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# ENVIRONMENTAL FEDERALISM AS FORUM SHOPPING

CALE JAFFE\*

## INTRODUCTION

Public policy advocates of all stripes—litigators, politicians, or newspaper columnists—invoke principles of federalism when they are imploring Congress to respect limits imposed by Article I, and when they are insisting that a state legislature accede to the supremacy of a duly enacted national law, invoking Article VI. Yet historically, application of the term, “federalism,” at least in the context of environmental law, has been driven far more by pragmatic considerations than constitutional ones.<sup>1</sup>

This pragmatic approach should not be surprising because, at its core, federalism simply asks what is the right level of government to solve a given problem. After an environmental problem has been discovered—a fish kill or noxious smell emanating from a nearby river, for example—our thoughts immediately turn to *how* this problem can be solved. Figuring out *how* we get to “clean,” then requires us to consider *who* will be in charge of making decisions throughout the clean-up process. *Who decides* which actors are responsible for contamination from a toxic waste landfill that has leached into that nearby river? *Who decides* who pays for the clean-up? *Who decides* when the clean-up is complete?

This critical question—*who decides*—is central to debates on environmental federalism. In the example of toxic waste spilled into a river, federalism doctrines will consider the roles of the local government that zoned for the landfill, the state government that issued a permit for the landfill, and the federal government that established regulations affecting toxic waste management from cradle to grave.

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<sup>1</sup> See generally, e.g., Jody Freeman & Daniel A. Farber, *Modular Environmental Regulation*, 54 DUKE L.J. 795 (2005).

The purpose of this Article, therefore, is to document how debates over environmental federalism have indeed been driven far more by pragmatic factors (like forum shopping by litigants) than by constitutional considerations (like concern for the limits of Congress's enumerated powers). Part I briefly pays its respects to the historical, constitutional underpinnings of federalism. Parts II, III, and IV then give an overview of environmental federalism in practice, focusing on federal land management in the Western United States (Part II), the history of air pollution regulation (Part III), and the current debate over climate policy (Part IV). Building off of the study of these experiences, Part V then culminates with an analysis of federalism as forum shopping—i.e., driven by the pragmatic concerns of stakeholders as opposed to any commitment to a particular constitutional philosophy or states' rights.

#### I. THE HISTORICAL ROOTS OF FEDERALISM

The federalist structure of the U.S. Constitution has long been understood as a compromise at the time of the founding between those who favored a stronger central government and those who preferred a looser confederation where states would remain preeminent.<sup>2</sup> Of course, the Constitution itself is a relatively sparse document,<sup>3</sup> which provides only limited insight into the thinking of the founders as they sought to strike a balance between central power and state autonomy. One source that courts and scholars have relied on for additional insights is the *Federalist Papers*, a collection of documents authored (anonymously) by Alexander Hamilton, James Madison, and John Jay to advocate for the newly created constitution.<sup>4</sup> Their contemporaneous arguments about the Constitution, addressing both its strengths and vulnerabilities, remain a useful jumping-off point for any analysis of the doctrine of federalism. Three basic observations have often been drawn from the *Federalist Papers* to assist lawyers and laypeople alike in understanding the U.S. Constitution:

- First, the retention of independent state sovereignty. As articulated in Federalist No. 32: “[T]he state

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<sup>2</sup> See, e.g., H. Jefferson Powell, *The Modern Misunderstanding of Original Intent*, 54 U. CHI. L. REV. 1513, 1514–15 (1987).

<sup>3</sup> See *A Look at the Sizes of State Constitutions*, TEX. POL. PROJECT, <https://texaspolitics.utexas.edu/educational-resources/look-sizes-state-constitutions> [<https://perma.cc/2Q88-4SM5>] (last visited Apr. 2, 2020).

<sup>4</sup> See, e.g., Ira C. Lupo, *The Most-Cited Federalist Papers*, 15 CONST. COMMENT. 403 (1998); Gregory E. Maggs, *A Concise Guide to the Federalist Papers as a Source of the Original Meaning of the United States Constitution*, 87 B.U. L. REV. 801 (2007).

governments would clearly retain all the rights of sovereignty which they before had, and which were not, by that act, *exclusively* delegated to the United States.”<sup>5</sup>

- Second, the supremacy of the National government whenever a conflict between Federal and State authority arises. Again, Federalist No. 32 explains that “alienation[] of state sovereignty” would occur, for example, where the Constitution “granted an authority to the Union, to which a similar authority in the States would be absolutely and totally *contradictory* and *repugnant*.”<sup>6</sup>
- Third, the essential value of maintaining *both* sovereigns, state and national, in constant and healthy tension with each other. As famously stated by James Madison in Federalist No. 51,

Ambition must be made to counteract ambition. . . . In the compound republic of America, the power surrendered by the people is first divided between two distinct governments [national and state], and then the portion allotted to each subdivided among distinct and separate departments [executive, legislative, judicial]. Hence a double security arises to the rights of the people. The different governments will control each other; at the same time that each will be controlled by itself.<sup>7</sup>

Criticisms of modern environmental law have long referenced the rise of the 20th century administrative state as a development that could not have been foreseen or intended by the founding generation.<sup>8</sup> Fodder for this argument is easy to assemble; James Madison’s insistence that

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<sup>5</sup> THE FEDERALIST NO. 32 (Alexander Hamilton) (emphasis added).

<sup>6</sup> *Id.* (emphasis added).

<sup>7</sup> THE FEDERALIST NO. 51 (James Madison).

<sup>8</sup> See, e.g., Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1232–33 (1994); see also Cass R. Sunstein, *Is the Clean Air Act Unconstitutional?*, 98 MICH. L. REV. 303, 331–35 (1999).

“[t]he number of individuals employed under the Constitution of the United States will be much smaller than the number employed under the particular States”<sup>9</sup> appears in superficial tension with the creation of the U.S. Fish & Wildlife Service, the Bureau of Land Management, the Environmental Protection Agency, and other federal agencies engaged in environmental policymaking. Opponents of federal action might reference the sheer size of federal agencies to supplement an argument that the national government has overstepped its constitutionally prescribed authority.

Supporters of federal action will counter that federal authority has evolved over two and a half centuries to respond to the needs of a growing nation. To state the obvious, the original text of the Constitution did not acknowledge voting rights for non-property-owning men, much less voting rights for any woman.<sup>10</sup> It allowed the horror of slavery to remain in force, while barring “Indians not taxed” from inclusion in the census and counting African Americans as “three fifths of all other Persons.”<sup>11</sup> The expansion of federal agencies following the enactment of modern environmental laws in the early 1970s is a relatively modest evolution of our governmental structure when compared to the seismic changes that led to amending the Constitution—either by war, amendment, or practice—to address the tragic injustices from the founding era. The expansion of federal agencies has been made vitally necessary to carry out the purposes of the founding document in a dramatically more complex world.

Relatedly, it is impossible to predict the founding generation’s view of modern environmental law given that environmental advocacy, as practiced today, did not even exist in the 18th and early 19th century. As Jon Cannon phrased it, the Constitution was drafted in a “pre-ecological” era.<sup>12</sup> *Willson v. Black Bird Creek Marsh Company* gives some insight into that earlier world-view.<sup>13</sup> The Supreme Court was called upon to consider the impact of a dam that had been constructed on a tributary of the Delaware

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<sup>9</sup> THE FEDERALIST NO. 45 (James Madison).

<sup>10</sup> U.S. CONST. art. I, § 4, cl. 1; see also Steven Mintz, *Winning the Vote: A History of Voting Rights*, GILDERLEHRMAN INST. AM. HIST. (2004), <https://www.gilderlehrman.org/history-now/essays/winning-vote-history-voting-rights> [<https://perma.cc/QK67-VSZZ>]; Grace Panetta & Olivia Reaney, *Today is National Voter Registration Day. The evolution of American voting rights in 242 years shows how far we’ve come—and how far we still have to go*, BUS. INSIDER (Sept. 24, 2019), <https://www.businessinsider.com/when-women-got-the-right-to-vote-american-voting-rights-timeline-2018-10> [<https://perma.cc/F9Q7-BSUP>].

<sup>11</sup> U.S. CONST. art. I, § 2.

<sup>12</sup> JON CANNON, ENVIRONMENT IN THE BALANCE: THE GREEN MOVEMENT AND THE SUPREME COURT 29 (2015) (explaining the “Constitutional Setting” for environmental law).

<sup>13</sup> *Willson v. Black Bird Creek Marsh Co.*, 27 U.S. 245 (1829).

River.<sup>14</sup> Yet there were no modern aquatic scientists to aid the Court in its analysis and document the value of wetlands for wildlife habitation preservation, flood mitigation, and maintenance of clean, healthy water.<sup>15</sup> The environmental harms caused by the dam were never evaluated. Instead, the Court highlighted the dam's "positive" attributes: "[t]he value of the property on its banks must be enhanced by excluding the water from the marsh, and the health of the inhabitants probably improved."<sup>16</sup>

So yes, respecting the historical roots of federalism is undeniably necessary as we try to make sense of environmental federalism today, but we need to be wary not to deify the founding generation. For our communities to address the diverse spectrum of environmental problems that we are facing, we must embrace a more active understanding of the Constitution.<sup>17</sup> Figuring out *who decides* how to resolve a controversy (again, the question that undergirds environmental federalism) is fundamentally a pragmatic task.

## II. THE SAGEBRUSH REBELLION, THE REAGAN REVOLUTION, AND THE WESTERN EXPERIENCE WITH ENVIRONMENTAL FEDERALISM

Understanding the pragmatic challenges with any federal response to environmental concerns requires appreciating the long history of conflict between state and federal authorities in this policy arena. As far back as the late 19th century, Westerners had documented their frustrations with federal involvement in public lands management. Civil War veteran-turned-explorer, John Wesley Powell, surveyed much of the West and reported in 1893 at an International Irrigation Congress meeting in Los Angeles, "I tell you gentlemen, . . . you are piling up a heritage of conflict and litigation over water rights for there is not sufficient water to supply the land."<sup>18</sup>

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<sup>14</sup> *Id.* at 245.

<sup>15</sup> See Brief for Aquatic Scientists and Scientific Societies as Amici Curiae in Support of Respondents, *County of Maui v. Hawaii Wildlife Fund*, No. 18-260 (July 19, 2019); see also, e.g., Thomas E. Dahl & Gregory J. Allord, *History of Wetlands in the Conterminous United States*, U.S. GEOLOGICAL SURV., <https://water.usgs.gov/nwsum/WSP2425/history.html> [<https://perma.cc/KYG5-KKBP>] (last visited Apr. 2, 2020) (explaining that wetland conservation largely emerged in the 1960s, over a century after *Willson*).

