 1976\textsuperscript{54} promote the goal of achieving maximum local involvement within a framework that assures that state and regional interests will not be ignored. Once a local coastal program receives state certification, many local decisions become final (except for judicial review). Significant development activities and particular projects in sensitive resource areas, however, remain subject to appeal to the state commission.\textsuperscript{55} Similarly, the state continues to perform a monitoring function through the commission’s power to review amendments of certified local programs.\textsuperscript{56}

California’s coastal regulatory experiences show the advantages of a reasonable compromise between localism and centralism. State legislatures should take the leadership role in designing coastal land management mechanisms, but the resulting design should not necessarily establish a strong, direct state regulatory role. The diversities of a large state, such as California, make it easier to advocate a major role for local governments. The same arguments can be made in most states that have heavily urbanized coastal areas. A strong local role encourages innovation and experimentation and is likely to promote more citizen participation. The “creative spark” will more likely come from encouraging experimentation by individuals and small units of government. Central authority, although often suitable for monitoring compliance with broad policies, is not likely to promote grass roots enthusiasm and experimentation.

California’s 1972–75 coastal regulatory experiences\textsuperscript{57} revealed that the state’s 1,000 yard-wide land regulatory zone needed substantial adjustments. Many observers agreed that 1,000 yards was unnecessarily large for well-developed urban areas. The 1976 California Coastal Act, accordingly, allows reduction of the zone in urban areas.\textsuperscript{58} The experience in rural areas having sensitive natural features convinced the legislature

\textsuperscript{52.} \textit{Model Land Dev. Code} (1976).
\textsuperscript{53.} See \textit{id.}, art. 7, Areas of Critical State Concern, §§ 7-201 to 208. For a discussion of California’s and Florida’s balances, see also infra notes 54-71 and accompanying text.
\textsuperscript{55.} \textit{id.} § 30603.
\textsuperscript{56.} \textit{id.} § 30514.
\textsuperscript{58.} \textit{id.} at 727-29.
that 1,000 yards was far too small. Accordingly, the Act now provides for a zone of up to five miles inland for certain sensitive resource areas. One possible deficiency of the zone relates to the ability of the California Coastal Commission to prevent unnecessary conversion of prime agricultural lands to nonagricultural uses. More must be understood, however, about how other regulatory reforms, such as the coastal conservancy provisions, will function before reaching that conclusion.

The geographic and substantive jurisdiction of coastal decisionmakers should not be divorced from related housing, transportation, energy, and other matters of statewide concern. The 1976 California Coastal Act made commendable efforts to coordinate the coastal function with other state programs. Still, there is room for improvement. "Affordable housing" is a prime example of the problem. By 1980, the California Coastal Commission was aggressively implementing the coastal act’s requirement that "housing opportunities for persons . . . of low or moderate income . . . shall be protected, encouraged, and, where feasible, provided." The program became so controversial, however, that the California legislature repealed the Coastal Commission’s authority over "affordable housing" and transferred the function to local government. Particularly in California, the low-and moderate-income housing problem should be addressed as a statewide problem.

The California legislature should provide a better statutory base for statewide comprehensive planning. Although the Office of Planning and Research made commendable efforts in the late 1970s, California needs a better process for preparing and adopting statewide policies. Politically, comprehensive coastal planning probably had to precede statewide comprehensive planning, and, undoubtedly, enactment of additional planning programs is unlikely in the current political climate.

59. Id.
61. CAL. PUB. RES. CODE §§ 31000-31406 (West 1977 & Cum. Supp. 1984). The California Coastal Act of 1976 covers prime and other agricultural lands. Id. §§ 30241 & 30242. A coastal commission staff member believes that the commission and staff have “been fairly stringent in our protection of agricultural land.” Interview with Jack Liebster, in San Francisco (Sept. 19, 1983). He cites the County of Santa Cruz as an example of the commission’s efforts. In Santa Cruz and San Mateo Counties, the landward coastal zone boundaries are among the widest in the state, id., so the coastal commission has been actively promoting the act’s policy of maintaining the “maximum amount of prime agricultural land . . . in agricultural production. . . .” CAL. PUB. RES. CODE § 30241(a) (West 1977 & Cum. Supp. 1984).
63. See generally Calif. CLM, supra note 57, at 705-09.
65. Id.
67. See Weber, Evolution of an Agency, CAL. LAW., Feb. 1984, at 25 (tracing the ebbs and flows of the California Coastal Commission’s political acceptance, with particular emphasis on Governor
ever, it is artificial, and often counterproductive, to divorce coastal planning from statewide planning for other purposes.

**Florida**

Florida has some of the nation’s more innovative and effective land and water use management systems, yet its coastal land management system has been less effective than California’s. Florida’s coastal program has not been well-coordinated and integrated. Extensive 1984 legislation, however, promises substantial improvement.

