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# The Firm Constitutional Foundation and Shaky Political Future of Environmental Cooperative Federalism

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# THE FIRM CONSTITUTIONAL FOUNDATION AND SHAKY POLITICAL FUTURE OF ENVIRONMENTAL COOPERATIVE FEDERALISM

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## CHAPTER EIGHT

in AMERICAN FEDERALISM AND PUBLIC POLICY (Christopher P. Banks ed.) (Routledge, 2018).

Environmental regulation in the United States is based on a cooperative federalism foundation, which splits authority and responsibility for adopting, implementing, and enforcing environmental protection standards between the federal and state governments. Early attacks in court on this framework based on alleged limits on the federal government's regulatory authority failed. The Rehnquist Court's recognition of limits on federal power under the Commerce Clause of the Constitution<sup>1</sup> prompted a second wave of litigation seeking to impose constraints on regulatory authority. These ventures, too, largely met a hostile judicial reception, at least as a matter of constitutional law.

The Rehnquist and Roberts Courts were more receptive to claims that federal regulation exceeded statutory limits. It relied on the Constitution's federalism structure to interpret narrowly the intended scope of delegated federal regulatory power. This federalism dynamic surfaced most prominently in cases construing the scope of regulatory jurisdiction under the federal Clean Water Act (CWA), although the issue has also arisen under the Clean Air Act (CAA). More recently, the Roberts Court recognized limits on federal power under the Spending Clause<sup>2</sup> that have the potential to rein in federal environmental regulatory authority, albeit probably only at the margins. On the other hand, the courts have recognized limits on state regulatory power under the Supremacy<sup>3</sup> and dormant Commerce Clauses.

The cooperative federalism structure built into the nation's key environmental statutes<sup>4</sup> has largely withstood the test of time, nearly fifty years after Congress kicked off the "environmental decade" by adopting the CAA in 1970. Federal power to protect the environment has emerged relatively unscathed. The Roberts Court may chip away at that power at the margins, through its interpretations of the Commerce Clause, the Spending Clause, and the Tenth Amendment,<sup>5</sup> but there is little indication that its current lineup is prepared to sharply constrain that power.

The environmental cooperative federalism venture that has served the nation so well is nevertheless under attack. The Trump Administration is committed to sharply curtailing the scope of federal environmental regulatory action as a matter of regulatory policy if not constitutional

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<sup>1</sup> U.S. CONST. art. I, § 8, cl. 3.

<sup>2</sup> *Id.* art. I, § 8, cl. 1.

<sup>3</sup> *Id.* art. VI, cl. 2.

<sup>4</sup> Unless otherwise indicated, environmental statutes refer to those aimed at controlling pollution, not those governing natural resource management. The latter implicate additional constitutional provisions, such as the Property Clause, *id.* art. IV, § 3, cl. 2, which vests in Congress the power to adopt "needful Rules and Regulations" for management of federally owned lands and resources.

<sup>5</sup> *Id.* amend. X.

law. The President and his top environmental appointees have professed a commitment to federalism and protection of state sovereignty. This commitment seems disturbingly one-sided, however. Although the Administration favors limitations on federal environmental regulatory authority, its willingness to acknowledge and support state authority in this area appears to be limited to state efforts to remove regulatory constraints and free up development. The Administration has sought to slash federal funding that traditionally has allowed the states to play a vital role in environmental cooperative federalism. Without it, the state role will necessarily weaken. Further, the Administration has raised the prospect that it may support preemption of state efforts to impose environmental constraints more stringent than federal regulation provides. This asymmetric approach to state power fuels the perception that the Trump Administration's devotion to federalism is a thinly veiled mask for its fervor to ravage environmental protection regulatory authority at both the federal and state levels.

This chapter begins by exploring the structure of and rationale for traditional cooperative federalism. It then surveys the constitutional parameters of both federal and state environmental regulatory power, emphasizing decisions by the Rehnquist and Roberts Courts that bear on the scope of each sovereign's powers. The chapter concludes by analyzing the threats to environmental cooperative federalism posed by the Trump Administration's policies.

### **Traditional Environmental Cooperative Federalism**

Cooperative federalism structures to achieve public policy goals are not confined to environmental law and policy, as the chapters in this book attest. Environmental regulation, however, has been a prominent arena in which Congress has relied on this model of governance. One member of the Supreme Court has described cooperative federalism as an approach in which Congress invites state and local authorities to make decisions subject to minimum federal standards instead of preempting state authority in pursuit of a nationally uniform approach to problem solving.<sup>6</sup> In an early environmental case, the Court described a "program of cooperative federalism" as one "that allows the States, within limits established by federal minimum standards, to enact and administer their own regulatory programs, structured to meet their own particular needs."<sup>7</sup> In another case, it used that term to describe instances in which, although "Congress has the authority to regulate private activity under the Commerce Clause," it has chosen "to offer States the choice of regulating that activity according to federal standards or having state law pre-empted by federal regulation."<sup>8</sup> Cooperative federalism statutes thus anticipate "a partnership between the States and the Federal Government, animated by a shared objective" and employ "permissible method[s] of encouraging a State to conform to federal policy choices."<sup>9</sup>

In a nutshell, cooperative federalism in environmental regulation promotes "shared governmental responsibilities for regulating private activity."<sup>10</sup> Environmental statutes in the cooperative federalism mold assign important roles to both levels of government. Under legislation such as the

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<sup>6</sup> *City of Rancho Palo Verdes, California v. Abrams*, 544 U.S. 113, 127-28 (2005) (Breyer, J., concurring).

<sup>7</sup> *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 289 (1981).

<sup>8</sup> *New York v. United States*, 505 U.S. 144, 167 (1992).

<sup>9</sup> *Id.*

<sup>10</sup> I GEORGE CAMERON COGGINS & ROBERT L. GLICKSMAN, *PUBLIC NATURAL RESOURCES LAW* § 5:3 (2d ed. 2007) (citing Susan Rose-Ackerman, *Cooperative Federalism and Co-Optation*, 92 *YALE L.J.* 1344 (1983)).

CAA and CWA, the federal government, acting through authority delegated to the Environmental Protection Agency (EPA), is responsible for adopting standards that provide a minimum level of protection throughout the country.<sup>11</sup> Under these laws, Congress has carved out a significant role for the states to implement federal standards, subject to EPA's approval. According to J.B. Ruhl, environmental cooperative federalism statutes provide "opportunities for states to implement national goals and standards through state-run programs that satisfy certain delegation criteria regarding equivalency to the federal regime and adequacy of enforcement, in exchange for which the federal government takes a back seat in the particular delegated state."<sup>12</sup> States need not respond to these invitations to craft policies that suit their economic and environmental needs,<sup>13</sup> but if they do not, EPA will step into the breach.<sup>14</sup>

Under most federal environmental statutes, states may apply to EPA for authorization to administer the permit programs that provide the principal means of applying emission standards or other regulatory obligations (such as monitoring, recordkeeping, and reporting) to individual regulated entities.<sup>15</sup> Individual permits are typically subject to EPA veto.<sup>16</sup> A state choosing not to seek permitting authority forfeits to EPA the power to administer the permit program for regulated sources within the state. The environmental statutes typically divide authority to enforce statutory or regulatory obligations between the federal and state governments, although the statutes differ in the extent to which EPA must await state action before proceeding.<sup>17</sup> EPA retains exclusive authority to enforce some federal standards.<sup>18</sup> Finally, cooperative federalism statutes tend to include "savings clauses" that reserve state authority to adopt controls more stringent than those adopted or required by EPA,<sup>19</sup> with some exceptions.<sup>20</sup> Thus, federal standards usually serve as floors, not ceilings, on regulatory stringency.<sup>21</sup>

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<sup>11</sup> *E.g.*, 33 U.S.C. § 1311(b) (technology-based effluent limitations under the CWA); 42 U.S.C. § 7409(b) (2012) (national ambient air quality standards (NAAQS) under the CAA).

<sup>12</sup> J.B. Ruhl, *Cooperative Federalism and the Endangered Species Act — Is There Hope for Something More?*, in STRATEGIES FOR ENVIRONMENTAL SUCCESS IN AN UNCERTAIN JUDICIAL CLIMATE 325, 326 (Michael Allan Wolf ed., 2005). *See, e.g.*, 42 U.S.C. §§ 7407(a), 7410(a) (making states responsible for implementing NAAQS and setting forth minimum requirements for acceptable state implementation plans); *see also* 33 U.S.C. § 1313(c) (vesting in states the responsibility to adopt and implement water quality standards).

