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FROM COOPERATIVE TO INOPERATIVE  
FEDERALISM: THE PERVERSE MUTATION OF  
ENVIRONMENTAL LAW AND POLICY

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I. INTRODUCTION

In the foreword to a symposium on “Cooperative Federalism” published in the *Iowa Law Review* in 1938, the unnamed author asserted “that federalism is still in flux and that no balance has yet been struck between state and nation.”<sup>1</sup> The same statement clearly still holds true, at least in the area of environmental law. The symposium foreword attributed the uncertainty about the appropriate realms of federal and state power to “experimentation in federalism” reflected in recent federal and state legislation that was “characterized by the participation of several governments in cooperative legislative or administrative action.”<sup>2</sup>

Beginning in 1970, Congress embarked upon a new experiment in cooperative federalism in the field of environmental law. In a rash of legislation adopted over the next decade, Congress established a framework in which the federal and state governments would work together to protect health, the environment, and natural resources, such as wildlife, from the adverse effects of pollution-generating and developmental activities by both private and public entities. Under this new regime of federal environmental law, each level of government had a particular role to play. Under many of the federal pollution control laws, the federal government was

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1. *Symposium on Cooperative Federalism: Foreword*, 23 *IOWA L. REV.* 455, 455 (1938). This symposium was brought to my attention through the scholarship of Professor Rob Fischman. See Robert L. Fischman, *Cooperative Federalism and Natural Resources Law*, 14 *N.Y.U. ENVTL. L.J.* 179, 185-87 (2005).

2. *Symposium on Cooperative Federalism*, *supra* note 1, at 456.

responsible for promulgating standards to protect health and the environment. Congress gave states the option of administering the programs necessary to achieve the federally promulgated standards by, for example, developing implementation plans<sup>3</sup> or issuing permits to individual polluters,<sup>4</sup> although the federal government typically retained veto power over state decisions. Both levels of government shared the power to enforce applicable controls,<sup>5</sup> supplemented by private enforcement initiatives.<sup>6</sup> In most instances, the statutes explicitly delegated to the states the authority to adopt standards that were more stringent than applicable federal standards.<sup>7</sup> Under this model, both levels of government would contribute to the common goal of minimizing the degree to which human activities threaten harm to health and to valuable natural resources.

This model of environmental statutory cooperative federalism is nominally still in place today. The on-the-ground operation of environmental cooperative federalism nevertheless looks distinctly different today than it did for much of the period following the enactment of the Clean Air Act (“CAA”),<sup>8</sup> the first major, modern federal pollution control statute. Federal power to prevent environmental harm is in some respects more limited today than it has been for most of the modern environmental era. This contraction of federal power has resulted from a combination of judicial, legislative, and administrative activity. Many state and local governments have reacted to the shackles imposed on federal authority to protect the environment and conserve natural resources by engaging in the kind of experimentation referred to in the Iowa Law Review symposium introduction. Perhaps more than at any time in the last thirty-five years, the states and localities have begun to fulfill their potential as “laboratories” of experimentation<sup>9</sup> in achieving environmental protection goals. Instead of welcoming this development, however, the federal government, acting again through all three branches, has recognized or imposed limitations on

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3. *See, e.g.*, Clean Air Act, 42 U.S.C. § 7410(a)(2) (2000).

4. *See, e.g.*, Clean Water Act, 33 U.S.C. § 1342(b) (2000).

5. *See, e.g.*, Clean Water Act § 1319; Clean Air Act § 7413.

6. *See, e.g.*, Clean Water Act § 1365; Clean Air Act § 7604.

7. *See, e.g.*, Clean Water Act § 1370; Clean Air Act § 7416.

8. Pub. L. No. 91-604, 84 Stat. 1676 (1970) (codified as amended at 42 U.S.C. §§ 7401-7671q (2000)).

9. In *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting), Justice Brandeis remarked that “[i]t is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”

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state and local authority to continue with these endeavors. Thus, both levels of government have been subjected to constraints on the authority to pursue many of the statutory goals established during the 1970s. Congress's decision in a few instances to delegate (or consider delegating) to the states the authority to grant exemptions from federally established environmental requirements provides the final component of the inversion of the manner in which federalism operates in the context of environmental law.

This Article discusses the transformation of environmental law from a set of rules and doctrines that enabled federal and state governments to cooperate in the quest for environmental protection, to a revised system that, at least in some respects, restrains both levels of government from the vigorous pursuit of that goal. Part II of the Article discusses the origins of the concept of cooperative federalism and the application of that concept to environmental law. It explores the rationale for increased federal involvement in establishing limitations on activities with the potential to harm the environment. It also provides a description of the characteristics of cooperative federalism initially built into the federal pollution control and natural resource management statutes. These statutes reflect the understanding that, despite the creation of an extensive body of federal environmental restrictions, the states would continue to play an important role in the adoption and implementation of environmental policy, and that, in particular, they would remain free to supplement or exceed federally established goals or standards.

The next two parts address the manner in which the original model of cooperative federalism as it applies to environmental law has shifted. Part III examines the contraction of federal power to regulate activities that are potentially harmful to the environment. It explores the manner in which each branch of the federal government has contributed to that retrenchment. Part IV details the extent to which state and local authorities have reacted by establishing programs to fill the vacuum created by the disappearance of federal power or by the unwillingness of the federal government to exercise the power it retains to promote environmental protection. Part IV also explores recent developments, at both the federal and state levels, that have resulted in the fettering of state power to combat environmentally destructive activities. Finally, it considers a few circumstances in which the federal government has delegated enhanced authority to the states to carve loopholes in federal environmental protection measures that otherwise would apply, rather than allowing states to exceed minimal federal safeguards. The upshot of all these developments has been a federal system that hinders the capacity of

both levels of government to pursue environmental protection initiatives, thereby constraining the force of environmental law by pushing both levels toward the lowest common denominator.

## II. THE HISTORICAL BASELINE: COOPERATIVE FEDERALISM

Federalism issues derive from the Constitution's treatment of the states as sovereign entities that are distinct from the federal government.<sup>10</sup> Justice Kennedy has described federalism as "the unique contribution of the Framers to political science and political theory."<sup>11</sup> A majority of the Supreme Court has characterized "our federalism" as "requir[ing] that Congress treat the States in a manner consistent with their status as residuary sovereigns and joint participants in the governance of the Nation."<sup>12</sup> As the Court conceives of it, federalism entails neither "blind deference to 'States' Rights'" nor "centralization of control over every important issue in our National Government and its courts," but rather

a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States.<sup>13</sup>

The existence of a system of government based on dual sovereignty has generated debate over "how power, resources, and responsibility should be divided among different government entities."<sup>14</sup> One of the ways in which the federal government may

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10. See 1 LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 119 (3d ed. 2000). See also William Wade Buzbee, *Brownfields, Environmental Federalism, and Institutional Determinism*, 21 WM. & MARY ENVTL. L. & POL'Y REV. 1, 20 (1997) (describing federalism in general as "a system of governance with a central government authority and regional governments with at least some areas of policymaking autonomy" and federalism under the U.S. Constitution as "a legal system recognizing the United States federal government and state governments as entities with areas of autonomous political authority and areas of overlapping or delegated authority").

11. *United States v. Lopez*, 514 U.S. 549, 575 (1995) (Kennedy, J., concurring). For a less charitable view, see Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. REV. 903, 914-26 (1994) (arguing that federalism does not secure citizen participation, make government more responsive, encourage experimentation, diffuse power, or secure community).

12. *Alden v. Maine*, 527 U.S. 706, 748 (1999).

13. *Younger v. Harris*, 401 U.S. 37, 44 (1971).

14. Robert V. Percival, *Environmental Federalism: Historical Roots and Contemporary Models*, 54 MD. L. REV. 1141, 1143 (1995).

pursue its objectives without running roughshod over state sovereignty is to enlist the assistance of state governments in the pursuit of federal goals and to allow the states to pursue supplementary or alternative goals, as long as such state efforts do not frustrate achievement of the federal purposes. Congress has a long history of creating regulatory programs that rely upon such cooperative ventures between the federal government and the states to attain goals common to both sovereigns. One of the areas in which this tradition of cooperative federalism has been richest is environmental law and policy.

A. *The Origins of Cooperative Federalism*

The 1938 Iowa Law Review symposium foreword characterized cooperative legislation involving federal and state governments as still in an “experimental stage” and speculated that it might constitute “a temporarily significant phase in the development of the federal system of government.”<sup>15</sup> The articles in the symposium discussed the relationship of federal and state regulatory authority in areas that included efforts to provide safe food and drugs,<sup>16</sup> regulate the consumption of alcohol,<sup>17</sup> solve fiscal problems,<sup>18</sup> restrict the use of child labor,<sup>19</sup> and require collective bargaining.<sup>20</sup> The authors of the symposium articles gathered underneath the umbrella of cooperative federalism various programs under which Congress provided grants to the states “to encourage the states in enlarged activity,”<sup>21</sup> required states to pursue policies they might themselves have endorsed but for the existence of strong political opposition at the state level,<sup>22</sup> allowed states to determine the degree to or the manner in which they were willing to pursue federal policy

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15. *Symposium on Cooperative Federalism*, *supra* note 1, at 458. Earlier articles had explored the dimensions of federal-state cooperation. *See, e.g.*, Edward S. Corwin, *National-State Cooperation—Its Present Possibilities*, 46 *YALE L.J.* 599 (1937).

16. Frank R. Strong, *Cooperative Federalism*, 23 *IOWA L. REV.* 459, 479-82 (1938).

17. Jane Perry Clark, *Interdependent Federal and State Law as a Form of Federal-State Cooperation*, 23 *IOWA L. REV.* 539, 543, 549-52 (1938); W. Brooke Graves, *Influence of Congressional Legislation on Legislation in the States*, 23 *IOWA L. REV.* 519, 521-22 (1938).

18. Graves, *supra* note 17, at 523-28.

19. John B. Cheadle, *Cooperation in Reverse: A Natural State Tendency*, 23 *IOWA L. REV.* 586, 601 (1938); Clark, *supra* note 17, at 563-64; Strong, *supra* note 16, at 483-87.

20. Graves, *supra* note 17, at 530-32; Strong, *supra* note 16, at 489-93.

21. Strong, *supra* note 16, at 502.

22. *Id.* at 504.

endeavors,<sup>23</sup> depended upon state implementation to achieve federal statutory objectives,<sup>24</sup> and prevented destructive interstate competition or efforts by the states to protect themselves from or profit at the expense of neighboring jurisdictions.<sup>25</sup> Congress later resorted to all of these techniques in the federal environmental legislation that it adopted beginning in 1970.

The symposium articles describing the emerging cooperative federalism regimes did not focus primarily on environmental protection (which, most likely, none of the authors would have recognized as an ongoing function of government, certainly not at the federal level) or natural resource management. Neither did they ignore what we today call environmental law problems. Thus, the symposium authors referred to the influence of federal legislation on state efforts to engage in natural resource conservation and planning.<sup>26</sup> Indeed, an entire article was devoted to a discussion of cooperative federalism in drainage basin-wide water use planning.<sup>27</sup> One of the symposium pieces discussed federal regulation of navigable waterways, which required pilots to conform to existing or future state laws, and federal legislation that conditioned the issuance of federal licenses to operate hydropower facilities on compliance with state water power laws.<sup>28</sup> The same piece mentioned federal legislation governing use of the national parks, which required compliance with state fish licensing laws.<sup>29</sup> Additionally, the piece analyzed federal initiatives to control commerce in natural resources following failed state initiatives in this area.<sup>30</sup> The author noted the intrusion of the federal government into an area traditionally regarded as an appropriate (if not exclusive) prerogative of the states—fish and wild game conservation.<sup>31</sup>

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23. *Id.* at 512-14. According to Strong, these types of initiatives allow “the registered will of a preponderant majority [to become], without operation of the formal amendment mechanism, the national will.” *Id.* at 515.

24. Clark, *supra* note 17, at 539.

25. Cheadle, *supra* note 19, at 587-88, 592.

26. *See, e.g.*, Graves, *supra* note 17, at 535-37.

27. William E. Warne, *The Drainage Basin Studies: Cooperative Federalism in Practice*, 23 IOWA L. REV. 565 (1938).

28. Clark, *supra* note 17, at 539-40.

29. *Id.* at 540.

30. *Id.* at 546-49.

