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THE COMPACT CLAUSE AND TRANSBOUNDARY PROBLEMS: "A FEDERAL REMEDY FOR THE DISEASE MOST INCIDENT TO A FEDERAL GOVERNMENT"¹

By
DALE D. GOBLE*

There where it is we do not need the wall:
He is all pine and I am apple orchard.
My apple trees will never get across
And eat the cones under his pines, I tell him.
He only says, "Good fences make good neighbors."

—Robert Frost²

The political and constitutional relationship that is known as "federalism" creates boundaries that often do not correspond to resources. The anadromous salmon and steelhead of the Columbia River Basin, for example, cross several jurisdictional boundaries during their life cycle. Jurisdictional boundaries frequently contribute to poor resource planning because some actors are excluded.

One traditional response to such transboundary resource difficulties has been to nationalize the problem, thus creating a forum in which all of the actors may participate. Nationalization, however, may be overinclusive when the problem is regional. An alternative that is potentially more sensitive to local concerns is found in the compact clause of the Constitution. This clause allows states and the national government to reallocate authority to

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1. With apologies to Publius, who argued in *The Federalist* No. 10 that a geographically extensive republic would reduce the likelihood that any faction would be able to obtain a majority and thus was "a Republican remedy for the diseases most incident to Republican Government." *THE FEDERALIST* No. 10, at 65 (J. Madison) (J. Cooke ed. 1961) [all subsequent citations to specific pages will be to this edition].

2. R. Frost, *Mending Wall*, in *THE POETRY OF ROBERT FROST* 33 (E. Lathem ed. 1969).

address regional issues.

Two recent federal statutes have adopted the compact clause mechanism in response to Pacific Northwest resource allocation problems. This Article examines the Pacific Northwest Electric Power Planning and Conservation Act and the Columbia River Gorge National Scenic Area Act as examples of a regional response to transboundary resource problems.

I. INTRODUCTION

Fences may indeed make good neighbors, but the limitation of responsibility that a fence creates can produce a myopia. This shortsightedness often contributes to poor resource decision making because our fences seldom correspond to natural divisions.³ Air, water, and wildlife cross our artificial boundaries in response to gravity, wind, rain, or biology. The intricate jurisdictional boundaries that fence the Columbia River Basin, for example, are a major cause of the decimation of the River's anadromous fish.⁴ When concern ends at the nearest fence, the connectedness of things is lost; lines on paper become walls and decisions lack vision.⁵ Federalism, with its symbolic fences, encourages such trans-

3. Cf. Smith, *What are the Metes and Bounds of a Wave*, 4 OCEAN DEV. & INT'L L. 369 (1977) (arguing against the extension of "land-oriented system[s]" to a "fluid medium").

4. During its life, a spring chinook salmon spawned in the Salmon River of Idaho will be subject to at least seventeen distinct jurisdictions. See Goble, *Introduction to the Symposium on Legal Structures for Managing the Pacific Northwest Salmon and Steelhead: The Biological and Historical Context*, 22 IDAHO L. REV. 417, 419 n.5 (1986). The result has been conflict and the near-loss of a seemingly inexhaustible resource. See generally Bodi, *Protecting Columbia River Salmon under the Endangered Species Act*, 10 ENVTL. L. 349 (1980); Wilkinson & Conner, *The Law of the Pacific Salmon Fishery: Conservation and Allocation of a Transboundary Common Property Resource*, 32 U. KAN. L. REV. 17 (1983).

5. As George Coggins pithily put it: "Grizzly bears don't stop at customs." Coggins, *Grizzly Bears Don't Stop at Customs: A Preface to Transboundary Problems in Natural Resources Law*, 32 U. KAN. L. REV. 1 (1983). See generally *Symposium on Transboundary Problems in Natural Resources Law*, *id.* Our symbolic fences create problems even with relatively stationary resources. A decision by the federal government to sell coal leases in the face of state opposition is but another example of boundaries contributing to resource conflicts. See generally Babbitt, *Federalism and the Environment: An Intergovernmental Perspective of the Sagebrush Rebellion*, 12 ENVTL. L. 847 (1982); Wilkinson, *Cross-Jurisdictional Conflicts: An Analysis of Legitimate State Interests on Federal and Indian Lands*, 2 UCLA J. ENVTL. L. & POL'Y 145 (1982).

boundary problems. Indeed, the myopia produced by our jurisdictional fences is "the disease most incident to federalism."

Two symptoms of this disease are particularly common in resource decision making.⁶ The first is the spillover effect. Because of their geographically limited political responsibility, states are unlikely to restrict the conduct of their citizens to benefit the citizens of another state. Out-of-state individuals cannot make their preferences known through the local political market. Oregon and Washington, for example, have no incentive to limit salmon fishing in the Columbia River so that fishers in Idaho can harvest part of the run because Idaho fishers do not vote in Oregon or Washington.

The second symptom also has an economic analogue: the Tragedy of the Commons.⁷ Local decision making encourages each state to avoid actions that might create competitive disadvantages. Oregon and Washington have no incentive to limit the salmon fishing of their citizens unless the other state also does, because one state's action would merely leave more salmon for the other state's fishers.

A principal response to these symptoms of myopia is to remove the fences by nationalizing the transboundary problem: uniform national standards can reduce spillovers and blunt interstate competition in lax enforcement.⁸ The national perspective is an integrative force that can internalize the externalities and provide uniform regulation for the commons; a geographically larger group of individuals can make their preferences known in the

6. See, e.g., Leman & Nelson, *The Rise of Managerial Federalism: An Assessment of Benefits and Costs*, 12 ENVTL. L. 981, 998-1000 (1982); Stewart, *Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy*, 86 YALE L.J. 1196, 1211-12, 1215-16 (1977).

7. Each rancher has an incentive to put another cow on the open range because the benefit of the cow accrues to the rancher while the disadvantage is shared by all grazers; besides, the grass will otherwise be eaten by someone else's cow. The result, of course, is that the range is destroyed and the cows starve. The classic statement of the theory is in Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243 (1968). I have elsewhere argued that the problem would more accurately be labeled (another) Tragedy of the Market. See Goble, *supra* note 4, at 418 n.4.

8. But see Squillace, *Cooperative Federalism under the Surface Mining Control and Reclamation Act: Is This Any Way to Run a Government?*, 87 W. VA. L. REV. 687 (1985).

more encompassing national political marketplace.

Although nationalization has been the most common response, it has its limits; not all transboundary problems are of a national size.⁹ The difficulties facing the Columbia River's salmon and steelhead, for example, are largely regional, traceable primarily to the unique degree of hydroelectric development in the Basin.¹⁰ The problems on the Columbia differ thus from those on the Sacramento,¹¹ which differ in turn from the problems on the Klamath.¹² In the face of such diversity, a uniform federal rule would necessarily be a very blunt instrument. At the same time, however, these river systems involve more than a single sovereign, and the resulting jurisdictional fences are part of the problem. A regional remedy for myopia is needed, and the Constitution offers one—the interstate compact clause.¹³

The compact clause provides a formal mechanism for states to remove the fences between themselves and create an area of interstate uniformity that reduces the jurisdictional component of a transboundary problem. A compact creates this area of uni-

9. It should also be noted that nationalization does not reach the international transboundary problems. Chinook salmon from Idaho's Salmon River, for example, must pass through Canadian territorial waters on their return trip from their feeding grounds in the Gulf of Alaska and elude Canadian fishers. The same disincentives to conserve resources are also applicable to the fences between Canada and the United States. See Goble, *supra* note 4, at 459-61; Jensen, *The United States-Canada Pacific Salmon Interception Treaty: An Historical and Legal Overview*, 16 ENVTL. L. 363 (1986).

10. See generally Blumm, *Hydropower vs. Salmon: The Struggle of the Pacific Northwest's Anadromous Fish Resources for a Peaceful Coexistence with the Federal Columbia River Power System*, 11 ENVTL. L. 211, 220-22 (1981); Goble, *supra* note 4, at 431-41.

11. The National Marine Fisheries Service recently considered listing the Sacramento River Basin's winter-run chinook population as an endangered species. The primary cause of the run's decline was an irrigation diversion dam with insufficient fish-passage facilities that prevented some of the run from reaching suitable spawning habitat above the diversion dam. See Notice on Winter Run Chinook Salmon, 52 Fed. Reg. 6,041 (1987).

12. The Klamath runs are allegedly threatened by timber harvesting and road building activities which would increase sedimentation in spawning areas. See Northwest Indian Cemetery Protective Ass'n v. Peterson, 565 F. Supp. 586 (N.D. Cal. 1983), *aff'd in part, vacated in part*, 764 F.2d 581 (9th Cir. 1985), *on reh'g*, 796 F.2d 688 (9th Cir. 1986), *cert. granted* 107 S. Ct. 1971 (1986).