<sup>13</sup> The CAA affords each state the "liberty to adopt whatever mix of emission limitations it deems best suited to its particular situation." *Train v. Natural Res. Def. Council, Inc.*, 421 U.S. 60, 79 (1975).

<sup>14</sup> *E.g.*, 33 U.S.C. § 1313(c)(4), (d)(2) (CWA); 42 U.S.C. § 7410(c) (CAA).

<sup>15</sup> *E.g.*, 33 U.S.C. § 1342(b) (CWA); 42 U.S.C. 6926 (Resource Conservation and Recovery Act (RCRA)); 42 U.S.C. §§ 7661-7661f (CAA).

<sup>16</sup> 33 U.S.C. § 1342(d)(2) (CWA); 42 U.S.C. § 7661d(b)-(c) (CAA).

<sup>17</sup> *E.g.*, 42 U.S.C. § 7413(b) (CAA); *see also* *United States v. Power Engineering Co.*, 303 F.3d 1232 (10<sup>th</sup> Cir. 2002); *Harmon Indus., Inc. v. Browner*, 191 F.3d 894 (8<sup>th</sup> Cir. 1999) (addressing when the federal government may "overfile" when dissatisfied with a state's enforcement approach).

<sup>18</sup> *E.g.*, 42 U.S.C. § 7413(a)(3) (CAA). *Cf.* 29 U.S.C. § 666 (Occupational Safety and Health Act).

<sup>19</sup> *E.g.*, 33 U.S.C. § 1370(1) (CWA); 42 U.S.C. § 6929 (RCRA); 42 U.S.C. § 7416 (CAA).

<sup>20</sup> *E.g.*, 7 U.S.C. § 136v(b) (barring states from adopting labeling or packaging requirements different from those required under federal pesticide statute); 42 U.S.C. §§ 7543(a), 7545(c)(4), 7573 (CAA provisions barring adoption of state standards to control motor vehicle emissions, specify permissible fuel additives, and control aircraft emissions).

<sup>21</sup> For a summary of cooperative federalism under the CWA, *see* *United States Dep't of Energy v. Ohio*, 503 U.S. 607, 633-34 (1992). *See also* Robert L. Glicksman, *From Cooperative to Inoperative Federalism: The Perverse Mutation of Environmental Law and Policy*, 41 WAKE FOREST L. REV. 719, 737-47 (2006) (describing environmental statutes reflecting cooperative federalism).

The rationale for shared federal and state environmental regulatory authority is well known. One reason to vest standard-setting in the federal government is to assure that every American enjoys a minimum level of protection against public health threats arising from polluting activities, regardless of where they live. If individual states decide to enhance those protections, they are free to do so by adopting more stringent standards.<sup>22</sup> Congress also carved out a predominant federal role to address collective actions problems that experience showed that states were incapable of tackling or unwilling to address. These include addressing transboundary negative externalities, preventing a race to the bottom among the states, facilitating the pooling of resources capable of effectively addressing environmental threats, providing uniformity in areas such as standard-setting for nationally marketed products, and restricting state or local authority to preclude the local siting of socially important but environmentally undesirable uses.<sup>23</sup>

Inviting states to play a significant role in the pursuit of environmental regulatory goals also promotes important values. These include enhancing participatory democracy (because it is usually easier for citizens to access state than federal officials), allowing states to craft regulatory solutions that are responsive to local needs and conditions, taking advantage of the superior expertise that state officials possess on the nature and extent of environmental problems affecting their citizens, and allowing states to experiment with regulatory approaches to gain knowledge that may ultimately benefit other states and federal regulators.<sup>24</sup> Vesting overlapping and concurrent standard-setting and enforcement authority in both levels of government also creates a safety net that protects against inertia by or capture of regulators.<sup>25</sup>

## **Challenges to the Constitutionality of Cooperative Federalism**

### *Early Constitutional Challenges*

Regulated entities took little time to challenge the constitutionality of environmental cooperative federalism statutes. The lower courts uniformly rejected those attacks, and the Supreme Court soon followed suit. The Court issued its most important early decision in 1981 in *Hodel v. Virginia Surface Mining and Reclamation Association*,<sup>26</sup> rejecting claims by an association of companies engaged in surface coal mining that the Surface Mining Control and Reclamation Act (SMCRA)<sup>27</sup> violated a host of constitutional provisions, including the Commerce Clause and the Tenth

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<sup>22</sup> See Adam Babich, *Our Federalism, Our Hazardous Waste, and Our Good Fortune*, 54 MD. L. REV. 1516, 1532-33 (1995) (Cooperative federalism “holds the promise of allowing states continued primacy and flexibility in their traditional realms of protecting health and welfare, while ensuring that protections for all citizens meet minimum federal standards.”).

<sup>23</sup> See Robert L. Glicksman & Richard E. Levy, *A Collective Action Perspective on Ceiling Preemption by Federal Environmental Regulation: The Case of Global Climate Change*, 102 N.W. U. L. REV. 579, 591-62 (2008).

<sup>24</sup> See Alejandro E. Camacho & Robert L. Glicksman, *Functional Government in 3-D: A Framework for Evaluating Allocations of Government Authority*, 51 HARV. J. ON LEGIS. 21, 39-42 (2014) (summarizing benefits of decentralized governance); see also *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (touting federalism’s potential to empower states to act as laboratories by “try[ing] novel social and economic experiments without risk to the rest of the country”); MARTHA DERTHICK, *THE INFLUENCE OF FEDERAL GRANTS: PUBLIC ASSISTANCE IN MASSACHUSETTS 220* (1970) (noting that cooperative federalism “enables the cooperating governments to benefit from one another’s special capacities while still preserving the value of political pluralism”).

<sup>25</sup> See Camacho & Glicksman, *supra* note 24, at 52.

<sup>26</sup> 452 U.S. 264 (1981).

<sup>27</sup> 30 U.S.C. §§ 1201-1328.

Amendment. Like other environmental cooperative federalism statutes, SMCRA authorizes federal performance standards, delegation of permitting authority to willing states, and shared enforcement authority (between the states and the Department of the Interior).<sup>28</sup>

The coal companies argued that SMCRA's regulation of private lands within a single state exceeded the scope of federal regulatory power under the Commerce Clause. The Court stressed the deference courts must afford congressional findings that regulated activities affect interstate commerce, and the "plenary" nature of the authority granted to Congress by the Commerce Clause.<sup>29</sup> It held that Congress rationally determined that regulation of intrastate surface coal mining is necessary to protect interstate commerce from the resulting adverse effects. It found ample constitutional authority for Congress's establishment of uniform national standards to prevent destructive interstate competition among the states to attract coal mining, deeming this effort a "traditional role for congressional action under the Commerce Clause."<sup>30</sup> In doing so, the Court endorsed a series of lower court decisions that had "uniformly found the power conferred by the Commerce Clause broad enough to permit congressional regulation of activities causing air or water pollution, or other environmental hazards that may have effects in more than one State."<sup>31</sup>

The coal producers' Tenth Amendment attacks on SMCRA fared no better. They argued that constraints on surface mining on steep slopes impermissibly interfered with the traditional state and local power to regulate land use. The Court disagreed, reasoning that these constraints applied only to private coal mining operations. SMCRA did not compel states to enforce the standards, to expend any state funds, or to participate in the federal regulatory program in any way; the federal government would take on the burden of implementation and enforcement in any state choosing not to participate. As a result, SMCRA did not "commandeer" state legislative processes "by directly compelling them to enact and enforce a federal regulatory program."<sup>32</sup> Again, the Court approvingly cited lower court decisions upholding other environmental statutes in the face of Tenth Amendment challenges.<sup>33</sup> It ruled that Congress does not invade powers reserved to the states under the Tenth Amendment "simply because it exercises its authority under the Commerce Clause in a manner that displaces the States' exercise of their police powers."<sup>34</sup> The next year, the Court used similar reasoning to turn aside Commerce Clause and Tenth Amendment challenges to another cooperative federalism statute involving energy regulation.<sup>35</sup>

A decade later, the Court identified an environmental statutory provision that ran afoul of the Constitution's federalism provisions. In *New York v. United States*,<sup>36</sup> it upheld surcharges imposed

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<sup>28</sup> *Hodel*, 452 U.S. at 268-72.

<sup>29</sup> *Id.* at 276.

<sup>30</sup> *Id.* at 281-82.

<sup>31</sup> Among the cases cited were *United States v. Byrd*, 609 F.2d 1204 (7<sup>th</sup> Cir.1979) (CWA); *Sierra Club v. EPA*, 540 F.2d 1114 (D.C. Cir. 1976) (CAA); *District of Columbia v. Train*, 521 F.2d 971 (D.C. Cir. 1975) (CAA); *United States v. Ashland Oil & Transp. Co.*, 504 F.2d 1317 (6<sup>th</sup> Cir. 1974) (CWA); *S. Terminal Corp. v. EPA*, 504 F.2d 646 (1<sup>st</sup> Cir. 1974) (CAA).