31. *Id.* at 545-46. *See also* Cheadle, *supra* note 19, at 598. Professor Clark devoted particular attention to the cooperative efforts of federal and state authorities in enforcing the Migratory Bird Treaty Act, ch. 128, § 2, 40 Stat. 755 (1918) (codified as amended at 16 U.S.C. § 703 (2000)), and related state laws. *See* Clark, *supra* note 17, at 559-61. The articles also discussed the use of interstate compacts as a method of cooperative federalism, with one of the

These initiatives amounted to a kind of “hybrid federal legislation positing cooperation through interacting state and federal consent.”<sup>32</sup> The symposium authors tended to view these developments in a positive light. One argued for example, that

[t]he acceptance by the state legislatures of the leadership of Congress . . . appears to provide at least as good, if not a better solution of one of the major problems of cooperative federalism, than any that has yet been tried. It brings into existence a very considerable measure of uniformity without . . . doing violence to the principles upon which the federal system has long endured.<sup>33</sup>

The author added that, while the transfer of power to the federal government that the states are unable or unwilling to use is unobjectionable, “it is quite as reasonable to insist that the states ought to be permitted to retain all the powers that they do or can use effectively.”<sup>34</sup>

The earliest appearance of the term “cooperative federalism” in a reported decision handed down by a federal court was in 1950, when, in a case involving the validity of an Alaska income tax statute, the Court of Appeals for the Ninth Circuit cited a law review article by that name.<sup>35</sup> Today, the rhetoric of “cooperative federalism” is routinely invoked by the courts in a variety of regulatory and other contexts. During the last thirty years, the

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authors concluding that “[w]ithin limits,” the creation of interstate agencies “makes for better methods of conserving natural resources.” Cheadle, *supra* note 19, at 615. Interstate compacts are beyond the scope of this Article.

32. Strong, *supra* note 16, at 504.

33. Graves, *supra* note 17, at 537. See also Warne, *supra* note 27, at 572 (quoting a water resource planning official who stated that “mutually helpful negotiations of the Federal and State groups, if continued, should produce the sanest ultimate plans, with that strengthening of local autonomy and responsibility which all of us believe is the key to our successful democratic processes”).

34. Graves, *supra* note 17, at 538.

35. Alaska Steamship Co. v. Mullaney, 180 F.2d 805, 816 n.14 (9th Cir. 1950) (citing Samuel Mermain, “Cooperative Federalism” Again: State and Municipal Legislation Penalizing Violation of Existing and Future Federal Requirements: I, 57 YALE L.J. 1, 18 (1947)). Earlier decisions had described efforts on the part of federal and state governments to cooperate with one another in areas such as flood control, reclamation, and navigation improvement. See, e.g., United States v. W. Va. Power Co., 122 F.2d 733, 738 (4th Cir. 1941); Overton v. United States, No. 30233, 1909 WL 872, \*1 (Ct. Cl. 1909). Cf. United States v. New York, 315 U.S. 510, 516-17 (1942) (describing “scheme” pursued under the Bankruptcy Act “to encourage the States to establish and maintain unemployment insurance funds and thus to cooperate with the federal government in meeting a common problem”).

Supreme Court has characterized as “cooperative federalism” endeavors such as educational programs for handicapped children,<sup>36</sup> financial aid for needy families with dependent children,<sup>37</sup> telecommunications facility siting requirements,<sup>38</sup> health insurance,<sup>39</sup> financial security in old age,<sup>40</sup> interstate efforts to fight crime,<sup>41</sup> and, of course, environmental law.<sup>42</sup>

The Supreme Court’s multifarious exposure to cooperative federalism ventures has provided it with the occasion to describe what it thinks cooperative federalism entails. In a recent opinion, Justice Breyer identified some of the attributes of a typical cooperative federalism program, regarding it as one that rejects a nationally uniform approach to problem solving in which Congress preempts state authority, and that instead allows state and local authorities to make at least some decisions, subject to minimum federal standards.<sup>43</sup> In an earlier 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>44</sup> Similarly, in a 1992 case raising a Tenth Amendment challenge to a federal statute creating processes for the disposal of low-level radioactive waste, the Court used the term “program of cooperative federalism” 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

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36. Schaffer *ex rel.* Schaffer v. Weast, 126 S. Ct. 528, 531 (2005); *id.* at 541 (Breyer, J., dissenting).

37. Bowen v. Gilliard, 483 U.S. 587, 589 n.1 (1987) (quoting King v. Smith, 392 U.S. 309, 316 (1968)); Batterton v. Francis, 432 U.S. 416, 431 (1977).

38. City of Rancho Palos Verdes v. Abrams, 544 U.S. 113, 128 (2005) (Breyer, J., concurring).

39. Wis. Dep’t of Health & Family Servs. v. Blumer, 534 U.S. 473, 485 (2002) (Medicaid).

40. Chapman v. Houston Welfare Rights Org., 441 U.S. 600, 645 (1979) (Powell, J., concurring); Quern v. Mandley, 436 U.S. 725, 736 (1978). See generally MARTHA DERTHICK, THE INFLUENCE OF FEDERAL GRANTS: PUBLIC ASSISTANCE IN MASSACHUSETTS (1970) (analyzing cooperative federalism in the implementation of the Social Security Act).

41. United States v. Balsys, 524 U.S. 666, 694 (1998).

42. Alaska Dep’t of Env’tl. Conservation v. EPA, 540 U.S. 461, 518 (2004) (Kennedy, J., dissenting). Cf. Fischman, *supra* note 1, at 187 (“Though cooperative federalism is a term that retains some currency outside of environmental law, it does not play as central a role in any other field”).

43. City of Rancho Palos Verdes, 544 U.S. at 128 (Breyer, J., concurring).

44. Hodel v. Va. Surface Mining & Reclamation Ass’n, 452 U.S. 264, 289 (1981).

standards or having state law pre-empted by federal regulation.”<sup>45</sup> In the same opinion, it swept within the rubric of cooperative federalism statutory programs that “anticipat[e] a partnership between the States and the Federal Government, animated by a shared objective” or that employ “any other permissible method of encouraging a State to conform to federal policy choices.”<sup>46</sup>

The Supreme Court has even created special guidelines for interpreting federal statutes that reflect Congress’s intent to embark on a cooperative federalism venture. It has stated, for example, that “[w]hen interpreting . . . statutes so structured, we have not been reluctant to leave a range of permissible choices to the States, at least where the superintending federal agency has concluded that such latitude is consistent with the statute’s aims.”<sup>47</sup> Similarly, the Court has invoked a “presumption in favor of ‘cooperative federalism.’”<sup>48</sup>

### B. Cooperative Federalism and Environmental Law

Both the federal government and the states have ample authority to take actions that are designed to protect human health and the environment from the adverse effects of industrial and developmental activity. The federal government may rely upon its authority to regulate interstate and foreign commerce<sup>49</sup> to restrict pollution-generating activities, for example,<sup>50</sup> and it may rely upon its power to “make all needful Rules and Regulations respecting” property that it owns<sup>51</sup> to manage the federal public lands and resources and protect them from damage caused by activities on adjacent private land.<sup>52</sup> Beginning in the nineteenth century, the

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45. *New York v. United States*, 505 U.S. 144, 167 (1992). The Court cited several examples of such programs created by environmental and health and safety statutes. *Id.* at 167-68.

46. *Id.* “If federal preferences are to prevail . . . the core of shared values and goals that federal and state administrators derive from the sharing of a function must be elaborated and perfected, in ways of federal choosing, until a high degree of congruence has been achieved.” DERTHICK, *supra* note 40, at 203-04. Derthick describes cooperative federalism as “a system in which . . . divided authority is brought together again,” in a way that “enables the cooperating governments to benefit from one another’s special capacities while still preserving the value of political pluralism.” *Id.* at 220.

47. *Wis. Dep’t of Health & Family Servs. v. Blumer*, 534 U.S. 473, 495 (2002).

48. *N.Y. Tel. Co. v. N.Y. State Dep’t of Labor*, 440 U.S. 519, 539 n.31 (1979).

49. U.S. CONST. art. I, § 8, cl. 3.

50. An additional source of federal authority to take action to protect the environment is the Treaty Clause, see *id.* art. II, § 2, cl. 2.

51. *Id.* art. IV, § 3, cl. 2.

52. For a discussion of the scope of the federal government’s authority

federal government frequently resorted to its authority under the Property Clause by enacting statutes that authorized federal agencies, such as the National Forest Service<sup>53</sup> and the National Park Service,<sup>54</sup> to protect federal lands and resources from being adversely affected by private use and exploitation.<sup>55</sup> Until 1970, however, the federal government did little to regulate activities responsible for causing pollution. Instead, state governments, acting pursuant to their inherent police powers, and local governments, to whom the states sometimes delegated the authority to regulate to protect the public health, the public safety, and the general welfare, took primary responsibility for that kind of regulation.<sup>56</sup>

Beginning in 1970, Congress adopted a series of statutes that dramatically altered the relative responsibilities of the federal and state governments to restrict polluting activities with the potential to harm public health and the environment. Through statutes such as the CAA and the Clean Water Act (“CWA”), Congress asserted its authority to regulate such activities by both private and public entities.<sup>57</sup> The federal government, however, did not completely divest the states and localities of their preexisting regulatory authority. Instead, many of the statutes that Congress adopted

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under the Property Clause to protect federal lands and resources from such external threats, see 1 GEORGE CAMERON COGGINS & ROBERT L. GLICKSMAN, PUBLIC NATURAL RESOURCES LAW § 3:14 [hereinafter 1 COGGINS & GLICKSMAN]; 2 GEORGE CAMERON COGGINS & ROBERT L. GLICKSMAN, PUBLIC NATURAL RESOURCES LAW § 14:5 [hereinafter 2 COGGINS & GLICKSMAN].

53. See the Organic Act of 1897, 16 U.S.C. §§ 473-482 (2000) (repealed in part in 1976).

54. See the National Park System Act of 1916, 16 U.S.C. §§ 1-20g (2000). Congress formally changed the name of the statute to the National Park System General Authorities Act. See Pub. L. No. 108-352, § 10(b), 118 Stat. 1395, 1397 (2004) (to be codified at 16 U.S.C. § 1a-6).

55. See, e.g., 16 U.S.C. § 475 (2000) (requiring that the national forests be established “to improve and protect the forest within the boundaries” and “for the purpose of securing favorable conditions of water flows, and to furnish a continuous supply of timber for the use and necessities of citizens of the United States); *id.* § 1 (authorizing the National Park Service to regulate the national parks and monuments “to conserve the scenery and the natural and historic objects and the wild life therein” so as to “leave them unimpaired for the enjoyment of future generations”). See also Percival, *supra* note 14, at 1147 (“The early history of federal environmental policy was dominated by disputes over development of the public lands.”).

56. See Percival, *supra* note 14, at 1148 (“By the mid-nineteenth century, the Supreme Court had confirmed that states had broad police powers that could be used to regulate businesses.”).

57. Clean Air Act, 42 U.S.C. §§ 7401-7671q (2000); Clean Water Act, 33 U.S.C. §§ 1251-1387 (2000).

during the 1970s and 1980s created cooperative partnerships between federal and state governments whose aim was to protect the environment.

1. *Responsibility for Environmental Regulation Before 1970*

Throughout the nineteenth century and the first half of the twentieth century, the federal government had little involvement in protecting public health and the environment from pollution. Congress enacted occasional statutes, such as the River and Harbors Act of 1899,<sup>58</sup> that would later be enlisted in the fight against pollution,<sup>59</sup> but it did so to promote commerce, such as by preserving navigability of rivers, rather than to abate activities generating harmful pollution.<sup>60</sup>

It was the state and local governments that first took the initiative in restricting polluting and land development activities with the potential to harm the environment. Common law litigation sounding in causes of action, such as nuisance, trespass, negligence, and strict liability, provided one forum in which those injured by pollution could seek monetary redress for past injury and injunctive relief to prevent future harm.<sup>61</sup> Local land use regulations, such as zoning laws, were used to segregate incompatible uses, such as residential uses and industrial uses, whose pollution could harm them.<sup>62</sup> Local governments also enacted rudimentary pollution

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58. 33 U.S.C. § 407 (2000) (prohibiting the discharge of “refuse matter” without a permit from the Secretary of the Army).

59. *See, e.g.*, *United States v. Pa. Indus. Chem. Corp.*, 411 U.S. 655 (1973); *United States v. Standard Oil Co.*, 384 U.S. 224 (1966). *See generally* William H. Rodgers, Jr., *Industrial Water Pollution and the Refuse Act: A Second Chance for Water Quality*, 119 U. PA. L. REV. 761, 762 (1971) (focusing on the Refuse Act “as a deterrent to industrial water pollution and as a spur to securing the necessary process and treatment changes”).

60. *See* ROBERT V. PERCIVAL ET AL., *ENVIRONMENTAL REGULATION: LAW, SCIENCE, AND POLICY* 102 (3d ed. 2000); Percival, *supra* note 14, at 1149.