An analyst of state land use planning and regulation concluded in 1979 that “Florida is truly the nation’s chief land use laboratory.” Florida has experimented with all the federally-recommended models for allocating land and water regulatory power between state and local governments.

Florida’s landmark 1972 legislative package and 1975 local planning act will probably have as much influence on the evolution of American land planning law as California’s Proposition 20 of 1972 and its Coastal Act of 1976. Indeed, Florida’s 1984 political climate appears

George Deukmejian’s “unwavering opposition to the Coastal Commission”). *Id.* “When the Legislature appropriated $7.2 million for the commission in the 1983-84 budget, Deukmejian pared the figure to $5.8 million . . . and when Senator Robert Presley (D.-Riverside) sponsored a bill that reinstated some $1 million in federal funds that had been destined for the commission, the governor resolutely slashed the appropriation in half.” *Id.* at 26. See generally Calif. CLM, supra note 57, at 707 n.211 (noting that, by 1978, statewide comprehensive planning was not a popular idea in California).

68. See also O’Connell, Florida’s Struggle for Approval Under the Coastal Zone Management Act, 25 NAT. RES. J. 61 (1985).


72. (A) State establishment of criteria and standards for local implementation, subject to administrative review and enforcement for compliance;

(B) Direct state land and water use planning and regulation; or State administrative review for consistency with the management program of all development plans, projects, or land and water use regulations, including exceptions and variances thereto, proposed by any state or local authority or private developer, with power to approve or disapprove after public notice and an opportunity for hearings.


much more conducive to land and water regulatory reform than California's.  

Florida's planning framework can be visualized as a pyramid. Planning at the base is done by local governments pursuant to the Local Government Comprehensive Planning Act of 1975; 77 at the mid-level by regional agencies, such as regional councils of government; 78 and at the vortex by state agencies, such as the Executive Office of the Governor and the state land planning agency. 79

All local governments in Florida are now required to adopt local comprehensive plans which become the standards by which subsequent development orders and development regulations are measured for consistency. 80 These local plans must include several elements relevant to coastal land management. 81 The plans have the potential of becoming the most important part of Florida's coastal land management process. Even considering the 1984 reforms, Florida's legislature, however, still must require that the local plans be better coordinated and integrated with regional and statewide plans. 82

Coastal planning at the state and regional level must result in adoption of broad principles, policies, and standards similar to the coastal resources planning and management policies enacted by the legislature as part of the California Coastal Act of 1976. 83 Florida's legislature should either directly enact similar policies as law or the governor and cabinet should achieve this comprehensive coastal planning goal by vigorous implementation of the Florida State and Regional Planning Act of 1984. 84 The latter alternative seems preferable because comprehensive coastal plan-

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nring should be a central part of Florida's statewide comprehensive planning for other purposes; Florida's legislature also appears to prefer this approach. Whichever alternative is adopted, the legislature should continue its regulatory reform by requiring that all local comprehensive plans be reviewed and certified for consistency with regional and state plans.

The Florida State and Regional Planning Act of 1984 underscores the important role of regional planning councils in state policy development. The Act provides that the regional planning councils are "the primary organization to address problems and plan solutions that are of greater than local concern or scope, and . . . shall be recognized by local governments as one of the means to provide input into state policy development." The Act defines "comprehensive regional policy plan" and requires that the plan "shall be consistent with and shall further the state comprehensive plan and implement and accurately reflect the goals and policies of the state comprehensive plan."

Although Florida has several coastal regulatory programs, the Florida Environmental Land and Water Management Act of 1972 (FLWMA) has gained the most national attention. The FLWMA utilizes two techniques for increased state participation in land regulation: (1) "Areas of Critical State Concern" (critical areas) and (2) "Development of Regional Impact" (DRI). The fact that some geographic areas are so sensitive, by their nature and characteristics, that such development in the area is likely to have substantial extraterritorial effects wherever they are undertaken, forms the premise of the critical areas process.

The critical areas process works as follows: the Administration Commission (governor and cabinet) designates a discrete geographical area; specifies standards with which each affected local government's land development regulations must comply; and adopts, if local government fails to submit adequate regulations, suitable land development regulations to be administered by local authorities. The 1979 amendments in

85. For a brief history of the state comprehensive planning process, see Florida CLM, supra note 69, at 314-19. See also 1984 State and Regional Planning Act, 1984 Fla. Sess. Law Serv. ch. 84-257.
86. 1984 State and Regional Planning Act, 1984 Fla. Sess. Law Serv. ch. 84-257.
87. Id.
88. Id.
89. Id.
90. See, e.g., THE USE OF LAND: A CITIZEN'S POLICY GUIDE TO URBAN GROWTH (W. Reilly ed. 1973) (the report of the Rockefeller sponsored Task Force on Land Use and Urban Growth, which concluded that the 1972 legislative package is "one of the strongest sets of land and water management laws yet to clear a state legislature." Id. at 39); T. PELHAM, supra note 71; J. DEGROVE, LAND, GROWTH & POLITICS 106-76 (1984).
93. 1979 Fla. Laws, ch. 79-73.
response to *Askew v. Cross Key Waterways*, also ensure strong legislative supervision: the administrative commissions rule designating the area must be submitted to the legislature for "review." Land development regulations adopted within the critical area become effective only upon such review. Even then, the area's designation faces a three-year "sunset" provision, further ensuring continued, close legislative scrutiny.