13. The clause provides: "No State shall, without the Consent of Congress, . . . enter into any Agreement or Compact with another State." U.S. CONST. art. I, § 10, cl. 3.

formity in two ways. First, the process of political adjustment required to negotiate a compact allows the parties to specify decision making procedures and standards; in effect, to adopt a uniform law applicable to the particular problem. Oregon and Washington, for example, have established uniform regulations for harvesting the salmon runs in the Columbia Basin through the Columbia River Fish Compact.¹⁴ In addition, the formalization of the compact ensures that these standards and procedures will be uniformly interpreted: "[C]ongressional consent transforms an interstate compact . . . into a law of the United States" and interpretation of its terms is, therefore, a federal question for the federal courts.¹⁵ An interstate compact thus creates interstate

14. Act of Apr. 8, 1918, Pub. L. No. 65-123, 40 Stat. 515. This compact also highlights the two principal shortcomings of resolving transboundary resource problems through interstate compacts. First, they require a symmetry of interests among the compacting states that may not always be present. Since compacts must be negotiated, a state creating spillovers will often have little incentive to agree to restrict its flexibility. The history of the Columbia River Fish Compact is illustrative of the problem. Under the terms of their admission acts, Oregon and Washington have concurrent jurisdiction over the Columbia River where it forms their common boundary. A 1909 Supreme Court decision reversing an Oregon conviction of two Washington residents for violations of the more restrictive Oregon fisheries laws provided additional incentives for joint regulation of the fishery in the River because neither state could effectively regulate without the concurrence of the other. The two states negotiated a compact in 1915; Congress approved it in 1918. See *Nielsen v. Oregon*, 212 U.S. 315 (1909); Wollenberg, *The Columbia River Fish Compact*, 18 OR. L. REV. 88, 92-97 (1939). Idaho's frequent request for admission to the compact, on the other hand, has been consistently rejected by the downstream states. Under the compact, Oregon and Washington were able to allocate the fish that spawn in Idaho without Idaho's participation. There is little incentive to alter the system because the effects are asymmetrical. See generally *Idaho ex rel. Evans v. Oregon*, 462 U.S. 1017, 1022 (1983); Goble, *supra* note 4, at 464-66.

The second limitation is the time required. One review found that water resources control compacts require an average of eight years to negotiate, with another five years needed for congressional approval. *Interstate Agreements for Air Pollution Control*, 1968 WASH. U.L.Q. 260, 264.

15. *Cuyler v. Adams*, 449 U.S. 433, 438 (1981); *West Virginia ex rel. Dyer v. Sims*, 341 U.S. 22 (1951). The uneven development of this conclusion is traced in Goble, *The Council and the Constitution: An Article on the Constitutionality of the Northwest Power Planning Council*, 1 J. ENVTL. L. & LITIGATION 11, 51 n.164 (1986). A compact thus overcomes a major limitation of less formal methods of interstate cooperation, the lack of binding dispute resolution.

The fact that interpretation of the terms of the compact is a federal question does not transform the compact agency into a national instrumentality. The belief that all agencies exercising political power must be classifiable as either state or

consistency through an almost-constitutional redistribution of political power among the compacting parties.¹⁶

In many situations such state-to-state political adjustments will provide the needed degree of uniformity; the compact agency can address the resource problems that the compact members individually could not.¹⁷ In some situations, however, interstate consistency is insufficient because the national government also has a stake in the problem. Many of the problems facing the Columbia's salmon runs, for example, are traceable to the Basin's federal hydroelectric projects. Restoring the runs therefore requires a more complex accommodation of governmental interests. In some cases, Congress has required a federal representative to be included on the compact agency to ensure that the national interest is considered in the agency's decision making;¹⁸ in others, Congress has provided a limited waiver of federal supremacy so that the agency can effect the needed uniformity. In both cases, the goal has been to limit the consequences of fences on decision making by integrating the relevant interests.

Two federal resource-management statutes addressing trans-boundary resources in the Pacific Northwest are examples of such federal-state compacts. The first, the Pacific Northwest Electric

national lay at the root of the challenge to the constitutionality of the Northwest Power Planning Council. A compact agency, however, does not fit the traditional binary division of political power because it has both national and state attributes. *E.g.*, *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391, 399 (1979). This neither-state-nor-national character provides the constitutional flexibility to create novel political institutions to address more-than-state-but-less-than-national problems.

16. *E.g.*, *West Virginia ex rel. Dyer v. Sims*, 341 U.S. 22 (1951). Although it limits state discretion, a compact does not reduce congressional power, "[o]therwise Congress and two States would possess the power to modify and alter the Constitution itself." *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421, 433 (1856).

17. This potential to enhance the power of individual states vis-à-vis the national government is the basis of the requirement of congressional approval. *See United States Steel Corp. v. Multistate Tax Comm'n*, 434 U.S. 452, 471 (1978); *Virginia v. Tennessee*, 148 U.S. 503, 518 (1893).

18. *See, e.g.*, *Delaware River Basin Compact*, §§ 2.1, .2, .5, 5.4, 75 Stat. 691 (1961); *see generally* Grad, *Federal-State Compact: A New Experiment in Co-Operative Federalism*, 63 COLUM. L. REV. 825 (1963). *But see* McKinley, *The Management of Water Resources under the American Federal System*, in *FEDERALISM* 328, 334-37 (A. Macmahon ed. 1955).

Power Planning and Conservation Act [hereinafter PNEPPCA],¹⁹ authorized a regional, state-appointed agency to oversee the management of the Federal Columbia River Power System.²⁰ The second, the Columbia River Gorge National Scenic Area Act (Gorge Act),²¹ established a bi-state agency to develop a comprehensive land use plan to protect the scenic and recreational values in the Columbia River Gorge.²² Both statutes set out the terms of an interstate agreement, providing detailed decision making procedures and standards for the compact agency; both statutes explicitly confer jurisdiction on the federal courts to resolve disputes concerning compact provisions. In addition, because the federal government is a major property owner of the resources involved, Congress has provided a limited waiver of federal supremacy. Thus, both statutes provide congressional approval of regional regulation of resource problems caused in part by the jurisdictional fences that are the defining characteristic of the American federal system. Such agreements among the states and the federal government are "a Federal remedy for the diseases most incident to a Federal Government."

This federal solution, however, has been challenged as contrary to the federal structure. The executive branch of the national government has questioned the constitutionality of the limited congressional waiver of federal supremacy, arguing that it impermissibly subjects federal officers to the control of state appointees. The validity of this challenge is the subject of this brief Article. A review of the two statutes and the waivers of supremacy that they contain will provide the necessary background to a discussion of the constitutional question.

19. Pacific Northwest Electric Power Planning and Conservation Act, 16 U.S.C. §§ 839-839h (1982) [hereinafter PNEPPCA].

20. PNEPPCA was enacted to prevent a pending regional battle over the allocation of inexpensive hydroelectricity generated by federally-owned dams on the Columbia River. See generally Balmer, *From Symbiosis to Synergy: A Case Study of Public and Private Power in the Pacific Northwest*, 13 ENVTL. L. 637 (1983); Blumm, *The Northwest's Hydroelectric Heritage: Prologue to the Pacific Northwest Electric Power Planning and Conservation Act*, 58 WASH. L. REV. 175 (1983); Goble, *supra* note 15, at 16-18.

21. Columbia River Gorge National Scenic Area Act, 16 U.S.C.A. §§ 544-544h (West Supp. 1987) [hereinafter Gorge Act].

22. See *id.* § 3, 16 U.S.C.A. § 544a (statement of purposes).

II. THE STATUTES: ADJUSTING THE STATE AND FEDERAL RULES

A. *The Pacific Northwest Electric Power Planning and Conservation Act*

The water which eventually becomes the Columbia River falls as rain and snow on seven states (Idaho, Montana, Nevada, Oregon, Utah, Wyoming, and Washington) and one foreign country (Canada). The major rivers which channel that water into the Columbia—the Snake, the Clearwater and the Salmon of Idaho; the Deschutes, the Willamette, and the John Day of Oregon; and the Yakima, the Spokane, and the Pend Oreille of Washington—share two relevant features. Each has been extensively dammed to generate hydroelectricity; there are now almost 130 hydroelectric or multipurpose dams in the Basin.²³ Each river also shares the Basin's almost-lost heritage as home to the world's largest salmon and steelhead runs. These two facts are related because the operation of the Basin's rivers to maximize electricity production was a principal cause of the decline of the runs.²⁴

The relationship between fish and power in the Columbia River Basin is a classical transboundary problem requiring coordination of the four principal states (Idaho, Montana, Oregon, and Washington) as well as the federal government. The necessary coordination was formalized when the states and the federal government reached the agreement contained in the Northwest Power Act (PNEPPCA).²⁵

PNEPPCA has three primary components. First, it reallocated the low-cost hydroelectricity generated by the federally-owned dams on the Columbia River.²⁶ Second, it increased the