61. *See, e.g.*, WILLIAM H. RODGERS, JR., *ENVIRONMENTAL LAW* 125 (2d ed. 1994); Daniel C. Esty, *Revitalizing Environmental Federalism*, 95 MICH. L. REV. 570, 600 (1996) (“Until quite recently, the harms that accrued from air and water pollution were addressed . . . through the most decentralized of control mechanisms: nuisance law”); Percival, *supra* note 14, at 1152 (“In the absence of regulatory standards, the common law was the principal legal instrument for addressing pollution problems”). *See generally* Robert L. Glicksman, *A Guide to Kansas Common Law Actions Against Industrial Pollution Sources*, 33 U. KAN. L. REV. 621 (1985) (discussing generally applicable common law rules and theories available to injured Kansas plaintiffs); Robert L. Glicksman, *Federal Preemption and Private Legal Remedies for Pollution*, 134 U. PA. L. REV. 121, 171-222 (1985) (discussing state common law remedies).

62. *See, e.g.*, *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 388 (1926), where the Court stated:

control legislation, such as smoke control ordinances, and more sophisticated ordinances authorizing municipal officials to require the use of specified pollution control equipment.<sup>63</sup>

In the middle of the twentieth century, the federal government moved haltingly to establish a presence in the pollution control field.<sup>64</sup> As pollution continued to increase, despite the efforts of state and local governments to abate it, Congress enacted legislation that sponsored research into the causes and effects of pollution<sup>65</sup> and provided technical and financial assistance to state regulatory efforts.<sup>66</sup> By the 1960s, Congress was ready to take the next step by adopting legislation that authorized federal administrative agencies to impose substantive controls on industry to avert harm to public health and the environment. Paradoxically, some of this legislation was supported by the regulated entities themselves—the automobile and coal producing industries. They feared that, in the absence of federal regulation, they would be subject to a multiplicity of potentially inconsistent and rigorous state and local measures.<sup>67</sup> Another important spur to the adoption of more substantive federal

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There is no serious difference of opinion in respect of the validity of laws and regulations fixing the height of buildings within reasonable limits, the character of materials and methods of construction, and the adjoining area which must be left open, in order to minimize the danger of fire or collapse, the evils of over-crowding, and the like, and excluding from residential sections offensive trades, industries and structures likely to create nuisances.

63. See ROBERT L. GLICKSMAN ET AL., ENVIRONMENTAL PROTECTION: LAW AND POLICY 326 (4th ed. 2003) (citing Jan G. Laitos, *Legal Institutions and Pollution: Some Intersections Between Law and History*, 15 NAT. RESOURCES J. 423, 434 (1975)); FRANK P. GRAD, ENVIRONMENTAL LAW 8 (3d ed. 1985); Esty, *supra* note 61, at 600.

64. One author has referred to the process as “creeping federalization.” Percival, *supra* note 14, at 1155 (quoting J. William Futrell, *The History of Environmental Law*, in SUSTAINABLE ENVIRONMENTAL LAW: INTEGRATING NATURAL RESOURCE AND POLLUTION ABATEMENT LAW FROM RESOURCES TO RECOVERY 38 (1993)).

65. See, e.g., An Act to Improve, Strengthen, and Accelerate Programs for the Prevention and Abatement of Air Pollution, Pub. L. No. 88-206, 77 Stat. 392 (1963); An Act to Provide Research and Technical Assistance Relating to Air Pollution Control, Pub. L. No. 84-159, 69 Stat. 322 (1955).

66. See GLICKSMAN ET AL., *supra* note 63, at 507 (describing federal legislation to subsidize construction of municipal sewage treatment works); GRAD, *supra* note 63, at 9; Percival, *supra* note 14, at 1155-57.

67. See E. Donald Elliott et al., *Toward A Theory of Statutory Evolution: The Federalization of Environmental Law*, 1 J.L. ECON. & ORG. 313, 326-27 (1985). See also GLICKSMAN ET AL., *supra* note 63, at 507 (citing GABRIEL KOLKO, THE TRIUMPH OF CONSERVATISM: A REINTERPRETATION OF AMERICAN HISTORY, 1900-1916 (1963); WILLIAM TUCKER, PROGRESS AND PRIVILEGE: AMERICA IN THE AGE OF ENVIRONMENTALISM (1982)).

legislation was the recognition that interstate pollution, which was becoming a more obvious problem, could be dealt with more effectively by the federal government than by the states.<sup>68</sup> The Water Quality Act of 1965,<sup>69</sup> for example, created a mechanism, albeit a cumbersome and ultimately ineffective one, for the abatement of interstate water pollution.<sup>70</sup> Within a few years, however, these modest programs would mushroom through the enactment of a series of statutes that vested in federal agencies, such as the federal Environmental Protection Agency (“EPA”), expansive authority to regulate virtually every corner of the United States economy to prevent pollution from harming public health and the environment.

## 2. *Environmental Law and Cooperative Federalism After 1970*

a. *The Rationales for Federal Environmental Law.* Even before 1970, Congress had begun to adopt new legislation, such as the Wilderness Act of 1964,<sup>71</sup> which was designed to enhance the protection of the federal lands and resources.<sup>72</sup> The environmental decade kicked off with the passage of the National Environmental Policy Act of 1969 (“NEPA”),<sup>73</sup> which President Nixon signed into law on New Year’s Day 1970.<sup>74</sup> NEPA’s principal provision forces federal agencies to consider the potential adverse environmental effects of proposed actions and disclose those effects to the public before they commit to take those actions.<sup>75</sup>

It was not until 1970 that Congress began to alter the landscape of pollution control law. The proliferation of federal environmental legislation that began in that year<sup>76</sup> was the product, at least in part,

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68. See PERCIVAL ET AL., *supra* note 60, at 103-04; ZYGMUNT J.B. PLATER ET AL., ENVIRONMENTAL LAW AND POLICY: NATURE, LAW, AND SOCIETY 295-96 (3d ed. 2004).

69. Pub. L. No. 89-234, 79 Stat. 903 (1965).

70. See GLICKSMAN ET AL., *supra* note 63, at 508. Similar federal efforts to abate interstate air pollution worked no better. See Percival, *supra* note 14, at 1157.

71. Pub. L. No. 88-577, 78 Stat. 890 (1964) (codified as amended at 16 U.S.C. §§ 1131-1136 (2000)).

72. See also Multiple-Use Sustained-Yield Act of 1960, Pub. L. No. 86-517, 74 Stat. 215 (1960) (codified as amended at 16 U.S.C. §§ 528-531 (2000)); Wild and Scenic Rivers Act, Pub. L. No. 90-542, 82 Stat. 906 (1968) (codified as amended at 16 U.S.C. §§ 1271-1287 (2000)).

73. Pub. L. No. 91-190, 83 Stat. 852 (1970) (codified as amended at 42 U.S.C. §§ 4321-4370f (2000)).

74. See Percival, *supra* note 14, at 1159.

75. 42 U.S.C. § 4332(2)(C)(ii) (2000).

76. In addition to the federal pollution control statutes adopted during the

of the perception that a system in which state and local efforts took the lead in adopting and enforcing measures to protect the environment had not been effective.<sup>77</sup> Moreover, the national dimensions of a variety of environmental problems were becoming increasingly clear to many, including federal legislators.<sup>78</sup> If the states and localities were not capable of adopting and implementing an effective set of programs to protect the public health and the environment, it would be necessary and advisable for the federal government to step into the breach,<sup>79</sup> particularly because “many

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1970s, Congress refined, sometimes dramatically, the legislation that authorized federal agencies, such as the National Forest Service (“Forest Service”) and the Bureau of Land Management (“BLM”), to manage the federal public lands. *See, e.g.*, the National Forest Management Act, 16 U.S.C. §§ 1600-1687 (2000) (adopted in 1976); the Federal Land Policy and Management Act, 43 U.S.C. §§ 1701-1785 (2000) (also adopted in 1976). These statutes are sometimes referred to as the organic acts for the Forest Service and the BLM, respectively. Congress also enacted the Endangered Species Act in 1973. Pub. L. No. 93-205, 87 Stat. 884 (1973) (codified as amended at 16 U.S.C. §§ 1531-1544 (2000)).

77. *See* John P. Dwyer, *The Practice of Federalism Under the Clean Air Act*, 54 MD. L. REV. 1183, 1221 (1995) (“The principal justification for federal air pollution regulation has been that environmental protection is of great national importance and that states have been unwilling or unable to deal with pressing air pollution problems.”); Douglas T. Kendall, *Redefining Federalism*, 35 ENVTL. L. REP. 10445, 10447-48 (2005) (“The federal environmental laws of the early and mid-1970s were premised, at least in part, on the notion that state and local governments were unable or unwilling to take responsibility for safeguarding natural resources.”); Percival, *supra* note 14, at 1144 (“[E]nvironmental law became federalized only after a long history of state failure to protect what had come to be viewed as nationally important interests.”). The Supreme Court described the adoption of the 1970 version of the CAA as Congress’s response to the states’ “disappointing” performance under earlier versions of the statute in which the federal government played a smaller regulatory role. In the Court’s terminology, “Congress reacted by taking a stick to the States in the form of the Clean Air Amendments of 1970,” which “sharply increased federal authority and responsibility in the continuing effort to combat air pollution.” *Train v. Natural Res. Def. Council, Inc.*, 421 U.S. 60, 64 (1975).

78. *See* Percival, *supra* note 14, at 1157. Part of the increasing visibility of environmental problems was due to the publication of books such as RACHEL CARSON, *SILENT SPRING* (1962).

79. *See* Dwyer, *supra* note 77, at 1219 (explaining that one of the justifications for “a dominant federal role in environmental regulation” was the need “to replace unduly weak state regulation”). An additional justification for centralized federal environmental regulation is the claim that “public choice pathologies cause environmental interests to be systematically underrepresented at the state level relative to business interests.” Richard L. Revesz, *Federalism and Environmental Regulation: A Public Choice Analysis*, 115 HARV. L. REV. 555, 555-56 (2001). Professor Revesz’s article disputes that

Americans regard environmental quality as an important national good that transcends individual or local interest.”<sup>80</sup>

One possible explanation for the states’ failure to provide effective environmental regulation is their lack of scientific expertise and their inability to provide the resources needed to implement such regulation.<sup>81</sup> Similarly, federal environmental legislation arguably permits environmental policymakers to take advantage of the economies of scale that result from the adoption of national standards.<sup>82</sup> As John Dwyer has explained, “[i]n terms of efficiency, it makes little sense for each state to duplicate the underlying research and collection of data necessary to regulate air pollution. There are also economies of scale in standard setting when the standards are nationally uniform.”<sup>83</sup> Daniel Esty has elaborated on this rationale:

It makes no sense to ask every state, city, or town to measure the level, size, and type of particulates in its air, determine their connection to respiratory failure and other health problems, identify the safe level of emissions, and design cost-effective policy responses. Data collection and quality control, fate and transport studies, epidemiological and ecological analyses, and risk assessments all represent highly technical activities in which expertise is important and scale economies

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assertion, claiming instead that “differences in preferences for environmental improvements across the states more plausibly explains why certain states adopt more stringent regulations than do others.” *Id.* at 558. *Cf.* Tom Laughlin, Note, *Evaluating New Federalism Arguments in the Area of the Environment: The Search for Empirical Measures*, 13 N.Y.U. ENVTL. L.J. 481, 482-83 (2005) (claiming that empirical data based on evaluation of the League of Conservation Voter scorecards that rate the environmental voting records of federal and state legislators support the conclusion “that state governments do not appear to be captured by public choice pathologies and that a system concentrating authority in the states may produce more stringent environmental regulation than a system emphasizing a stronger federal role”).

80. Richard B. Stewart, *Environmental Quality as a National Good in a Federal State*, 1997 U. CHI. LEGAL F. 199, 210 (1997).

81. *See* Dwyer, *supra* note 77, at 1221 (“[A] lack of adequate state administrative resources and systematic problems in state policy-making processes prevented states from adopting needed environmental programs.”); Percival, *supra* note 14, at 1178 (“[H]istory demonstrates that state and local officials generally are too vulnerable to local economic and political pressures favoring development to be given exclusive responsibility for environmental protection.”).

82. *See* Percival, *supra* note 14, at 1172; *id.* at 1174 (“The cooperative federalism model seeks to exploit economies of scale by establishing national environmental standards while leaving their attainment to state authorities subject to federal oversight”).

83. Dwyer, *supra* note 77, at 1220.

are significant. In addition, the core variables within these functions do not vary spatially, and thus diversity claims hold little sway. Absent centralized functions, independent state regulators will either duplicate each other's analytic work or engage in time-consuming and complex negotiations to establish an efficient division of technical labor. The poorer the jurisdiction, moreover, the more likely its regulators will lack basic technical competence. Likewise, the smaller the regulating entity, the more likely it is to suffer from the absence of scientific scale economies. Both of these dimensions of technical failure are recognized as significant obstacles to good regulation in many states.<sup>84</sup>

The federal government was thus better equipped to develop the necessary expertise to formulate effective environmental regulatory standards as well as to implement and enforce those standards in an efficient manner.