<sup>16</sup> *Willson*, 27 U.S. at 251.

<sup>17</sup> See generally STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* (2005).

<sup>18</sup> WALLACE STEGNER, *BEYOND THE HUNDREDTH MERIDIAN: JOHN WESLEY POWELL AND THE SECOND OPENING OF THE WEST* 342–43 (Penguin Books 1992) (1954).

In the first half of the 20th century, the U.S. Army Corps of Engineers embarked on plans to construct a series of dams for flood control along the Brazos River in North Central Texas, not far from the city of Fort Worth.<sup>19</sup> The naturalist John Graves lamented the pending arrival of those dams in *Goodbye to a River*, first published in 1959.<sup>20</sup> Graves captured the skepticism that many Westerners would bring to meetings with federal land managers. Opponents of the dams, Graves wrote, were “bottom-land farmers and ranchers whose holdings would be inundated, competitive utility companies shrilling ‘Socialism!’ and big irrigationists downstream” who would lose access to water.<sup>21</sup> Their concerns about dam management were insufficient to impede the call for government-managed flood control. “When someone official dreams up a dam, it generally goes in. . . . Maybe you save a Dinosaur Monument from time to time, but in-between such salvations you lose ten Brazoes.”<sup>22</sup> The kind of deep-seated disrespect documented by Graves—of “someone official” telling Westerners how to care for “their” land—can be seen in a myriad of instances. In each case, the evidence suggests a frustration by at least some stakeholders over how the “who decides” question has been answered.

The writer Rick Bass documented a telling anecdote from a wildlife biologist working on reintroduction of the endangered Mexican wolf in rural Arizona in the mid-1990s. The scientist was awoken at gunpoint while sleeping in his pickup truck.<sup>23</sup> His assailant wrongly assumed that the truck’s Washington State license plates were from Washington, D.C., and that he “had caught a spy, an infidel from that foreign land, napping within his territory.”<sup>24</sup>

The ante was upped in 2014, when Cliven Bundy famously engaged in an armed and unlawful stand-off with agents from the Bureau of Land Management (“BLM”) while refusing to pay grazing fees for use of federal land.<sup>25</sup> The stand-off ended with BLM returning the cattle and pledging to continue efforts to recoup grazing fees “administratively and judicially.”<sup>26</sup>

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<sup>19</sup> *Brazos River Authority*, TEX. ST. HIST. ASS’N (June 12, 2010), <https://tshaonline.org/handbook/online/articles/mwb01> [<https://perma.cc/86HN-BN3C>].

<sup>20</sup> See JOHN GRAVES, *GOODBYE TO A RIVER* (Vintage Books 2002) (1959).

<sup>21</sup> *Id.* at 9.

<sup>22</sup> *Id.*

<sup>23</sup> RICK BASS, *THE NEW WOLVES* 83–84 (1998).

<sup>24</sup> *Id.* at 84.

<sup>25</sup> RICHARD L. REVESZ ET AL., *ENVIRONMENTAL LAW AND POLICY* 1221–22 (4th ed. 2019).

<sup>26</sup> Andrew Prokop, *The 2014 controversy over Nevada rancher Cliven Bundy, explained*, VOX, <https://www.vox.com/2014/8/14/18080508/nevada-rancher-cliven-bundy-explained> [<https://perma.cc/C66F-CD2P>] (last updated May 14, 2015) (citing a press statement from the BLM dated April 12, 2014).

Bundy's extralegal resistance was the model for twenty-five armed militants who seized control of federal property in the Malheur National Wildlife Refuge in Oregon for six weeks in 2016.<sup>27</sup> Indeed, Cliven Bundy's son, Ammon, was one of the primary organizers of the Malheur occupation.<sup>28</sup>

The Bundy family and those who cheered the Malheur siege were not writing on a blank slate. Their insistence that local, private actors should decide how federal, public lands are administered built on the so-called "Sagebrush Rebellion"—a movement rooted in states' rights ideology.<sup>29</sup> The Sagebrush Rebellion began with passage of the 1976 Federal Land Policy and Management Act, which "reversed the long-held presumption that most of the public domain would eventually be disposed of," and that federal holdings in Western states no longer would be sold to private actors.<sup>30</sup> Nevada responded to the new congressional policy with a 1979 act declaring that the "State of Nevada has a strong moral claim upon the public land retained by the Federal Government within Nevada's borders," and that the "exercise of such dominion and control of the public lands within the State of Nevada by the United States works a severe, continuous and debilitating hardship upon the people of the State of Nevada."<sup>31</sup> Several other western states soon adopted similar measures.<sup>32</sup>

In 1982, then-Governor of Arizona Bruce Babbitt (who would later go on to serve as Secretary of the Interior under Bill Clinton<sup>33</sup>), cautioned that it would be "easy to dismiss the motives of the small group of stockmen and their political allies who have revived the rallying cry of states' rights for their own benefit," but that the well of support for Sagebrush rebels evinces "a deep-seated frustration" with federal land management practices.<sup>34</sup>

That frustration, however, was not anchored in respect for federalism as constitutional theory. Rather, it was pragmatic. For ranchers

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<sup>27</sup> Michael C. Blumm & Olivier Jamin, *The Property Clause and Its Discontents: Lessons from the Malheur Occupation*, 43 *ECOLOGY L.Q.* 781, 793–94 (2017).

<sup>28</sup> Sam Levin, *Oregon militia standoff: one dead after Ammon Bundy and others arrested*, *GUARDIAN* (Jan. 27, 2016), <https://www.theguardian.com/us-news/2016/jan/26/oregon-militia-standoff-ammon-bundy-arrested-and-one-confirmed-dead-after-shootout> [<https://perma.cc/79TE-UKBK>].

<sup>29</sup> Bruce Babbitt, *Federalism and the Environment: An Intergovernmental Perspective of the Sagebrush Rebellion*, 12 *ENVTL. L.* 847, 853 (1982).

<sup>30</sup> *Id.* at 852–54.

<sup>31</sup> *NEV. REV. STAT.* § 321.596 (1970).

<sup>32</sup> Babbitt, *supra* note 29, at 848.

<sup>33</sup> See *List of Past Secretaries*, U.S. DEPT INTERIOR, <https://www.doi.gov/whoweare/past-secretaries> [<https://perma.cc/HE45-FRA4>] (last visited Apr. 2, 2020).

<sup>34</sup> Babbitt, *supra* note 29, at 847, 852–53.



who had worked on BLM land for decades, a states' rights argument was simply and honestly the tool that best suited their advocacy needs in the moment. Then-candidate Ronald Reagan capitalized on that sentiment during the 1980 presidential campaign and famously declared, "[c]ount me in as a rebel," trumpeting his own, avowed commitment to states' rights.<sup>35</sup> Yet as discussed in Part V below, President Reagan did not adhere to a theory of states' rights *constitutionalism* once in office.

### III. ENVIRONMENTAL FEDERALISM IN PRACTICE: A HISTORY OF AIR POLLUTION REGULATORY EFFORTS

The story of industrialized air pollution provides a clear example of how the ground has shifted over many decades, and how litigants have engaged in forum shopping as the shift has progressed.<sup>36</sup> Today, many stakeholders view air pollution from *stationary sources* as an interstate issue, best regulated at the federal level.<sup>37</sup> Air pollution, after all, does not respect state boundaries, and it is difficult for one state to address an air pollution problem that is caused by industrial contaminants blowing in from a neighboring state's power plants.<sup>38</sup> While national regulation of power plants under the modern Clean Air Act is now accepted as a baseline environmental safeguard, this was not always the case. Throughout the first half of the 20th century, industrial air pollution was perceived as an issue of public health and welfare, which meant that it rested exclusively within the purview of the several states' *police powers*.<sup>39</sup>

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<sup>35</sup> Howell Raines, 'Sagebrush Rebellion' Gets Reagan's Strong Support, DISPATCH, July 7, 1980, at 5, [https://news.google.com/newspapers?nid=1734&dat=19800707&id=\\_JcbAAAAIBAJ&sjid=x1EEAAAIAIBAJ&pg=4226,632733](https://news.google.com/newspapers?nid=1734&dat=19800707&id=_JcbAAAAIBAJ&sjid=x1EEAAAIAIBAJ&pg=4226,632733) [<https://perma.cc/3Y6T-TATU>].

<sup>36</sup> An excellent history of air pollution control law in the United States, from the founding until the 1990 Clean Air Act Amendments, can be found in Arnold W. Reitze, Jr., *A Century of Air Pollution Control Law: What's Worked; What's Failed; What Might Work*, 21 ENVTL. L. 1549 (1991).

<sup>37</sup> Today, under the federal Clean Air Act and state air pollution control laws, industrial facilities like factories and power plants are referred to as "stationary sources" of air pollution, which are subject to different environmental, public health, and safety regulatory regimes than "mobile sources," e.g., cars, trucks, and off-road vehicles. *See generally*, e.g., David P. Currie, *Direct Federal Regulation of Stationary Sources Under the Clean Air Act*, 128 PENN. L. REV. 1389 (1980); *Stationary Sources of Air Pollution*, EPA, <https://www.epa.gov/stationary-sources-air-pollution> [<https://perma.cc/3TMT-JLKN>] (last updated Oct. 8, 2019).

<sup>38</sup> *See, e.g.*, North Carolina *ex rel. Cooper v. Tenn. Valley Auth.*, 515 F.3d 344, 347 (4th Cir. 2008).

<sup>39</sup> The *police powers* are commonly thought of as those powers delegated to the states under the Tenth Amendment to the U.S. Constitution and including laws and regulations to

The instinct for early 20th century American policymakers was to protect air quality through use of local or intra-state options—although even those efforts were resisted as impediments to industrial progress.<sup>40</sup> In fact, the first attempts at government regulation of air pollution were through city ordinances. In 1881, the City of Chicago adopted what is considered to be the nation's first air pollution control measure—an ordinance that declared “dense smoke . . . from any chimney anywhere within the city” to be a public nuisance.<sup>41</sup> The ordinance was enforceable by the city's Commissioner of Health and the Superintendent of Police, who were directed “to make complaint against and cause to be prosecuted all persons violating” the ordinance.<sup>42</sup> A report from the Department of Health for the City of Chicago documented the success of the ordinance in its first two years of implementation: “all doubt as to the feasibility and legality of the ordinance have been dispelled, and business men generally are beginning to appreciate and approve the necessity of the ordinance.”<sup>43</sup>

Although the Clean Air Act of 1970 is sometimes credited as originating the concept of technology-forcing environmental regulations, the Chicago ordinance proved to be something of a precursor.<sup>44</sup> The issuance

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“secure generally the comfort, safety, morals, health, and prosperity of its citizens . . .” *Police Power*, BLACK'S LAW DICTIONARY (6th ed. 1990).