23. Goble, *supra* note 4, at 431-32.

24. See Blumm, *supra* note 10, at 220-22; Goble, *supra* note 4, at 435-41.

25. Pacific Northwest Electric Power Planning and Conservation Act, 16 U.S.C. §§ 839-839h (1986) [hereinafter PNEPPCA].

26. Section 5 of the Act requires the BPA Administrator to supply electricity to customers who previously lacked a legal entitlement. Prior to PNEPPCA, BPA's obligation to provide electricity was restricted to the output of the Federal Columbia River Power System hydroelectric projects and the agency's interest in certain thermal plants. 16 U.S.C. § 832a (1982). Although the electricity produced by the Federal Columbia River Power System was legally subject to a preference clause, nonpreference customers had become dependent upon the federal electricity. In PNEPPCA, Congress recognized this dependence and sought to prevent the disruption that would occur when the surplus ended. It did so by establishing

authority of the Bonneville Power Administration (BPA) Administrator to acquire electricity.²⁷ This new authority, however, was restricted by the third major component of the Act, an interstate compact agency.²⁸ The Administrator's discretion was limited by the requirement that she act consistently with two plans developed by the compact agency.²⁹ PNEPPCA thus sought to prevent the region's threatened electricity shortages by increasing the Administrator's authority to acquire additional electricity and by reallocating the existing supplies of federally-owned hydroelectricity. In addition, Congress attempted to allay fears that the Administrator would become a regional "energy czar" by balancing the expanded federal role with an expanded state role.³⁰ Con-

minimum statutory entitlements for each class of BPA customers, including customers who previously lacked a legal entitlement. PNEPPCA § 5(g)(1). See generally Goble, *supra* note 15, at 19 n.28; Mellem, *Darkness to Dawn? Generating and Conserving Electricity in the Pacific Northwest: A Primer on the Northwest Power Act*, 58 WASH. L. REV. 245 (1983); Michie, *Impacts of the Pacific Northwest Electric Power Planning and Conservation Act on the Development of Energy Resources in the Pacific Northwest: An Analysis of the Resource Acquisition Priority Scheme*, 4 U. PUGET SOUND L. REV. 299 (1981).

27. Section 6 of the Act requires the Administrator to "acquire . . . sufficient [conserving and generating] resources . . . to meet his contractual obligations" incurred under § 5. PNEPPCA § 6(a)(2). The section provides the Administrator with several alternative methods to meet her new statutory responsibilities. See generally Goble, *supra* note 15, at 20 n.30.

28. The Council has eight members, two of whom are appointed by each of the four principal states: Idaho, Montana, Oregon and Washington. PNEPPCA § 4(a)(2).

29. The first is a twenty-year regional conservation and electric power plan (the Plan). *Id.* §§ 4(d)(1)-(e)(3). The Plan is to contain a schedule for implementing conservation measures and developing additional generating capacity to meet regional electric loads as well as building conservation standards. *Id.* § 4(e)(2). As one of the chief sponsors of the bill noted, "[t]he regional power plan, drafted by the regional council, will be the map of the region's future energy path." 126 CONG. REC. 27,819 (1980) (statement of Rep. Swift). The second planning document is "a program to protect, mitigate, and enhance fish and wildlife" resources and habitat (the Program). PNEPPCA § 4(h)(1)(A). The Program is in part intended to redress the historic imbalance between power and fish in the Basin. See generally Blumm, *supra* note 10; Blumm, *Promising a Process for Parity: The Pacific Northwest Electric Power Planning and Conservation Act and Anadromous Fish Protection*, 11 ENVTL. L. 497 (1981); Goble, *supra* note 4.

30. "The states feared that without a regional planning authority responsibility to the states, BPA's decisions on what new generating plants should be built would simply overwhelm the state planning and siting process." Hemmingway, *The Northwest Power Planning Council: Its Origins and Future Role*, 13 ENVTL. L. 673, 679 (1983); see also H.R. REP. No. 976, 96th Cong., 2d Sess., pt. 2, at 78,

gress therefore reduced the Administrator's discretion by waiving federal supremacy to require her to act "in a manner consistent with" the Council's plans.³¹ This restriction is the basis of the challenge to the constitutionality of the Act and the Council.³²

B. *The Columbia River Gorge National Scenic Area Act*

Where the Snake River joins the Columbia, the Columbia turns west, becoming the border between Oregon and Washington. Almost 200 miles downstream, the river meets the Cascade Mountains where it has carved a gorge, a place of special beauty. But, like many special places, the Gorge is threatened by its uniqueness. The threats are compounded by the division of governmental power among three sovereigns: the north side of the Gorge is in Washington, the south in Oregon, and much of the land remains in federal ownership, managed primarily by the Forest Service. Protection thus requires the cooperation of the three sovereigns.³³

The needed cooperation was given institutional structure and formal procedures in the Columbia River Gorge National Scenic Area Act.³⁴ The structure consists of an interstate compact agency, the Columbia River Gorge Commission,³⁵ that is responsi-

reprinted in 1980 U.S. CODE CONG. & ADMIN. NEWS 6023, 6069. Given the pivotal position of energy planning to state siting responsibilities, a state-appointed planning council was a necessary check on the Administrator's authority—lest she become a regional "energy czar." See, e.g., 126 CONG. REC. 27,818, 27,828 (1980) (statements of Rep. Swift); *id.* at 27,815 (statement of Rep. Dingell); *id.* at 27,812 (statement of Rep. Lujan).

31. PNEPPCA contains several provisions requiring BPA to use its statutory authority to protect fish and wildlife "in a manner consistent with" the Plan and the Program, PNEPPCA § 4(h)(10)(A), and requiring resource acquisition decisions to be consistent with the Plan. *Id.* § 4(d)(2); see also *id.* §§ 6(a)(1), (f)(1) (reiterating the general requirement that resources be acquired only when "consistent with the plan"). The consistency requirements are set out in detail in Goble, *supra* note 15, at 19-29.

32. See *infra* notes 71-75 and accompanying text.

33. As Representative Les AuCoin of Oregon commented, "Without a bi-State commission with a Federal official involved, all the interests involved are not going to be fully represented." 132 CONG. REC. H11,121 (daily ed. Oct. 16, 1986) (statement of Rep. AuCoin).

34. Gorge Act, 16 U.S.C.A. §§ 544-555h (West Supp. 1987).

35. The Gorge Act gives congressional consent to the formation of a commission to consist of twelve state members and an *ex officio* representative of the Secretary of Agriculture. *Id.* § 5(a), 16 U.S.C.A. § 544c(a).

ble with the Secretary of Agriculture for developing a management plan for lands within the Gorge.³⁶ To implement this joint planning responsibility, the Gorge Act establishes standards and procedures; the process thus instituted is to culminate in a Scenic Area Management Plan, incorporating land use designations applicable to both federal and nonfederal lands.³⁷ Subsequent land use decisions within the Scenic Area are required to be consistent with the Management Plan.³⁸

Until the Management Plan has been completed, the Secretary of Agriculture may initiate proceedings to condemn private land "which is being used or threatened to be used in a manner inconsistent with the purposes for which the scenic area was established."³⁹ This condemnation authority, however, is subject to the veto of the Gorge Commission.⁴⁰ This limited waiver of federal supremacy is the basis of the executive branch's attack on the constitutionality of the Act.⁴¹

C. Some Preliminary Conclusions

Both statutes share several common features. These can be traced to the fact that both statutes involve resource problems where the state and federal governments have some governmental authority over the resource but each government lacks sufficient independent authority to address the entire problem. Both statutes, in other words, embody an adjustment and redistribution of authority among the governments involved in an attempt to re-

36. The Gorge Act applies to all federal and nonfederal lands within the Scenic Area except that within thirteen designated "urban areas." *Id.* § 4(e), 16 U.S.C.A. § 544b(e).

37. The land use designations and management directions applicable to the federal lands within the Gorge are adopted by the Secretary of Agriculture and incorporated "without change" into the Plan. *Id.* § 6(c)(4), 16 U.S.C.A. § 544d(c)(4). For nonfederal lands, see generally *id.* § 6, 16 U.S.C.A. § 544d; see also *id.* § 8(f), 16 U.S.C.A. § 544f(f).

38. *Id.* § 7(b), 16 U.S.C.A. § 544e(b).

39. *Id.* § 10(b)(1), 16 U.S.C.A. § 544h(b)(1). This authority is statutorily limited by the additional requirement that, except for lands used to mine sand, gravel, or crushed rock, or to dispose of garbage, the land use must have changed after the effective date of the Act. *Id.*

40. The Commission may by a supermajority override the Secretary's decision to condemn lands. *Id.* If the Commission is not in existence, the governor of the state in which the land is located may exercise the veto. *Id.*

41. See *infra* notes 77-84 and accompanying text.

duce the jurisdictional component of the problem. By removing the jurisdictional fences, the problem can be addressed more comprehensively.