Another possible explanation for the federal government's ability to generate more effective environmental legislation is the relatively greater difficulty of capturing the federal government, as compared to state and local governments.<sup>85</sup> Moreover, as Professor Bill Buzbee has pointed out, "[s]tate and local governments, due to tax and employment goals, will be more growth oriented than federal policymakers."<sup>86</sup> In testifying before Congress, EPA's first

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84. Esty, *supra* note 61, at 614-15. See also Kirsten H. Engel, *State Environmental Standard-Setting: Is There a "Race" and Is It "to the Bottom"?*, 48 HASTINGS L.J. 271, 287 (1997) (stating that Congress "saw federal involvement in environmental regulation as necessary to realize certain benefits for both states and regulated entities that accrue from centralized administration of environmental law," including "realization of economies of scale in scientific research"). *But cf.* Stewart, *supra* note 80, at 206 (contending that, even if economies of scale justify a lead federal role in the generation of information about the effects of pollution and resource development, they "do not necessarily justify centralized standards and regulations"). Douglas Williams has responded to arguments such as the one Professor Stewart has made by contending that any effort to draw a distinction between "fact-based inquiries" such as information gathering and assessment (for which economies of scale justify centralized effort) and "value-based judgments" such as those involved in standard-setting (for which economies of scale may not exist) is problematic. Douglas R. Williams, *Cooperative Federalism and the Clean Air Act: A Defense of Minimum Federal Standards*, 20 ST. LOUIS U. PUB. L. REV. 67, 88 (2001). Professor Engel identifies a "second efficiency-related benefit of centralized" regulation—"the ability to lower the potential barriers to interstate trade that might otherwise be posed by non-uniform state product regulation." Engel, *supra*, at 288.

85. See William W. Buzbee, *Contextual Environmental Federalism*, 14 N.Y.U. ENVTL. L.J. 108, 112 (2005) (repeating the argument that "larger units of government are less susceptible to regulatory surrender").

86. *Id.* at 121 (citing PAUL E. PETERSON, *CITY LIMITS* 69 (1981)) (arguing

Administrator gave credence to that justification for a strong federal government presence in environmental law and policymaking.<sup>87</sup>

Another justification for the adoption of federal environmental legislation was the inability of the states to provide effective constraints on transboundary pollution—pollution with interstate or international effects.<sup>88</sup> One observer described this justification as follows:

The need for the federal government to regulate interstate pollution is fairly self-evident. As environmentalists are fond of saying, pollution knows no boundaries, and it seems unlikely that upwind states would ever adequately take into account the concerns of downwind states. The upwind states lack any incentive to cooperate with the downwind states, and the transactional costs of establishing interstate regulation are too high for the states, except in special cases. The federal legislature, by contrast, has a national focus and is a natural forum to establish regulations and procedures to resolve interstate conflicts. Consequently, it should be better able to regulate interstate pollution.<sup>89</sup>

According to Professor Richard Stewart, “spillover effects among the states create the strongest justification for federal intervention.”<sup>90</sup>

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that state and local governments often wind up being “growth machines”).

87. Specifically, EPA Administrator William Ruckelhaus testified that “[v]arying local revenue capabilities, economic pressures, and citizen interest have often stagnated community and State initiative.” *Weyerhaeuser Co. v. Costle*, 590 F.2d 1011, 1042 n.46 (D.C. Cir. 1978) (citing A LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972, at 156 (1973)).

88. See *Esty*, *supra* note 61, at 601 (listing interstate spillovers as one of the three main reasons advanced during congressional hearings in the late 1960s and 1970s for centralizing environmental regulation at the federal level); Robert R. Kuehn, *The Limits of Devolving Enforcement of Federal Environmental Laws*, 70 TUL. L. REV. 2373, 2375 (1996) (finding the rationale for federal regulation to prevent interstate and international spillovers to have retained its validity); Percival, *supra* note 14, at 1147 (“Most existing federal regulatory programs were not created until after a long history of state failures to cope with problems that became increasingly interstate in scope”).

89. Dwyer, *supra* note 77, at 1220.

90. Richard B. Stewart, *Pyramids of Sacrifice?: Problems of Federalism in Mandating State Implementation of National Environmental Policy*, 86 YALE L.J. 1196, 1264 (1977). See also William A. Butler, *The “New Federalism”—Can It Really Work in Implementing Environmental Statutes?*, 12 ENVTL. L. REP. 15,095, 15,096 (1982) (arguing that federal statutes are required to resolve interstate environmental problems because “states are either unable or unwilling” to do so); Christopher K. Leman & Robert H. Nelson, *The Rise of Managerial Federalism: An Assessment of Benefits and Costs*, 12 ENVTL. L. 981, 999 (1982) (“Environmental spillovers across state lines require regional, interstate, or federal action.”).

One final justification for the enactment of federal environmental regulation is the perception that, in the absence of uniform national minimum environmental standards, the states are likely to compete with one another to attract new business by adopting increasingly lenient controls on activities with potentially damaging environmental effects.<sup>91</sup> Thus, Professor Stewart, in a seminal 1977 article describing the various rationales for the adoption of a federal body of environmental law, described the problem this way:

Given the mobility of industry and commerce, any individual state or community may rationally decline unilaterally to adopt high environmental standards that entail substantial costs for industry and obstacles to economic development for fear that the resulting environmental gains will be more than offset by movement of capital to other areas with lower standards.<sup>92</sup>

The advocates of federal legislation argue that minimum federal standards could combat this “race to the bottom” by guaranteeing a minimum level of environmental protection to all Americans, regardless of their state of residence, and a minimum level of environmental restraints for businesses, regardless of where they decide to locate or relocate.<sup>93</sup>

The law reviews are filled with articles debating the validity of the race to the bottom theory.<sup>94</sup> Whether or not the perception that,

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91. See, e.g., Esty, *supra* note 61, at 602 (identifying “interstate competitiveness effects arising from differing environmental standards” as one of the justifications for federal environmental regulation in the 1970s).

92. Stewart, *supra* note 90, at 1212. See also Engel, *supra* note 84, at 285 (stating that “[t]he interstate spillover rationale is the classic economic efficiency argument that federal intervention is necessary to prevent the environmental, social, and economic losses that accrue when air and water pollution originating in one state are carried by natural forces into other states” because the state of the pollution’s origin has little incentive to abate activities that generate economic benefits for its residents and environmental harms for the residents of other states).

93. See Percival, *supra* note 14, at 1172 (“While the ‘race-to-the-bottom’ rationale for federal regulation has been criticized on theoretical grounds, it is still widely believed that federal standards can help states resist industry pressures to relax regulatory standards”).

94. Among the articles that question the validity of the race to the bottom rationale for federal environmental regulation are Richard L. Revesz, *Rehabilitating Interstate Competition: Rethinking the “Race-to-the-Bottom” Rationale for Federal Environmental Regulation*, 67 N.Y.U. L. REV. 1210 (1992); Richard L. Revesz, *The Race to the Bottom and Federal Environmental Regulation: A Response to Critics*, 82 MINN. L. REV. 535 (1997). Among those who contend that states have indeed engaged in a race to the bottom, and would

absent federal intervention, the states would participate in an environmentally destructive race-to-the-bottom was accurate at the time or remains so today, many federal legislators acted on the assumption that it was accurate.<sup>95</sup> As John Dwyer reports:

In floor debates and legislative reports, members of Congress repeatedly stated their belief that the states had failed to adopt effective air pollution programs because they were engaged in a “race-to-the-bottom.” States that were eager to attract and keep economic development purportedly competed against each other by relaxing environmental regulations below some optimal level.<sup>96</sup>

The shift in focus from state and local to federal regulation of environmentally damaging activities was the product of a series of arguments that federal legislators apparently found persuasive. The remaining question was what the resulting federal environmental law would look like.

b. *Adoption of the Cooperative Federalism Model.* One terse definition of cooperative federalism is “shared governmental responsibilities for regulating private activity.”<sup>97</sup> That is an apt

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do so to an even greater extent absent federal environmental legislation, are Engel, *supra* note 84; Scott R. Saleska & Kirsten H. Engel, “Facts Are Stubborn Things”: An Empirical Reality Check in the Theoretical Debate Over the Race-to-the-Bottom in State Environmental Standard-Setting, 8 CORNELL J.L. & PUB. POL’Y 55 (1998); Joshua D. Sarnoff, A Reply to Professor Revesz’s Response in “The Race to the Bottom and Federal Environmental Legislation,” 8 DUKE ENVTL. L. & POL’Y F. 295 (1998); Peter P. Swire, *The Race to Laxity and the Race to Undesirability: Explaining Failures in Competition Among Jurisdictions in Environmental Law*, 14 YALE L. & POL’Y REV. 67 (1996).

95. See, e.g., *Weyerhaeuser Co. v. Costle*, 590 F.2d 1011, 1042 (D.C. Cir. 1978) (“Congress considered uniformity vital to free the states from the temptation of relaxing local limitations in order to woo or keep industrial facilities.”). The court quoted from a floor statement by a member of the House of Representatives, who asserted that “the greatest political barrier to effective pollution control is the threat by industrial polluters to move their factories out of any State that seriously tries to protect its environment.” *Id.* at 1042 n.46 (quoting A LEGISLATIVE HISTORY, *supra* note 87, at 577 (1973)).

96. Dwyer, *supra* note 77, at 1221-22. See also Esty, *supra* note 61, at 628 (“Fears of a welfare-reducing race to the bottom represent one of the central underpinnings of federal environmental regulation in the United States”); Stewart, *supra* note 80, at 207-08 (“[M]any political actors, including industry and environmental representatives, apparently believe, or in any event assert, that environmental regulation significantly affect[s] industry decisions about investment and location.”).

97. 1 COGGINS & GLICKSMAN, *supra* note 52, § 5:3 (citing Susan Rose-Ackerman, *Cooperative Federalism and Co-Optation*, 92 YALE L.J. 1344 (1983); Corwin, *supra* note 15). Cf. Adam Babich, *Our Federalism, Our Hazardous*

description of many of the federal environmental statutes adopted since 1970. In adopting the federal pollution control statutes, Congress has taken care to stress that it does not intend to oust the states from their traditional role as guardians of the public health and safety. The CWA provides, for example, that “[i]t is the policy of the Congress 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>98</sup> Similarly, the CAA provides “that air pollution prevention . . . and air pollution control at its source is the primary responsibility of States and local governments.”<sup>99</sup> In the Resource Conservation and Recovery Act (“RCRA”), Congress recognized that “the collection and disposal of solid wastes should continue to be primarily the function of State, regional, and local agencies.”<sup>100</sup>

Congress has explicitly staked out a primary role for the federal government in some areas. The CAA, for example, asserts “that Federal financial assistance and leadership is essential for the development of cooperative Federal, State, regional, and local programs to prevent and control air pollution.”<sup>101</sup> The CWA declares it to be a “national policy that Federal financial assistance be provided to construct” municipal sewage treatment facilities.<sup>102</sup> One

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*Waste, and Our Good Fortune*, 54 MD. L. REV. 1516, 1532-33 (1995) (describing cooperative federalism as a concept “based on federal *incentives* for state regulation” which “holds the promise of allowing the states continued primacy and flexibility in their traditional realms of protecting public health and welfare, while ensuring that protections for all citizens meet minimum federal standards” and which “allows states to experiment and innovate, but not to sacrifice public health and welfare in a bidding war to attract industry”); *id.* at 1534 (“The essence of cooperative federalism is that states take primary responsibility for implementing federal standards, while retaining the freedom to apply their own, more stringent standards.”). Babich contends that a program of cooperative federalism should (1) provide for state implementation, (2) set clear standards, (3) respect state autonomy, (4) provide mechanisms to police the exercise of state power, and (5) apply the same rules to government and private parties. *Id.* at 1534.

98. 33 U.S.C. § 1251(b) (2000). *See also id.* § 1251(g) (declaring a policy “that the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated, or otherwise impaired by” the CWA).

99. 42 U.S.C. § 7401(a)(3) (2000). *See also id.* § 7407(a) (declaring it to be “the primary responsibility” of each state to assure air quality within the state by submitting an implementation plan to EPA).

100. *Id.* § 6901(a)(4).

101. *Id.* § 7401(a)(4).

102. 33 U.S.C. § 1251(a)(4) (2000). Similarly, the portion of the CWA that governs sewage treatment plant grants and loans identifies as the purpose of

of the stated objectives of RCRA is to “provid[e] technical and financial assistance to State and local governments . . . for the development” of plans to promote improved solid waste management techniques.<sup>103</sup> Indeed, federal funding “is the chief incentive for states to participate in cooperative federalism.”<sup>104</sup>

In other statutory provisions, Congress has identified the creation of federal-state partnerships as the means by which it has decided to pursue the relevant environmental protection goals. One of RCRA’s stated objectives is to promote health and environmental protection by “establishing a viable Federal-State partnership to carry out the purposes of [RCRA] and insuring that [EPA] will . . . give a high priority to assisting and cooperating with States” in their efforts to administer the permit program for hazardous waste treatment, storage, and disposal facilities.<sup>105</sup> The CWA commits the federal government to cooperation with state and local agencies “to develop comprehensive solutions to prevent, reduce and eliminate pollution in concert with programs for managing water resources.”<sup>106</sup> Congress declared in the CAA that one of its primary goals was “to encourage or otherwise promote reasonable Federal, State, and local governmental actions . . . for pollution prevention.”<sup>107</sup>

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those provisions “to require and to assist the development and implementation of waste treatment management plans and practices which will achieve” the statute’s water quality goals. *Id.* § 1281(a).