<sup>32</sup> *Hodel*, 452 U.S. at 288.

<sup>33</sup> *Id.* (citing *Friends of the Earth v. Carey*, 552 F.2d 25 (2d Cir. 1977) (CAA); *Sierra Club v. EPA*, 540 F.2d 1114 (D.C. Cir. 1976) (CAA)).

<sup>34</sup> *Id.* at 291. In another case decided the same day, the Court held that SMCRA's provisions protecting prime farmland violated neither the Commerce Clause nor the Tenth Amendment. *Hodel v. Indiana*, 452 U.S. 314 (1981).

<sup>35</sup> *FERC v. Mississippi*, 456 U.S. 742, 767 (1982).

<sup>36</sup> 505 U.S. 144 (1992).

on states for disposal of radioactive waste generated without complying with Low-Level Radioactive Waste Policy Act of 1985 requirements to participate in efforts to site and build new disposal facilities. It also ruled that conditioning the receipt of federal funds on compliance with the statute’s schedule for constructing, or participating in an interstate compact that constructed, a disposal site was a valid exercise of the Spending Clause.

The Court concluded, however, that the Act’s provisions forcing states not complying with the requirements for helping to site new disposal facilities to take title to waste generated within their borders violated the Tenth Amendment. Those provisions purportedly offered the states the “choice” of accepting ownership of low-level waste or regulating disposal according to federal instructions. The Court reasoned, however, that:

A choice between two unconstitutionally coercive regulatory techniques is no choice at all. Either way, “the Act commandeers the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program,” an outcome that has never been understood to lie within the authority conferred upon Congress by the Constitution.<sup>37</sup>

*New York v. United States* established that Congress may not offer a state “no option other than that of implementing [federal] legislation. . . .”<sup>38</sup> Congress has not replicated the 1985 Act’s “take title” provisions in other federal statutes, however, and most efforts to extend that precedent to other pollution control statutes failed.<sup>39</sup> Despite *New York*, little environmental legislation has been vulnerable to Tenth Amendment challenge.

A 2015 decision by the U.S. Court of Appeals for the D.C. Circuit is illustrative.<sup>40</sup> The court rebuffed claims by a group of states and industrial entities that CAA provisions allowing EPA to override state determinations on the appropriate status of air quality control regions (attainment, nonattainment, or unclassifiable) amounted to unconstitutional commandeering. The statute does not compel states to implement a federal regulatory program. Instead, it authorizes EPA “to promulgate and administer a federal implementation plan of its own if the State fails to submit an adequate state implementation plan [SIP],” imposing the “full regulatory burden” on the federal government if a state chooses not to submit a SIP.<sup>41</sup> In another CAA case, the same court interpreted Supreme Court precedents as “repeatedly affirm[ing] the constitutionality of federal

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<sup>37</sup> *Id.* at 176 (quoting *Hodel*, 452 U.S. at 288).

<sup>38</sup> *Id.* at 177.

<sup>39</sup> *See, e.g.*, *Nebraska v. EPA*, 331 F.3d 995 (D.C. Cir. 2003) (rejecting Tenth Amendment attack on the Safe Drinking Water Act (SDWA)); *City of Abilene v. EPA*, 325 F.3d 657 (5th Cir. 2003) (upholding conditions on EPA-issued stormwater discharge permits under the CWA); *Env’tl. Def. Ctr. v. EPA*, 319 F.3d 398 (9th Cir. 2003) (same); *Virginia v. Browner*, 80 F.3d 869 (4th Cir. 1996) (rejecting challenge to CAA provisions authorizing EPA to impose sanctions on states with inadequate permit programs); *cf. Wyoming v. United States*, 279 F.3d 1214 (10th Cir. 2002) (holding that agency’s refusal to permit state to vaccinate elk on national wildlife refuge to prevent brucellosis did not violate Tenth Amendment). On rare occasions, Tenth Amendment challenges succeeded. *See ACORN v. Edwards*, 81 F.3d 1387 (5th Cir. 1996) (holding that SDWA requirement that states establish remedial plans to remove lead-contamination from school and day-care center drinking water facilities impermissibly sought to control state legislative processes).

<sup>40</sup> *Mississippi Comm’n on Env’tl. Quality v. EPA*, 790 F.3d 138 (D.C. Cir. 2015).

<sup>41</sup> *Id.* at 175.

statutes that allow States to administer federal programs but provide for direct federal administration if a State chooses not to administer it.”<sup>42</sup>

### *More Recent Constitutional Attacks*

Twenty-five years after Congress enacted the CAA, the constitutionality of federal environmental legislation seemed secure. With few exceptions, the courts at all levels had turned aside federalism-based challenges to cooperative federalism regimes. In 1995, however, for the first time in decades, the Supreme Court in *United States v. Lopez*<sup>43</sup> concluded that a federal statute exceeded Congress’s Commerce Clause authority. Five years later, the Court invalidated another statute on the same ground in *United States v. Morrison*.<sup>44</sup>

Neither of these decisions involved an environmental statute. They nevertheless triggered a new round of constitutional challenges to federal environmental legislation. Those efforts were no more successful than the first wave of constitutional challenges had been, as the courts easily distinguished *Lopez* and *Morrison* in finding solid grounding for the environmental statutes in the Commerce Clause. The lower courts rejected claims that statutory provisions directed at purportedly intrastate, local activities exceeded the scope of federal legislative authority under the Commerce Clause. Among the statutes whose provisions survived these attacks were the SDWA,<sup>45</sup> the CAA,<sup>46</sup> the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA),<sup>47</sup> and the CWA.<sup>48</sup>

The Roberts Court fortified these decisions in its 2006 *Raich* decision,<sup>49</sup> in which it confirmed the continuing validity of *Wickard v. Filburn*.<sup>50</sup> That 1942 case established that Congress may regulate purely local activities that are part of an economic class of activities that have a substantial effect on interstate commerce. Ten years later, the Roberts Court again ruled in *Taylor v. United States* that Congress may regulate intrastate activities based on their “aggregate effects on interstate commerce.”<sup>51</sup> Although neither of these cases addressed an environmental statute, the courts of appeals relied on them in dismissing Commerce Clause challenges to regulation of intrastate activities under statutes such as the Endangered Species Act (ESA). Every appellate court to address the issue, some of which predated *Raich*, have held that the ESA’s taking prohibition does not violate the Commerce Clause, notwithstanding differences in the rationales for concluding that the ESA’s regulatory scheme has a substantial effect on interstate commerce even when the species in question is found only in one state.<sup>52</sup> The ESA is not structured along the lines of a traditional

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<sup>42</sup> *Texas v. EPA*, 726 F.3d 180, 196-97 (D.C. Cir. 2013) (citing *New York and Hodel*).

<sup>43</sup> 514 U.S. 549 (1995) (invalidating the Gun-Free School Zones Act).

<sup>44</sup> 529 U.S. 598 (2000) (invalidating the Violence Against Women Act).

<sup>45</sup> *E.g.*, *Nebraska v. EPA*, 331 F.3d 995 (D.C. Cir. 2003).

<sup>46</sup> *E.g.*, *United States v. Ho*, 311 F.3d 589 (5<sup>th</sup> Cir. 2002); *Allied Local & Reg’l Mfrs. Caucus*, 215 F.3d 61 (D.C. Cir. 2000).

<sup>47</sup> *E.g.*, *United States v. Olin Corp.* 107 F.3d 1506 (11<sup>th</sup> Cir. 1997).

<sup>48</sup> *E.g.*, *United States v. Gerke Excavating, Inc.*, 412 F.3d 804 (7<sup>th</sup> Cir. 2005), *vacated on other grounds*, 548 U.S. 901 (2006); *United States v. Deaton*, 332 F.3d 698 (4<sup>th</sup> Cir. 2003).

<sup>49</sup> *Gonzalez v. Raich*, 545 U.S. 1 (2006).

<sup>50</sup> 317 U.S. 111 (1942).

<sup>51</sup> *Taylor v. United States*, 136 S. Ct. 2074, 2079-80 (2016).