<sup>40</sup> Reitze, Jr., *supra* note 36, at 1576–79.

<sup>41</sup> EGBERT JAMIESON & FRANCIS ADAMS, *THE MUNICIPAL CODE OF CHICAGO: COMPRISING THE LAWS OF ILLINOIS RELATING TO THE CITY OF CHICAGO AND THE ORDINANCES OF THE CITY COUNCIL: CODIFIED AND REVISED 386* (Beach, Barnard & Co., Legal Printers 1881). Prior to the formal adoption of ordinances like the one in Chicago, environmental regulation was affected through application of common law tort doctrines. James V. Fitzpatrick & Austin N. Heller, *A Dynamic Air Resource Management Program, City of Chicago*, 15 J. AIR POLLUTION CONTROL ASS'N 297, 297–301 (1965), <https://www.tandfonline.com/doi/pdf/10.1080/00022470.1965.10468381> [<https://perma.cc/A37N-5L26>].

<sup>42</sup> JAMIESON & ADAMS, *supra* note 41, at 386.

<sup>43</sup> REPORT OF THE DEPARTMENT OF HEALTH, CITY OF CHICAGO, FOR THE YEARS 1881 AND 1882, at 136–37 (Geo. K. Hazlitt & Co., Printers 1883) [hereinafter REPORT OF THE DEPARTMENT OF HEALTH] (providing the “Smoke Inspector's Report from July, 1882 to December 31, 1884”).

<sup>44</sup> See, e.g., Hon. Henry A. Waxman, *An Overview of the Clean Air Act Amendments of 1990*, 21 ENVTL. L. 1721, 1748–49 (1991) (“Continuing a trend that began with the original Clean Air Amendments of 1970 (1970 Amendments), and has grown with amendments to the Comprehensive Environmental Response and Liability Act (Superfund) and the Resources Conservation and Recovery Act (RCRA), the 1990 Amendments include numerous provisions that force the development of new technologies to provide for health protection and to achieve environmental objectives. The rationale behind technology forcing is that by setting emissions standards that are beyond the reach of conventional control methods, Congress creates a market incentive that can force the development and commercialization of new technologies. In the 1970 Amendments, the approach succeeded in spurring

of notices of violation and prosecutions against violators of the ordinance compelled businesses and entrepreneurs to engineer solutions to control pollution. Thus, the city's Smoke Inspector reported:

Great progress has been made within the last two years by the improvements of smoke-preventing devices and the invention of new ones; nowhere in the United States have they attained such a state of perfection in so short a time as in the City of Chicago. I have personally examined within two years over sixty different devices, but only six of them have proved successful and each of the six now in successful operation differ in merits generally, but all abate the smoke nuisance.<sup>45</sup>

Similar ordinances were adopted in other municipalities across the country. The City of Los Angeles adopted an ordinance in the early 1900s that made it "unlawful for any person to establish or operate a brickyard . . . or place for the manufacture or burning of brick within described limits in the city."<sup>46</sup> The ordinance was driven by the expansion of the city's population, which grew sixfold between 1890 and 1910, with residential communities pushing out into industrial areas.<sup>47</sup> Joseph Hadacheck, who had purchased an eight-acre parcel outside of the city boundaries of Los Angeles for the purpose of excavating clay and manufacturing it into bricks, challenged the ordinance on federal constitutional grounds, "charg[ing] a deprivation of property, the taking of property without compensation [in violation of the 5th Amendment], and that the ordinance is in consequence invalid."<sup>48</sup> The Los Angeles prohibition was upheld by the Supreme Court of the United States with explicit reference to the state's police power.<sup>49</sup> A win for "State's rights," in this context, was a win for the "pro-environment" citizens of Los Angeles, who had sought to mitigate harms from urban air pollution by turning to the municipal powers that derived their authority from the State of California.<sup>50</sup>

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development of the catalytic converter for control of automotive tailpipe emissions.") (internal citations omitted).

<sup>45</sup> REPORT OF THE DEPARTMENT OF HEALTH, *supra* note 43, at 138.

<sup>46</sup> *Hadacheck v. Sebastian*, 239 U.S. 394, 404 (1915).

<sup>47</sup> Kathy A. Kolnick, *Order Before Zoning: Land Use Regulation in Los Angeles, 1880–1915*, at 198 (May 2008) (Ph.D. Dissertation, Univ. of S. Cal.), <http://digitalibrary.usc.edu/cdm/ref/collection/p15799coll127/id/61051> [<https://perma.cc/A5D9-6S5E>].

<sup>48</sup> *See Hadacheck*, 239 U.S. at 407.

<sup>49</sup> *Id.* at 410.

<sup>50</sup> *See generally* MANUELA ALBUQUERQUE, *LOCAL GOVERNMENTS NAVIGATING THE CALIFORNIA*

Similarly, the seminal case of *Village of Euclid v. Ambler Realty Co.* upheld the authority of local governments to adopt ordinances for “the creation and maintenance of residential districts, from which business and trade of every sort, including hotels and apartment houses, are excluded.”<sup>51</sup> Coming eleven years after *Hadacheck*, the *Euclid* Court seemed to accept without controversy the fact that the authority to impose zoning restrictions, if it existed at all, rested with the states. Thus, the Court explained, “[t]he ordinance now under review, and all similar laws and regulations, *must* find their justification in some aspect of the police power, asserted for the public welfare.”<sup>52</sup> The takeaway from the Chicago ordinance, the Los Angeles litigation, and *Euclid* is clear; environmental advocates (even if they did not use that label to identify themselves) relied on state and local decision-makers to resolve the controversies they cared about.

A generation after *Euclid*, however, clean air advocates started to anticipate a stronger federal hand, effectively abandoning their early 20th century preference for a states’ rights approach. One of the more instructive events to spur a reconsideration of environmental policy was the occurrence of a catastrophic event known as the Donora Death Fog. The town of Donora, Pennsylvania, on the banks of the Monongahela River, was a steel-making town in the 1940s.<sup>53</sup> The U.S. Steel Corporation owned and operated the Donora Zinc Works, which along with other steel-related industries in the area, employed most of the adult residents in Donora.<sup>54</sup> In 1948, more than twenty years before the birth of the federal Clean Air Act of 1970, the Donora Zinc Works operated without any

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CONSTITUTION: CONSTITUTIONAL POWERS OF CITIES (Feb. 8, 2013), [https://www.law.berkeley.edu/files/Albuquerque1\\_-\\_Constitutional\\_Powers\\_of\\_Cities-MLI\\_Feb\\_8\\_2013.pdf](https://www.law.berkeley.edu/files/Albuquerque1_-_Constitutional_Powers_of_Cities-MLI_Feb_8_2013.pdf) [<https://perma.cc/7ESG-EP39>]; Sean Hecht, “States’ Rights” and Environmental Law: California on the Front Lines, LEGAL PLANET (Mar. 6, 2017), <https://legal-planet.org/2017/03/06/states-rights-and-environmental-law-california-on-the-front-lines/> [<https://perma.cc/JV S2-WW DU>].

<sup>51</sup> *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 390 (1926).

<sup>52</sup> *Id.* at 387 (emphasis added).

<sup>53</sup> See *Steel Mill*, DONORA HIST. SOC’Y & SMOG MUSEUM, <https://www.sites.google.com/site/donorahistoricalsociety/steel-mill> [<https://perma.cc/HQ4Q-TWGR>] (last visited Apr. 2, 2020).

<sup>54</sup> Edwin Kiester, Jr., *A Darkness in Donora*, SMITHSONIAN MAG. (Nov. 1999), <https://www.smithsonianmag.com/history/a-darkness-in-donora-174128118/> [<https://perma.cc/CW2W-7UDN>]; see also Reitze, Jr., *supra* note 36, at 1585; Elizabeth Guenther, *Donora Death Fog: The Crisis that Led to Modern Air Pollution Laws*, AM. INST. CHEMICAL ENGINEERS (Oct. 27, 2011), <https://www.aiche.org/cheneched/2011/10/donora-death-fog-crisis-led-modern-air-pollution-laws> [<https://perma.cc/A8ML-WDL9>]; Ann Murray, *Smog Deaths In 1948 Led To Clean Air Laws*, NPR (Apr. 22, 2009), <https://www.npr.org/templates/story/story.php?storyId=103359330> [<https://perma.cc/4M9U-YHFX>].

notable environmental constraints.<sup>55</sup> Sulfur dioxide, nitrogen oxides, carbon monoxide, and fine particulate matter fanned out from Donora's unregulated smokestacks.<sup>56</sup>

When an anticyclone stalled over Pennsylvania on October 26, 1948, it held air pollution from the Donora Zinc Works smokestacks close to the ground. The thick fog of contaminants was immediately apparent. Simply walking to work on the morning of October 27th, residents suffered eye, nose, and throat irritations.<sup>57</sup> Over the next five days—through Halloween of 1948—the smog worsened. That week's high school football game was "almost invisible," with teams electing to run the ball since no one could track a pass through the smog.<sup>58</sup> A restaurant owner later recalled turning his ankle when stepping off of the curb "because I couldn't see my feet."<sup>59</sup> Community leaders asked the zinc plant operators to shut down the facility until the pollution abated, but the owners of the plant refused.<sup>60</sup> The local Donora Hotel had to be converted to a makeshift hospital as the pre-existing medical resources were overwhelmed.<sup>61</sup> By the end of the week, as many as 14,000 people were sickened.<sup>62</sup> Twenty-two were confirmed dead.<sup>63</sup>

Press coverage in national magazines led the federal Public Health Service to begin an investigation.<sup>64</sup> The federal response ultimately led to enactment of the Air Pollution Control Act of 1955—the country's first federal air pollution statute.<sup>65</sup> The Donora Historical Society and Smog Museum claims that "Clean Air Started Here" in Pennsylvania.<sup>66</sup>

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<sup>55</sup> Lorraine Boissoneault, *The Deadly Donora Smog of 1948 Spurred Environmental Protection—But Have We Forgotten the Lesson?*, SMITHSONIAN MAG. (Oct. 26, 2018), <https://www.smithsonianmag.com/history/deadly-donora-smog-1948-spurred-environmental-protection-have-we-forgotten-lesson-180970533/> [<https://perma.cc/B3QR-CGLN>].