103. 42 U.S.C. § 6902(a)(1) (2000).

104. Fischman, *supra* note 1, at 190-91 (“The ‘partnership’ rhetoric that is now prevalent in environmental law builds on a foundation of cost-sharing for state administration.”). Statutory provisions authorizing federal financial assistance to the states and localities is not limited to the pollution control laws. One of the purposes and policies of the Occupational Safety and Health Act is to assure safe and healthful working conditions

by encouraging the States to assume the fullest responsibility for the administration and enforcement of their occupational safety and health laws by providing grants to the States to assist in identifying their needs and responsibilities in the area of occupational safety and health, to develop plans in accordance with the provisions of this chapter, [and] to improve the administration and enforcement of State occupational safety and health laws . . . .

29 U.S.C. § 651(b)(11) (2000). The federal government’s issuance of grants to state and local governments can provide a means by which the federal government compensates for its lack of authority to impose directives on the states and localities. “Insofar as the state can be induced to share federal values and objectives and act as the agent of the federal will, federal authority can be exercised over local governments by proxy.” DERTHICK, *supra* note 40, at 14-15.

105. 42 U.S.C. § 6902(a)(7) (2000).

106. 33 U.S.C. § 1251(g) (2000).

107. Clean Air Act, 42 U.S.C. § 7401(c) (2000).

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. Under the federal pollution control laws, primary standard setting authority typically has been retained by the federal government. Under the CAA, Congress delegated to EPA the responsibility of identifying air pollutants whose emissions are anticipated to endanger the public health or welfare<sup>108</sup> and the authority to promulgate national ambient air quality standards ("NAAQS") that establish maximum permissible concentrations of these "criteria" pollutants in the ambient air to protect the public health and welfare.<sup>109</sup> EPA also has the power to issue nationally uniform emission standards for new stationary sources of air pollution,<sup>110</sup> for stationary sources of hazardous air pollutants,<sup>111</sup> and for tailpipe emissions from new motor vehicles.<sup>112</sup> RCRA delegates to EPA the power to identify substances which qualify as hazardous wastes<sup>113</sup> and to adopt standards to govern the activities of those who engage in the generation, transportation, treatment, storage, or disposal of such waste.<sup>114</sup> Under the CWA, EPA is the agency responsible for promulgating technology-based standards to control discharges of pollution into waters of the United States by point sources.<sup>115</sup> Similar federal standard-setting authority also exists under statutes such as the Safe Drinking Water Act ("SDWA")<sup>116</sup> and the Toxic Substances Control Act ("TSCA").<sup>117</sup>

Under most of these laws, Congress has carved out a significant role for the states either in implementing the federal standards or in supplementing federal regulatory initiatives.<sup>118</sup> Under the CAA,

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108. *Id.* § 7408(a)(1).

109. *Id.* § 7409(b).

110. *Id.* § 7411.

111. *Id.* § 7412.

112. *Id.* § 7521.

113. *Id.* § 6921.

114. *Id.* §§ 6922-6924. RCRA affords the states a much greater role in the management of non hazardous solid wastes. *See id.* §§ 6941-6949a; GLICKSMAN ET AL., *supra* note 63, at 816-17.

115. 33 U.S.C. § 1311(b) (2000).

116. 42 U.S.C. § 300g-1(b)(1)(A) (2000) (granting authority to adopt national primary drinking water regulations that contain maximum contaminant levels).

117. 15 U.S.C. § 2605 (2000). Under the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), EPA is responsible for deciding whether or not to register pesticides and to restrict their sale or use. 7 U.S.C. § 136a (2000).

118. Professor Fischman identifies two "key elements" to what he calls the "narrow definition of cooperative federalism" used to describe the pollution control laws: "(1) the fostering of state administrative programs, and (2) the

Congress gave the states the task of adopting plans, called state implementation plans ("SIPs"), to achieve the NAAQS.<sup>119</sup> As the Supreme Court has recognized, Congress initially intended to afford each state the "liberty to adopt whatever mix of emission limitations it deems best suited to its particular situation."<sup>120</sup> As enacted, each state plan must conform to minimum federal standards,<sup>121</sup> and EPA retains the power to disapprove incomplete or inadequate state plans, such as plans that EPA decides are insufficient to meet the NAAQS by the applicable statutory deadlines.<sup>122</sup> States need not fulfill their SIP preparation responsibilities, but if they fail to do so, EPA has the authority to develop, implement, and enforce a federal plan establishing emission limitations for sources within the delinquent state.<sup>123</sup>

The states' responsibilities under the CWA are somewhat different from those vested in them under the CAA. The technology-based effluent limitations issued by EPA are supposed to serve as the primary mechanism for achieving the statutory goal of fishable-swimmable waters.<sup>124</sup> The statute also delegates to the states, however, the responsibility of adopting water quality standards that act as backstops in the event that compliance with the effluent limitations is not sufficient to provide acceptable water quality.<sup>125</sup> The states must submit their water quality standards for EPA

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delegation of tailored standard-setting." Fischman, *supra* note 1, at 190. Professor Buzbee describes cooperative federalism schemes as those in which "federal laws set goals and federal authorities provide states with technological and scientific data and oversee state or local government implementation decisions." Buzbee, *supra* note 10, at 25. J.B. Ruhl has stated that cooperative federalism is reflected in the many federal environmental statutes that 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." 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). According to Ruhl, however, the ESA is not among those statutes and "barely qualifies as an example of cooperative federalism at work." *Id.*

119. Clean Air Act, 42 U.S.C. §§ 7407(a), 7410(a) (2000).

120. *Train v. Natural Res. Def. Council, Inc.*, 421 U.S. 60, 79 (1975).

121. 42 U.S.C. § 7410(a)(2) (2000) (specifying mandatory contents of every SIP).

122. *Id.* § 7410(k).

123. *Id.* § 7410(c). For a description of cooperative federalism under the CAA, see Arnold W. Reitze, Jr., *Federalism and the Inspection and Maintenance Program Under the Clean Air Act*, 27 PAC. L.J. 1461, 1476-86 (1996).

124. 33 U.S.C. § 1251(a)(2) (2000).

125. *Id.* § 1313(c)(1).

review, and EPA may disapprove any standards that it finds not to be consistent with applicable CWA requirements.<sup>126</sup> Once again, the statute does not compel the states to do anything, but delegates to EPA the authority to adopt standards that are “necessary to meet the requirements” of the CWA if a state fails to do so.<sup>127</sup>

Under most of the federal pollution control statutes, states have the option of applying 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>128</sup> The statutes, supplemented by EPA regulations, establish minimum requirements for approvable state permit programs, however, and individual permits are typically subject to EPA veto.<sup>129</sup> EPA may even suspend or withdraw a state’s authority to administer a permit program if the state operates the program in violation of the statute.<sup>130</sup> EPA may not compel a state to administer a permit program, but states may face sanctions if they fail to do so, including forfeiture to EPA of the authority to issue permits to sources within the state.<sup>131</sup>

The pollution control statutes divide up between the federal and state governments the authority to enforce statutory or regulatory obligations. In some instances, states have primary enforcement authority, with EPA having the power to step in if the state fails to act.<sup>132</sup> Under other statutory provisions, either level of government may take the initiative by commencing enforcement action,<sup>133</sup> and

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126. *Id.* § 1313(c)(3).

127. *Id.* § 1313(c)(4).

128. *See, e.g.*, Clean Water Act, 33 U.S.C. § 1342(b) (2000); Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6926 (2000); Clean Air Act, 42 U.S.C. §§ 7661-7661f (2000).

129. Clean Water Act § 1342(d)(2); Clean Air Act § 7661d(b)-(c).

130. Clean Water Act § 1342(c); Resource Conservation and Recovery Act § 6926(e); Clean Air Act § 7661d(e).

131. *See, e.g.*, *Virginia v. Browner*, 80 F.3d 869 (4th Cir. 1996) (discussing and upholding the validity of CAA sanctions for states that fail to adopt adequate permit programs).

132. *See, e.g.*, Clean Water Act § 1319(a)(1); Safe Drinking Water Act (SDWA), 42 U.S.C. §§ 300g-2, 300g-3 (2000); Clean Air Act § 7413(a)(1).

133. *See, e.g.*, Clean Air Act § 7413(b). Thorny issues have arisen concerning whether the federal government may “overfile” in the event that it is dissatisfied with a state’s enforcement action against a particular regulated entity. *See, e.g.*, *United States v. Power Eng’g Co.*, 303 F.3d 1232, 1236-41 (10th Cir. 2002) (finding EPA’s interpretation that overfilling was permissible “reasonable” under *Chevron*); *Harmon Indus., Inc. v. Browner*, 191 F.3d 894, 897-902 (8th Cir. 1999) (finding the EPA practice of overfilling oversteps the federal agency’s authority under RCRA).

under still others, only EPA may enforce.<sup>134</sup>

The final component of the cooperative federalism model that is typically reflected in the federal pollution control statutes is an explicit reservation of authority for the states to adopt more stringent controls than those adopted or required by EPA. The CWA, for example, provides that nothing in the statute should be interpreted to “preclude or deny the right of any State or political subdivision . . . to adopt or enforce” standards limiting pollutant discharges or requirements relating to the control or abatement of pollution, except that the states and localities may not adopt or enforce standards or requirements that are less stringent than applicable federally promulgated standards.<sup>135</sup> Similar “savings clauses” appear in other statutes as well.<sup>136</sup> In relatively few instances, Congress has completely precluded the adoption of state standards that differ in any way from federal standards that apply to the same conduct.<sup>137</sup> With these limited exceptions, the regulatory restrictions adopted by federal agencies serve as floors, not ceilings, on the degree of regulation to which the relevant environmentally damaging conduct may be subject. Thus, under statutes such as the CAA, the CWA, and RCRA, “[c]onsiderable state autonomy is preserved because most federal environmental standards established under this model are minimum standards with states expressly authorized to establish more stringent controls if they so desire.”<sup>138</sup>

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134. See, e.g., Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) 7 U.S.C. § 136l (2000); Clean Air Act, 42 U.S.C. § 7413(a)(3) (2000). Cf. Occupational Safety and Health Act (OSHA), 29 U.S.C. § 666 (2000). For a description of the operation of federalism in the context of efforts to enforce the CWA, see David R. Hodas, *Enforcement of Environmental Law in a Triangular Federal System: Can Three Not Be a Crowd When Enforcement Authority Is Shared by the United States, the States, and Their Citizens?*, 54 MD. L. REV. 1552 (1995).

135. 33 U.S.C. § 1370 (2000).

136. See, e.g., Federal Insecticide, Fungicide, and Rodenticide Act 7 U.S.C. § 136v(a) (2000); Toxic Substances Control Act (TSCA) 15 U.S.C. § 2617(a)(1) (2000); Resource Conservation and Recovery Act, 42 U.S.C. § 6929 (2000); Clean Air Act § 7416.

137. See, e.g., 7 U.S.C. § 136v(b) (2000) (barring states from adopting labeling or packaging requirements that are in addition to or different from those required under FIFRA); 42 U.S.C. §§ 7543(a), 7545(c)(4), 7573 (2000) (CAA provisions barring the adoption of state standards relating to control of motor vehicle emissions, specification of permissible fuel additives, and control of aircraft emissions).

138. Percival, *supra* note 14, at 1175. Justice White described the cooperative federalism approach codified in the CWA in the following terms:

The Clean Water Act [CWA] anticipates a partnership between the States and the Federal Government. . . . To effectuate this

Significantly less attention has been devoted to describing the interplay between federal and state authority under the federal land management statutes,<sup>139</sup> perhaps because the relevant statutes are more diverse in their approaches to dividing up power to prevent natural resource degradation than the common approach codified in many of the federal pollution control laws.<sup>140</sup> The federal government obviously reserves to itself the primary responsibility for determining appropriate management standards for federal public lands such as the national parks, forests, and national wildlife refuges and the public lands administered by the Bureau of Land Management (“BLM”). Professor Rob Fischman has documented, however, the degree to which cooperative federalism has infused implementation of the natural resource management statutes through what he calls “place-based collaboration,”<sup>141</sup> state

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partnership, the CWA authorizes [EPA] to issue pollution discharge permits, but provides that a State may “administer” its own permit system if it complies with detailed statutory and regulatory requirements. A State that seeks to “administer” a permitting program is required to adopt a system of civil penalties. Federal regulations establish the minimum size of the penalties and mandate how, and when, they must be imposed.