To remove this federalism component of the resource problem, both statutes establish an interstate compact agency with planning responsibilities. In addition, because the federal government is a major resource owner, Congress has included the national interest in the adjustment of governmental powers by enacting a restricted waiver of federal supremacy. Both statutes thus embody a complex balancing of the interests of the governments involved in an attempt to fashion a remedy to the myopia inherent in federalism.

The question is whether this remedy is constitutionally permissible.

III. THE CONSTITUTIONAL CHALLENGE

The executive branch of the national government has questioned the constitutionality of both statutes, contending that state governments cannot control decisions of the national government.⁴² In his statement prior to signing the Gorge Bill, for example, President Reagan said:

I have grave doubts as to the constitutionality of the provision in section 10, which would authorize the Governors of Washington and Oregon and the State-appointed Columbia River Gorge Commission to disapprove Federal condemnation actions. The Federal government may not constitutionally be bound by such State action taken pursuant to Federal law.⁴³

42. Both PNEPPCA and the Gorge Act concern subjects over which the federal government has jurisdiction under the property clause of the Constitution; that clause provides: "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." U.S. CONST. art. IV § 3 cl. 2. PNEPPCA is based upon federal ownership of the Columbia River dams and the electricity they generate. See *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 330-39 (1936). Similarly, the Gorge Act is predicated on federal ownership of the National Forest lands within the Gorge. See *Kleppe v. New Mexico*, 426 U.S. 529 (1976); *United States v. Grimaud*, 220 U.S. 506 (1911); *United States v. Gratiot*, 39 U.S. (14 Pet.) 526 (1840).

43. President's Statement upon Signing H.R. 5705 Into Law, 22 WEEKLY COMP. PRES. DOC. 1576 (Nov. 17, 1986). The President justified signing an unconstitutional bill by announcing his interpretation of the language:

The same argument was raised in the attack on the constitutionality of the Power Planning Council.⁴⁴

The challenge to the two statutes is predicated upon the contention that they exceed federalism limits. The executive branch argues that Congress (with the concurrence of the President)⁴⁵ has impermissibly sought to restructure the fundamental relationship between the national and state governments enunciated in the supremacy clause of the Constitution:⁴⁶ the states lack the

I am signing this bill with the understanding that State disapproval of a Federal condemnation action under this legislation will not operate as a veto, but will be merely advisory. Upon receipt of a State notice of disapproval, the Federal government will decide whether to proceed with its condemnation action.

Id. The language of § 10 is not, however, subject to the President's interpretation. *See infra* notes 82-84 and accompanying text.

The President's statement contains no analysis, only assertion. Attempts to obtain a more complete account of the executive branch's position have been unsuccessful. A Freedom of Information Act request for the documents was denied; a complaint is currently being drafted for filing in federal district court. There is a troubling irony in this situation: the President states that a statute is unconstitutional—for reasons that are too secret to be revealed.

44. Litigation attacking the regional conservation and power plan challenged the constitutionality of the Council. *See Seattle Master Builders Ass'n v. Pacific Northwest Elec. Power & Conservation Planning Council*, 786 F.2d 1359 (9th Cir. 1986), *cert. denied*, 107 S. Ct. 939 (1987). Among the arguments offered by petitioners was the contention that PNEPPCA violated federalism limitations by subjecting the decisions of a federal agency to a state-appointed body. Petitioners' Opening Brief at 53-55, *id.*; Petitioners' Reply Brief at 21-25, *id.* This argument appears to be the same as that suggested by President Reagan in his statement on signing the Gorge bill. *See generally infra* notes 71-84 and accompanying text.

45. There is, of course, an irony in allowing the executive branch to attack the constitutionality of a statute that became law only with the concurrence of the President. Furthermore, it effectively allows the President a power akin to the item veto since he is able to accept what he likes and litigate the rest. *See Miller & Bowman, Presidential Attacks on the Constitutionality of Federal Statutes: A New Separation of Powers Problem*, 40 OHIO ST. L.J. 51 (1979). This irony reaches levels of the absurd when practiced by an administration that so stridently advocates what it terms a "Jurisprudence of Original Intention." *See Meese, Speech to the American Bar Association, Washington, D.C. (July 9, 1986), reprinted as The Supreme Court of the United States: Bulwark of a Limited Constitution*, 27 S. TEX. L. REV. 455, 464 (1986). On the "Original Intention" as to the veto power, *see, e.g., THE FEDERALIST* No. 73 (A. Hamilton).

46. The clause provides that the "Constitution, and the laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; . . . any Thing in the Constitution or Laws of any State to the

power to control federal officers and activities.⁴⁷ States, in other words, may not restrict the discretion of a federal officer in managing federal property as long as Congress has delegated discretion to the officer.⁴⁸ The President's challenge raises the question of the constitutionally permissible relationship between state and national governments: does federalism limit the range of possible political adjustments?

A. *Federalism: The Spatial Division of Power*

"Federalism" is an attempt to create a constitutional structure which accommodates both diversity and nondiversity—the local and the national—through a spatial division of governmental power. In common with "confederalism," the term specifies that two governments exercise power over the same geographical territory; as distinguished from "confederalism," federalism specifies that the central or federal government acts directly upon the individuals within that territory rather than only upon the constituent governments.⁴⁹ Individuals, in other words, owe political loyalty to two sovereigns in a federal system.⁵⁰

Contrary notwithstanding." U.S. CONST. art. VI, cl. 2.

47. As Chief Justice Marshall commented, the prohibition is a corollary deduced from the supremacy clause. *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 426, 433 (1819).

48. The officer's discretion is limited by the statute under which the officer acts since it is Congress which has "Power to . . . make all needful Rules and Regulations respecting the . . . Property belonging to the United States." U.S. CONST. art. IV, § 3, cl. 2.

49. See Macmahon, *The Problems of Federalism: A Survey*, in FEDERALISM 3, 4-5 (A. Macmahon ed. 1955). The modern denotation of the term "federalism" is the result of the ratification debates over the United States Constitution. Prior to that debate, political discourse provided only alternative positions: national (consolidated) and federal. See THE FEDERALIST No. 39 (J. Madison). It was the rhetorical genius of the Federalists to seize the term, branding the Constitution's opponents Anti-Federalists when the latter were in fact the *real* federalists as that term had previously been understood. See generally G. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-87, at 524-32 (1969); Diamond, *The Federalist's View of Federalism*, in ESSAYS IN FEDERALISM 20 (1961).

50. This seeming anomaly was a stumbling block for participants in the ratification debates. In the Virginia Convention, William Grayson made the problem explicit:

How are two legislatures to coincide, with powers transcendent, supreme, and omnipotent? for such is the definition of a legislature. . . . I never heard of two supreme coordinate powers in one and the same country

This dual allegiance and dual authority has created continuing difficulties for those attempting to resolve claims of diversity and nondiversity.⁵¹ The traditional solution has been to assert that the Constitution established a set of functional boundaries corresponding to those powers granted to the national government; within the bounds marked out, each sovereign was supreme.⁵² As employed by the Supreme Court, this approach for-

before. I cannot conceive how it can happen. It surpasses every thing that I have read of concerning other governments, or that I can conceive by the utmost exertion of my faculties.

3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787, at 281 (J. Elliott ed. Philadelphia 1836) [hereinafter ELLIOTT'S DEBATES]; see also *id.* at 29 (statement of George Mason); The Address and Reasons of Dissent of the Minority of the Convention of Pennsylvania To Their Constituents (Dec. 18, 1787), reprinted in 3 THE COMPLETE ANTI-FEDERALIST 145, 155 (H. Storing ed. 1981); Letters of Agrippa No. 5 (Dec. 11, 1787), reprinted in 4 *id.* at 68, 79. Even some supporters of the Constitution had difficulty with the division. After becoming Vice President, John Adams wrote, "Our government is an attempt to divide a sovereignty; a fresh essay at *imperium in imperio*. It cannot, therefore, be expected to be very stable or very firm. It will prevent us for a time from drawing our swords upon each other, and when it will do that no longer, we must call a new Convention to reform it." Letter from John Adams to Richard Price (Apr. 19, 1790), reprinted in 9 THE WORKS OF JOHN ADAMS 564, 565 (C.F. Adams ed. 1854).

51. James Madison, in his letter to Thomas Jefferson providing a copy of the proposed Constitution, noted that one of the "great objects" was "to draw a line of demarkation [sic] which would give to the General Government every power requisite for general purposes, and leave to the States every power which might be most beneficially administered by them." This partitioning of powers "was perhaps of all, the most nice and difficult," and Madison feared that the powers of the national government were insufficient to the task. Letter from James Madison to Thomas Jefferson (Oct. 24, 1787), reprinted in 10 THE PAPERS OF JAMES MADISON 206, 207-09 (R. Rutland ed. 1977).