<sup>52</sup> *See, e.g.*, *People for the Ethical Treatment of Property Owners v. U.S. Fish and Wildlife Serv.*, 852 F.3d 990 (10<sup>th</sup> Cir. 2017); *Markle Interests v. United States*, 827 F.3d 452 (5<sup>th</sup> Cir. 2016), *reh’g en banc denied*, 848 F.3d 635 (5<sup>th</sup>



cooperative federalism statute. But the courts' expansive interpretations in ESA cases of the Commerce Clause's application to intrastate economic activities with substantial aggregate effects on interstate commerce are consistent with and have lent force to cases in which recent efforts to convince courts that cooperative federalism statutes such as the CAA outstrip Congress's Commerce Clause power have met a frosty judicial reception.<sup>53</sup>

## Constitutional Avoidance

Although the Supreme Court has yet to conclude that an environmental statute is not supported by the Commerce Clause, it has relied on constitutional limits on the power to regulate commerce to interpret the scope of one of these statutes, the CWA, narrowly. The Court has long sought to avoid unnecessarily addressing constitutional questions by adopting an interpretation of a statute susceptible to multiple interpretations that eliminates the alleged constitutional deficiency.<sup>54</sup> In the *SWANCC* case,<sup>55</sup> the Army Corps of Engineers, which jointly administers the CWA's dredge and fill permit program with EPA, required a permit for an abandoned sand and gravel pit containing ponds that provided habitat for migratory birds. The Court found it unnecessary to address whether that expansive application of the permit program ran afoul of the Commerce Clause. Instead, it held that the Corps' position conflicted with congressional intent, ruling that the CWA does not extend to ponds that are not adjacent to open water.

The Court reasoned that “[w]here an administrative interpretation of a statute invokes the outer limits of Congress’ power, we expect a clear indication that Congress intended that result.”<sup>56</sup> It added that its “prudential desire not to needlessly reach constitutional issues . . . is heightened where the administrative interpretation alters the federal-state framework by permitting federal encroachment upon a traditional state power.”<sup>57</sup> In the absence of clear congressional intent to cover the affected waters, the Court construed the statute narrowly “to avoid the significant constitutional and federalism questions raised by [the Corps’] interpretation.”<sup>58</sup>

A plurality of the Court relied on similar reasoning five years later in ruling in the *Rapanos* case that the Corps improperly applied the dredge and fill permit program to wetlands based on their indirect connections to tributaries of navigable waters.<sup>59</sup> Lacking a “clear and manifest” statement from Congress, the plurality refused to conclude that Congress intended to “authorize an unprecedented intrusion into traditional state authority” that “presses the envelope of constitutional validity.”<sup>60</sup> It concluded that the program applies only to “relatively permanent, standing or

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Cir. 2017); *San Luis & Delta-Mendota Water Auth. v. Salazar*, 638 F.3d 1163 (9<sup>th</sup> Cir. 2011); *Alabama-Tombigbee Rivers Coal. v. Kempthorne*, 477 F.3d 1250 (11<sup>th</sup> Cir. 2007); *Rancho Viejo, LLC v. Norton*, 323 F.3d 1062 (D.C. Cir. 2003); *Gibbs v. Babbitt*, 214 F.3d 483 (4<sup>th</sup> Cir. 2000).

<sup>53</sup> *See, e.g.*, *Mississippi Comm’n on Env’tl. Quality v. EPA*, 790 F.3d 138, 181 (D.C. Cir. 2015) (“[T]here is no doubt that the general regulatory scheme of the [CAA] has a substantial relation to interstate commerce.”).

<sup>54</sup> RICHARD E. LEVY & ROBERT L. GLICKSMAN, *STATUTORY ANALYSIS IN THE REGULATORY STATE* 156-57 (2014) (“Statutes should be construed to avoid constitutional issues or problems.”).

<sup>55</sup> *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng’rs*, 531 U.S. 159 (2001) (*SWANCC*).

<sup>56</sup> *Id.* at 172.

<sup>57</sup> *Id.* at 172-73.

<sup>58</sup> *Id.* at 174.

<sup>59</sup> *Rapanos v. United States*, 547 U.S. 715 (2006).

<sup>60</sup> *Id.* at 738.

flowing bodies of water,” not to channels in which water flows intermittently or ephemerally.<sup>61</sup> Justice Anthony Kennedy wrote a concurring opinion advancing a “significant nexus” test that the lower courts have applied in most subsequent cases. In doing so, he asserted that his interpretation of the statute avoided federalism concerns more effectively than the plurality’s approach.<sup>62</sup> Some lower courts have relied on *SWANCC* or *Rapanos* to interpret federal environmental legislation narrowly.<sup>63</sup>

### **The Roberts Court and Spending and Commerce Clause Constraints on Federal Power**

To date, the Roberts Court’s Commerce Clause and Tenth Amendment jurisprudence has not posed threats to the constitutionality of federal environmental statutes. Its interpretation of the Spending Clause has the potential to do so, however. In 2012, the Court addressed the constitutionality of portions of the Patient Protection and Affordable Care Act of 2010 (ACA) in the *Sebelius* case.<sup>64</sup> Five justices agreed that the federal tax power<sup>65</sup> supported the individual mandate (which penalizes individuals refusing to purchase health insurance). Seven justices in two separate opinions, however, concluded that that the ACA’s reliance on the Spending Clause to withhold all federal Medicaid funding from states refusing to expand the program’s coverage for the poor was constitutionally problematic. Chief Justice John Roberts characterized the threat to pull back all Medicaid funding to uncooperative states as “a gun to the head” of the states and “economic dragooning” that was impermissibly coercive.<sup>66</sup>

The federal government has long provided financial assistance to help its state partners fulfill their responsibilities under the environmental laws. Even before Congress adopted the CAA, it provided financial and technical assistance to state regulators.<sup>67</sup> EPA provided first grants and then loans to help municipalities meet their CWA water treatment responsibilities.<sup>68</sup> Sometimes, these funds come with strings attached. Indeed, Congress has invoked its power to withdraw funding for other activities if states fail to meet their environmental statutory obligations. The CAA, for example, authorizes EPA to withhold federal funding for highway construction from states that do not comply with their duties to improve air quality in areas not yet in compliance with the NAAQS.<sup>69</sup> Before *Sebelius*, the Fourth Circuit held that this conditional funding mechanism is not impermissibly coercive and that the conditions on receipt of highway funding are reasonably related to the goal of reducing air pollution. Holding that the highway sanctions are a valid exercise of the spending power, the court concluded that “Congress may ensure that funds it allocates are not used to exacerbate the overall problem of air pollution.”<sup>70</sup>

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<sup>61</sup> *Id.* at 739.

<sup>62</sup> *Id.* at 782-83 (Kennedy, J., concurring in the judgment).

<sup>63</sup> *E.g.*, *In re Needham*, 354 F.3d 340 (5<sup>th</sup> Cir. 2003); *Rice v. Harken Exploration Co.*, 250 F.3d 264 (5<sup>th</sup> Cir. 2001).

<sup>64</sup> *Nat’l Fed’n of Indep. Business v. Sebelius*, 567 U.S. 519 (2012).

<sup>65</sup> U.S. CONST. art. I, § 8, cl. 1.

<sup>66</sup> *Sebelius*, 567 U.S. at 581, 582.

<sup>67</sup> *See* Glicksman & Levy, *supra* note 23, at 596; Glicksman, *supra* note 21, at 730.

<sup>68</sup> *See* 33 U.S.C. §§ 1281-1288.

<sup>69</sup> 42 U.S.C. § 7509(b)(1).

<sup>70</sup> *Virginia v. Browner*, 80 F.3d 869, 882 (4<sup>th</sup> Cir. 1996).