Even when a State obtains approval to administer its permitting system, the Federal Government maintains an extraordinary level of involvement. EPA reviews state water quality standards. It retains authority to object to the issuance of particular permits, to monitor the state program for continuing compliance with federal directives, and even to enforce the terms of state permits when the State has not instituted enforcement proceedings.

U.S. Dep’t of Energy v. Ohio, 503 U.S. 607, 633-34 (1992) (White, J., concurring) (citations omitted).

139. See Fischman, *supra* note 1, at 194. Some statutes are difficult to classify as either pollution control or natural resource management statutes because they include components of both regimes. For a description of the cooperative federalism aspects of one such statute, the Surface Mining Control and Reclamation Act (SMCRA), 30 U.S.C. §§ 1201-1328 (2000), see Patrick C. McGinley, *From Pick to Shovel to Mountaintop Removal: Environmental Injustice in the Appalachian Coalfields*, 34 ENVTL. L. 21, 51-53 (2004).

140. Dan Tarlock has argued that “[n]one of the dominant models of federalism are suited to protect biodiversity” and may well frustrate it because, among other things, there are no uniform standards that can realistically be applied to biodiversity in different ecosystems the way that uniform federal pollution control standards serve as floors. A. Dan Tarlock, *Biodiversity Federalism*, 54 MD. L. REV. 1315, 1318 (1995).

141. See Fischman, *supra* note 1, at 196-99. Fischman includes in this category of cooperative federalism relationships the issuance of incidental take permits under the ESA pursuant to negotiations that include not only the affected landowner, but also state agencies. He also describes special management regimes that vest decisionmaking authority in agencies, such as the Columbia River Gorge Commission, that include state representation.

favoritism in the federal land management process,<sup>142</sup> and federal deference to state process.<sup>143</sup>

Others have described the nature of the cooperative federalism regimes that operate under the natural resource management statutes in somewhat different terms.<sup>144</sup> From the earliest days of the nation's history, the states received grants of federal land for purposes that included enhanced public education.<sup>145</sup> They have long shared in revenues received by the federal government under disposition programs for resources, such as timber, oil and gas, and other minerals, and, under the Payment in Lieu of Taxes Act,<sup>146</sup> they continue to receive annual payments based on the acreage owned by the federal government within each state.<sup>147</sup> They act as favored consultants under some of the federal land management planning processes<sup>148</sup> and may even be responsible for preparing environmental impact statements under NEPA under limited circumstances.<sup>149</sup> The states have significant authority to manage wildlife resources, particularly in the national forests and on the BLM public lands.<sup>150</sup>

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142. *Id.* at 200-03. This set of cooperative federalism initiatives includes land use planning procedures pursuant to which the Forest Service and the BLM place special emphasis on the input of state and local governments and statutory provisions that require federal plans, such as those that govern use of the national wildlife refuges, that are required to conform to state wildlife conservation plans to the extent practicable. *See id.* at 200 (citing 16 U.S.C. § 668dd(e)(1)(A)(iii) (2000)).

143. *See* Fischman, *supra* note 1, at 203-04. Fischman's examples include implementation of the Coastal Zone Management Act's requirement that activities conducted or authorized by federal agencies be consistent with federally approved state management plans. 16 U.S.C. § 1456(c)(2) (2000). They also include the CWA requirement that any applicant for a federal license or permit (such as a license from the Federal Energy Regulatory Commission to operate a hydroelectric facility) that may result in a discharge into navigable waters provide a certification from the state in which the discharge will originate that the discharge will comply with applicable provisions of the CWA, as well as any other "appropriate" requirements of state law. 33 U.S.C. § 1341(a)(1), (d) (2000).

144. *See, e.g.*, 1 COGGINS & GLICKSMAN, *supra* note 52, §§ 5:4-5:6, 5:38 (describing statutory programs in which state governments act as consultants, active partners, dominant partners, and beneficiaries of federal revenue sharing programs).

145. *See id.* § 2:7.

146. 31 U.S.C. §§ 6901-6907 (2000).

147. *See* 1 COGGINS & GLICKSMAN, *supra* note 52, § 5:38.

148. *See id.* § 5:4.

149. 42 U.S.C. § 4332(2)(D) (2000) (relating to major federal actions funded under a program of grants to the states).

150. *See* 43 U.S.C. § 1732(b) (2000). *See generally* 1 COGGINS & GLICKSMAN, *supra* note 52, § 5:6; 3 GEORGE CAMERON COGGINS & ROBERT L. GLICKSMAN,

Finally, the Endangered Species Act (“ESA”) provides opportunities, albeit limited ones, for the states to participate in the process of protecting endangered or threatened species.<sup>151</sup> The ESA mandates that the Secretary of the Interior, in implementing the statute, “cooperate to the maximum extent practicable with the States.”<sup>152</sup> It authorizes the Secretary to enter agreements with states for the administration and management of any area established for the conservation of listed species and to enter cooperative agreements to establish and maintain “adequate and active” programs for such conservation.<sup>153</sup> Like the federal pollution control laws, the ESA invalidates state laws or regulations that authorize conduct prohibited by the ESA or federal implementing regulations or prohibit conduct that the federal government has authorized. It specifically reserves state authority, however, to adopt laws or regulations that are otherwise intended to conserve fish or wildlife, and to adopt laws regulating the taking of listed species that are more restrictive than the ESA’s provisions.<sup>154</sup>

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PUBLIC NATURAL RESOURCES LAW § 18.11 [hereinafter 3 COGGINS & GLICKSMAN]; Michael C. Blumm & Lucus Ritchie, *The Pioneer Spirit and the Public Trust: The American Rule of Capture and State Ownership of Wildlife*, 35 ENVTL. L. 673 (2005) (discussing the continuing importance of the concept of state ownership of wildlife in trust).

151. See generally 2 COGGINS & GLICKSMAN, *supra* note 52, § 15C:8.

152. 16 U.S.C. § 1535(a) (2000). Professor Fischman describes § 1535 as a provision that is “the centerpiece of the ESA’s longstanding but minor program of cooperative federalism.” Fischman, *supra* note 1, at 211. Fischman has also asserted that “the ESA program has yet to realize the potential of cooperative federalism.” Robert L. Fischman & Jaelith Hall-Rivera, *A Lesson for Conservation from Pollution Control Law: Cooperative Federalism for Recovery Under the Endangered Species Act*, 27 COLUM. J. ENVTL. L. 45, 79 (2002). Compare with Robert L. Fischman, *Predictions and Prescriptions for the Endangered Species Act*, 34 ENVTL. L. 451, 463 (2004) (highlighting the emphasis on cooperative federalism in the ESA’s legislative history and concluding that “[c]ooperative programs are bound to play an increasingly important role in ESA implementation in the near future”). J.B. Ruhl, on the other hand, has asserted that, “compared to other environmental laws the ESA is remarkably devoid of creative strategies for putting cooperative federalism in play.” Ruhl, *supra* note 118, at 329. See also *id.* at 333 (“[T]he ESA comes off as looking fully incoherent on the topic of cooperative environmental federalism.”).

153. 16 U.S.C. § 1535(b)-(c) (2000). The ESA authorizes the Secretary to provide financial assistance to the states that are parties to such cooperative agreements. *Id.* § 1535(d).

154. 16 U.S.C. § 1535(f). See, e.g., *Florida v. Billie*, 497 So. 2d 889, 893-94 (Fla. Dist. Ct. App. 1986) (holding that states can impose stricter penalties than those contained in EPA); *Moffat County Rd. Dep’t*, 158 IBLA 221, 231 (2003) (stating that wildlife protection is not limited to that afforded by ESA).

Congress either adopted or revised more than twenty major environmental laws during the 1970s.<sup>155</sup> By the time Congress had adopted the Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”)<sup>156</sup> at the end of the environmental decade of the 1970s, the federal government had assumed the dominant role in regulating activities that harm the environment.<sup>157</sup> However, it had afforded states substantial freedom to participate in the administration and enforcement of the federal regulatory programs,<sup>158</sup> and to adopt and enforce more stringent controls.<sup>159</sup> What remained to be seen was whether the courts would regard the shared responsibilities for protecting health and the environment established by these laws as consistent with the federalism provisions of the United States Constitution.<sup>160</sup>

*c. Judicial Reaction to Environmental Cooperative Federalism.* The cooperative federalism mechanisms described above received a warm judicial reception in the early years of the modern environmental era. The lower federal courts during the 1970s consistently rejected constitutional attacks on the environmental statutes adopted during that decade. By the beginning of the next decade, the Supreme Court had not only supported those decisions, but also had provided an “explicit

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155. Percival, *supra* note 14, at 1160.

156. 42 U.S.C. §§ 9601-9675 (2000).

157. *Cf.* Jonathan H. Adler, *The Green Aspects of Printz: The Revival of Federalism and Its Implications for Environmental Law*, 6 GEO. MASON L. REV. 573, 625 (1998) (“The conventional presumption is that the federal government has the primary responsibility for environmental protection,” and that the presumption “needs to be reconsidered.”).

158. In at least one statute, the CAA, Congress over time significantly scaled back the scope of state freedom to determine the appropriate mix of emission controls necessary to meet federally specified environmental objectives due to the states’ persistent past failures to achieve those objectives. *See, e.g.*, GLICKSMAN ET AL., *supra* note 63, at 333-35, 388-89, 420-21; Williams, *supra* note 84, at 88 (stating that in the 1990 amendments to the CAA, “[t]he obligations of states containing ozone nonattainment areas were spelled out in extraordinary detail in the statute”).

159. *See* Percival, *supra* note 14, at 1146 (“The federal government now plays the dominant role in environmental protection policy in the United States.”). According to Professor Stewart, the federal pollution control statutes “generally allow states to adopt more stringent standards and requirements, and often accord the states a substantial—albeit subsidiary and federally supervised—role in implementation and enforcement.” Stewart, *supra* note 80, at 200.

160. For one assessment of the constitutional validity of various forms of cooperative federalism, see Joshua D. Sarnoff, *Cooperative Federalism, the Delegation of Federal Power, and the Constitution*, 39 ARIZ. L. REV. 205 (1997).

endorsement” of cooperative federalism in the context of environmental law.<sup>161</sup>

The Court’s first opportunity to address the consistency of the cooperative federalism model with the Constitution in the context of environmental law was in 1981, when it decided *Hodel v. Virginia Surface Mining and Reclamation Ass’n*.<sup>162</sup> In that case, an association of coal producers engaged in surface coal mining in Virginia brought suit against the Secretary of the Interior, alleging that certain regulatory provisions of the Surface Mining Control and Reclamation Act (“SMCRA”)<sup>163</sup> violated a host of constitutional provisions, including the Commerce Clause, the Tenth Amendment, and the Takings Clause. SMCRA follows the typical pattern of environmental statutes adopted during the 1970s in the cooperative federalism mode. It authorizes the Secretary of the Interior to establish performance standards for surface coal mining. States may request approval from the Secretary to administer their own programs, but the federal program continues to apply in all states without programs approved by the Secretary. States with approved programs share enforcement authority with the Interior Department.<sup>164</sup>

The coal companies argued that SMCRA’s principal goal is regulating the use of private lands within a single state, rather than the interstate effects of coal mining, and urged the Court to decide whether land as such can be regulated under the Commerce Clause.<sup>165</sup> The Court, in an opinion joined by all of the Justices except Justice Rehnquist (who concurred in the judgment), stressed initially that the task of a court asked to decide whether a federal statute is supported by the Commerce Clause “is relatively narrow,” and that it “must defer to a congressional finding that a regulated activity affects interstate commerce, if there is any rational basis for such a finding.”<sup>166</sup> Moreover, judicial review of Commerce Clause challenges “is influenced . . . by the fact that the Commerce Clause is a grant of plenary authority to Congress.”<sup>167</sup> The Court upheld the district court’s decision to defer to Congress’s explicit findings that surface coal mining adversely affects interstate commerce, and that “inadequacies in existing state laws and the need for uniform minimum nationwide standards made federal regulations

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161. Adler, *supra* note 157, at 580.

162. 452 U.S. 264 (1981).

163. 30 U.S.C. §§ 1201-1328 (2000).

164. *Hodel*, 452 U.S. at 268-72.

165. *Id.* at 275-76.

166. *Id.* at 276.

167. *Id.*

imperative.”<sup>168</sup> The coal producers urged the Court to abandon the rational basis test to assess the constitutionality of the regulation of land use, a local act that does not affect interstate commerce. Citing *Wickard v. Filburn*,<sup>169</sup> however, the Court declined the invitation, holding that Congress had rationally determined that regulation of intrastate surface coal mining is necessary to protect interstate commerce from the resulting adverse effects.<sup>170</sup> In doing so, it endorsed Congress’s effort to establish uniform national standards to prevent destructive interstate competition among the states to attract coal mining as a “traditional role for congressional action under the Commerce Clause.”<sup>171</sup>

The Court in *Hodel* did more than just put its stamp of approval on the challenged provisions of SMCRA, however. It also endorsed a series of lower court decisions that, as the Court interpreted them, 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>172</sup> In one sweeping

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168. *Id.* at 280.