A developer proposing development within the critical area applies for a permit to the relevant local government, which conducts an initial hearing on the application and issues its development order, granting or denying the permit. The order is final unless appealed to the Florida Land and Water Adjudicatory Commission (also the governor and cabinet).

The 1979 amendments gave institutional status to an informal, cooperative process which the state land planning agency had utilized successfully during the previous five years. A Resource Planning and Management Committee (resource committee) must be appointed by the governor prior to recommending the designation of a critical area. The objective of the resource committee is to seek resolution, through voluntary and cooperative means, of the problems that may endanger the resources, facilities, and areas potentially subject to critical area designation. The 1984 legislation provides for better coordination between the resource committee and other state, regional, and local programs.

If the state subsequently undertakes formal designation of a critical area, the state land planning agency's recommendations to the governor and cabinet (administration commission) must include any report or recommendation of the resource committee. Later, when the legislature reviews the designation of a critical area, "the Legislature may consider, among other factors, whether a resource planning and management committee established a program."

Florida's Development of Regional Impact (DRI) process resembles the Environmental Impact Report (EIR) process under the California Environmental Quality Act. The DRI process has a stronger nexus, however, between its regional impact report and the ultimate regulatory

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94. 372 So.2d 913 (Fla. 1978).
decision to grant or deny a development application. Developers who undertake "any development which, because of its character, magnitude, or location, would have a substantial effect upon the health, safety, or welfare of citizens of more than one county" must apply to the relevant local government for a development permit. When the local government hears the application, it must consider the regional impact as reported by the regional planning agency and the consistency of the proposed development with any applicable state land development plan. The local government’s development order is final, unless the order is appealed to the state land and water adjudicatory commission.

The legislature has provided two principal means for determining whether a proposed development is DRI: (1) administratively-developed “standards and guidelines” that create presumptions of regional impact and (2) a process by which a doubtful developer can apply to the state land planning agency for a binding determination within the legislative definition. The legislature must “approve” revisions to the standards and guidelines.

The Courts Have Their Say

California courts have traditionally been solicitous of government’s efforts to regulate land use. As put by a leading commentator: “[t]he striking feature of California zoning law is that the courts in that state have quite consistently been far rougher on the property rights of developers than those in any other state.” Given this willingness to tolerate restrictions, the California coastal programs unsurprisingly have incurred virtually no state judicial hostility.

Many Florida judges may prove to have a quite different philosophy from that of most California judges. In Askew v. Cross Key Waterways, the first Land and Water Management Act case to reach the Florida Supreme Court, the court invalidated the Act’s delegation of power to the governor and cabinet for designating particular areas of critical state concern. The standards for exercise of the power were held inadequate and unconstitutional under the separation of powers section of the Florida Constitution. In reaching its decision, the court expressly refused to adopt

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101. Id. § 380.06(1).
102. Id. §§ 380.06(2)(a), 380.06(4)(a).
103. Id. § 380.06(2)(a).
105. See generally Calif. CLM, supra note 57.
106. 372 So.2d 913 (Fla. 1978).
a more liberal view of delegation applied at the federal level and by a substantial minority of state courts. It refused to apply standards virtually identical to those recommended by the American Law Institute for its similar process in the Model Land Development Code. The court also expressly rejected a theory of delegation espoused by leading administrative law scholars.

The major weakness of the Cross Key opinion is its failure to articulate all the policy reasons that undoubtedly supported the court’s judgment. Rather than carefully discussing all the competing values and arguments underlying the profound choice before the court, the decision was explained as one compelled by a unique, restrictive provision in the Florida

107. Two important exceptions to the United States Supreme Court’s tendency to uphold congressional delegations are A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935), and Panama Ref. Co. v. Ryan, 293 U.S. 388 (1935). For subsequent decisions upholding broad delegations, see Arizona v. California, 373 U.S. 546 (1963); Lichter v. United States, 334 U.S. 742 (1948); and Yakus v. United States, 321 U.S. 414 (1944). For three cases (out of “perhaps three hundred cases”) in which Davis believes “the whole policy of the government on the particular subject was made by the agency without guidance from Congress,” see K. Davis, Administrative Law Treatise, § 2.00, at 40 (Supp. 1970). See also W. Gellhorn & C. Byse, Administrative Law: Cases and Comments 71-84 (6th ed. 1974) (“the steady course of Supreme Court decisions since the Panama Refining and Schechter cases underscores the improbability that a federal statute regulating business practices and not affecting freedom of expression will be found defective on the ground that it violates the delegation doctrine.”