<sup>56</sup> Elizabeth T. Jacobs et al., *The Donora Smog Revisited: 70 Years After the Event That Inspired the Clean Air Act*, 108 AM. J. PUB. HEALTH S85, S86 (2018).

<sup>57</sup> Murray, *supra* note 54.

<sup>58</sup> Kiestler, Jr., *supra* note 54.

<sup>59</sup> *Id.*

<sup>60</sup> Murray, *supra* note 54.

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

<sup>62</sup> Teresa Bonner, *'People realized smog could kill': Legacy of 4 deadly days in Donora, Pa.*, PENNLIVE (May 22, 2019), [https://www.pennlive.com/news/2017/04/deadly\\_smog\\_in\\_pa\\_town\\_paves\\_w.html](https://www.pennlive.com/news/2017/04/deadly_smog_in_pa_town_paves_w.html) [<https://perma.cc/5K2Z-3KNJ>].

<sup>63</sup> *Id.*

<sup>64</sup> Kiestler, Jr., *supra* note 54.

<sup>65</sup> *Evolution of the Clean Air Act*, EPA, <https://www.epa.gov/clean-air-act-overview/evolution-clean-air-act> [<https://perma.cc/RH6C-7PNT>] (last updated Jan. 3, 2017).

<sup>66</sup> *1948 Smog*, DONORA HIST. SOC'Y & SMOG MUSEUM, <https://www.sites.google.com/site/donora-historical-society/1948-smog> [<https://perma.cc/3YXG-7V2Z>] (last visited Apr. 2, 2020).

These early federal environmental laws—including the 1955 Air Pollution Control Act—still expected states to shoulder most of the burden through exercise of their historic police powers.<sup>67</sup> The 1955 law, entitled “An Act to provide research and technical assistance relating to air pollution control,” simply allocated money for federal research into air pollution and made financial assistance available to states that might be eager to take the lead on the issue.<sup>68</sup> It did not, however, include the technology-forcing federal requirements that are a hallmark of the modern Clean Air Act.<sup>69</sup> As the federal Bureau of the Budget (the precursor to today’s Office of Management and Budget, “OMB”) reported in 1955, “unlike water pollution [affecting navigable rivers that cross state boundaries], air pollution is essentially a local problem.”<sup>70</sup>

The law was significantly amended in 1963, but still affirmed that “municipal, State, and interstate action to abate air pollution shall be encouraged and shall not be displaced by Federal enforcement action except as otherwise provided” in Section 5 of the 1963 Act, which detailed a tightly circumscribed, federal enforcement option that was only available to address cross-state air pollution concerns.<sup>71</sup> That enforcement option required at least a full year of regulatory process and public hearings before any litigation to remedy an air quality violation could be initiated.<sup>72</sup>

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<sup>67</sup> Reitze, Jr., *supra* note 36, at 1580–81.

<sup>68</sup> Air Pollution Act of July 14, 1955, Pub. L. No. 84-159, 69 Stat. 322, 322 (1955).

<sup>69</sup> See 42 U.S.C. § 7411 (2012); Clean Air Amendments of 1970, Pub. L. No. 91-604, § 111, 84 Stat. 1676, 1683–84 (1970).

<sup>70</sup> Reitze, Jr., *supra* note 36, at 1585 (quoting the Bureau of the Budget).

<sup>71</sup> Clean Air Act of 1963, Pub. L. No. 88-206, § 5(b), 77 Stat. 392, 396 (1963) (amended 1970).

<sup>72</sup> The process under the 1963 Clean Air Act would work as follows: [1] Where air pollution generated in one state was endangering populations in a downwind state, the U.S. Secretary of Health, Education, and Welfare was authorized to convene a conference and “invite the cooperation of any municipal, State, or interstate air pollution control agencies” to participate. *Id.* § 5(c)(1)(C). [2] After the conclusion of the conference, if the Secretary determined that “effective progress toward abatement of such pollution [was] not being made,” the federal government would then issue “recommendations” on “necessary remedial action” and “allow at least six months” for the involved states to implement those recommendations. *Id.* § 5(d). [3] If, following that initial six-month period, the air pollution problem had not been resolved, the Secretary could then hold a public hearing before a “board of five or more persons,” which had to include at least one member selected by the state causing the air pollution problem and one member selected by the state suffering from the air pollution problem. *Id.* § 5(e)(1). Further, the majority of hearing board members needed to be individuals who were not “officers or employees of the [U.S.] Department of Health, Education, and Welfare.” *Id.* [4] The Secretary was then authorized to send the board’s recommendations to the individuals or businesses causing the air pollution problem and provide them at least an additional six months to abate the pollution. *Id.* § 5(e)(3). [5] After the end of this second six-month period, if the problem still remained

It is critical to emphasize how reluctant policymakers were in this era to leverage federal power to address the nation's air pollution crisis. The cautious approach of the 1963 Clean Air Act was highlighted by Sidney Edelman, then the Chief of the Environmental Health Branch within the U.S. Department of Health, Education and Welfare. Edelman's views, as a federal civil servant in that era, offer a window into how regulators might have typically viewed their authority.

Quoting *United States v. Darby*,<sup>73</sup> Edelman wrote in 1965,

The regulation and control of air pollution has long been held to be clearly within the scope of the police power of the states, but, "[i]t is no objection to the assertion of the power to regulate interstate commerce that its exercise is attended by the same incidents which attend the exercise of the police power of the states."<sup>74</sup>

Thus, Edelman assured readers that the 1963 Act and its Section 5 enforcement authority "does not evidence a congressional intent to exceed its constitutional authority by regulating matters of strictly internal concern to the state. Rather, the section must be taken as reflecting congressional determination that any air pollution of such magnitude as to endanger the health or welfare of persons in the state in which it originates is likely to, and indeed, does affect interstate commerce."<sup>75</sup> Edelman continued, "[a]ny discharge of pollution into the air anywhere is a discharge into navigable [by aircraft] airspace, but the [1963] Clean Air Act does not purport to reach all intrastate air pollution. It extends to such pollution only when its effects are significant . . . ."<sup>76</sup>

Not surprisingly, the byzantine process mandated by the federal statute only yielded one significant case decision—*United States v. Bishop Processing Co.*—and that case was not resolved until 1970, the same year that the modern Clean Air Act was enacted as a wholesale replacement to the 1963 law.<sup>77</sup> Nevertheless, *Bishop Processing* provides insight into

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unresolved, the Secretary was finally authorized to "request the Attorney General to bring a suit on behalf of the United States to secure abatement of pollution." *Id.* § 5(f)(1).

<sup>73</sup> *United States v. Darby*, 312 U.S. 100, 114 (1941).

<sup>74</sup> Sidney Edelman, *Federal Air and Water Control: The Application of the Commerce Power to Abate Interstate and Intrastate Pollution*, 30 GEO. WASH. L. REV. 1067, 1082 (1965).

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* at 1086–87.

<sup>77</sup> See Clean Air Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1676, 1676 (1970); *United States v. Bishop Processing Co.*, 423 F.2d 469 (4th Cir. 1970); Reitze, Jr., *supra* note 36, at 1587.

how litigants can leverage federalism to suit their legal arguments. That is, the political winds on federalism shifted in *Bishop Processing* based on the short-term objectives of the parties.

The residents of Selbyville, Delaware had complained for years about the poor environmental practices at the Bishop Processing Company's chicken plant across the state border in Bishop, Maryland.<sup>78</sup> Yet it was not until 1965, at least six years into multistate efforts to address the problem, that "the United States Secretary of Health, Education and Welfare received a request from the Delaware authorities" asking it to intervene pursuant to its authority under Section 5 of the 1963 Clean Air Act.<sup>79</sup> A directive from federal authorities to "abate the pollution not later than December 1, 1967" proved "fruitless," which led to an enforcement action, filed in district court in March 1968, which sought to "enjoin Bishop from discharging malodorous air pollutants."<sup>80</sup> The United States District Court for Maryland ultimately ruled in favor of the Delaware complainants.<sup>81</sup> On appeal to the Fourth Circuit, Bishop Processing's objections echoed "states' rights" concerns hostile to federal enforcement:

It is contended that information supplied by employees of the United States should not have been considered, for the federal government is an adversary in this proceeding. It is argued to us that appellant had faith in the Delaware Director [of the state's Air Pollution Control Division] but not in the federal officials and that appellant's expectation [from an earlier consent decree] was that the Delaware official would not rely upon federal representations made to him.<sup>82</sup>

Importantly, the position of Bishop Processing Co. on questions of federalism—*who decides* what is clean—is reversed from the position that the industrial polluter took in *Hadacheck v. Sebastian*. In *Hadacheck*, when the lever of authority was a local ordinance, the brick kiln operator pleaded for federal intervention to strike down the ordinance.<sup>83</sup> In *Bishop Processing*, when the lever of authority was a federal intervention, the chicken

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<sup>78</sup> *Bishop Processing Co.*, 423 F.2d at 470 (observing that litigation sought "to induce Bishop Processing Company . . . to abate the malodorous air pollution which allegedly moves across the state line to pollute the air of nearby Selbyville").

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

<sup>80</sup> *Id.* at 471.

<sup>81</sup> *Id.* at 472.

<sup>82</sup> *Id.* at 472–73.

<sup>83</sup> See *Hadacheck v. Sebastian*, 239 U.S. 394, 407–09 (1915).



processing plant sought deference to state officials to manage the clean-up.<sup>84</sup> The industrial party's position on federalism was not inherently "pro"- or "anti"-federal action.

A few years later, when President Nixon signed the 1970 Clean Air Act Amendments into law, the federal approach to air quality regulation at issue in *Bishop Processing* would not be so circumspect. The 1970 Amendments replaced the laborious process under Section 5 of the 1963 statute, which was highly deferential to the states, with a model that relied on a much stronger federal hand that would come to be labeled "cooperative federalism."<sup>85</sup> Under Section 109 of the 1970 Clean Air Act Amendments, the federal government sets nationally applicable air quality standards (the National Ambient Air Quality Standards, or "NAAQS"), which are established by the U.S. Environmental Protection Agency for multiple pollutants (sulfur dioxide, nitrogen oxides, carbon monoxide, ozone, lead, and particulate matter).<sup>86</sup> Under Section 110, each state is obligated to develop a State Implementation Plan ("SIP") to ensure that it is able to maintain or attain the NAAQS for each of these pollutants in every city and county within its borders. States that fail to develop a plan—or propose an insufficiently stringent plan—face the prospect of the EPA imposing its own Federal Implementation Plan ("FIP").