169. 317 U.S. 111 (1942).

170. *Hodel*, 452 U.S. at 281.

171. *Id.* at 281-82.

172. *Id.* at 282. By way of example, the Court cited the following cases: *United States v. Byrd*, 609 F.2d 1204, 1209-10 (7th Cir. 1979) (upholding the constitutional validity of the CWA’s dredge and fill permit program); *Bethlehem Steel Corp. v. Train*, 544 F.2d 657, 663 (3d Cir. 1976) (“[T]he federal government’s power over interstate commerce is sufficiently broad to encompass this effort to confront the pressing problem of improving the quality of our nation’s waters.”); *Sierra Club v. EPA*, 540 F.2d 1114, 1139 (D.C. Cir. 1976) (finding the challenges to the constitutionality of the nondeterioration regulations promulgated by EPA under the CAA to be “insubstantial” because “[r]egulation of air pollution clearly is within the power of the federal government under the commerce clause,” and rejecting takings challenge because “the limitation is not so extreme as to represent an appropriation of the land”), *vacated by* *Mont. Power Co. v. EPA*, 434 U.S. 809 (1977); *District of Columbia v. Train*, 521 F.2d 971, 988 (D.C. Cir. 1975) (upholding constitutionality of the use of transportation controls under the CAA and finding specifically that “the federal government thus clearly has the power to direct owners of motor vehicles to install emission control devices and maintain them in proper adjustment”), *vacated and remanded on other grounds sub nom.* *EPA v. Brown*, 431 U.S. 99 (1977); *United States v. Ashland Oil & Transp. Co.*, 504 F.2d 1317, 1328 (6th Cir. 1974) (“[W]ater pollution is subject to Congressional restraint [under the Commerce Clause] because it affects commerce in innumerable ways and because it affects the health and welfare of the nation.”); *see id.* (concluding that, in enacting the CWA, Congress “intended to exercise its full constitutional powers, and we are required to give effect to that intention,” and noting that the “generous construction of water pollution laws required by the Supreme Court is amply demonstrated in many cases”);

motion, therefore, the Court signaled the futility of attacking as an illegitimate exercise of the authority to regulate interstate commerce the exercise of federal regulatory power under the cooperative-federalism based environmental statutes adopted during the preceding decade. The Court pointedly refused to distinguish SMCRA from statutes that regulate air and water pollution, because it found the coal producers' argument that land use is less susceptible to regulation under the Commerce Clause to be without foundation.<sup>173</sup>

The Court found the coal producers' Tenth Amendment attacks on SMCRA to be no more persuasive. The plaintiffs argued that the statutory provisions prescribing performance standards for surface mining on steep slopes<sup>174</sup> impermissibly interfered with the traditional state and local power to regulate land use. The Court disagreed. First, the steep slope regulations applied only to private coal mining operations. Second, the statute did not compel the 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 implementing and enforcing the regulatory program in any state that chose not to adopt its own conforming program. As a result, "there can be no suggestion that the Act commandeers the legislative processes of the States by directly compelling them to enact and enforce a federal

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Pennsylvania v. EPA, 500 F.2d 246, 262 (3d Cir. 1974) (refusing to find that federal enforcement of CAA imposing transportation controls "conflicts with the proper functioning of the system of federalism embodied in our Constitution" and concluding instead that, when Congress "created an interlocking governmental structure in which the Federal Government and the states would cooperate to reach the primary goal of the [CAA]—the attainment of national ambient air quality standards"—such that "state and local governments retain responsibility for the basic design and implementation of air pollution strategies, subject to approval and, if necessary, enforcement by EPA," it used an "approach that represents a valid adaptation of federalist principles to the need for increased federal involvement"); S. Terminal Corp. v. EPA, 504 F.2d 646, 677 (1st Cir. 1974) (upholding imposition of transportation controls under the CAA because "[m]otor vehicles are indisputably in commerce," and "[e]ven though any individual motor vehicle may travel exclusively within one state, commerce by motor vehicle sufficiently touches multi-state concerns as to be federally regulable," and concluding that EPA regulations did not usurp state police powers); United States v. Bishop Processing Co., 287 F. Supp. 624, 629 (D. Md. 1968) (finding, in rejecting attack on pre-1970 federal air pollution legislation, that "[t]he movement of pollutants across a state line . . . constitutes interstate commerce subject to the power granted to Congress by the Constitution to regulate such commerce"), *aff'd*, 423 F.2d 469 (4th Cir. 1970).

173. *Hodel*, 452 U.S. at 282-83.

174. 30 U.S.C. § 1265(d)-(e) (2000).

regulatory program.”<sup>175</sup> The Court added that “[t]he most that can be said is that [SMCRA] establishes a program of cooperative federalism that allows the States, within limits established by minimum federal standards, to enact and administer their own regulatory programs, structured to meet their own regulatory needs.”<sup>176</sup> The Court likened SMCRA in that respect to other federal statutes that had survived Tenth Amendment challenges in the lower courts, again citing cases rejecting constitutional attacks on the CAA and the CWA.<sup>177</sup> The coal producers in effect urged the Court to conclude that “the Tenth Amendment limits congressional power to pre-empt or displace state regulation of private activities affecting interstate commerce,” but the Court refused to do so.<sup>178</sup> The Court instead adhered to the well established principle 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>179</sup>

The SMCRA case was not the only context in which the Supreme Court endorsed Congress’s reliance on cooperative federalism as a means of inducing states to contribute to the achievement of federal statutory objectives. In a case decided a year after *Hodel*, the court rejected a federalism-based facial attack on the constitutionality of the Public Utilities Regulatory Policy Act (“PURPA”).<sup>180</sup> Quoting *Hodel*, the Court found that, like SMCRA,

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175. *Hodel*, 452 U.S. at 288.

176. *Id.* at 289.

177. *Id.* (citing *Friends of the Earth v. Carey*, 552 F.2d 25, 36-39 (2d Cir. 1977) (upholding the CAA); *Sierra Club v. EPA*, 540 F.2d 1114, 1140 (D.C. Cir. 1976) (upholding the CAA)).

178. *Hodel*, 452 U.S. at 289-90. The Court added that “Congress could constitutionally have enacted a statute prohibiting any state regulation of surface coal mining,” and that it did not understand why SMCRA should be more susceptible to constitutional challenge “simply because Congress [allowed] the States a regulatory role.” *Id.* at 290.

179. *Id.* at 291. The Court also rejected the coal producers’ takings claims on the ground that they were not ripe for review. *Id.* at 297. In a companion case to *Hodel* decided on the same day, the Court held that the provisions of SMCRA that aimed to protect prime farmland violated neither the Commerce Clause nor the Tenth Amendment. *Hodel v. Indiana*, 452 U.S. 314, 321-30 (1981). Justice Rehnquist, who concurred in the judgment, was again the only Justice who did not join the opinion.

180. *FERC v. Mississippi*, 456 U.S. 742 (1982). The challenged provisions directed state public utility agencies and nonregulated utilities to “consider” the adoption and implementation of rate design and regulatory standards, and required the agencies to comply with certain procedures when acting on proposed federal standards. The statute also sought to encourage the development of cogeneration by directing the Federal Energy Regulatory

PURPA merely “establishe[d] a program of cooperative federalism 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>181</sup> Previously, the Court had invoked with apparent approval the terminology of “cooperative federalism” in a natural resource management context. In *California v. United States*,<sup>182</sup> the Court interpreted expansively a savings clause in the Reclamation Act of 1902 that denied any intention to interfere with state laws “relating to the control, appropriation, use, or distribution of water used in irrigation,” and required the Secretary of the Interior, in carrying out the Act, to proceed “in conformity with” those state laws.<sup>183</sup> In particular, the Court held that the state could impose conditions on the operation of federal reclamation projects to conserve water, as long as those conditions did not conflict with specific congressional directives.<sup>184</sup>

Thus, in the years following the adoption of the environmental legislation of the 1970s, the Supreme Court, following the lead of earlier decisions by the lower federal courts, respected the congressional policy judgments reflected in the cooperative federalism enterprise that Congress constructed to protect public health and the environment.<sup>185</sup> The courts rejected broad-based constitutional attacks on the federal environmental statutes, and they often interpreted the intended sweep of those statutes broadly. Moreover, praise for the cooperative federalism model for achieving environmental protection goals was not confined to the courts.

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Commission (FERC) to issue regulations to carry out this goal, which the states would then be required to implement. The Court held that these provisions violated neither the Commerce Clause nor the Tenth Amendment.

181. *Id.* at 767.

182. 438 U.S. 645 (1978).

183. *Id.* at 650 (quoting 32 Stat. 390) (referring to cooperative federalism).

184. *California*, 438 U.S. at 653-79.

185. One court described the CAA as the result of Congress having “embarked upon a bold experiment in cooperative federalism designed to protect the nation against the grave threat of air pollution.” *Connecticut v. EPA*, 696 F.2d 147, 151 (2d Cir. 1982). *See also* *Sweat v. Hull*, 200 F. Supp. 2d 1162, 1178 (D. Ariz. 2001) (“Like the CWA, the CAA is a ‘program of cooperative federalism.’”). More recently, Justice Breyer asserted that “Congress often can better reflect state concerns for autonomy in the details of sophisticated statutory schemes than can the Judiciary, which cannot easily gather the relevant facts and which must apply more general legal rules and categories,” in resolving federalism-based attacks on the constitutionality of federal legislation. *United States v. Morrison*, 529 U.S. 598, 661 (2000) (Breyer, J., dissenting). He specifically cited the CAA and the CWA as examples of that kind of cooperative federalism. *Id.*

Though attacked in some quarters as a cumbersome and inefficient approach to achieving environmental quality goals,<sup>186</sup> the cooperative federalism mechanisms that Congress built into many of the federal pollution control laws beginning in 1970 were defended by some commentators on both practical grounds<sup>187</sup> and on the basis of normative political theory.<sup>188</sup> More recently, both the judiciary and the political branches of government have taken actions that have severely undercut the ability of the cooperative environmental federalism model to achieve the nation's environmental quality goals.

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186. See Esty, *supra* note 61, at 605 (“From nearly the day that the ink was dry on [Richard Stewart’s arguments in his 1977 article, *supra* note 89] justifying federal environmental regulation, the tides of political thinking and legal scholarship have run the other way.”); Stewart, *supra* note 90, at 213 (“The existing system of centralized federal command-and-control regulation and liability . . . displays many grievous flaws.”); Tarlock, *supra* note 140, at 1321 (“Cooperative federalism has proved better in theory than in practice”); Williams, *supra* note 84, at 112 (describing claims by supporters of devolution of environmental policymaking authority to state and local governments that such an approach will result in a more flexible and efficient system). Edward Rubin claims that cooperative federalism may frustrate accountability because it “tends to obscure any separation between state and federal authority, thus demanding even more spectacular levels of sophistication from voters if they are to hold state officials accountable within their area of sole authority.” Edward Rubin, *The Myth of Accountability and the Anti-Administrative Impulse*, 103 MICH. L. REV. 2073, 2088 (2005).

187. See, e.g., Percival, *supra* note 14, at 1178 (“[E]ffective environmental protection policy requires some form of cooperative federalism in which federal and state authorities work together to achieve national goals” because, among other things, “the federal government simply does not have the capacity to regulate effectively without the cooperation of state and local governments”); Williams, *supra* note 84, at 118-19 (arguing that minimum federal standards backed by sanctions for states that fail to achieve them can provide important incentives for technological innovation); Babich, *supra* note 97, at 1518 (arguing that, despite some failures of cooperative federalism in the hazardous waste field, “the doctrine earns its keep by providing a potentially effective structure for enforcing hazardous-waste laws against government-owned or operated facilities”).

188. See, e.g., Percival, *supra* note 14, at 1179 (“[T]he focus should be on what works best in promoting national interests in environmental protection in a manner that is sensitive to state sovereignty.”); Kendall, *supra* note 77, at 10446 (“The most important neutral value advanced by a federal system of government stems from federalism’s ability to allow regional variation and thereby improve citizen satisfaction with political outcomes.”); Williams, *supra* note 84, at 97 (“[T]reating air quality as a national good, subject to minimum federal standards[,] is a normatively more attractive approach than treating air quality as merely a ‘local’ good.”).

C. *Summary*

After the Supreme Court's decision in *Hodel*, the validity of the cooperative federalism model reflected in many of the federal environmental statutes was firmly entrenched. A decade into the modern era of environmental law, the federal government and the states seemed primed to continue to make progress toward the goal of protecting the public health, the environment, and the nation's natural resource base. The momentum that federal agencies and the states had made toward achieving that goal would soon be slowed, however. In the next couple of decades, a series of decisions by all three branches of the federal government would raise significant questions about the scope of federal power to protect the environment, as well as about the willingness of the federal government to exercise the power that it has.