108. For recent state supreme court decisions that have adopted the position that procedural safeguards, including the formulation of subsidiary administrative standards, are more important than insisting on precise legislative standards, see, e.g., Boehl v. Sabre Jet Room, Inc., 349 P.2d 585 (Alaska 1960); Barry & Barry, Inc., v. State Dep’t. of Motor Vehicles, 81 Wash. 2d 155, 500 P.2d 540 (1972), appeal dismissed, 410 U.S. 977 (1973); Watchmaking Examining Bd. v. Husar, 49 Wis. 2d 526, 182 N.W.2d 257 (1971). See also Cross Key Waterways v. Askew, 372 So.2d 913 (Fla. 1978), and cases cited therein. Notwithstanding the liberalization of the doctrine in many state courts, it has retained considerable vitality in others. See generally F. Cooper, State Administrative Law (1965); Gellhorn & Byse, supra note 107 at 34; L. Jaffe, Judicial Control of Administrative Action 73-85 (abridged ed. 1965); Note, Safeguards, Standards, and Necessity: Permissible Parameters for Legislative Delegations in Iowa, Statutes Delegating Legislative Power Need Not Prescribe Standards 14 Stan. L. Rev. 372 (1962).


110. Professor Davis maintains that there should be a shift in emphasis from legislatively imposed standards for administrative action to procedural safeguards in the administrative process. He supports his rationale by citation to federal decisions as well as decisions from a minority of state court jurisdictions. His premises are that (1) strict adherence to the nondelegation doctrine would stultify the administrative process; (2) the doctrine, in fact, has been used as a label to invalidate legislation of which courts disapprove without any rational distinction between standards approved and those disapproved; and (3) the danger of arbitrary or capricious administrative action is best met through procedural due process safeguards in the administrative process. Although the Davis view is an entirely reasonable one as demonstrated by its adoption in the federal courts and a minority of state jurisdictions, nonetheless, it clearly has not been the view in Florida.

111. The author’s criticism of Cross Key Waterways is elaborated in Florida CLM, supra note 69, at 349-57.
Constitution. Although the court’s holding was unquestionably within its power, it acknowledged that similar language in other state constitutions had been interpreted differently.

The lower court’s opinion in Cross Key was much more candid in exposing that court’s philosophical preference. The judge explained:

[T]he Act . . . shifts ultimate regulatory authority from the county courthouse and city hall to the Capital. The Act thus touches sensibilities as old as the Revolution itself, because it affects the right of access to government—‘the right of the people effectively to instruct their representatives, and to petition for redress of grievances’—on which other cherished rights ultimately depend. The primacy of local government jurisdiction in land development regulation has traditionally been, in this country, a corollary of the people’s right of access to government. In a sense, therefore, the jurisdictional claim of local governments in these matters is based on historical preferences stronger than law.

Ironically, Florida’s critical area process and Article 7 of the ALI Code (on which Florida’s act was patterned) are excellent models for promoting the “primacy of local government jurisdiction in land development regulation.” During the 1970s, the Florida legislature undoubtedly sensed, even if Florida’s courts did not, that significant pressures were building to shift a significant degree of land planning and regulation to higher levels of government. Florida’s FLWMA is a sensible compromise between localism and centralism. It will be an unfortunate usurpation of legislative prerogative if the Florida judiciary utilizes the nondelegation

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112. FLA. CONST. art. II, § 3: “The powers of the state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein.”
114. 351 So.2d 1062, 1065 (Fla. App. 1977).
115. Id. The Commentary to the tentative draft of Article 7 of the ALI MODEL LAND DEVELOPMENT CODE, on which Florida’s Land and Water Management Act was patterned, explained that at least 90 percent of the land use decisions currently being made by local governments have no major effect on the state or national interest . . . The Reporters have tried, therefore, to balance the need for expanded state participation in the control of land use against a policy that this participation be directed toward only those decisions involving important state or regional interests, while retaining local control over the great majority of matters which are only of local concern.

MODEL LAND DEV. CODE at 5 (Tent. Draft no. 3, 1971). Dr. John DeGrove was chairman of the gubernatorial Task Force on Resource Management that produced and recommended enactment of what became Florida’s Land and Water Management Act. The author of this article was chairman of the Task Force’s land use subcommittee. Legislative history of the major consideration to the continuing primary role of local governments is recorded in DEGROVE, supra note 91, 106-16; FLORIDA CLM, supra note 69, at 335-39; and Finnell, Saving Paradise: The Florida Environmental Land and Water Management Act of 1972, 1973 Urb. L. ANN. 103 (“At least five major policies tended to be predominant during Task Force deliberations: (1) the land regulation power should remain as close to those affected as possible; (2) large, centralized bureaucracy, with its concomitant impersonality, should be avoided . . .” Id. at 114).
doctrine to substitute its policy preferences for those of the legislature. Several cases arising under the FLWMA reflect no perceptible judicial hostility. Indeed, the court’s opinion in General Development Corp. v. Division of State Planning\textsuperscript{116} is exemplary in requiring better administrative procedures and closer adherence to the legislative purposes of the Development of Regional Impact (DRI) process.