52. This argument was developed during the debates over the ratification of the Constitution in response to Anti-Federalist claims that the document was "calculated ultimately to make the states one consolidated government." Federal Farmer, Letter No. 1 (Oct. 8, 1787), reprinted in 2 THE COMPLETE ANTI-FEDERALIST 214, 228 (H. Storing ed. 1981). See also Brutus, Letter No. 1 (Oct. 18, 1787), reprinted in *id.* at 358, 364-65. In the Virginia ratifying convention, for example, Edmund Pendleton argued that

[t]he two governments act in different manners, and for different purposes—the general government in great national concerns, in which we are interested in common with other members of the Union; the state legislature in our mere local concerns. . . . Being for two different purposes, as long as they are limited to the different objects, they can no more clash than two parallel lines can meet.

mally resolved the dual sovereign problem and allowed the Court to avoid directly confronting the diversity-nondiversity question by focusing instead upon constitutionally established functional boundaries.

Unfortunately but understandably, the constitutional text fails to provide the boundaries this model requires.⁵³ Not only are there significant areas of concurrent power,⁵⁴ but consistent lines have also proven elusive even where there are nominal boundaries. The textbook example of this difficulty, of course, is the term "interstate commerce" and the Supreme Court's repeated attempts to formulate tests separating "commerce" from other "economic activity" and "interstate" from "intrastate."⁵⁵ Once eco-

3 ELLIOTT'S DEBATES, *supra* note 50, at 301 (statement of Edmund Pendleton); *see also* 2 *id.* at 385 (statement of Robert Livingston); 3 *id.* at 94, 381 (statements of J. Madison); 4 *id.* at 160 (statement of William Davie).

53. A conclusion that would not surprise Publius. *See* THE FEDERALIST NO. 37, at 234-35 (J. Madison). For earlier, similar sentiments, *see* 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 53 (M. Farrand ed. 1911) [hereinafter FEDERAL CONVENTION RECORDS] (statement of J. Madison); *id.* at 60 (statement of J. Madison).

54. The most apparent is the concurrent power of each government to tax individuals. U.S. CONST. art. I, § 8, cl. 1; § 9, cl. 4; amend. 16.

55. For example, in *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 189, 194, 196 (1824), Chief Justice Marshall proposed definitional boundaries: "Commerce . . . is intercourse." "[A]mong the several states . . . concerns more states than one." "[T]o regulate . . . is, to prescribe the rule by which commerce is to be governed." The attempt proved unavailing even for the Marshall Court. *E.g.*, *Willson v. Black Bird Creek Marsh Co.*, 27 U.S. (2 Pet.) 245 (1829) (commerce clause does not preclude state-authorized dam across navigable stream). Subsequent attempts to distinguish direct and indirect effects on commerce were similarly unsuccessful. *Compare* *Smith v. Alabama*, 124 U.S. 465 (1888) *with* *Seaboard Air Line Ry. v. Blackwell*, 244 U.S. 310 (1917). "[T]he history of judicial limitation of congressional power over commerce . . . has been more largely one of retreat than ultimate victory." *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 415 (1946). *Compare* *National League of Cities v. Usery*, 426 U.S. 833 (1976) *with* *Garcia v. San Antonio Metro. Transit Auth.*, 105 S. Ct. 1005 (1985); *compare* *Hammer v. Dagenhart*, 247 U.S. 251 (1918) *with* *United States v. Darby*, 312 U.S. 100 (1941); *compare* *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935) *with* *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937); *compare* *United States v. E.C. Knight Co.*, 156 U.S. 1 (1895) *with* *United States v. American Tobacco Co.*, 221 U.S. 1106 (1911). *See generally* O'Fallon, *The Commerce Clause: A Theoretical Comment*, 61 OR. L. REV. 395 (1981).

The commerce clause example can be easily reiterated. Thus, the property clause empowers Congress to "make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." U.S. CONST. art.

conomic reality supplanted the artificial, definitional approach, no principled line could be drawn between inter- and intrastate commerce and the attempt to fashion axiomatic constitutional theories to resolve the dual sovereignty dilemma collapsed.⁵⁶

Fortunately, the lack of a coherent theory causes no calamitous results. As the Court has increasingly acknowledged, politics works even in the absence of overarching constitutional theory. The Court's primary response to the collapse of its theoretical superstructure, therefore, has been an increasing reliance upon the political process to resolve competing diversity and nondiversity claims.⁵⁷ As the Court has recognized, this approach finds support in the structure of the Constitution, which gives the states a ma-

IV, § 3, cl. 2. The Court's decisions on the respective roles of state and federal governments over federal lands within a state provide a tale that mirrors its commerce clause cases. See *California Coastal Zone Comm'n v. Granite Rock Co.*, 107 S. Ct. 1419 (1987); *Kleppe v. New Mexico*, 426 U.S. 529 (1976); *Federal Power Comm'n v. Oregon*, 349 U.S. 435 (1955); *Omaechevarria v. Idaho*, 246 U.S. 343 (1918); *Utah Power & Light Co. v. United States*, 243 U.S. 389 (1917); *Fort Leavenworth R.R. v. Lowe*, 114 U.S. 525 (1885); *Pollard v. Hagan*, 44 U.S. (3 How.) 212 (1845); *United States v. Gratiot*, 39 U.S. (14 Pet.) 526 (1840). See generally *Goble, The Myth of the Classic Property Clause Doctrine*, 63 DEN. U.L. REV. 495, 508-11 (1986).

56. *E.g.*, *Wickard v. Filburn*, 317 U.S. 111 (1942).

57. The Court does directly confront the diversity/nondiversity issue in those contexts where state action is attacked as contrary to federal power. For example, in adjudicating dormant commerce clause cases, the Court explicitly balances the competing local and national interests:

Where the [state] statute regulates evenhandedly 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 would 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.

Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970) (citations omitted). See also *Commonwealth Edison v. Montana*, 453 U.S. 609 (1981). Less frequently, the Court relies upon diversity to exempt local activity from federal regulation which apparently imposed unity requirements. For example, in *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963), Florida avocado producers sought to enjoin the enforcement of a California statute that determined the maturity of avocados in a manner which prohibited the sale of some Florida avocados that were "mature" under federal regulations. The Court explicitly considered the local diversity claims in upholding that state statute. *Id.* at 148-49. In both types of cases, the political branches have the power to override the Court's decisions.

major role in the composition and selection of the officers of the federal government.⁵⁸ While reliance solely on political safeguards has its problems,⁵⁹ it does provide a more defensible basis from which to review federalism claims than did the theories which collapsed during the New Deal era.

An abstract invocation of "federalism" says only that a question of the relationship between nation and state is present; in itself, it provides no guidance on how to resolve that issue. Despite the failure to fashion a constitutional theory of federalism, one general principle is undoubted: actions of the federal government within the confines of its authority preclude inconsistent state actions. As a general matter, therefore, a state may not interfere with federal activities or property. This general rule is, however, subject to an exception that reflects the differing nature of federalism claims.

B. The Nature of Federalism Claims and the Authority of the Political Branches

Since the challenge to both statutes is based upon federalism, it is helpful to note the nature of such claims: the contention that a governmental action violates a federalism provision of the Constitution ultimately reduces to an assertion that the government which acted lacked the authority to do so, that it was the "wrong" government.⁶⁰ Federalism litigation falls into one of two general classes: it either questions the validity of federal action—contending that the disputed act does not fall within the scope of any power granted to the national government—or it de-

58. J. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS* 176-90 (1980); Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 *COLUM. L. REV.* 543, 546 (1954). See also *Garcia v. San Antonio Metro. Transit Auth.*, 105 S. Ct. 1005, 1017-20 (1985); *THE FEDERALIST* No. 45 (J. Madison).

59. See La Pierre, *Political Accountability in the National Political Process—The Alternative to Judicial Review of Federalism Issues*, 80 *Nw. U.L. REV.* 577 (1986); La Pierre, *The Political Safeguards of Federalism Redux: Intergovernmental Immunity and the States as Agents of the Nation*, 60 *WASH. U.L.Q.* 779 (1982); Comment, Garcia, *The Seventeenth Amendment, and the Role of the Supreme Court in Defending Federalism*, 10 *HARV. J.L. & PUB. POL'Y* 189 (1987).