The adoption of a federal hammer like the FIP process in the 1970 Act—something Congress neglected to impose in 1955 after a nationally resonant crisis like the Donora Death Fog—raises an important conundrum: what changed with respect to perspectives on federalism and states' rights between 1955 and 1970? The seminal civil rights cases from that era might help answer that question. Indeed, as Jon Cannon has observed:

Claiming parallels between their movement and the civil rights movement, environmentalists sought constitutional-level recognition of environmental rights comparable to the Court's decision barring racial segregation in schools in *Brown v. Board of Education*.<sup>87</sup>

In *Heart of Atlanta v. United States*, the Court considered application of Title II of the Civil Rights Act of 1964, which had been recently adopted by Congress and signed into law by President Lyndon Baines Johnson, to a "whites only" motel in Atlanta, Georgia that objected to any

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<sup>84</sup> See *Bishop Processing Co.*, 423 F.2d at 473.

<sup>85</sup> Clean Air Amendments of 1970, Pub. L. No. 91-604 § 5, 84 Stat. 1676, 1689–90 (1970).

<sup>86</sup> Clean Air Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1679.

<sup>87</sup> CANNON, *supra* note 12, at 28.

requirement “to rent available rooms to Negroes against its will . . . .”<sup>88</sup> The law was enacted pursuant to article 1, section 8, clause 3 of the Constitution, which provides Congress with authority to “regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.”<sup>89</sup> The racist owners of the Georgia motel insisted that their operation was local, intra-state commerce and outside of the reach of federal regulators. The Supreme Court disagreed, explaining that

the power of Congress to promote interstate commerce also includes the power to regulate the local incidents thereof, including local activities in both the States of origin and destination, which might have a substantial and harmful effect upon that commerce. . . . Congress may—as it has—prohibit racial discrimination by motels serving travelers, however “local” their operations may appear.<sup>90</sup>

*Katzenbach v. McClung* was argued with and decided on the same day as *Heart of Atlanta*.<sup>91</sup> The case considered the business practices of Ollie McClung, Sr., and his son, who owned and operated Ollie’s Barbeque in Birmingham, Alabama.<sup>92</sup> The McClung men entertained white residents at their sit-down restaurant, but refused to accept African-American customers inside.<sup>93</sup> Instead, non-white customers were served via “a take-out service for Negroes.”<sup>94</sup> The McClung’s chief argument was that unlike a motel business that courted out-of-state travelers, their segregationist operation was chiefly an intra-state commercial affair.<sup>95</sup> The Court noted that “the volume of food purchased by Ollie’s Barbecue from sources supplied from out of state was insignificant,” but nevertheless upheld the application of Congress’s law to the business, quoting the Court’s 1942 decision in *Wickard v. Filburn*.<sup>96</sup> A “trivial” contribution to interstate commerce, the Court explained, would not exempt Ollie’s Barbeque “from the scope of federal regulation.”<sup>97</sup>

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<sup>88</sup> *Heart of Atlanta Motel v. United States*, 379 U.S. 241, 244 (1964).

<sup>89</sup> U.S. CONST. art. I, § 8, cl. 3.

<sup>90</sup> *Heart of Atlanta Motel*, 379 U.S. at 258.

<sup>91</sup> *Katzenbach v. McClung*, 379 U.S. 294, 294 (1964).

<sup>92</sup> *Id.*

<sup>93</sup> *Id.* at 297.

<sup>94</sup> *Id.* at 296.

<sup>95</sup> *Id.* at 298.

<sup>96</sup> *Id.* at 300–01.

<sup>97</sup> *Katzenbach*, 379 U.S. at 301 (quoting *Wickard v. Filburn*, 317 U.S. 111, 127–28 (1942)).

*Katzenbach* and *Heart of Atlanta* mark an important evolution in our understanding of federalism, because they further extended the role for Congress to commercial areas that had traditionally been the exclusive subject of the states' police powers. Once the Supreme Court accepted federal involvement in the management of motels, restaurants, and public schools, it became easier for Congress to follow suit and contemplate a federal solution for other pervasive problems like industrial air pollution. In this way, champions of the 1970 Clean Air Act Amendments owe a debt of gratitude to the civil rights activists of the 1960s.

#### IV. THE PENDULUM SWINGS AGAIN: FEDERALISM AND STATE APPROACHES TO CLIMATE CHANGE

In a moment that is analogous to the first air pollution ordinances of the 1880s, the country is now seeing the re-emergence of state leadership on the most dominant environmental concern of our time: global warming. In the late 19th century, without any prospect for remedial action by the federal government, municipalities like Chicago took the lead and adopted technology-forcing laws to curb coal-fired air pollution.<sup>98</sup> A similar story is now playing out to address carbon pollution. Delivering on a campaign promise, President Trump initiated efforts in June of 2017 to withdraw the United States from the Paris Agreement to the United Nations Framework Convention on Climate Change ("UNFCCC").<sup>99</sup> The Commonwealth of Virginia is one of several states that responded by taking matters into its own hands. In 2020, the Virginia General Assembly passed the Virginia Clean Economy Act, which seeks to place electric utilities on a mandatory path to a zero-carbon electricity grid.<sup>100</sup>

Indeed, appeals to federalism have been seen both in President Trump's deregulatory effort on climate change as well as the responses to it. The Koch-funded advocacy organization, Americans for Prosperity, pilloried the Obama administration's signature program to address climate change, the Clean Power Plan, as an "overreach of executive power" that would have "force[d] states to slash their carbon emissions and switch to costlier forms of energy."<sup>101</sup> Building on this narrative, the Attorney

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<sup>98</sup> See William G. Christy, *History of the Air Pollution Control Association*, 10 J. AIR POLLUTION CONTROL ASS'N 126, 129–30 (1960).

<sup>99</sup> *Statement by President Trump on the Paris Climate Accord*, WHITEHOUSE.GOV (June 1, 2017), <https://www.whitehouse.gov/briefings-statements/statement-president-trump-paris-climate-accord/> [https://perma.cc/4CC3-R782].

<sup>100</sup> SB 851, 2020 Sess. (Va. 2020).

<sup>101</sup> *AFB Praises Clean Power Plan Repeal*, AMS. FOR PROSPERITY (Oct. 9, 2017), <https://americansforprosperity.org/afp-praises-clean-power-plan-repeal/> [https://perma.cc/T769-FC5L].

General of Texas sought an administrative stay of the Clean Power Plan under the allegation that the rule “represents a significant expansion of EPA’s power without a legitimate legal basis.”<sup>102</sup> The Obama-era regulation, according to the Texas Attorney General’s request, called “for a sweeping reorganization of States’ energy infrastructure” and “displace[d] sovereign powers that Congress has reserved for the States.”<sup>103</sup>

When the Trump administration announced its proposal to replace the Clean Power Plan with the “Affordable Clean Energy Rule,” an analysis by the Natural Resources Defense Council<sup>104</sup> argued that the Trump proposal was “all about propping up dirty coal-fired power plants” and amounted to nothing more than a “Dirty Power Scam . . . [that] cooks the books to justify increasing harmful air pollution.”<sup>105</sup> Conservation-minded organizations opposed to the repeal insisted that EPA was abdicating its obligation to provide federal leadership on reducing greenhouse gas pollution. The National Trust for Historic Preservation, relying on statutory commands in the Clean Air Act, commented, “EPA cannot lawfully repeal the [Clean Power Plan] and leave a vacuum with no [federal] regulation of GHG emissions from stationary sources.”<sup>106</sup> The National Trust further emphasized that “given the severe threats that climate change poses, it would be arbitrary and capricious for EPA to weaken vital GHG regulations by moving from the 2015 Clean Power Plan to the less-protective Proposed ACE Rule.”<sup>107</sup>

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<sup>102</sup> Letter from Ken Paxton, Att’y Gen. of Tex., to Gina McCarthy, EPA Administrator, re: EPA Docket No. EPA-HQ-OAR-2013-0602; Application for an Administrative Stay of the Final Rule on Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units (Aug. 20, 2015), [http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/case-documents/2015/20150820\\_docket-na\\_application-for-administrative-stay.pdf](http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/case-documents/2015/20150820_docket-na_application-for-administrative-stay.pdf) [<https://perma.cc/639G-HYP9>].

<sup>103</sup> *Id.*

<sup>104</sup> Starla Yeh, *How EPA Admin. Wheeler Cooks the Books for Dirty Power Scam*, NAT. RESOURCES DEF. COUNCIL (Aug. 28, 2018), <https://www.nrdc.org/experts/starla-yeh/how-epa-admin-wheeler-cooks-books-dirty-power-scam> [<https://perma.cc/CK3R-D8YC>].

<sup>105</sup> *Id.* (emphasis omitted).

<sup>106</sup> Letter from Cale Jaffe, Univ. of Va. Env’tl & Regulatory Law Clinic, and Sharee Williamson, Nat’l Tr. for Historic Preservation in the U.S., to Peter Tsirigotis, U.S. EPA, re: Docket ID: EPA-HQ-OAR-2017-0355: Proposed Repeal of Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generation Units (Apr. 26, 2018), <https://www.regulations.gov/document?D=EPA-HQ-OAR-2017-0355-19923> [<https://perma.cc/W5Q7-EF52>].