The 1981 decision in Graham v. Estuary Properties, Inc.\textsuperscript{117} may also signal a new sensitivity on the part of the Florida Supreme Court to legislative efforts to protect Florida’s natural resources. Estuary Properties was the first case to consider several complex issues that arise when coastal wetlands are regulated pursuant to the DRI process.\textsuperscript{118} The decision is particularly important because it embraces, as part of Florida’s “takings clause” jurisprudence, the rationale of the important Wisconsin Supreme Court decision in Just v. Marinette County.\textsuperscript{119} The Florida Supreme Court noted the relevance of the public trust doctrine\textsuperscript{120} and agreed with the Wisconsin court that “[a]n owner of land has no absolute and unlimited right to change the essential natural character of his land so as to use it for a purpose for which it was unsuited in its natural state and which injures the rights of others.”\textsuperscript{121}

**STRIKING THE PROPER BALANCE**

The environmental and energy crises of the 1970s have resulted in institutional reforms that may cause profound shifts in the balances of power among national, state, and local governments. Although Congress should not necessarily be constrained by the judicial policy preferences reflected in the supremacy and commerce clause cases discussed above, review of these judicially-derived criteria offers useful insights for evaluation of proper nation-state relationships in the field of coastal land management. A checklist should contain the following questions:

(a) Does the federal regulatory program operate in a field thought

\begin{itemize}
\item \textsuperscript{116} 353 So. 2d 1199 (Fla. Ct. App. 1977).
\item \textsuperscript{117} 399 So. 2d 1374 (Fla. 1981), cert denied, 454 U.S. 1083 (1981).
\item \textsuperscript{118} Other issues the Estuary Properties court decided were: (1) the Florida Land and Water Management Act “requires a balancing of the interests of the state in protecting the health, safety, and welfare of the public against the constitutionally protected private property interests of the landowner,” Id. at 1377; (2) the burdens of proof, Id. at 1378-79; and (3) procedural requirements concerning changes in the development order which would make it possible for Estuary to receive a permit, Id. at 1379-80.
\item \textsuperscript{119} 56 Wis. 2d 7, 201 N.W.2d 871 (1972).
\item \textsuperscript{121} 399 So.2d at 1382 (citing Just v. Marinette County, 56 Wis. 2d 7, 17, 201 N.W.2d 761, 768 (1972)).
\end{itemize}
traditionally to be the regulatory responsibility of state and local governments?

(b) If so, have the proponents of the federal program rebutted the presumption that the activity or area regulated should remain exclusively under state and local regulation?

(c) Does the activity or area regulated, by its nature, character, location, or magnitude require uniform national regulation?

(d) Does the activity or area concerned require that the federal government regulate because of the inability or unwillingness of the state political processes to consider extrastate effects? Will affected citizens of the United States be unfairly represented by relying solely on state and local political and legal processes?

(e) Assuming federal regulation is needed, should it be exclusive or concurrent with state and local programs?

(1) Would a state program in the same field "stand as an obstacle to the accomplishment and the execution of the full purpose and objectives"\(^\text{122}\) of an important congressionally-enacted program?

(2) Is there an inevitable collision between the two schemes of regulation?

(3) Does the subject demand exclusive federal regulation in order to achieve uniformity necessary to national interests?\(^\text{123}\)

(4) Would state regulation of the subject unreasonably burden interstate commerce? Even if the subject were a legitimate local public interest, is it likely that the burden imposed on interstate commerce would be excessive in relation to the local benefits?

(5) Assuming exclusive federal jurisdiction is not required, is there need for a dual state-federal permit program, or could the national interest be served as well by state or local regulation subject to compliance with federal standards?

There are many reasons, of course, why Congress should be cautious in deciding upon an appropriate federal role in coastal land management. One reason relates to the federal judiciary's reluctance to be active in zoning and other land use disputes.\(^\text{124}\) Most land use decisions in the coastal zone will have significant environmental, social, and economic consequences affecting citizens from all socioeconomic groups located over wide geographical areas. The courts are properly reluctant to substitute their judgments for those of policymakers in such a policy-laden field.\(^\text{125}\) This judicial reluctance carries over even into quasi-judicial mat-

\(^{122}\) Hines v. Davidowitz, 312 U.S. 52, 67 (1941).


\(^{124}\) See, e.g., Construction Indus. Ass'n v. City of Petaluma, 522 F.2d 897 (9th Cir. 1975), cert denied, 424 U.S. 934 (1976).