60. A federalism challenge concedes that one government has the authority to take the action in question, merely contending that the government which acted cannot do so.

nies the permissibility of state action—asserting that the subject is within a power to be exercised by the federal government.⁶¹

Although this dichotomy is self-evident, one conclusion flowing from it deserves emphasis: a judicial decision invalidating national action on federalism grounds differs fundamentally from a decision invalidating state action on the same basis. A judgment that a national government action transgresses a federalism boundary is the final word; it can be overruled only by a subsequent judicial decision or by an amendment to the Constitution. A finding that state action violates a federalism limit, on the other hand, is not necessarily the final word because Congress and the President may overrule the judicial decision simply by enacting a statute. For example, when the Court decides that state action is void because the political branches intended to preempt it, that decision can be reversed simply by amending the statute to clarify a political decision not to preempt. The same interplay of judicial and political powers occurs when the Court decides that the state action violates an unexercised federal power such as the dormant commerce clause: Congress and the President may, for example, authorize the states to impose restrictions upon interstate commerce which would be constitutionally impermissible in the absence of the statute.⁶² As the Court

61. Although early cases suggested that all interstate commerce was beyond state regulation, *e.g.*, *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 209 (1824), since the Court's decision in *Willson v. Black Bird Creek Marsh Co.*, 27 U.S. (2 Pet.) 245 (1829), concurrent federal and state jurisdiction has been the accepted constitutional doctrine. Thus, a federalism challenge to state action requires the challenger to demonstrate that the subject is exclusively federal. This additional element reduces to a question of congressional intent: did Congress intend by its action or inaction to preempt state activities within the field? *See, e.g.*, *Commonwealth Edison v. Montana*, 453 U.S. 609 (1981); *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970). This question is not raised by the challenge to either PNEPPCA or the Gorge Act because the state-appointed compact agencies derive their power from a waiver of federal supremacy, thus explicitly resolving the question of congressional intent to preempt.

62. *Compare* *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944) *with* *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408 (1946) *and* *Western & S. Life Ins. Co. v. State Bd. of Equalization*, 451 U.S. 648 (1981); *compare* *Bowman v. Chicago & Nw. Ry.*, 125 U.S. 465 (1888) *with* *Clark Distilling Co. v. Western Maryland Ry.*, 242 U.S. 311 (1917); *compare* *Leisy v. Hardin*, 135 U.S. 100 (1890) *with* *In re Rahrer*, 140 U.S. 545, 562 (1891); *compare* *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421 (1856) *with* *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 54 U.S. (13 How.) 518 (1852); *see also* *The*

recently stated in such a case:

It is indeed well settled that Congress may use its power under the Commerce Clause to '[confer] upon the States an ability to restrict the flow of interstate commerce that they would not otherwise enjoy.' . . . The dispositive question . . . is whether Congress has in fact authorized the states to impose [such] restrictions.⁶³

Although the question arises most frequently in dormant commerce clause cases, this is due to the relative frequency of such decisions rather than to a principled limitation: the authority of Congress and the President to overrule judicial decisions invalidating state action on federalism grounds extends to all powers delegated to the national government. For example, Congress and the President may require federal property-managing agencies to comply with state air and water pollution standards⁶⁴ or they may limit the discretion of such agencies by requiring that facilities constructed on federally-owned lands conform to state standards.⁶⁵ The political branches may require federal agencies to comply with state-imposed conditions in acquiring property⁶⁶ and may empower the states to establish the rules under which individuals may acquire title to federal lands.⁶⁷ Thus, as a general matter, the political branches may authorize state action which would otherwise be constitutionally prohibited under the implied immunity that is a corollary of the supremacy clause—and they may do so under any power delegated to the national government.⁶⁸ In effect, the federalism boundaries in

Clinton Bridge, 77 U.S. (10 Wall.) 454 (1870); see generally O'Fallon, *supra* note 55, at 404-14; Note, *Congressional Consent to Discriminatory State Legislation*, 45 COLUM. L. REV. 927, 929-30 (1945); cf. *United States v. Sharpnack*, 355 U.S. 286 (1958) (reviewing the history of the various assimilative crimes acts through which Congress and the President adopted state criminal law for federal enclaves).

63. *New England Power Co. v. New Hampshire*, 455 U.S. 331, 339-40 (1982) (quoting *Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27, 44 (1980)).

64. *E.g.*, *EPA v. California ex rel. State Water Resources Control Bd.*, 426 U.S. 200, 211 (1976); *Hancock v. Train*, 426 U.S. 167, 179 (1976).

65. *E.g.*, *Montana v. Johnson*, 738 F.2d 1074 (9th Cir. 1984); *Citizens & Landowners Against the Miles City/New Underwood Power Line v. Secretary of Energy*, 683 F.2d 1171, 1178-81 (8th Cir. 1982); *Columbia Basin Land Protection Ass'n v. Schlesinger*, 643 F.2d 585, 604-05 (9th Cir. 1981); see also *Alabama v. Seeber*, 502 F.2d 1238, 1247-48 (5th Cir. 1974).

66. *California v. United States*, 438 U.S. 645 (1978).

67. *Butte City Water Co. v. Baker*, 196 U.S. 119 (1905).

68. The fact that the "state" entity is an interstate compact agency does not

such cases are politically rather than judicially defined.⁶⁹

The question for the Court in such cases is whether Congress intended to authorize the otherwise impermissible state action. Although language seeming to waive supremacy faces a countervailing presumption, the question is one of clarity of the intent rather than constitutional permissibility:

Because of the fundamental importance of the principles shielding federal installations and activities from regulation by the States, an authorization of state regulation is found only when and to the extent that there is 'a clear congressional mandate,' 'specific congressional action' that makes this authorization of state regulation 'clear and unambiguous.'⁷⁰

The question of the authority of the state-appointed compact agencies to restrict the discretion of the federal property managers turns upon the clarity of the congressional intent to grant the authority. This is a question of statutory language rather than constitutional text.

change the fundamental principle. While compacts most frequently transfer state powers to the federal government—the practical effect of giving the federal courts jurisdiction to decide issues arising under the terms of the compact, *see supra* note 15—compacts can also transfer federal powers to the compacting states. For example, the Low-Level Radioactive Waste Policy Act authorizes the creation of regional interstate compacts to provide for the disposal of low-level radioactive wastes. The Act allows the compacting states to prohibit the importation of wastes "generated outside of the region comprised of the party states." Low-Level Radioactive Waste Policy Amendments Act, 42 U.S.C. § 2021d & note (1986). In the absence of this authorization, it would be an unconstitutional burden on the interstate commerce in garbage for any state to prohibit the importation of waste. *See Philadelphia v. New Jersey*, 437 U.S. 617 (1978) (garbage is an item of commerce and a state may not prohibit its importation); *Washington State Bldg. Trades Council v. Spellman*, 684 F.2d 627 (9th Cir. 1982), *cert. denied*, 461 U.S. 913 (1983) (state statute prohibiting importation of radioactive wastes is unconstitutional under the commerce and supremacy clauses).

69. As Dean Choper has noted, in exercising this type of judicial review, the Court "acts only as an intermediate agency between the states and Congress"; it "performs an essentially legislative role, quite nakedly constructing policies for the particular case that are the product of the Court's own value-balancing of national versus state concerns." J. CHOPER, *supra* note 58, at 207.

70. *Hancock v. Train*, 426 U.S. 167, 179 (1976) (footnotes omitted). *See also* *New England Power Co. v. New Hampshire*, 455 U.S. 331, 339-40 (1982); *Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27, 44 (1980); *California v. United States*, 438 U.S. 645, 665-66 (1978); *EPA v. California ex rel. State Water Resources Control Bd.*, 426 U.S. 200, 211 (1976).

C. *The Statutes: Of Master Builders and the Gorge*

The contention that it is impermissible to authorize state-appointed officers to exercise policymaking authority over federal officials was litigated in a case challenging part of the regional conservation and power plan developed under PNEPPCA by the Power Planning Council.⁷¹ The Ninth Circuit Court of Appeals rejected this argument, holding that the Council was constitutional; the decision provides strong precedent for concluding that the Columbia River Gorge Commission is also constitutionally permissible.

The suit was brought by a homebuilders association displeased with the changes in housing construction required under the Council's plan. Among the arguments offered was the contention that the statute violated federalism limitations by subjecting the decisions of a federal agency to a state-appointed body.⁷² The Department of Justice intervened in the suit, contending that, although the specific powers exercised by the Council at issue in the case presented no problems, other provisions of PNEPPCA did raise "difficult" constitutional issues; the Department urged the court to avoid the constitutional issue.⁷³

71. *Seattle Master Builders Ass'n v. Pacific Northwest Elec. Power & Conservation Planning Council*, 786 F.2d 1359 (9th Cir. 1986), cert. denied, 107 S. Ct. 939 (1987). The suit attacked the validity of the Model Conservation Standards, the regional energy-conserving building standards that are a federally mandated component of the regional power plan.