Some scholars have argued that *Sebelius* may dictate a contrary conclusion, having clarified the extent of (or imposed new constraints on) the exercise of the federal spending power.<sup>71</sup> The D.C. Circuit, however, has dismissed the contention that the highway sanctions “impose such a steep price that State officials effectively have no choice but to comply—in contravention of [*Sebelius*].”<sup>72</sup> For several reasons, the court determined that the highway sanctions “are not nearly as coercive as those in the ACA.”<sup>73</sup> First, a noncomplying state only risks forfeiture of funding for transportation projects or grants applicable to its nonattainment areas rather than losing all federal funding for an existing program. Second, states risk losing a much lower percentage of their federal funding, either for highway construction or of their overall budget than in *Sebelius*. Third, although imposition of a condition that did not restrict how the affected federal highway funds were to be used might be problematic, the CAA redirects federal highway funds of noncomplying states to Congress’ chosen programs, including those that would improve air quality. Fourth, the problematic condition in *Sebelius* was new both because it had been recently enacted at the time of the litigation and because conditions it imposed additional requirements with which states had to comply to continue receiving preexisting federal funding. Neither the CAA’s requirement to submit a SIP nor its highway funds sanction was a newly imposed condition. As a result, the states were “not suddenly surprised by dramatically new conditions retroactively imposed after a long period in which the State had accepted and relied upon unconditional federal funding—as was the case in [*Sebelius*].”<sup>74</sup>

Moreover, even if highway sanctions are newly problematic after *Sebelius*, few environmental statutes are likely to be similarly affected. Jonathan Adler and Nathaniel Stewart, who have suggested that the highway sanctions may violate the Spending Clause, conclude that “conditional spending requirements under other federal environmental statutes appear to be far less vulnerable. At present, most other federal environmental statutes simply impose conditions on how funding for state-level environmental programs is to be spent or do no more than threaten conditional preemption.”<sup>75</sup>

*Sebelius* also has potential implications for Commerce Clause jurisprudence. The Court’s conclusion that the tax power supported the individual mandate precluded the need to address whether the mandate is a legitimate exercise of Commerce Clause authority. Chief Justice Roberts nevertheless weighed in, albeit arguably in dicta. Justice Antonin Scalia, joined by three other justices, also did so in a separate opinion. Neither opinion disputed that health care was imbued with commerce or that individuals’ decisions not to obtain health insurance affected insurance markets. They took issue, however, with the federal government’s attempt to compel someone not actively in health care markets to buy insurance. Both opinions distinguished *Wickard*’s aggregation of the local effects of an economic class of activities with substantial effects on interstate commerce because the wheat farmers growing for home consumption in that case engaged in affirmative conduct. Roberts concluded that the federal government cannot compel

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<sup>71</sup> Jonathan H. Adler & Nathaniel Stewart, *Is the Clean Air Act Unconstitutional? Coercion, Cooperative Federalism and Conditional Spending After NFIB v. Sebelius*, 43 *ECOLOGY L.Q.* 671, 701 (2016) (calling EPA withholding of federal highway funds from noncompliant states “vulnerable” after *Sebelius*).

<sup>72</sup> *Mississippi Comm’n on Env’tl. Quality v. EPA*, 790 F.3d 138, 175 (D.C. Cir. 2015).

<sup>73</sup> *Id.* at 177.

<sup>74</sup> *Id.* at 179.

<sup>75</sup> Adler & Stewart, *supra* note 71, at 722.

activity under the Commerce Clause “whenever enough [individuals] are not doing something the Government would have them do.”<sup>76</sup>

Putting aside that the Roberts and Scalia Commerce Clause analyses were unnecessary to the decision given the agreement of a majority of the Court that the tax power supports the individual mandate, this portion of *Sebelius* is not likely to provide fertile ground for future Commerce Clause attacks on environmental regulation in most cases. Because almost all pollution and other environmental harms result from affirmative economic activity, the compulsion to enter a market involuntarily that troubled Roberts and Scalia is lacking. One context that might be analogous to *Sebelius* involves forcing an individual to address hazardous substances under his or her land under “passive migration” theories derived from federal hazardous waste statutes. Even then, however, the landowner would have acted in acquiring the property (unless title passed by will or intestate succession). It is unclear whether courts would find Commerce Clause concerns in such a case to be cogent, but even if they do, the Commerce Clause reasoning in the Roberts and Scalia opinions in *Sebelius* do not appear to pose a significant threat to the constitutionality of most federal environmental statutory provisions.

### **Constraints on State Power**

The flip side of the cooperative federalism coin is the exercise of state regulatory authority in the pursuit of environmental protection goals. The primary constraints on state regulatory power in this context are the Supremacy and dormant Commerce Clauses. The former provides that federal law prevails over inconsistent state law. Preemption issues turn on whether Congress intended to preserve or negate state law in particular circumstances. To the extent that the environmental statutes explicitly preserve a role for the states (such as by allowing them to adopt standards more stringent than federal law), preemption is not an issue, although questions concerning the proper interpretation and application of statutory savings clauses and related provisions often arise.<sup>77</sup> The Roberts Court concluded in 2011 that the CAA displaces federal common law public nuisance remedies for harms caused by greenhouse gas (GHG) emissions.<sup>78</sup> That case turned on separation of powers, not federalism considerations. The Court left open whether state common law claims survived.<sup>79</sup> The Sixth Circuit subsequently held that the CAA preserves claims under more stringent state law, including state common law.<sup>80</sup>

The dormant Commerce Clause restricts the ability of states and localities to control the flow of interstate commerce or discriminate against out-of-state commerce. The Rehnquist Court repeatedly struck down state and local attempts to prohibit the importation of solid waste generated elsewhere or otherwise to control the flow of waste.<sup>81</sup> The Roberts Court distinguished those cases

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<sup>76</sup> *Sebelius*, 567 U.S. at 553.

<sup>77</sup> See, e.g., Sandi Zellmer, *When Congress Goes Unheard: Savings Clauses’ Rocky Judicial Reception*, in PREEMPTION CHOICE: THE THEORY, LAW, AND REALITY OF FEDERALISM’S CORE QUESTION 144 (William W. Buzbee ed., 2009).

<sup>78</sup> *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410 (2011).

<sup>79</sup> *Id.* at 429.

<sup>80</sup> *Merrick v. Diageo Americas Supply, Inc.*, 805 F.3d 685 (6<sup>th</sup> Cir. 2015).

<sup>81</sup> See *C&A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383 (1994); *Oregon Waste Sys., Inc. v. Oregon Dep’t of Env’tl. Quality*, 511 U.S. 93 (1992); *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep’t of Natural Resources*, 504 U.S. 353 (1992); *Chem. Waste Mgmt., Inc. v. Hunt*, 504 U.S. 334 (1992).

in upholding a flow control ordinance that forced waste haulers to send waste to facilities owned and operated by a state-created public benefit corporation.<sup>82</sup> Finding that the ordinance did not discriminate against interstate commerce, the Court upheld it because any incidental burden it may have had on interstate commerce was outweighed by the public benefits conferred.

None of these cases directly implicated cooperative federalism statutes. Dormant Commerce Clause issues may arise, however, in contexts in which challenged state laws can be regarded as efforts to exercise preserved authority to advance federal environmental goals through more stringent regulation. The Ninth Circuit ruled in 2013 that California's Low Carbon Fuel Standard, which sought to reduce GHGs emitted in the production of transportation fuel, neither improperly discriminated against interstate commerce nor violated the dormant Commerce Clause's prohibition on extraterritorial state regulation.<sup>83</sup> More recently, the Eighth Circuit struck down Minnesota's renewable portfolio standard (RPS),<sup>84</sup> which was also designed to combat climate change.<sup>85</sup> The panel members disagreed on the rationale. One concluded that the standard qualified as improper extraterritorial regulation because, to comply with it, integrated utilities must either unplug from the electric grid or seek approval from Minnesota regulators of transactions that may import electricity into Minnesota. The RPS improperly foisted on surrounding states Minnesota's policy of increasing the cost of electricity by restricting use of the most cost-efficient sources of generating capacity.<sup>86</sup> A second judge concluded that the RPS was preempted because it conflicted with the CAA's cooperative federalism regime by limiting a source state's authority to govern emissions from sources within its own borders. The CAA creates other mechanisms for a state to object to upwind state emissions.<sup>87</sup> That result purports to advance, not frustrate Congress's cooperative federalism goals, but it creates the potential to block states from supplementing weak or nonexistent implementation of CAA provisions authorizing regulation of GHGs.<sup>88</sup>

### **Sabotaging Environmental Cooperative Federalism through Abdication and Asymmetrical Devolution**

The discussion thus far indicates that, with few exceptions, cooperative federalism statutes stand on strong constitutional footing. The principal current threats to environmental cooperative federalism statutes and the protective goals they embody come from the executive branch, not the courts. The environmental policy decisions advanced during the first six months of the Trump Administration reflect an unprecedented retrenchment from the leadership role that EPA has exercised in this arena, at Congress's direction, for nearly 50 years. At the same time, despite

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<sup>82</sup> *United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330 (2007).

<sup>83</sup> *Rocky Mountain Farmers Union v. Corey*, 730 F.3d 1070 (9<sup>th</sup> Cir. 2013), *reh'g en banc denied*, 740 F.3d 507 (9<sup>th</sup> Cir 2014).

<sup>84</sup> RPSs require electric utilities to generate at least a minimum amount of power from renewable or other low carbon or carbon-free energy sources. See ROBERT L. GLICKSMAN ET AL., *ENVIRONMENTAL PROTECTION: LAW AND POLICY* 1247 (7<sup>th</sup> ed. 2015).

<sup>85</sup> *North Dakota v. Heydinger*, 825 F.3d 912 (8<sup>th</sup> Cir. 2016).