\(^{125}\) The courts' "legislative" categorization of many land use decisions (even small-tract rezonings), the "fairly debatable" rule, and the presumption of validity of legislative judgments are primary judicial techniques for deferring to legislative judgments. See, e.g., Village of Euclid v.
Thus, most impetus for experimentation and innovation in coastal land management techniques will come from the political and legislative processes.

Reliance on exclusive federal regulatory programs poses a danger because Congress is probably unable to carry the burden of experimentation, amendment, and interstitial development of coastal land management programs. The difference in local, regional, and state needs will be too great. As a practical matter, there could be difficulty in even getting congressional attention. Thus, preemptive federal programs ought to be exceptional. A healthy federal system requires that state and local governments have a major role in experimenting with innovative techniques for meeting public needs in the coastal zone. Regional diversities will more likely be reflected when regional political forces can be depended upon to review and correct such experimental legislation.

The field of coastal land management, in contrast with regulation of commercial watercourses or offshore areas, is still not well adapted to the homogenizing effects of federal uniformity. Institutional arrangements must be designed to meet the needs of the "public interest" at every level of government. They must also contain dependable mechanisms for continuing review and correction. These goals require a dynamic, ongoing legislative function at every level of government.

The California and Florida approaches are sound, even if implementation has often been sluggish and fine-tuning slow. Most large, diverse coastal states should design programs providing for the strongest feasible planning and regulatory role for local governments. More is at stake in coastal land management than the intelligent use of coastal resources. Accessibility and accountability of government to its citizens; promotion of the values of localism, voluntarism, and diversity; encouragement of private initiative and experimentation—these and other values are better promoted by keeping coastal land use decisionmaking at the lowest feasible level of government.

Clearly, some sensitive areas and major development activities require centralized regulation. It would be foolhardy, for example, to leave final decisions on the placement of major energy facilities, critical to the


Although a few state supreme courts have reconceptualized the small-tract rezoning, e.g., Snyder v. City of Lakewood, 189 Colo. 421, 542 P.2d 371 (Colo. 1975); City of Colorado Springs v. District Court, 184 Colo. 177, 519 P.2d 323 (Colo. 1974); Aldon v. Borough of Roseland, 42 N.J. Super. 495, 127 A.2d 190 (1956); Fasano v. Board of County Comm’rs, 264 Or. 524, 507 P.2d 23 (1973); other state supreme courts, e.g., Olley Valley Estates, Inc. v. Fussell, 232 Ga. 779, 208 S.E.2d 801 (1974), continue to follow the majority position that even a small-tract rezoning is a legislative function.

126. Id.
nation’s security, to the unfettered discretion of the states. It would be unwise to allow local governments the final word on how sensitive coastal marshes are used.

Congress should specify significant national interests and adopt regulatory technique that will ensure that national goals and objectives are met. The Coastal Zone Management Improvement Act of 1980 enumerates several national policies. States are expected, for example, to protect “natural resources, including wetlands, floodplains, estuaries, beaches, dunes, barrier islands, coral reefs, and fish and wildlife in their habitat...” States are expected to protect life and property endangered by “improper development in flood-prone, storm surge, geological hazard, and erosion-prone areas and in areas of subsidence and saltwater intrusion, and by the destruction of natural protective features such as beaches, dunes, wetlands, and barrier islands.”

These and other national policies and goals will not be achieved, however, if the task is left entirely to state and local governments. The nation’s vital wetlands, for instance, were dangerously threatened until the Army Corps of Engineers improved its wetlands protection programs under Section 10 of the Rivers and Harbors Act of 1899 and under Section 404 of the Clean Water Act. Hazardous development of barrier islands was exacerbated by federal policy until Congress, through the Coastal Barrier Resources Act and amendment to the national flood insurance program removed many of the subsidies and incentives that have encouraged such destructive development.

The national government must have the final word on placement of critical energy facilities and other projects having substantial effects upon national security. But these decisions should be made within an institutional context which ensures that the views of state and local governments will be heard and considered. The federal consistency clauses can work well in this respect. Congress, however, should modify the CZMA in response to the restrictive effects of the Supreme Court’s recent decision in *Secretary of the Interior v. California*. The CZMA requires that

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128. Id. at §3 (codified at 16 U.S.C. § 1452(2)(A) (1982)).
129. Id. at §3 (codified at 16 U.S.C. § 1451(2)(B) (1982)).
130. E.g., provisions relating to priority to coastal-dependent uses; siting of major facilities; location of new development in or adjacent to areas where such development already exists; public access to the coasts; redevelopment of deteriorating urban waterfronts and ports; management for living marine resources.
particular activities be consistent with approved state management programs, but reserves for the secretary of commerce the power to override a state's determination of inconsistency if the secretary finds that the activity is consistent with the objectives of the CZMA or is necessary in the interest of national security.\footnote{137}