<sup>107</sup> Letter from Cale Jaffe, Univ. of Va. Env’tl & Regulatory Law Clinic, and Sharee Williamson, Nat’l Tr. for Historic Preservation in the U.S., to Nicholas Swanson, U.S. EPA, re: Docket ID: EPA-HQ-OAR-2017-0355—Emission Guidelines for Greenhouse Gas Emissions for Existing Utility Generating Units; Revisions to Emission Guideline Implementing

As the Trump deregulatory juggernaut rolls forward, left-leaning legislatures and governors are flexing their muscles and affirming state-specific commitments to the UNFCCC goals. In the face of federal intransigence, state and local governments have stepped into the regulatory vacuum. As of 2019, there were two major nonfederal GHG programs designed to implement multistate cap-and-trade regimes. The first is the Regional Greenhouse Gas Initiative (“RGGI”), which covers GHG emissions from the electricity sector in ten states: Connecticut, Delaware, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Rhode Island, and Vermont.<sup>108</sup> Each of these state sovereigns has adopted its own state-level statutes and regulations to join the RGGI regime.<sup>109</sup> The second program is based in California and was established by the California Global Warming Solutions Act, also known as California Assembly Bill 32.<sup>110</sup> The California program covers not only emissions generated by the energy sector, but also large industrial facilities and transportation providers.<sup>111</sup> As stated above, the Commonwealth of Virginia has developed its own state-level carbon reduction regulation that is designed to link into the multistate RGGI program.<sup>112</sup>

A report funded by Michael Bloomberg lists seventeen states and 540 cities, counties, and tribal governments that have signed non-binding pledges to help meet the United States’ obligations under the Paris Agreement through nonfederal means.<sup>113</sup> According to the study’s authors, these jurisdictions “represent over half of the U.S. population (173 million people), over half of the American economy (\$11.4 trillion), and over 35 percent

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Regulations; Revisions to New Source Review Program (Oct. 30, 2018), <https://www.regulations.gov/document?D=EPA-HQ-OAR-2017-0355-24006> [<https://perma.cc/2BAL-WGGY>].

<sup>108</sup> *Welcome*, REGIONAL GREENHOUSE GAS INITIATIVE, <https://www.rggi.org/> [<https://perma.cc/2W2Y-HF9M>] (last visited Apr. 2, 2020).

<sup>109</sup> *State Statutes & Regulations*, REGIONAL GREENHOUSE GAS INITIATIVE, <https://www.rggi.org/program-overview-and-design/state-regulations> [<https://perma.cc/V9YM-YMHU>] (last visited Apr. 2, 2020).

<sup>110</sup> *Assembly Bill 32 Overview*, CAL. AIR RESOURCES BOARD, <https://www.arb.ca.gov/cc/ab32/ab32.htm> [<https://perma.cc/69UU-AR3N>] (last updated Aug. 5, 2014).

<sup>111</sup> CAL. AIR RES. BD., CALIFORNIA’S 2017 CLIMATE CHANGE SCOPING PLAN: THE STRATEGY FOR ACHIEVING CALIFORNIA’S 2030 GREENHOUSE GAS TARGET ES6–ES11 (Nov. 2017), [https://ww3.arb.ca.gov/cc/scopingplan/scoping\\_plan\\_2017.pdf](https://ww3.arb.ca.gov/cc/scopingplan/scoping_plan_2017.pdf) [<https://perma.cc/F8CK-VVU2>].

<sup>112</sup> SB 851, 2020 Sess. (Va. 2020); *Greenhouse Gases*, VA. DEPT’ ENVTL. QUALITY, <https://www.deq.virginia.gov/Programs/Air/GreenhouseGasPlan.aspx> [<https://perma.cc/HJT6-MYS9>] (last visited Apr. 2, 2020).

<sup>113</sup> BLOOMBERG PHILANTHROPIES, FULFILLING AMERICA’S PLEDGE: HOW STATES, CITIES, AND BUSINESSES ARE LEADING THE UNITED STATES TO A LOW-CARBON FUTURE 14 (2018), <https://www.bbhub.io/dotorg/sites/28/2018/09/Fulfilling-Americas-Pledge-2018.pdf> [<https://perma.cc/XK6F-UMNR>].

of nationwide GHG emissions.”<sup>114</sup> Tellingly, the Bloomberg report cites Justice Brandeis’s famous dissent coining the term “laboratories of democracy” to suggest that state experimentation on climate and energy policy might even lead to better climate solutions that previously envisioned:

States control many of the most powerful energy and climate policy levers, such as renewable portfolio standards and air pollution regulations. States will often experiment and emulate peers: early mover states typically demonstrate successful models and then engage others to follow. U.S. Supreme Court Justice Louis Brandeis famously called states the “laboratories of democracy” thanks to their ability to innovate and experiment with diverse policy solutions. This is as true of energy and climate today as it was true of leading public policy issues in Brandeis’s time nearly 80 years ago.<sup>115</sup>

The results of the Bloomberg study are buttressed by the findings of Professor Sharmila Murthy, who has observed that “in the absence of national leadership, subnational state and local actors have tried to fill the void.”<sup>116</sup>

Mike Bloomberg, as an individual, nevertheless has made it clear he would prefer federal controls. In a joint op-ed with then-California Governor Jerry Brown, he wrote, “What happens in Washington still matters, of course, and we need to vote out of office those who refuse to recognize reality. But the American people are not waiting on Washington to take action . . . .”<sup>117</sup>

But giving state-led initiatives the leeway to innovate on climate policy might not simply be an alternative to federal action; it might very well prove to be a necessary predicate to federal action. *The Special Report on the Impacts of Global Warming of 1.5°C*, published by the Intergovernmental Panel on Climate Change in October 2018, documents the narrow

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<sup>114</sup> *Id.*

<sup>115</sup> *Id.* at 34.

<sup>116</sup> Sharmila L. Murthy, *States and Cities as “Norm Sustainers”: A Role for Subnational Actors in the Paris Agreement on Climate Change*, 37 VA. ENVTL. L.J. 1, 50 (2019).

<sup>117</sup> Jerry Brown & Michael Bloomberg, *Op-Ed: Even without the Trump administration, the U.S. is upholding its commitment to the Paris climate agreement*, L.A. TIMES (Sept. 12, 2018), <https://www.latimes.com/opinion/op-ed/la-oe-brown-bloomberg-climate-summit-20180912-story.html> [<https://perma.cc/3ELV-UEZL>].

and challenging pathways for industrialized nations to limit global warming to 1.5 or 2°C above pre-industrial levels.<sup>118</sup> The report concludes, “[t]here is no documented historic precedent” for the scale and speed of economic transformation that needs to occur.<sup>119</sup>

State leadership is likely to prove invaluable in providing, if not a historic precedent, then a realizable plan of action. Indeed, relying on state leadership to reimagine the American economy is hardly a new idea. The historian James Oakes has described how anti-slavery activists envisioned a “cordon of freedom” as one state after another abolished the unimaginably horrific and tragic institution of slavery, leaving the remaining slave-owning republics more and more isolated.<sup>120</sup> The “larger goal was to surround the slave states . . . until, ‘like a scorpion surrounded by fire,’ . . . slavery would sting itself to death—one state at a time.”<sup>121</sup> Oakes observed a key aspect about the role of state leadership in the abolition movement. He writes:

We say all the time that in the late eighteenth century slavery was abolished in “the North.” But that isn’t quite right. . . . The *North* did not abolish slavery; rather, state by state abolition created a section we call the North.<sup>122</sup>

Indeed, state action changed views on what was possible for a whole region, which eventually led to change at the national level. There is a lesson here in trying to predict how climate activism and carbon-neutral states might remake the country today.<sup>123</sup> Other scholars, notably Maxine Burkett, have already drawn similar connections between “the slave and fossil fuel economies.”<sup>124</sup> As the Bloomberg report documents, many state

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<sup>118</sup> See INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, SPECIAL REPORT: GLOBAL WARMING OF 1.5°C (Valérie Masson-Delmotte et al. eds., 2018), [https://www.ipcc.ch/site/assets/uploads/sites/2/2019/06/SR15\\_Full\\_Report\\_High\\_Res.pdf](https://www.ipcc.ch/site/assets/uploads/sites/2/2019/06/SR15_Full_Report_High_Res.pdf) [<https://perma.cc/R3AP-6X2N>] (an IPCC Special Report on the impacts of global warming of 1.5°C above pre-industrial levels).

<sup>119</sup> *Id.* at 15.

<sup>120</sup> James Oakes, *Making Freedom National: Salmon P. Chase and the Abolition of Slavery*, 13 GEO. J.L. & PUB. POL'Y 407, 416–17 (2015).

<sup>121</sup> *Id.* at 418.

<sup>122</sup> *Id.* at 411.

<sup>123</sup> See Maxine Burkett, *Climate Disobedience*, 27 DUKE ENVTL. L. & POL'Y F. 1, 20 (2016); Karl S. Coplan, *Fossil Fuel Abolition: Legal and Social Issues*, 41 COLUM. J. ENVTL. L. 223, 298–301 (2016); Albert C. Lin, *Evangelizing Climate Change*, 17 N.Y.U. ENVTL. L.J. 1135, 1169 n.170 (citing to a “number of commentators [who] have drawn this analogy”).

<sup>124</sup> Burkett, *supra* note 123, at 20.

governments are moving forward with concrete, binding statutes and regulations to achieve carbon neutrality. Once these leadership states succeed in establishing a proverbial “proof of concept” on a zero-carbon economy, it will exert pressure on neighboring states throughout a given region to follow.<sup>125</sup> Professor Murthy has envisioned a similar role for subnational actors writing, “[A]s norm sustainers, states and cities help to demonstrate the feasibility of climate actions in a way that lays the groundwork for national policy.”<sup>126</sup>

Pressure will come, in part, from the sheer economic force of some state actors; California is the *world’s* fifth largest economy, and has set a statewide target of achieving carbon neutrality by 2045.<sup>127</sup> Pressure will also be exerted by the interconnected nature of the electric transmission grid in many parts of the country. Virginia, for example, is part of PJM Interconnection, a regional transmission organization that manages wholesale electric power purchases throughout a region that covers all or part of thirteen states and the District of Columbia.<sup>128</sup> Virginia’s governor signed an executive order directing state agencies to outline the process for achieving a “carbon-free” grid by 2050.<sup>129</sup> The state’s public utility commission, the Virginia State Corporation Commission, has ordered the investor-owned utility Appalachian Power to develop integrated resource plans for achieving “30% renewable power by 2030,” “75% renewable power by 2040,” and “100% renewable power by 2050.”<sup>130</sup>

Implementing these plans undoubtedly will have some impact on the wholesale market for fossil-fuel electricity within the PJM region. It might begin to form a “cordon” of fossil-fuel-free states, as one state’s refusal to purchase electricity from gas, oil, or coal-fired power plants changes how Americans, region by region, think of their relationship to fossil fuels.

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<sup>125</sup> David Iaconangelo & Carlos Anchondo, ‘Remarkable leap.’ *Va. backs 100% carbon-free electricity*, E&ENews (Mar. 9, 2020), <https://www.eenews.net/energywire/stories/1062554521/search?keyword=Virginia+Clean+Economy+Act> [<https://perma.cc/X7JF-UNMW>].