72. In addition to procedural and substantive challenges to the plan itself, petitioners argued that the statute was unconstitutional on alternative separation of powers and federalism grounds. Petitioners first contended that the Council violated separation of powers principles because it exercised powers that only a federal agency could wield; thus, it was not a true interstate compact and its members could only be appointed in compliance with the provisions of the appointments clause of the federal Constitution. See *Master Builders*, 786 F.2d at 1371-78 (Beezer, J., dissenting); Brief of Amicus Curiae Pacific Legal Foundation at 23-33, *id.*; Petitioners' Reply Brief at 27-29, *id.* Alternatively, petitioners argued that PNEPPCA violated federalism limitations by subjecting the decisions of a federal agency to a state-appointed body. Petitioners' Opening Brief at 53-55, *id.*; Petitioners' Reply Brief at 21-25, *id.*

73. Brief for the United States as Intervenor at 13, *id.* In demonstrating the difficulty of the issues in support of its argument that the Court should avoid the issue, the Department contended that the Council's federalism argument was untenable because the Council exercised significant power in some areas over a federal agency under a federal statute, a power that the agency thought problematic. *Id.* at 18-19. It also noted, however, that the Council might exercise such powers if

The Ninth Circuit declined the Department's request to rule narrowly, concluding that the authority to exercise power over a federal agency was unquestionable:

There is no bar against federal agencies following policies set by nonfederal agencies. The federal government has in fact agreed to be bound by state law in several areas. The federal government can be subject to state law where there is a clear congressional mandate and specific legislation which makes the authorization of state control clear and unambiguous.⁷⁴

The court held that the Council was a constitutionally permissible example of "an innovative system of cooperative federalism under which the states, within limits provided in the Act, can represent their shared interests in the maintenance and development of a power supply in the Pacific Northwest and in related environmental concerns."⁷⁵

The *Master Builders* decision enunciates the proper standard for reviewing the executive branch's challenge to the Gorge Act. As with the attack on PNEPPCA, the issue is whether "there is a clear congressional mandate and specific legislation which makes the authorization of state control clear and unambiguous."⁷⁶ The Gorge Act and its legislative history demonstrate congressional intent with the requisite clarity.

"its members may be viewed as officers of the state . . . despite the significant federal authority they exercise." *Id.* at 20. Given this ambiguity and that the Department felt that the issue was unnecessary to a decision in the particular, it urged the court not to rule on the constitutional issues. *Id.* at 23-29.

74. *Master Builders*, 786 F.2d at 1364 (citations omitted).

75. *Id.* at 1366. The dissent would have decided the case on separation of powers grounds, concluding that "Congress has usurped the constitutionally delegated power of the executive branch by authorizing state governors to appoint the members of the Council." *Id.* at 1378 (Beezer, J., dissenting). It reached this conclusion by arguing that, because the Council "has a federal purpose and receives its authority from federal law, the Council is a federal agency." *Id.* at 1373. As such, it was unconstitutional because its members were not appointed in compliance with the appointments clause. *Id.* at 1374. The dissent dismissed the federalism question, noting simply that the "members of the Council exercise significant authority pursuant to federal law. As a result, the system of federalism embodied in the Constitution gives the power to select Council members to the executive branch." *Id.* at 1377. The majority and the dissent thus failed even to agree on the correct characterization of the issue: does the Council raise separation of powers or federalism questions? See generally Goble, *supra* note 15, at 60-64.

76. *Master Builders*, 786 F.2d at 1364.

The challenge to the constitutionality of the Gorge Act is predicated upon the provision that allows the compact agency to "disapprove" the Secretary of Agriculture's decision to condemn land within the scenic area before the management plan for the area has been completed.⁷⁷ The Secretary's "extremely limited"⁷⁸—or "broad, new"⁷⁹—condemnation authority was a very controversial feature of the legislation⁸⁰ and the restriction on the Secretary's authority was one element that the bill's supporters cited as fostering local control.⁸¹ They did so in terms that leave no doubt as to the proper interpretation of the statutory term "disapprove." Representative Weaver, the manager of the bill in the House, stated that "any proposed condemnation . . . by the Secretary can be overridden [sic] by . . . the commission."⁸² Representative Morrison argued that one of the features of the legislation related to local control was the fact that "[a] two-thirds majority of the bi-State Commission, or the Governor of the State involved, can override a condemnation decision."⁸³ The opponents of the bill conceded this interpretation, acknowledging that "[t]here is a proviso in this bill that will allow an override of any condemnation by the Federal Government by the Commission."⁸⁴ The Gorge Act's language and legislative history both demon-

77. The proviso provides in full:

[W]ithin thirty days of the filing by the Secretary of a complaint for condemnation of any land or interest in the scenic area, outside of the special management areas and urban areas, the Commission, by a vote of two-thirds of its membership including a majority of the members appointed from each State, or if the Commission is not in existence the Governor of the State in which the land or interest is located, may disapprove such proposed complaint.

Gorge Act, § 10(b)(1), 16 U.S.C.A. § 544h(b)(1) (West Supp. 1987).

78. 132 CONG. REC. H10,485 (daily ed. Oct. 16, 1986) (statement of Rep. Weaver). The proviso was originally included in the bill by the House. *See id.* at H11,131. The House bill was subsequently adopted by the Senate without any discussion of the proviso. *See id.* at S16,877-79 (daily ed. Oct. 17, 1986). Thus, the only legislative history is to be found in the House debates.

79. *Id.* at H10,486 (statement of Rep. Robert F. Smith).

80. *See generally id.* at H10,489 (statement of Rep. Lagomarsino); *id.* at H11,123 (statement of Rep. Morrison); *id.* at H11,124 (statement of Rep. Strang); *id.* (statement of Rep. Robert F. Smith).

81. *E.g., id.* at H10,485 (statement of Rep. Weaver); *id.* at H11,123-24 (statement of Rep. Morrison).

82. *Id.* at H10,484 (statement of Rep. Weaver).

83. *Id.* at H11,123 (statement of Rep. Morrison).

84. *Id.* at H11,143 (statement of Rep. Robert F. Smith).

strate the required clear congressional intent to waive federal supremacy.

The executive branch's challenge to the constitutionality of the Gorge Act is without basis.⁸⁵ There are no federalism-based restrictions on congressional waivers of supremacy. If the political branches decide to allow states to restrict federal activities or the uses of federal property, they may do so. The legal requirements imposed by the Court are intended simply to ensure that the waiver was actually a considered conclusion. Thus, if the waiver is unambiguous, the Court's work is at an end. In both PNEPPCA and the Gorge Act, the intent to waive national supremacy was clearly expressed.

IV. CONCLUSION

The founding documents of the United States reflect the recognition that government, while necessary to protect fundamental values—life, liberty, property, equality⁸⁶—may become destructive of the values it is instituted to promote.⁸⁷ With their Newtonian perspective,⁸⁸ the founders viewed this dilemma

85. Which suggests that the principal reason for withholding the Justice Department's legal opinion on the matter may be to avoid embarrassment rather than to protect state secrets. *See supra* note 43.

86. Thus, the Declaration of Independence begins with the assertion that it is a "self-evident" truth that "governments are instituted among men" to secure "certain unalienable rights" including "life, liberty, and the pursuit of happiness." The Declaration of Independence para. 1 (U.S. 1776). Similarly, the Constitution was established "to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty." U.S. CONST. preamble.

87. As the Declaration of Independence notes, governments can become "destructive of these ends." The Declaration of Independence para. 1 (U.S. 1776). Publius noted this tension in THE FEDERALIST:

Energy in Government is essential to that security against external and internal danger, and to that prompt and salutary execution of the laws, which enter into the very definition of good Government. Stability in Government, is essential to national character, and to the advantages annexed to it, as well as to that repose and confidence in the minds of the people, which are among the chief blessings of civil society. . . . On comparing, however, these valuable ingredients with the vital principles of liberty, we must perceive at once, the difficulty of mingling them together in their due proportions.

THE FEDERALIST No. 37, at 233-34 (J. Madison).

88. Sir Isaac Newton's work provided the dominant intellectual paradigm of

largely as a problem of fashioning a machine that would efficiently promote the ends of government while checking the tyrannical impulses of its operators.⁸⁹ They sought to preserve the libertarian goals of the Revolution and to remedy the perceived failures of the Confederation by restructuring the procedure through which political power would be exercised. They also sought to create a more "energetic" government while minimizing its abusive potential by restricting the field of its operation. To meet these twin goals of efficiency⁹⁰ and liberty,⁹¹ they doubly di-

the eighteenth century. C. BECKER, *THE HEAVENLY CITY OF THE EIGHTEENTH-CENTURY PHILOSOPHERS* 54-63 (1932). The machine, with its precisely balanced clock-work forces, was a frequent metaphor. Jefferson, for example, wrote of "the great machine of government." T. JEFFERSON, *A Summary View of the Rights of British America* (1774), in 1 *THE PAPERS OF THOMAS JEFFERSON* 121, 121 (J. Boyd ed. 1950); see also 2 *FEDERAL CONVENTION RECORDS*, *supra* note 53, at 278; *THE FEDERALIST* No. 19, at 121 (J. Madison); *id.* No. 58, at 396 (J. Madison); *id.* No. 65, at 443 (A. Hamilton); *id.* No. 69, at 467 (A. Hamilton). As Woodrow Wilson was to note at the beginning of this century,

the Constitution of the United States [was] made under the dominion of the Newtonian Theory. You have only to read the papers of *The Federalist* to see that fact written on every page. They speak of the 'checks and balances' of the Constitution, and use to express their idea the simile of the organization of the universe, and particularly the solar system,—how by the attraction of gravitation the various parts are held in their orbits; and then they proceed to represent Congress, the Judiciary, and the President as a sort of imitation of the solar system.