The federal consistency clauses have not caused serious delays or significant impediments to federal licensing or development. California is a major site for potential consistency disputes; nevertheless, a Senate committee reported in 1980 that "[t]he record on OCS [outer continental shelf] consistency certification in California was scrutinized in the hearing and found to average 21 days."\footnote{138}

California has actively involved local governments in decisions on offshore development. A working group composed of coastal commission staff, Office of Planning and Research staff, and local government planners has sought "(1) [t]o plan for onshore impacts of offshore oil development; (2) to make the forthcoming EIS more thorough; and (3) to increase public awareness of OCVS development and encourage participation in the leasing decisionmaking process."\footnote{139} True, California's litigation may delay some exploration off the California coast. It is essential, however, to establish a decisionmaking process which responds to state and local governments valid concerns about the potential onshore effects of offshore oil exploration.\footnote{140}

**EPILOGUE: RECENT PROBLEMS AND PROSPECTS**

Two other matters invite comment. The first involves California local governments' relatively sluggish record in producing the required local coastal programs (LCPs). The second concerns whether the multi-level programs discussed in this paper will be adequately funded.

California's LCP certification process has been significantly slow. Certification was less than one-third complete by the July 1981 deadline; the coastal commission's chief planner "hoped" that by January 1983, 75 to 80 percent of the LCPs would be certified.\footnote{141} By August 1984, however, the process was still far from complete. Facially, this record is disappointing, and, concededly, this performance raises serious questions about the feasibility of state and local collaborative coastal programs. The statistics do not reflect, however, all of the progress that has occurred. The

\begin{itemize}
  \item \footnote{137}{16 U.S.C. § 1456(d) (1982).}
  \item \footnote{138}{S. Rep. No. 783, 96th Cong., 2d Sess. 10 (1980).}
  \item \footnote{139}{California Coastal Commission, Biennial Report 1979-80 23 (undated).}
  \item \footnote{140}{For a further discussion of Secretary of Interior v. California see also Wolf, Accommodating Tensions in the Coastal Zone: An Introduction and Overview, 25 NAT. RES. J. (1985).}
  \item \footnote{141}{Interview with Robert G. Brown, in San Francisco (May 18, 1981).}
\end{itemize}
program was innovative; there were virtually no models to emulate.\textsuperscript{142} Thus, much time was consumed in identifying important coastal issues and establishing procedures for hearing public views and reconciling conflicts.\textsuperscript{143} Local governments had experience only in adopting and formulating plans under the general planning laws. The California Coastal Act required that coastal land use plans and implementing ordinances meet new and precise legislative requirements.\textsuperscript{144}

Moreover, the educational results are encouraging. The certification process has sensitized local citizens to coastal management issues. Many local governments have improved their capacities to respond to coastal land management needs.\textsuperscript{145} State planners now are more attuned to the need for maximum cooperation and coordination with local planners and officials. This knowledge can soon be translated into more and better LCPs.

The California experience will be the nation’s best test of whether a strong local regulatory role will work because California local governments are regaining a strong voice in coastal land management. The six regional coastal commissions automatically terminated on June 30, 1981,\textsuperscript{146} resulting in a dramatic increase in the planning and regulatory burden on the state coastal commission. This fact and the general mood favoring less regulation led to amendments to the coastal act, for example, that local governments be allowed to assume permit responsibility as soon as their coastal land use plan (LUP) is approved. Normally the permit function is not transferred to the local governments until the LCP, including implementing ordinances, is approved.\textsuperscript{147}

An additional matter that deserves careful attention is whether the current political climate will produce adequate funding of multilevel programs. At the national level, for example, the CZMA grant-in-aid program has been significantly curtailed.\textsuperscript{148}

The CZMA program would seem entirely consistent with at least one

\textsuperscript{142} For a discussion of the then existing models, see F. BOSELLMAN & D. CALLIES, THE QUIET REVOLUTION IN LAND USE CONTROLS (1971). For Florida’s reason for choosing article 7 of the ALI MODEL LAND DEV. CODE (Tent. Draft No. 3, Apr. 1971) instead of an existing state model, see Florida CLM, supra note 69, at 335-39.


\textsuperscript{144} Id.

\textsuperscript{145} Based on interviews in California (May 18-30, 1981 & Sept. 19, 1983).


\textsuperscript{147} Id. §§ 30108.6, 30600(d).

\textsuperscript{148} For fiscal year 1982, the Carter Administration had proposed funding at the rate of $38 million for Section 306 grants and $30 million for the Coastal Energy Impact Program. The Reagan Administration proposed zero budgets for both categories. In conference committee, the congressional compromise was $33 million for Section 306 and $7 million for CEIP. Interview with James Murley, Office of Coastal Zone Management, in Wash., D.C. (July 22, 1981).
of the major premises of President Reagan's policies: that "our American brand of federalism must be substantially modified because state and local governments are inherently more equitable and efficient in their distribution of public resources." The program ran afoul, however, of another of the Reagan premises: that "the primary villain in explaining inflation is deficit federal spending." Hence the President proposed, as part of a substantial reduction of funding for the National Oceanic and Atmospheric Administration, termination of the Coastal Energy Impact Program (CEIP) and withdrawal of all federal grants to support state management programs. Eighty percent of the support of California's LCP-certification process has come from federal funds.