<sup>86</sup> *Id.* at 922.

<sup>87</sup> *Id.* at 927-29 (Colloton, J., concurring in the judgment). Compare *Allco Finance Ltd. v. Klee*, 2017 WL 2782856 (2d Cir. 2017) (upholding Connecticut's RPS program, which did not discriminate against out-of-state renewable energy producer).

<sup>88</sup> For discussion of whether the federal government's failure to regulate can preempt state regulation, see Robert L. Glicksman, *Nothing Is Real: Protecting the Regulatory Void through Federal Preemption by Inaction*, 26 VA. ENVTL. L.J. 5 (2008) (concluding that preemption by inaction should occur only in limited circumstances).

paying lip service to federalism principles, the Administration seems intent on effectively disabling the exercise of meaningful state regulatory power, if not ousting important components of that authority entirely.

Early in the Trump Administration, EPA began repealing or delaying implementation of at least thirty environmental regulations. This was the largest and fastest effort to eliminate regulatory constraints that EPA had ever undertaken, and included delaying CAA rules restricting fugitive methane emissions from the oil and gas industry<sup>89</sup> and preventing explosions and spills at chemical plants.<sup>90</sup> Most prominently, EPA announced it would take steps to repeal an Obama EPA rule defining the jurisdictional boundaries of various CWA programs (the so-called “waters of the United States” or WOTUS rule)<sup>91</sup> and the Clean Power Plan (CPP), EPA’s effort to control GHG emissions from existing electric generating units under the CAA.<sup>92</sup> EPA’s action on the WOTUS rule came in response to an Executive Order directing EPA to “publish for notice and comment a proposed rule rescinding or revising the rule, as appropriate and consistent with the law.”<sup>93</sup> Retaining this Obama-era rule was apparently not an available option, regardless of the results of EPA’s review. The announcement on the CPP came on the heels of President Donald Trump’s issuance of an Executive Order promoting domestic energy production that mandated EPA review of the CPP and other CAA regulations directed at GHG emissions.<sup>94</sup> The same Order immediately repealed Obama Administration executive orders, memoranda, and reports relating to climate change.<sup>95</sup>

President Trump’s orders to EPA to review and, if appropriate, repeal both the WOTUS rule and the CPP invoked federalism concerns. The Order directing EPA to review the CPP enunciated a policy of “respecting the proper roles of the Congress and the States concerning these matters in

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<sup>89</sup> Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources, 81 Fed. Reg. 35,824 (June 3, 2016). EPA announced in May 2017 that the rule, which had gone into effect nearly a year earlier, would be stayed pending its reconsideration of the rule. The D.C. Circuit blocked the stay, finding it to be arbitrary and procedurally defective, and disagreeing that industry never had an opportunity to comment on the rule. *Clean Air Council v. EPA*, 2017 WL 2838112 (D.C. Cir. 2017). It temporarily stayed issuance of its order to allow the Administration to seek further review. *Clean Air Council v. EPA*, No. 17-1145 (D.C. Cir. July 13, 2017).

<sup>90</sup> Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act; Further Delay of Effective Date, 82 Fed. Reg. 27,133 (June 14, 2017); Coral Davenport, *E.P.A. Chief Voids Obama-Era Rules in Blazing Start*, N.Y. TIMES, July 2, 2017; see also Oliver Milman, *Trump’s alarming environmental rollback: what’s been scrapped so far*, THE GUARDIAN, July 4, 2017, <https://www.theguardian.com/environment/2017/jul/04/trump-environmental-rollback-epa-scrap-regulations> (The Trump Administration “has proceeded with quiet efficiency in its dismantling of other major environmental policies. The White House, Congress and [EPA] have dovetailed to engineer a dizzying reversal of clean air and water regulations implemented by Barack Obama’s administration.”).

<sup>91</sup> EPA, *U.S. Army Move to Rescind 2015 “Waters of the U.S.”*, EPA News Release, June 27, 2017, <https://www.epa.gov/newsreleases/epa-us-army-move-rescind-2015-waters-us>.

<sup>92</sup> Announcement of Review, 82 Fed. Reg. 16,329 (Apr. 4, 2017) (announcing intent to review, “and, if appropriate, . . . as soon as practicable and consistent with law, initiate proceedings to suspend, revise or rescind” this rule). EPA also withdrew proposed rules to establish a federal implementation plan for states failing to comply with federal regulations. Withdrawal of Proposed Rules: Federal Plan Requirements for Greenhouse Gas Emissions from Electric Utility Generating Units Constructed on or Before January 8, 2014; Model Trading Rules; Amendments to Framework Regulations; and Clean Energy Incentive Program Design Details, 82 Fed. Reg. 16,144 (Apr. 3, 2017).

<sup>93</sup> Exec. Order No. 13778, § 2(a), 82 Fed. Reg. 12,497 (Feb. 28, 2017).

<sup>94</sup> Exec. Order No. 13783, § 4, 82 Fed. Reg. 16,093 (Mar. 28, 2017).

<sup>95</sup> *Id.* § 3.

our constitutional republic.”<sup>96</sup> Likewise, the Order directing EPA to review the WOTUS rule was premised on a policy of “showing due regard for the roles of the Congress and the States under the Constitution” in addressing water pollution,<sup>97</sup> and the Order itself was titled “Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the ‘Waters of the United States’ Rule.”

EPA later issued a press release describing EPA Administrator E. Scott Pruitt’s “Back-to-Basics agenda,” which included “returning power to the states” and “restoring states’ important role in the regulation of local waters by reviewing the WOTUS . . . rule.”<sup>98</sup> Pruitt has repeated in other forums that an important focus of his agenda is “cooperative federalism[: p]artnership,”<sup>99</sup> which he labeled a “great concept” that had not yet proven effective.<sup>100</sup> He provided a different explanation for the agency’s whirlwind approach to rescinding or delaying implementation of these and other rules, however, proclaiming in an interview with Breitbart that “[w]e’re going to roll it back, those things that were unlawful, we’re going to roll back those things that were an overreach, we’re going to roll back the steps taken by the previous administration.”<sup>101</sup>

Before being confirmed, Pruitt postulated that EPA “was never meant to be our nation’s front-line environmental regulator.”<sup>102</sup> This demonstrably false statement flies in the face of voluminous evidence that Congress intended EPA to play exactly that role and that demonstrates a willful ignorance of the history of federal environmental regulation that is shocking for an EPA Administrator. Before Congress enacted the foundational cooperative federalism statutes, the federal government’s role was more confined than those laws would afford it. The states’ previous failures to provide acceptable levels of environmental quality induced Congress to create a more robust federal presence. Congress was also aware of the collective action problems, noted earlier, that make a strong federal presence essential. As I have explained elsewhere, “Congress made EPA the dominant partner because experience convinced it that the states lacked the will or the capacity to achieve air quality protection goals.”<sup>103</sup> When Congress amended the CAA in 1977 and 1990, in the face of many states’ persistent noncompliance with the NAAQS, it rethought the initial allocation of authority—and chose to rebalance the scales even more heavily in favor of federal power.<sup>104</sup> Congress made similar judgments when enacting the other cooperative

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<sup>96</sup> *Id.* § 1(d).

<sup>97</sup> Exec. Order No. 13778, *supra* note 93, § 1.

<sup>98</sup> EPA Launches Back-To-Basics Agenda at Pennsylvania Coal Mine, News Release, Apr. 13, 2017, <https://www.epa.gov/newsreleases/epa-launches-back-basics-agenda-pennsylvania-coal-mine>.

<sup>99</sup> Kevin Bogardus, *Pruitt talks up partnership with state regulators*, E&ENews, Apr. 7, 2017, <https://www.eenews.net/greenwire/stories/1060052820>.

<sup>100</sup> Niina Heikkinen, *Pruitt wants to give power to states. Not all of them want it*, CLIMATEWIRE, May 22, 2017, <https://www.eenews.net/climatewire/2017/05/22/stories/1060054887>.

<sup>101</sup> Charlie Spiering, *Exclusive: Scott Pruitt Promises ‘EPA Originalism’ in Donald Trump Administration*, BREITBART, Mar. 28, 2017, <http://www.breitbart.com/big-government/2017/03/28/exclusive-scott-pruitt-promises-epa-orginalism-in-donald-trump-administration/>; *see also* Milman, *supra* note 90 (quoting Pruitt’s promise to roll back regulations “in a very aggressive way,” and quoting a characterization of that scale of rollback as unprecedented by President George W. Bush’s first EPA Administrator).

