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States of Nature

by Jeffrey Rosen

How George Bush's legal war against the environment backfired.

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In their long-standing campaign against environmental protections, American conservatives have taken a kitchen sink approach: First they exalted states' rights and attacked the Environmental Protection Agency; later, they reversed course, attacking states' rights and exalting the EPA. The only consistent objective was to thwart regulation, and the only question was which strategy would be most effective in achieving that goal.

But their political opportunism may soon come to haunt them. By abandoning their strict states'-rights principles for a broad view of the EPA's authority, conservatives have boxed themselves into a corner. If Congress and the White House are in a more environmental mood after November, conservative anti-environmentalists may find that they have laid the legal groundwork for their ultimate defeat.

The debate among conservatives over the best strategy for pro-business environmental policies has been raging for three decades. During the Reagan and first Bush administrations, the states'-rights strategy initially prevailed. In a series of legal challenges, conservatives embraced a pre-New Deal vision of Congress's power to regulate the environment. They insisted that the Clean Air Act, which instructs the EPA to "protect the public health" by regulating ozone and particulate matter, was an unconstitutional delegation of regulatory authority. In a federal appellate opinion in 1999, Judge Douglas Ginsburg of the U.S. Court of Appeals in D.C. embraced this radical argument. (He was the same judge who had called for the resurrection of the "Constitution in Exile"--a reference to judicial limitations on federal authority that had been dormant since the 1930s and that would have called the EPA itself into question.) But, in 2001, in a unanimous opinion written by Justice Antonin Scalia, the Supreme Court disagreed. (In a separate concurrence, only Clarence Thomas indicated that he would be amenable to similarly radical arguments in the future.)

Scalia's rejection of the states'-rights argument didn't mean he was sympathetic to environmental regulations; it meant he was intellectually flexible about how to attack them. As early as 1982, Scalia, then teaching at the University of Chicago, had urged conservatives not to be blinded by their nostalgic devotion to states' rights and instead to fight a "two-front war" against meddlesome regulations at the state and federal levels. In defense of "market freedom," he said, conservatives should oppose regulation by the federal government, but they should have no compunction about supporting broad federal authority to block regulations by state governments, according to a recent article by Simon Lazarus and Harper Jean Tobin in The American Prospect.

In the current Bush administration, conservatives answered Scalia's call. Thwarted in their efforts to attack the EPA in the name of states' rights, they committed the EPA to an anti-regulatory agenda, and then attacked any states that tried to pass broader environmental protections than the now-complaisant federal agency. The Bush administration tried to do as little as possible on global warming and was alarmed when California, using a special power under the Clean Air Act, adopted more rigorous emission standards for cars than the federal government was willing to adopt. For the first time since the Clean Air Act was passed in 1970, the Bush administration last December refused to grant California a waiver allowing the state to set its own standards for global warming. The EPA's own legal staff warned that the denial of the waiver was illegal.

Last April, in the 5-4 Massachusetts v. EPA decision, the Supreme Court agreed, holding that the EPA had acted capriciously when it refused to regulate greenhouse gases without adequately justifying its decision. Justice John Paul Stevens's opinion for the Court, joined by Justice Anthony Kennedy and the three liberals, was full of rhetoric about the importance of states' rights and federalism, noting that states like Massachusetts played a crucial role in challenging the federal government's failure to follow the clear mandates of the law. Scalia's dissent, joined by Thomas, Samuel Alito, and John Roberts, struck a much more nationalistic note, arguing that the Court owed deference to the "reasoned judgment" of the EPA. (A year after the decision, the foot-dragging EPA has still failed to make the finding the Court required, leading congressional Democrats to threaten a subpoena.)

The fact that pro-business conservatives, on the Court and in the Bush administration, have abandoned their Barry Goldwater states'-rights rhetoric for a broad vision of executive power is not a historical anomaly. On the contrary, as Professor Roderick Hills of New York University recently argued on prawfsblog, the Republican Party, from its founding in 1856 through the Eisenhower presidency, "was built on the foundation of the nationalistic and elitist judicial power in the service of business." During the Gilded Age, Hills notes, the Republican Supreme Court held that "the central purpose of the courts and Congress was to suppress interference with a national market by juries, trade unions, states, or any other subnational power." In other words, by endorsing the use of creative judicial doctrines to favor business and suppress local populism, conservatives are returning to their Hamiltonian roots.

If the next administration grants the waiver that Bush denied and allows California's emissions standards to go into effect--as both Hillary Clinton and Barack Obama have promised to do (and as even John McCain at one point endorsed)--big business conservatives will turn once more to the Supreme Court to reverse their political defeat. They will argue that California's authority to adopt more liberal global-warming emissions rules under the Clean Air Act is "preempted" by another federal law establishing national emission standards. A federal judge in Vermont recently rejected this adventurous argument, and the case against it would be even stronger if it were opposed by a Democratic White House: As Scalia has said repeatedly, the Supreme Court is supposed to give deference to the views of the president and the EPA in environmental cases.

It's true that the Court under Chief Justice Roberts has been increasingly sympathetic to arguments that federal laws should "preempt" state health and safety regulations. But, even if anti-environmentalists convince the Supreme Court to overturn the policies of President Obama, Clinton, or McCain, Congress would likely reverse the decision with bipartisan majorities. Almost three in four Americans say they would pay more taxes for local governments to reduce the gases that cause global warming, according to a recent Roper/Yale environmental survey.

Because state legislators and Congress are in a pro-environmental mood, and because the Supreme Court is now committed to deferring to Congress, says Douglas Kendall of the Community Rights Council, "the next administration has all the tools it needs to control the global-warming agenda, and to push Congress to implement a national solution." In their opportunistic moves to use the courts and the EPA to thwart politically popular environmental regulations, conservatives may have unwittingly checkmated themselves.

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