<sup>126</sup> Murthy, *supra* note 116, at 51.

<sup>127</sup> David Roberts, *California just adopted its boldest energy target yet: 100% clean electricity*, VOX, <https://www.vox.com/energy-and-environment/2018/8/31/17799094/california-100-percent-clean-energy-target-brown-de-leon> [<https://perma.cc/4MT2-SEVZ>] (last updated Sept. 10, 2018).

<sup>128</sup> See *Territory Served*, PJM, <https://www.pjm.com/about-pjm/who-we-are/territory-served.aspx> [<https://perma.cc/W5NK-PPXB>] (last visited Apr. 2, 2020).

<sup>129</sup> Va. Off. of the Governor, Exec. Order No. 43 (2019) at 3, <https://www.governor.virginia.gov/media/governorvirginiagov/executive-actions/EO-43-Expanding-Access-to-Clean-Energy-and-Growing-the-Clean-Energy-Jobs-of-the-Future.pdf> [<https://perma.cc/4ZZK-EQ47>].

<sup>130</sup> COMMONWEALTH OF VA. STATE CORP. COMM’N, Final Order on App. Power Co.’s Integrated Resource Plan filing pursuant to Va. Code § 56-597 *et seq.* 5 (Jan. 28, 2020), <http://www.scc.virginia.gov/docketsearch/DOCS/4kx901!.pdf> [<https://perma.cc/5RW2-MFUE>].



## V. ENVIRONMENTAL FEDERALISM AS FORUM SHOPPING

The conventional wisdom on federalism frames the discussion as one that is deeply polarized. Those on the political left are assumed to prefer a strong federal hand in environmental governance, while those on the right are assumed to herald decentralized approaches. These assumptions allow for easy (albeit unhelpful) caricatures. Environmentalists are demonized for favoring “job-killing” federal regulations; business lobbyists are pilloried for putting “profits ahead of people.”

One challenge to the federal Endangered Species Act highlights just how this dynamic has played out. The challenge was launched by the self-titled “People for the Ethical Treatment of Property Owners,” an obvious dig at the prominent, animal rights organization, People for the Ethical Treatment of Animals, better known as PETA.<sup>131</sup> PETPO, the anti-PETA antagonist, explained that it was:

[F]ormed by residents of southwestern Utah who have suffered for decades under federal regulations to protect the Utah prairie dog. Its more than 200 members have been prevented from building homes, starting small businesses, and in the case of the local government, from protecting recreational facilities, a municipal airport, and the local cemetery from the Utah prairie dog's maleffects.<sup>132</sup>

The nonprofit organization Friends of Animals intervened on the side of the U.S. Fish & Wildlife Service to push back against PETPO's premise:

[W]hat is really on display here is a difference of opinion over the value of America's natural heritage. On one side, PETPO tends to view members of the animal kingdom to be valueless unless they can be reduced to mere “commodities,” if the animal cannot be sold or traded, then it is no more than a mere pest to be eradicated to make way for human development. On the other side, there [are] . . . the

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<sup>131</sup> *Prairie dogs and property owners: Both need protection from massive federal overreach*, PAC. LEGAL FOUND., <https://pacificlegal.org/case/people-for-the-ethical-treatment-of-property-owners-v-fish-and-wildlife-service/> [<https://perma.cc/XB72-TV6R>] (last visited Apr. 2, 2020).

<sup>132</sup> See Appellee's Brief, *People for the Ethical Treatment of Prop. Owners v. U.S. Fish & Wildlife Serv.*, No. 2:13-cv-00278-DB, 2015 WL 2395758 (10th Cir. May 18, 2015).

Federal Defendants, thousands of scientists, and millions of Americans who recognize that protection of *all* members of the North American biota—from the smallest fungi to the greatest of mammals—is essential to biodiversity and to human economic health.<sup>133</sup>

Federal leadership was assumed by Friends of Animals as essential to protecting broad public interests that were facing an acute threat from development pressures.<sup>134</sup> Devolution to the states, in the view of PETPO, was a means of dodging “overly burdensome regulations.”<sup>135</sup>

Yet in other cases, regulated industries are happy with a federal response if it serves a preferred policy outcome, and environmental groups are ready advocates of “states’ rights” when they perceive a presidential administration to be hostile to environmental protection.

The mining industry’s challenge to a Virginia statute that imposed a moratorium on uranium mining is perfectly illustrative of this principle. In *Virginia Uranium, Inc. v. Warren*, a mining company unsuccessfully sought to overturn Virginia’s uranium ban as pre-empted by the federal Atomic Energy Act, which gives the Nuclear Regulatory Commission authority over the processing of nuclear fuel, but leaves states in charge of the conventional mining of uranium ore.<sup>136</sup> In the parlance of the Atomic Energy Act, federal authority over uranium material does not begin until “after removal from its place of deposit in nature.”<sup>137</sup> Traditional conservative and pro-business interests argued in favor of an expansive view of federal power under this language from the Atomic Energy Act. Meanwhile, traditional liberal and pro-environmental groups argued in favor of deference to state sovereignty.

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<sup>133</sup> Friends of Animals’ Response to Plaintiff’s Motion for Summary Judgment, *People for the Ethical Treatment of Prop. Owners v. U.S. Fish & Wildlife Serv.*, No. 2:13-cv-00278-DB, 2014 WL 12649026 (D. Utah Feb. 18, 2014) (emphasis in original) (The U.S. Court of Appeals for the Tenth Circuit ultimately upheld the Fish & Wildlife Service’s regulation and found that protection of the Utah Prairie Dog, a “purely intrastate species,” was lawful under the Endangered Species Act and a “constitutional exercise of congressional authority under the Commerce Clause.”); see *People for the Ethical Treatment of Prop. Owners v. U.S. Fish & Wildlife Serv.*, 852 F.3d 990, 1008 (10th Cir. 2017).

<sup>134</sup> AVINASH KAR ET AL., NAT. RES. DEF. COUNCIL, EFFECTIVE ENVIRONMENTAL COMPLIANCE AND GOVERNANCE: PERSPECTIVES FROM THE NATIONAL RESOURCES DEFENSE COUNCIL 1, 6 (Dec. 2010), [https://www.nrdc.org/sites/default/files/int\\_10051901a.pdf](https://www.nrdc.org/sites/default/files/int_10051901a.pdf) [<https://perma.cc/DVR5-NNN2>].

<sup>135</sup> *People for the Ethical Treatment of Prop. Owners*, 852 F.3d at 996.

<sup>136</sup> See *Va. Uranium, Inc. v. Warren*, 139 S. Ct. 1894, 1902 (Gorsuch, J., plurality opinion).

<sup>137</sup> 42 U.S.C. § 2092 (1992).

Over the course of their political careers, U.S. Senators Tom Cotton,<sup>138</sup> Jim Inhofe,<sup>139</sup> and Ted Cruz<sup>140</sup> have each highlighted the Tenth Amendment to the U.S. Constitution in advocating for a limited view of federal government power and deference to states' rights. Yet each of these Senators signed on to an amicus brief<sup>141</sup> in support of a remarkably sweeping view of federal regulatory power and deference to the Nuclear Regulatory Commission's role. Their brief argued that the preemptive scope of the Atomic Energy Act was *not* limited just to striking down conflicting language in a state statute, but should also allow for a searching review of a state's legislative motive, even when that motive was not memorialized in the text of the law.<sup>142</sup> This broad view of preemption was needed "for good reason," they argued.<sup>143</sup> "Federal preemption could be rendered meaningless if state or local authorities could circumvent federal policy through artful wording or other creative backchannels."<sup>144</sup>

Positions taken by the U.S. Chamber of Commerce show a similar flexibility with regard to federalism. In 2016, the Chamber published a report that criticized a series of U.S. EPA actions as "federal efforts to take control of state environmental programs."<sup>145</sup> Yet the U.S. Chamber found itself in favor of a strong federal hand in *Virginia Uranium v. Warren*, where the Chamber argued that states "in most instances still

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<sup>138</sup> See Press Release, Tom Cotton: Arkansas Senator, Boozman, Cotton Introduce Bill Giving States Power to Reject Federal Electric Transmission Projects (Feb. 12, 2015), [https://www.cotton.senate.gov/?p=press\\_release&id=132](https://www.cotton.senate.gov/?p=press_release&id=132) [<https://perma.cc/BQ4C-JHN7>].

<sup>139</sup> See S.1632—Restoring the 10th Amendment Act, 113th Congress (2013), <https://www.congress.gov/bill/113th-congress/senate-bill/1632/cosponsors> [<https://perma.cc/94ZR-CU9V>] (James Inhofe signing on as co-sponsor on Oct. 31, 2013).

<sup>140</sup> Alexandra Jaffe, *Cruz introduces bill defending states' rights on marriage*, CNN (Feb. 11, 2015), <https://edition.cnn.com/2015/02/11/politics/ted-cruz-2016-gay-marriage-bill/> [<https://perma.cc/AXB7-D82X>]; see also CNN: *Cruz introduces bill defending states' rights on marriage*, U.S. SENATOR FOR TEXAS: TED CRUZ, <https://www.cruz.senate.gov/?p=news&id=2241=2241> [<https://perma.cc/LY5X-FGXZ>] (last visited Apr. 2, 2020).

<sup>141</sup> See Brief for Senator Tom Cotton, Senator Jim Inhofe, and Senator Ted Cruz as Amicus Curiae in Support of Petitioners at 13, *Va. Uranium, Inc. v. Warren*, 139 S. Ct. 1894 (2019) (No. 16-1275) (July 26, 2018).

<sup>142</sup> See *id.* at 13–14.

<sup>143</sup> *Id.*

<sup>144</sup> *Id.* at 13.