<sup>102</sup> Bridget DiCosmo & David LaRoss, *Pruitt Opponents Target Nominee’s Federalism Approach as ‘Shell Game,’ ENVTL. POLICY ALERT*, Feb. 1, 2017; *see also* Heikkinen, *supra* note 100 (“Pruitt said Congress initially intended for states to be a ‘primary or active partner’ in implementing regulations created under environmental legislation.”).

<sup>103</sup> Robert L. Glicksman & Jessica A. Wentz, *Debunking Revisionist Understandings of Environmental Cooperative Federalism: Collective Action Responses to Air Pollution*, in *THE LAW AND POLICY OF ENVIRONMENTAL FEDERALISM: A COMPARATIVE ANALYSIS* 3, 6 (Kalyani Robbins ed., 2015).

<sup>104</sup> *Id.*

federalism statutes,<sup>105</sup> although at least one Supreme Court justice has grossly mischaracterized the resulting cooperative federalism structures.<sup>106</sup> Nevertheless, as Attorney General of Oklahoma, Pruitt filed lawsuits challenging EPA’s authority in the context in which collective action problems may most clearly call for federal power—interstate pollution.<sup>107</sup>

Pruitt’s EPA has made it clear that it will use federalism as a sword to justify federal regulatory retrenchment. In its proposed rescission of the WOTUS rule, EPA cited § 101(b) of the CWA, which enunciates a policy “to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, [and] to plan the development and use (including restoration, preservation, and enhancement) of land and water resources.”<sup>108</sup> The preamble to the proposal indicated that EPA and the Corps of Engineers would “consider[ ] the relationship of the CWA objective and policies, and in particular, the meaning and importance of section 101(b).”<sup>109</sup> EPA asserted that, in promulgating the rule in 2015, the agencies acknowledged § 101(b) but failed to discuss its importance in guiding their choices in defining the scope of the CWA’s reach. The agencies would redress that deficiency by “more fully consider[ing]” § 101(b), “including the extent to which states or tribes have protected or may protect waters that are not subject to CWA jurisdiction.”<sup>110</sup> Some have suggested that the Trump Administration also may be interested in putting the states in charge of remedy selection in hazardous substance cleanups under CERCLA.<sup>111</sup> Congressional Republicans have introduced legislation that would require state approval before federal agencies may list species as endangered or threatened under the ESA.<sup>112</sup>

This withdrawal of the federal government from its historic role in protecting the environment is troublesome. It might be less so if the Trump Administration were truly committed to state empowerment and a sufficient number of states were willing and able to step into the breach created by EPA’s significantly diminished role, but the Administration’s professed commitment to the exercise of meaningful state regulatory power is belied by its actions.

As early as his confirmation hearings, Pruitt raised the possibility that he would revoke waivers previously granted by EPA allowing California to enact tailpipe emission standards for GHGs under the CAA that are more stringent than EPA’s, notwithstanding the statute’s general preemption of state authority to enact or enforce emissions standards for new motor vehicles.<sup>113</sup>

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<sup>105</sup> See Glicksman, *supra* note 21, at 740 (“The terminology of state primacy and of federal-state partnerships is misleading, however. The federal pollution control statutes unquestionably put the federal government, acting through authority delegated to EPA, in the driver’s seat.”).

<sup>106</sup> See Glicksman & Wentz, *supra* note 103, at 4-6 (describing Justice Kennedy’s misconceptions concerning cooperative federalism under the CAA in his dissent in *Alaska Dep’t of Env’tl. Conservation v. EPA*, 540 U.S. 461 (2004)).

<sup>107</sup> *EME Homer City Generating, L.P. v. EPA*, 795 F.3d 118, 121 (D.C. Cir. 2015) (listing Pruitt as an attorney for petitioners challenging the Cross-State Air Pollution Rule).

<sup>108</sup> 33 U.S.C. § 1251(b).

<sup>109</sup> Definition of “Waters of the United States”—Recodification of Pre-existing Rules, 82 Fed. Reg. 34,899, 34,902 (July 27, 2017).

<sup>110</sup> *Id.*

<sup>111</sup> Brian Dabbs, *Attorneys, Industry Mull Superfund Devolution Under Trump*, 47 ENV’T REP. (BNA) 4137 (Nov. 18, 2016).

<sup>112</sup> See S. 935, 115 Cong. (2017-2018), <https://www.congress.gov/bill/115th-congress/senate-bill/935/text>.

<sup>113</sup> 42 U.S.C. § 7543(a), (b) (prohibition and waiver provisions); *id.* § 7507 (authorizing other states to adopt California’s standards). See Evan Harper, *Trump’s Pick Casts Doubt on California’s Power to Regulate Auto Emissions*, L.A. TIMES, Jan. 18, 2017, <http://www.latimes.com/nation/la-na-pol-epa-confirmation-20170118->



Congress chose to allow California to adopt its own, more stringent emission standards because of the severity of auto-related pollution in the southern part of the state resulting from its climate and topography, and the state's leadership role in controlling mobile source pollution.<sup>114</sup> California began restricting vehicle emissions before federal agencies did so. According to California regulators, EPA's effort to block the state's authority to enforce its current standards restricting GHGs or to adopt future restrictions would eviscerate its ability to achieve its target of 40% reductions in GHG emissions below 1990 levels by 2030.<sup>115</sup> The effects of revoking California's waiver would extend to other states, several of which have adopted standards equivalent to more stringent California standards approved by EPA.<sup>116</sup>

Pruitt announced in 2017 that he would not revoke California's waiver,<sup>117</sup> declaring that "[c]urrently, the waiver is not under review."<sup>118</sup> But he had previously made it clear that the waiver is "something that is granted on an annual basis."<sup>119</sup> A refusal to renew the waiver at some time down the road cannot be ruled out. Indeed, in litigation concerning the validity of California's standards EPA has stated its intention to review previously granted waivers for other air pollutants.<sup>120</sup> This tepid defense of state leadership in combating mobile source pollution that contributes to both climate change and increased ozone concentrations is a far cry from Pruitt's call for EPA to step down so that states can play a heightened role.<sup>121</sup> Further evidence of the Administration's willingness to preempt protective state initiatives is its threat to preempt state RPSs.<sup>122</sup>

The budgets the Administration presented to Congress demonstrate even more clearly its questionable devotion to fostering vibrant state regulatory activity in an effort to shift the locus of environmental policymaking authority.<sup>123</sup> The Administration proposed cutting EPA's budget by about 30% in fiscal year 2018.<sup>124</sup> It sought to reduce EPA staffing by about 20% to its lowest

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story.html; Doug Obey, *Pruitt Vows to 'Review' California GHG Waiver, Hints at Unprecedented Step*, ENVTL. POLICY ALERT, Feb. 1, 2017, at 18.

<sup>114</sup> H.R. REP. NO. 90-278, at 42 (1967).

<sup>115</sup> Curt Barry, *CARB Chief Says Trump Blocking Vehicle Rules Would 'Destroy' GHG Plan*, ENVTL. POLICY ALERT, Feb. 1, 2017, at 19.

<sup>116</sup> See, e.g., *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. New York State Dep't of Env'tl. Conservation*, 79 F.3d 1298 (2d Cir. 1996) (approving New York standards).

<sup>117</sup> Dale Kasler, *Is Trump White House blinking on clash over California's clean air rules?*, SACRAMENTO BEE, June 15, 2017, <http://www.sacbee.com/news/local/environment/article156435834.html>.

<sup>118</sup> See Jennifer A. Dlouhy, *EPA Isn't Reviewing California's Clean Air Waiver: Pruitt*, 48 ENV'T REP. (BNA) 1140 (2017) (emphasis added) (quoting Pruitt's congressional testimony).

<sup>119</sup> Obey, *supra* note 113, at 18.

<sup>120</sup> See Kat Sieniuc, *EPA Sees 9<sup>th</sup> Circ. Pause Calif. Waiver Case*, LAW360, May 11, 2017, <https://www.law360.com/articles/923106/epa-sees-9th-circ-pause-calif-caa-waiver-case>.

<sup>121</sup> See also Richard Revesz, *According to Scott Pruitt, states only have the right to pollute, not protect their environments*, L.A. TIMES, Mar. 20, 2017, <http://www.latimes.com/opinion/op-ed/la-oe-revesz-pruitt-epa-federalism-20170320-story.html>.

<sup>122</sup> See Stuart Caplin, Brian Harms & Emily Prince, *Trump Administration Considers Preemption of State Renewable Policies*, RENEWABLE ENERGY INSIGHTS, May 24, 2017, <http://www.renewableinsights.com/2017/05/trump-administration-considers-preemption-state-renewable-policies/>.