W. WILSON, *THE NEW FREEDOM* 45-46 (1914). Wilson revealed his intellectual model: "The trouble with the theory is that government is not a machine, but a living thing. It falls, not under the theory of the universe, but under the theory of organic life. It is accountable to Darwin, not to Newton." *Id.* at 47.

89. Gordon Wood has argued that the fundamental distinction between the Federalists and the Anti-Federalists was the distinction "between those [the Anti-Federalists] who clung to moral reform and the regeneration of men's hearts as the remedy for viciousness and those [the Federalists] who looked to mechanical devices and institutional contrivances as the only lasting solution for America's ills." G. WOOD, *supra* note 49, at 428 (1969). See also H. Storing, *What the Anti-Federalists Were For*, 1 *THE COMPLETE ANTI-FEDERALIST* 1, 15-23 (H. Storing ed. 1981). Thus, the dilemma, as Publius put it, was to find "a Republican remedy for the diseases most incident to Republican Government." *THE FEDERALIST* No. 10, at 65 (J. Madison).

90. The efficiency rationale for federalism was stated by Madison at the Federal Convention:

The great objection made agst. an abolition of the State Govts. was that the Genl. Govt. could not extend its care to all the minute objects which fall under the cognizance of the local jurisdictions. The objection as stated lay not agst. the probable abuse of the general power, but agst. the imperfect use that could be made of it throughout so great an extent of country, and

vided political power, incorporating a spatial and functional division—a distribution of power between the federal and state governments, on the one hand, and among the trinity of legislative, executive, and judicial branches, on the other.⁹²

In rejecting the Confederation's national-state relations, the founders were concerned principally with restructuring the government so that it would be sufficient to achieve continental

over so great a variety of objects.

1 FEDERAL CONVENTION RECORDS, *supra* note 53, at 357. As Jefferson more succinctly put it: "Were we directed from Washington when to sow, and when to reap, we should soon want bread." T. JEFFERSON, *Autobiography* (1821), in 1 THE WRITINGS OF THOMAS JEFFERSON 1, 122 (Monticello ed. 1903). See also Letter from Thomas Jefferson to Samuel Kercheval (July 12, 1816), in 15 *id.* at 32, 37-38.

The need for an energetic and efficient government was a common refrain during the debates on the proposed constitution. For example, in THE FEDERALIST No. 23, Publius addressed the need to adopt a constitution "at least equally energetic with the one proposed," relying upon the "[d]efective" nature of the Articles of Confederation. THE FEDERALIST No. 23, at 146, 148 (A. Hamilton). The argument was frequently reiterated. See *id.* No. 15, at 93 (A. Hamilton); *id.* No. 22, at 140 (A. Hamilton); *id.* No. 26, at 164-65 (A. Hamilton); *id.* No. 37, at 231, 233-34 (J. Madison). See also Adams, *Thoughts on Government* (1776), in 1 AMERICAN POLITICAL WRITING DURING THE FOUNDING ERA 1760-1805, at 401, 404 (C. Hyeman & D. Lutz eds. 1983); letter from Thomas Jefferson to James Madison (Dec. 16, 1786), reprinted in 10 THE PAPERS OF THOMAS JEFFERSON 602, 603 (J. Boyd ed. 1954); letter from John Jay to Thomas Jefferson (Aug. 18, 1786), reprinted in 10 *id.* at 272-72; letter from John Jay to Thomas Jefferson (Feb. 9, 1787), reprinted in 11 *id.* at 129. Many Anti-Federalists conceded the need for a more "efficient and energetic" government. See, e.g., E. Gerry, *Objections to Signing the National Constitution* (1787), in 2 THE COMPLETE ANTI-FEDERALIST 4, 7 (H. Storing ed. 1981); *An Old Whig* (1787), in 3 *id.* at 17, 30; *A Plebeian* (1788), in 6 *id.* at 128, 134-35. See generally GOODNOW, PRINCIPLES OF CONSTITUTIONAL GOVERNMENT 18-19 (1916); Maass, *Division of Powers: An Areal Analysis*, in AREA AND POWER 9, 9-10 (A. Maass ed. 1959); Ylvisaker, *Some Criteria for a "Proper" Areal Division of Governmental Powers*, *id.* at 27, 30-33.

91. See THE FEDERALIST No. 51, at 351-53 (J. Madison). The libertarian goal has frequently been presumed the sole or at least dominant object of the division of political power. See also *Bartkus v. Illinois*, 359 U.S. 121, 137 (1959); Huffman, *Governing America's Resources: Federalism in the 1980's*, 12 ENVTL. L. 863 (1982).

92. In the compound republic of America, the power surrendered by the people, is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separated departments. Hence a double security arises to the rights of the people. The different governments will controul [sic] each other; at the same time that each will be controuled [sic] by itself.

THE FEDERALIST No. 51, at 351 (J. Madison).

ends.⁹³ They sought to fashion a remedy for the diseases of federalism—as the term was then understood—by constituting an entirely new structure that was, “in strictness neither a national nor a federal constitution; but a composition of both.”⁹⁴ Their remedy has clearly failed if the structure they established is so inflexible that the national and state governments—which between them

93. Professor Huffman has argued that federalism can be justified only to the extent that it promotes “the autonomy and welfare of the individual,” which he equates with freedom “from the constraints imposed by government or their fellow citizens.” Huffman, *supra* note 91, at 867 n.18. He thus emphasizes the libertarian rationale of federalism to the exclusion of the efficiency rationale. His equation of federalism with individual autonomy is questionable on at least three grounds.

First, Professor Huffman’s assertion is historically inaccurate. The founders did not believe that the sole or even dominant end of federalism was individual autonomy. The creation of an energetic and efficient government was a more important goal in structuring the relationship between state and national governments; the point, after all, was to replace a failed confederacy with a national government sufficiently energetic to accomplish its proper ends. As Madison argued, “Were it practicable for the Genl. Govt. to extend its care to every requisite object without the cooperation of the State Govts. the people would not be less free as members of one great Republic than as members of thirteen small ones.” 1 FEDERAL CONVENTION RECORDS, *supra* note 53, at 357. This drive for an efficient government was informed by a republican ideology which insisted that there was a public good that was more than the sum of individual greed: Publius was not a Reaganaut; greed was to be controlled rather than extolled. See THE FEDERALIST No. 10 (J. Madison); *id.* No. 31 (A. Hamilton); see generally G. WOOD, *supra* note 49, at 471-518.

Second, the equation of federalism with individual autonomy lacks any logical basis. “Federalism” is shorthand for the allocation of power between state and national governments. It is an allocation of power between governments rather than a denial of power to government. See *supra* note 60. The “liberty” that federalism preserves is not freedom from all governmental constraints, but rather the freedom to have some constraints imposed only by one government or the other. The equation rests upon an unstated premise about the relative intrusiveness of state and national regulation—a premise which is at least historically questionable.

Finally, Professor Huffman’s view of autonomous individuals free of the constraints of their fellow citizens is but another artificial fence that recreates the transboundary problems at the interpersonal level. Like jurisdictional boundaries, his view denies the essential interconnectedness of individuals that defines society.

This does not mean that individuals are simply cogs in some anthill state. It is instead a recognition that your decision to play loud music affects my opportunity to sleep, and that I therefore have a legitimate claim to protest. Whether I may restrict your conduct so that I can sleep will depend upon several things—but it will not depend upon federalism.

94. THE FEDERALIST No. 39, at 257 (J. Madison).

are the repositories of the full measure of political power⁹⁵—cannot adjust their respective spheres of responsibility in accordance with political need.

To insist on such rigidity based on an overarching constitutional theory that demands clear lines between nation and state is like Frost's fellow wall mender:

He only says, 'Good fences make good neighbors.'
 Spring is the mischief in me, and I wonder
 If I could put a notion in his head:
 'Why do they make good neighbors? . . .

* * * *

Something there is that doesn't love a wall,
 That wants it down.⁹⁶

To insist upon the sanctity of walls that serve only to frustrate a more comprehensive response to a problem inherent in the federal structure itself is to be unfaithful to the ingenious machine the founders constructed.

95. There is no suggestion that any individual's constitutionally-protected rights are at stake—an unremarkable conclusion when it is remembered that a federalism claim does not in itself implicate any individual rights since such claims amount to the assertion that the wrong government is acting. Although an individual may have a protected interest that is affected by the challenged conduct, the interest is not a federalism concern.

96. R. Frost, *Mending Wall*, *supra* note 2, at 33-34. The "Something there is" is nature "That sends the frozen-ground-swell under it, And spills the upper boulders in the sun." *Id.*