<sup>145</sup> WILLIAM L. KOVACS ET AL., U.S. CHAMBER OF COMMERCE, *THE GROWING BURDEN OF UNFUNDED EPA MANDATES ON THE STATES 2* (Aug. 2016), [https://www.uschamber.com/sites/default/files/documents/files/022879\\_etra\\_epa\\_coercive\\_federalism\\_report\\_fin.pdf](https://www.uschamber.com/sites/default/files/documents/files/022879_etra_epa_coercive_federalism_report_fin.pdf) [<https://perma.cc/4NEZ-J9V7>] (statement of William L. Kovacs, then–U.S. Chamber Senior Vice President for Environment, Technology & Regulatory Affairs).

do not have[]the extensive experience the federal government has acquired” in managing nuclear safety.<sup>146</sup>

On the other side of the aisle, Virginia’s Democratic Attorney General, Mark Herring, insisted that the Republican Senators’ “approach to preemption would be deeply misguided,”<sup>147</sup> and relied on language from the conservative lion of the Supreme Court, Justice Scalia, to support his defense of Virginia’s mining ban statute: “[D]etermining whether state and federal rules conflict based on the subjective intentions of the state legislature is an enterprise destined to produce ‘confusion worse confounded.’”<sup>148</sup> The Attorney General’s position was supported by three local environmental groups.<sup>149</sup> Statewide conservation organizations promoted the effort as well.<sup>150</sup>

Controversies over offshore drilling for oil and natural gas provide another useful example of environmental federalism as forum shopping. As discussed in Part II above, former California Governor Ronald Reagan ran for President on a states’ rights platform. Once elected, however, President Reagan rallied supporters to defend the authority of the federal government to override “states’ rights” when it suited his administration’s needs. A case in point is his effort to open up the coast of California to offshore drilling. In 1972, Congress had enacted the Coastal Zone Management Act (“CZMA”), which established a multistep process through which the U.S. Department of Commerce could authorize oil and gas drilling by private companies in federal waters.<sup>151</sup> The statute required federal agencies to conduct any activities “directly affecting” a state’s coastal areas “in a manner which is, to the maximum extent practicable, consistent with approved state management programs.”<sup>152</sup>

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<sup>146</sup> Brief for the Chamber of Commerce of the United States of America as Amicus Curiae in Support of Petitioners at 6, *Va. Uranium, Inc. v. Warren*, 139 S. Ct. 1894 (2019) (No. 16-1275) (July 26, 2018).

<sup>147</sup> Brief for Respondents at 1, *Va. Uranium, Inc. v. Warren*, 139 S. Ct. 1894 (2019) (No. 16-1275) (Aug. 27, 2018).

<sup>148</sup> *Id.* at 1–2 (quoting *Shady Grove Orthopedic Assocs., P.A. v. Allstate Insurance Co.*, 559 U.S. 393, 404 (2010)).

<sup>149</sup> Brief of the Roanoke River Basin Association, Dan River Basin Association, and Piedmont Environmental Council as Amici Curiae in Support of Respondents, *Va. Uranium, Inc. v. Warren*, 139 S. Ct. 1894 (2019) (No. 16-1275) (Sept. 4, 2018).

<sup>150</sup> Mary Rafferty, *Local Advocates Celebrate Uranium Ban Win at Supreme Court*, VA. CONSERVATION NETWORK (July 19, 2019), <http://www.vcnva.org/local-advocates-celebrate-uranium-ban-win-at-supreme-court/> [<https://perma.cc/XV8T-MXQM>].

<sup>151</sup> See Coastal Zone Management Act of 1972, §§ 301–304, 16 U.S.C. §§ 1451–1464 (1972).

<sup>152</sup> *Id.* § 1456(c)(1).

California residents carried the recent memory of a disastrous accident off the coast of Santa Barbara. Just three years before the CZMA was enacted, a blowout on an oil rig operated by Union Oil (later known as Unocal) spilled approximately three million gallons of crude oil, “creating an oil slick 35 miles long along California’s coast and killing thousands of birds, fish, and sea mammals.”<sup>153</sup> Responding to the Santa Barbara incident, state officials drafted a California Coastal Management Plan that sought to protect the state from suffering a similar catastrophe in the future.<sup>154</sup>

The Reagan administration sought to override California’s plan, arguing that the national interest in developing a stable supply of domestic oil reserves overrode state-specific concerns. Indeed, the administration argued that “the Arab oil embargo of 1973 precipitated renewed congressional action” and led to a series of amendments to the CZMA in 1978 that put a thumb on the scale in favor of federal control.<sup>155</sup> In *Secretary of the Interior v. California*, the Supreme Court sided with the Reagan administration and held that the sale of federal leases to begin exploration for possible offshore oil and gas development could override a state’s concerns as expressed in its coastal zone management program—at least at this preliminary stage of the process.<sup>156</sup>

The oil-and-gas industry (represented by the Western Oil & Gas Association) had joined the Secretary of the Interior to defend the California lease sales, arguing before the Supreme Court that under the CZMA the “role . . . for governors [was] to make recommendations; [the] role . . . for the Secretary of the Interior [was] to have final authority to assess a balance between state and national interests.”<sup>157</sup> The oil-and-gas industry reversed course years later, however, when the Obama White House adopted a different view of the same energy issue. *Hornbeck Offshore Services L.L.C. v. Salazar* considered the industry’s challenge to the Obama administration’s decision to impose a moratorium on offshore

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<sup>153</sup> Christine Mai-Duc, *The 1969 Santa Barbara Oil Spill That Changed Oil and Gas Exploration Forever*, L.A. TIMES (May 20, 2015), <https://www.latimes.com/local/lanow/la-me-ln-santa-barbara-oil-spill-1969-20150520-htmlstory.html> [<https://perma.cc/DTD3-CUG4>].

<sup>154</sup> CAL. COASTAL COMM’N, DESCRIPTION OF CALIFORNIA’S COASTAL MANAGEMENT PROGRAM (CCMP) 1–4.

<sup>155</sup> See Brief for Petitioners at 55, *Sec. of Interior v. California*, 464 U.S. 312 (1984) (No. 82-1326).

<sup>156</sup> *Sec. of Interior v. California*, 464 U.S. 312 (1984).

<sup>157</sup> Transcript of Oral Argument at 18, *Sec. of Interior v. California*, 464 U.S. 312 (1984) (No. 82-1326).

drilling in the Gulf of Mexico following the Deepwater Horizon disaster.<sup>158</sup> An *amicus* brief filed on behalf of the Louisiana Oil and Gas Association posited:

The oil and gas industry provided the stabilizing force necessary to sustain the Louisiana economy in the aftermath of Hurricanes Katrina and Rita, and is vital to the continued viability of the Gulf Coast as it grapples with the continued effects of the recession and the oil spill. The moratorium essentially cuts the legs from under Gulf Coast communities which are struggling to survive.<sup>159</sup>

Contrary to the industry's public policy view during the Reagan years, drilling operators confronting the Obama administration insisted that state and local impacts should pre-empt a Secretary of the Interior's preferred, national policy.

The legislative era of the 1970s is often recognized as marking the birth of modern environmental law and, with it, the dominant role played by federal actors. The Environmental Protection Agency, the U.S. Fish and Wildlife Service, and the Bureau of Land Management, among other regulators, would grow to assert primacy over a broad swath of environmental concerns. The Reagan era sought to unwind at least some of the federal regulatory apparatus, but a contemporaneous account of the administration's efforts documented mixed results. "Strangely enough, in spite of its strong language, the Reagan administration did not actually do very much," wrote Susan Rose-Ackerman in 1990.<sup>160</sup> She explained that "limited attempts at reform were made at the Environmental Protection Agency," but that these efforts largely failed as they were aimed at blind deregulation that proved difficult to defend in the courts.<sup>161</sup> "Simple inattention can reduce the pages in the Federal Register, but genuine reform requires expertise and commitment."<sup>162</sup> Add to Rose-Ackerman's account the times—such as with the development of offshore

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<sup>158</sup> *Hornbeck Offshore Services v. Salazar*, 696 F. Supp. 2d 627 (2010).

<sup>159</sup> Brief of Sen. Mary Landrieu of the State of Louisiana et al. as Amicus Curiae in Support of Plaintiff-Appellee's Opposition to Defendants-Appellants' Motion for Stay, at 7, *Hornbeck Offshore Services v. Salazar*, 713 F.3d 787 (5th Cir. 2013) (No. 10-30585).

<sup>160</sup> Susan Rose-Ackerman, *Defending the State: A Skeptical Look at 'Regulatory Reform' in the Eighties*, 61 U. COLO. L. REV. 517, 518 (1990).

<sup>161</sup> *Id.* at 523.

<sup>162</sup> *Id.* at 526.

oil and gas resources—when the Reagan administration explicitly favored a strong federal hand, and Reagan's record as a states' rights advocate becomes even murkier. His mixed record does not mean, however, that the core question of environmental law and federalism—*who decides*—was permanently resolved in favor of national control.

In the parlance of litigators, advocates on all sides engage in “forum shopping,” seeking the venue where a judge or jury is most likely to return a favorable verdict.<sup>163</sup> Forum shopping thus provides a subtle gloss on the broader, political considerations and deliberative or technocratic factors that undergird our description of environmental law and federalism.<sup>164</sup> The takeaway here is that federalism concerns are not as neatly partisan as they are sometimes portrayed. Answers to the question of “who decides” evolve over time. What the above examples demonstrate—from land management to offshore oil exploration to uranium mining—is that ideological commitments to “federalism” are remarkably fluid from case to case, as environmental activists and industry representatives try to put their arguments before the local, state, regional, or federal decision-maker who is most likely to deliver a preferred outcome.

## CONCLUSION

As the late Doug Kendall argued, honest, federalism-respecting arguments should not reflexively be assigned to conservatives. Citing state-government support for various progressive, federal legislative efforts, Kendall argued, “If federalism is about protecting the States, why not listen to them?”<sup>165</sup> Indeed, why not listen to all stakeholders when attempting to determine what level of government is best suited to resolve any environmental concern? As the examples highlighted here demonstrate—from public lands management in the West, to urban air pollution regulation in the late 19th century, to the birth of the modern Clean Air Act in 1970, to state-level leadership on global climate change today—environmental federalism has always been driven by pragmatic concerns from litigants and not by any commitment to a particular constitutional philosophy. In disputes over uranium mines, Endangered Species Act

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<sup>163</sup> *Forum Shopping*, BLACK'S LAW DICTIONARY (6th ed. 1990).

<sup>164</sup> See Michael Livermore, *The Perils of Experimentation*, 126 YALE L.J. 636, 638–39 (2017).

<sup>165</sup> J.E. AUSTIN ET AL., REDEFINING FEDERALISM: LISTENING TO THE STATES IN SHAPING “OUR FEDERALISM” 10 (2004).

enforcement, and moratoria on offshore drilling, environmental activists, industry executives, and other stakeholders have all shared a pragmatic approach to answering the “who decides” questions of environmental law. Perhaps acceptance of this commonality can help us dial down the rhetoric and narrow the partisan divide that has made environmental policymaking so polarizing in recent years.