<sup>123</sup> EPA, *Fiscal Year 2018: Justification of Appropriation Estimates for the Committee on Appropriations*, EPA-190-K-17-002 (May 2017), <https://www.epa.gov/sites/production/files/2017-05/documents/fy-2018-congressional-justification.pdf>.

<sup>124</sup> Coral Davenport, *Budget Seeks Cuts at E.P.A. to Regulators and Cleanups*, N.Y. TIMES, May 20, 2017, [https://www.nytimes.com/2017/05/19/climate/trump-epa-budget-superfund.html?\\_r=0](https://www.nytimes.com/2017/05/19/climate/trump-epa-budget-superfund.html?_r=0).

levels since the mid-1980s.<sup>125</sup> Trump’s budget called for reductions in EPA’s civil enforcement program by 18%, its criminal enforcement program by 16.5%, and the forensics support for enforcement by about 44%. The Administration justified these cuts by characterizing enforcement as a “shared” federal-state effort.<sup>126</sup> According to President Barack Obama’s former Assistant Administrator for the Office of Enforcement and Compliance Assurance, however, the cuts would deal “a death blow to environmental enforcement.”<sup>127</sup>

The dramatic cuts sought by the Administration would affect the states. Its budget proposal would have slashed EPA’s categorical grants to the states by 45%.<sup>128</sup> It also would have cut state funding beyond environmental cooperative federalism programs, including funding for coastal restoration, hurricane protection, and wildland fire suppression, all of which tend to be dealt with locally.<sup>129</sup> The budget sought to cut support for states to develop SIPs, the core mechanism for achieving the NAAQS, by 24%, and for state and local air quality programs generally by 45%.<sup>130</sup> Funding for favored state programs, including cleaning up the Great Lakes, Chesapeake Bay, and Puget Sound, would have been eliminated entirely. Other targets included beach protection, nonpoint source pollution, pollution prevention, radon, and underground storage tanks.<sup>131</sup> Perhaps most transparently, the Administration indicated it wants to eliminate or reduce federal spending on state actions that extend beyond EPA’s own (weakening) requirements.<sup>132</sup>

Thus, devolution only goes so far. It does not encompass support for state policies and programs that seek more rigorous environmental regulation than the Trump Administration sees fit to administer. As the executive director of the National Association of Clean Air Agencies<sup>133</sup> put it, “[w]hile the Trump Administration has been touting its commitment to ‘cooperative federalism,’ these proposed budget cuts belie that assertion.”<sup>134</sup> Similarly, the Executive Director of the Environmental Council of the States reasoned that “[t]o have cooperative federalism, you have to have financial support. There is a fairly significant disconnect going on.”<sup>135</sup>

Congress made it clear that the Trump budget had no chance of being enacted. But money talks. It is hard to interpret the Administration’s budget requests as anything other than a concerted effort

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<sup>125</sup> Brian Danna, *Budget Calls for 3-Year Low in Staff Levels*, 48 ENV’T REP. (BNA) 1014 (2017).

<sup>126</sup> Kevin Bogardus, *Trump calls for cutting budget by 30%, slashing 3,200 jobs*, GREENWIRE, May 23, 2017, <https://www.eenews.net/stories/1060054996>.

<sup>127</sup> Renee Schoof, *Civil, Criminal Environmental Enforcement Cut in Trump Budget Plan*, 48 ENV’T REP. (BNA) 1012 (2017).

<sup>128</sup> *Id.*

<sup>129</sup> Kellie Lunney, *Trump budget targets land acquisition, conservation programs*, GREENWIRE, May 23, 2017, <https://www.eenews.net/greenwire/stories/1060054995/>.

<sup>130</sup> Bogardus, *supra* note 126; Emily Holden & Camille von Kaenel, *Leaked budget shows cuts to Pruitt’s stated priorities*, CLIMATEWIRE, May 22, 2017, <https://www.eenews.net/climatewire/2017/05/22/stories/1060054888>.

<sup>131</sup> Brian Dabbs, *More Power to States, Funding Cuts Contradictory: Texas Official*, 48 ENV’T REP. (BNA) 681 (2017).

<sup>132</sup> Bogardus, *supra* note 126.

<sup>133</sup> The Association describes itself as “the national, non-partisan, non-profit association of air pollution control agencies in 40 states, the District of Columbia, four territories and 116 metropolitan areas.” NACAA, <http://www.4cleanair.org/>.

<sup>134</sup> Sean Reilly, *Report details sweeping impact of Trump’s proposed cuts*, E&ENewSPM, May 19, 2017, <https://www.eenews.net/eenewspm/2017/05/19/stories/1060054862>.

<sup>135</sup> Kevin Bogardus, *Budget undercuts Pruitt’s promises to states*, GREENWIRE, Apr. 4, 2017, <https://www.eenews.net/greenwire/stories/1060052582>.

to hollow out environmental regulation at both the federal and state levels. This destructive endeavor is a far cry from the vibrant cooperative federalism venture which is the Administration's purported aim.

The Trump Administration's aversion to a vibrant and environmentally protective version of cooperative federalism does not sound the death knell of state participation in innovative and effective environmental protection. Progressive states such as California continue to implement programs that extend beyond federal regulatory requirements, including its efforts to reduce GHG emissions<sup>136</sup> and ozone pollution.<sup>137</sup> States and localities took steps to join the 2015 Paris climate accord after President Trump repudiated it.<sup>138</sup> The Attorney Generals of states that value rather than disdain environmental protection have begun challenging Trump Administration efforts, sometimes in concert with one another, to roll back, delay implementation of, or otherwise weaken federal regulatory initiatives undertaken under or demanded by the cooperative federalism statutes.<sup>139</sup> These efforts are being undertaken without the support of and sometimes in direct opposition to federal officials, and state funding cuts would hamper their ability to fill federal regulatory gaps.

## Conclusion

The environmental cooperative federalism statutes have survived decades of judicial challenges in which litigants have asserted, with little success, that these statutes contravene constitutional limits on federal or state regulatory authority. Changes in the future composition of the Supreme Court may impose more significant constraints on cooperative federalism ventures than the Court has been willing to recognize to date. In the meantime, the constitutional underpinnings of these environmental statutes, which carve out distinctive roles for EPA and the states, seem solid. Environmental cooperative federalism, however, is facing perhaps its stiffest test in the form of the Trump Administration's efforts to reshape environmental law, both in substance and structure. This time, the threat comes from within. The extent to which environmental cooperative federalism

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<sup>136</sup> See Jacques Leslie, *In the Face of a Trump Environmental Rollback, California Stands in Defiance*, YALE ENV'T 360, Feb. 21, 2017, <http://e360.yale.edu/features/in-the-face-of-trump-environmental-rollback-california-stands-in-defiance>; Keith Goldberg, *Trump, Calif. Poised for Energy and Climate War*, LAW360, Apr. 21, 2017, <https://www.law360.com/articles/915197/trump-calif-poised-for-energy-and-climate-policy-war>; Ethan Shenkman et al., *9 Things to Know About Trump's Paris Agreement Decision*, LAW360, June 2, 2017, <https://www.law360.com/articles/930728/9-things-to-know-about-trump-s-paris-agreement-decision> (describing climate change initiatives in California, New York, and Washington).

<sup>137</sup> See Tony Barboza, *As Trump's EPA Delays Smog Rules, California Vows to Forge Ahead*, L.A. TIMES, June 8, 2017, <http://www.latimes.com/local/lanow/la-me-ozone-delay-20170607-story.html>.

<sup>138</sup> Benjamin Storrow & Emily Holden, *Governors Face Pressure to Distance Themselves from Trump*, E&ENEWS, June 5, 2017, <https://www.scientificamerican.com/article/governors-face-pressure-to-distance-themselves-from-trump-on-climate/>.

<sup>139</sup> Juan Carlos Rodriquez, *California AG Promises to Battle Trump on Enviro Issues*, LAW360, Mar. 30, 2017, <https://www.law360.com/articles/908179/california-ag-promises-to-battle-trump-on-enviro-issues>. The Sabin Center for Climate Change Law maintains a database of state attorney general actions "to advance environmental law and policy objectives," including legal actions against the federal government and "defensive actions" supporting federal and state rules. State Attorneys General Environmental Actions, <http://columbiaclimatelaw.com/resources/state-ag-environmental-actions/>.

is capable of emerging unscathed from this assault is not yet clear.<sup>140</sup> The fate of nearly fifty years of environmental protection advances hangs in the balance.

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<sup>140</sup> For discussion of previous coordinated assaults, see Thomas O. McGarity, *EPA at Helm's Deep; Surviving the Fourth Attack on Environmental Law*, 24 FORDHAM ENVTL. L. REV. 205 (2013).