California and Florida have had difficulties in implementing their coastal land control systems. There is little reason, however, to assume that a more centralized structure would have accomplished the same tasks more effectively. Indeed, there is some evidence that the California Coastal Commission has not performed well when requested to prepare an LCP for a local government. If a federal agency were assigned to do the fine-scale planning required for effective coastal land management, the probability of failure would seem even greater.

Strong reliance on local government is not only sound public policy but is virtually compelled by reasons of administrative feasibility. Land use decisions require close scrutiny of conflicting environmental, social, and economic values. Local governments should have a major voice—although often not the final voice—in determining how these conflicts are resolved.

State and local governments that resist the enactment and implementation of concurrent and cooperative regulatory programs are probably doing themselves and their constituencies serious disservice. There may be short-term political advantage in decrying state and federal intervention, but that is not the kind of political statesmanship required if coastal lands are to be managed in a sensible way. The ultimate question for state and local governments is not whether they can retain most of their


150. Id.

151. Id. at 5.


153. E.g. interview with Arnold S. Herskovic, senior planner, City of Eureka, California, in Eureka (May 11, 1981); and inferences drawn from interview with Bob Lagle, Executive Director, North Central Coast Regional Commission, in San Rafael, Cal. (May 26, 1981).
regulatory authority in the coastal zone. Rather it is whether they can keep any at all.

Congress should continue to fund the federal coastal zone program. State coastal zone programs are still in their infancy and will require federal support until they are more firmly established. If the state programs work well, it will be easier to keep federal programs to a minimum. The federal regulatory role can then be restricted to those issues such as wetlands protection, or placement of critical energy facilities projects, in which the states have shown an inability or unwillingness to promote important national objectives.

GARCIA V. SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY\textsuperscript{154}

On February 19, 1985, the U.S. Supreme Court expressly overruled \textit{National League of Cities v. Usery}.\textsuperscript{155} The Court concluded that "the attempt to draw the boundaries of state regulatory immunity in terms of 'traditional government function' is not only unworkable but is inconsistent with established principles of federalism and, indeed, with those very federalism principles on which \textit{National League of Cities} purported to rest."\textsuperscript{156}

Justice Blackmun, writing for the five-person majority, emphasized that "the principal and basic limit on the federal commerce power is that inherent in all congressional action—the built-in restraints that our system provides through state participation in federal governmental action."\textsuperscript{157} The four dissenting justices deplored the "emasculating of the powers of the States that can result from the Court's decision."\textsuperscript{158} Justice Rehnquist, with surprising candor, predicted that a limiting principle such as \textit{National League of Cities} will "in time again command the support of a majority of this Court."\textsuperscript{159}

A major premise of this article is that Congress can, if it chooses, totally displace state and local governments in the management of critical resources and activities in the coastal zone; the principal checks on national overreaching are the political checks inherent in the structure of

\begin{itemize}
  \item \textsuperscript{154} 53 U.S.L.W. 4135 (U.S. Feb. 19, 1985).
  \item \textsuperscript{155} Id.
  \item \textsuperscript{156} Id.
  \item \textsuperscript{157} Id.
  \item \textsuperscript{158} Id. at D-13 (Powell, J., dissenting). Justice Powell's dissenting opinion was joined by Chief Justice Burger and Justices Rehnquist and O'Connor.
  \item \textsuperscript{159} Id. at D-16 (Rehnquist, J., dissenting). Justice O'Connor's separate dissenting opinion, joined by Justices Powell and Rehnquist, predicted similarly: "I would not shirk the duty acknowledged by \textit{National League of Cities} and its progeny, and I share JUSTICE REHNQUIST'S belief that this Court will in time again assume its constitutional responsibility." Id. at D-18.
\end{itemize}
the Constitution.\footnote{See supra notes, 9, 11-19, and accompanying text.} This premise was defensible during the nine-year National League of Cities era; it seems virtually unassailable in the post Garcia v. San Antonio Metropolitan Transit Authority era.\footnote{Presumably, all the justices would support this statement from the majority opinion: “Of course we continue to recognize that the States occupy a special and specific position in our constitutional system and that the scope of Congress’ authority under the Commerce Clause must reflect that position.” 53 U.S.L.W. 4135 (U.S. Feb. 19, 1985). The dispute, of course, is whether “the internal safeguards of the political process,” id., are adequate or whether a limiting principle such as National League of Cities is required. The four dissenting justices predict that National League will yet be resurrected.}