### III. THE CONTRACTION OF FEDERAL POWER

The operative principle of cooperative federalism is that the federal government establishes a policy, such as protection of public health, and the environment, and sustainable natural resource use, and then enlists the aid of the states, through a combination of carrots, such as financial aid, and sticks, such as the imposition of constraints on private conduct through federal regulation, in pursuing that policy. The result is a system in which both levels of government work together to achieve a common goal. Although the goal originated with the federal government, a cooperative federalism program affords considerable discretion to the states to decide how to achieve the goal, thereby minimizing the extent to which pursuit of the federal goal infringes on state sovereignty. If the process works well, the synergism of related federal and state programs will yield more effective results than either level of government would have been capable of achieving by itself.<sup>189</sup>

Both the pollution control and natural resource management statutes that Congress adopted during the 1970s rely heavily on cooperative federalism to achieve the environmental policy goals enunciated by Congress. In the last fifteen years or so, however, cooperative federalism in environmental law has been turned on its head. Instead of serving as a means of empowering both the federal and state governments to pursue environmental protection initiatives, environmental law has to a considerable extent become a

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189. See, e.g., DERTHICK, *supra* note 40, at 206 ("When federal and state agencies work together, each reinforces the influence of the other, the state agency gaining as a result of the federal partnership, the federal agency being compensated for deficiencies in its ability to exercise influence directly in state affairs.").

constraint on the capacity of either level of government to take effective steps to protect the environment. This Part examines the contraction of federal power to protect the environment that has resulted from a combination of judicial, legislative, and executive branch decisions. The next Part explores the fate of efforts by state and local governments to respond to this reduction in federal power by pursuing their own innovative environmental protection initiatives.

A. *Judicial Developments that Reduce Federal Power*

The “new federalism” decisions of the Rehnquist Supreme Court have resulted in a narrowing of federal regulatory power.<sup>190</sup> The primary instruments of the Court’s new federalism agenda have been the Commerce Clause and the Tenth and Eleventh Amendments. All three provisions have provided ammunition for litigants in recent years to attack the validity of federal pollution control and natural resource management legislation.

1. *The Commerce Clause*

Most federal environmental legislation is rooted in Congress’s authority to regulate interstate commerce.<sup>191</sup> For most of the final three-quarters of the twentieth century, the Supreme Court interpreted the scope of Congress’s authority under the Commerce Clause expansively. In 1995, however, in *United States v. Lopez*,<sup>192</sup> the Court, for the first time in decades, struck down a federal statute on the ground that it exceeded Congress’s authority under

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190. See generally Stephen R. McAllister & Robert L. Glicksman, *Federal Environmental Law in the “New” Federalism Era*, 30 ENVTL. L. REP. 11122 (2000) (discussing cases heard in the October 2000 Term involving questions of constitutional power and the implications of the Court’s recent federalism decisions and congressional power decisions for federal environmental laws) [hereinafter McAllister & Glicksman, “New” Federalism Era]; Stephen R. McAllister & Robert L. Glicksman, *State Liability for Environmental Violations: The U.S. Supreme Court’s “New” Federalism*, 29 ENVTL. L. REP. 10665 (1999) (discussing Supreme Court decisions in the October 1999 term and the significance of those cases with respect to the enforcement of federal environmental laws) [hereinafter McAllister & Glicksman, *State Liability*].

191. U.S. CONST., art. I, § 8, cl. 3. Some legislation is premised on the Treaty Clause. See, e.g., *Missouri v. Holland*, 252 U.S. 416, 435 (1920) (upholding the Migratory Bird Treaty Act of 1918). Legislation governing the management and use of the federal lands and resources is based largely on the Property Clause, U.S. CONST. art. IV, § 3, cl. 2. See generally 1 COGGINS & GLICKSMAN, *supra* note 52, §§ 3:13-3:14 (discussing use of Property Clause).

192. 514 U.S. 549, (1995). *Lopez* invalidated the Gun-Free School Zones Act of 1990. *Id.* at 567.

the Commerce Clause.<sup>193</sup> Several years later, the Court invalidated another statute on the same ground in *United States v. Morrison*.<sup>194</sup> Although neither of these decisions involved an environmental statute, they spurred a renewed series of constitutional attacks on federal environmental legislation.

Thus far, the courts have shunted aside frontal assaults on both the federal pollution control<sup>195</sup> and natural resource management<sup>196</sup> statutes, and regulations issued under those statutes, as beyond the scope of Congress's authority to regulate interstate commerce. Some of the cases have been close, however. Several courts have refused to find that the ESA violates the Commerce Clause,<sup>197</sup> even as applied to activities alleged to result in a taking of a species found solely within one state<sup>198</sup> or to activities conducted on privately owned land.<sup>199</sup> In all four Court of Appeals decisions upholding the

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193. See 1 COGGINS & GLICKSMAN, *supra* note 52, § 3:16.

194. 529 U.S. 598, 627 (2000) (invalidating the Violence Against Women Act).

195. See, e.g., *Nebraska v. EPA*, 331 F.3d 995, 998 (D.C. Cir. 2003) (rejecting facial attack on the SDWA rooted in the Commerce Clause); *United States v. Ho*, 311 F.3d 589, 601 (5th Cir. 2002) (rejecting as applied attack on work practice standards adopted under CAA to limit emission of hazardous air pollutants); *Allied Local & Reg'l Mfrs. Caucus v. EPA*, 215 F.3d 61, 83 (D.C. Cir. 2000) (rejecting constitutional attack on EPA regulations issued under the CAA that limited content of ozone-producing chemicals in architectural coatings); *United States v. Olin Corp.* 107 F.3d 1506, 1510-11 (11th Cir. 1997) (overturning district court decision holding that application of CERCLA to intrastate hazardous substance disposal violated the Commerce Clause); *Nova Chem. Inc. v. GAF Corp.*, 945 F. Supp. 1098, 1105-06 (E.D. Tenn. 1996) (rejecting contention that application of CERCLA to contamination that was a byproduct of latex manufacturing and chemical compounding violated the Commerce Clause); *United States v. NL Indus., Inc.*, 936 F. Supp. 545, 560 (S.D. Ill. 1996) (relying on *Hodel* to reject a Commerce Clause attack on CERCLA). See also *Bolin v. Cessna Aircraft Co.*, 759 F. Supp. 692, 706-09 (D. Kan. 1991) (rejecting Commerce Clause attack on a provision of CERCLA establishing statute of limitations for state personal injury actions related to exposure to hazardous substances).

196. See, e.g., *United States v. Bramble*, 103 F.3d 1475, 1481-82 (9th Cir. 1996) (rejecting claim that the Eagle Protection Act violates the Commerce Clause); *United States v. Romano*, 929 F. Supp. 502, 508 (D. Mass. 1996) (same with respect to the Lacey Act); *United States v. Lundquist*, 932 F. Supp. 1237, 1244-45 (D. Or. 1996) (holding that the Bald and Golden Eagle Protection Act does not violate the Commerce Clause).

197. *Rancho Viejo, LLC v. Norton*, 323 F.3d 1062, 1079-80 (D.C. Cir. 2003), *rehearing en banc denied*, 334 F.3d 1158 (D.C. Cir. 2003).

198. *Nat'l Ass'n of Home Builders v. Babbitt*, 130 F.3d 1041, 1049 (D.C. Cir. 1997).

199. *GDF Realty Inv., Ltd. v. Norton*, 326 F.3d 622, 640-41 (5th Cir. 2003), *rehearing and rehearing en banc denied*, 362 F.3d 286 (5th Cir. 2004); *Gibbs v.*

ESA, however, at least one judge dissented,<sup>200</sup> and even the judges who voted to sustain the Act could not agree on a uniform rationale for doing so. The susceptibility of the ESA, and particularly of the application of the takings prohibition to intrastate activities<sup>201</sup>, to attack under the Commerce Clause is thus not completely free from doubt.<sup>202</sup>

Of more immediate consequence is the impact of *Lopez* and *Morrison* on judicial interpretation of the scope of some of the federal environmental legislation. The most important example involves a series of attacks on the application of the CWA's dredge and fill permit program<sup>203</sup> to water bodies and wetlands that are not traditionally navigable. Even before the Supreme Court's decision in *Lopez*, the Seventh Circuit invalidated as beyond the scope of the Commerce Clause an EPA regulation applying the dredge and fill permit program to isolated wetlands, although the court later reversed itself in that same case.<sup>204</sup> In 2001, the year after it decided *Morrison*, the Supreme Court addressed a challenge to the constitutionality of the dredge and fill permit program in the *Solid Waste Agency of Northern Cook County* ("SWANCC") case.<sup>205</sup> The case involved an attempt by the Army Corps of Engineers to require a dredge and fill permit for an abandoned sand and gravel pit containing both permanent and seasonal ponds that provided habitat for migratory birds. The consortium of local governments that owned the regulated property argued that the application of the dredge and fill permit program to their land exceeded the scope of

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Babbitt, 214 F.3d 483, 492 (4th Cir. 2000).

200. See, e.g., *GDF Realty*, 362 F.3d at 287-93 (Jones, J., dissenting from denial of rehearing en banc); *Rancho Viejo*, 334 F.3d at 1160 (Roberts, J., dissenting from denial of rehearing en banc); *Gibbs v. Babbitt*, 214 F.3d at 506-10 (Luttig, J., dissenting); *Nat'l Ass'n of Home Builders v. Babbitt*, 130 F.3d at 1060-67 (Sentelle, J., dissenting).

201. 16 U.S.C. § 1538(a)(1)(B) (2000).

202. *But cf.* Michael C. Blumm & George Kimbrell, *Flies, Spiders, Toads, Wolves, and the Constitutionality of the Endangered Species Act's Take Provision*, 34 ENVTL. L. 309, 346-60 (2004) (predicting that the Supreme Court will uphold the statute). See also John Copeland Nagle, *The Commerce Clause Meets the Delhi Sands Flower-Loving Fly*, 97 MICH. L. REV. 174 (1998) (analyzing the ESA under the three prongs of Commerce Clause analysis).

203. 33 U.S.C. § 1344 (2000).

204. *Hoffman Homes, Inc. v. EPA*, 961 F.2d 1310, 1323 (7th Cir. 1992), *vacated and rehearing granted*, 975 F.2d 1554 (7th Cir. 1992), *vacated on rehearing*, 999 F.2d 256 (7th Cir. 1993). See also *Leslie Salt Co. v. United States*, 55 F.3d 1388, 1396 (9th Cir. 1995) (concluding that, although regulation of isolated wetlands used as migratory bird habitat "tests the limits of Congress's commerce powers," it does not exceed them).

205. *Solid Waste Agency of N. Cook County v. United States Army Corps of Eng'rs*, 531 U.S. 159 (2001).

federal regulatory power under the Commerce Clause and that, even if it did not, Congress did not intend that the program reach nonnavigable, isolated, and intrastate waters simply because they provide habitat for migratory birds. The Court found it unnecessary to reach the constitutional question because it held, 5-4, that Congress did not intend to allow the Corps to apply the dredge and fill permit program to the land in question.<sup>206</sup>

To reach that result, the Court had to distinguish a 1985 decision in which it had upheld a Corps of Engineers regulation interpreting the dredge and fill permit program to apply to wetlands adjacent to navigable waters and their tributaries. The Court in *United States v. Riverside Bayview Homes, Inc.*,<sup>207</sup> found the statutory interpretation question posed in that case to be “an easy one.”<sup>208</sup> Characterizing the CWA as a “comprehensive legislative attempt” to maintain and protect water quality, it concluded that “Congress chose to define the waters covered by the Act broadly.”<sup>209</sup> In particular, the Court reasoned that, in defining the “navigable waters”<sup>210</sup> to which the dredge and fill permit program applies,<sup>211</sup> “Congress evidently intended to repudiate limits that had been placed on federal regulation by earlier water pollution control statutes and to exercise its powers under the Commerce Clause to regulate at least some waters that would not be deemed ‘navigable’ under the classical understanding of that term.”<sup>212</sup> The Court found it reasonable for the Corps to conclude that wetlands adjacent to navigable waters generally play an important role in protecting and enhancing water quality.<sup>213</sup> In short, the Court held that “the

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206. *Id.* at 162.

207. 474 U.S. 121 (1985).

208. *Id.* at 129.

209. *Id.* at 132-33.

210. The CWA defines “navigable waters” in relevant part as “the waters of the United States.” 33 U.S.C. § 1362(7) (2000).

211. The term “navigable waters” also defines the scope of the CWA’s National Pollutant Discharge Elimination System permit program, which applies to point sources discharging pollutants into navigable waters. *Id.* §§ 1311(a), 1342(a).

212. *Riverside Bayview Homes*, 474 U.S. at 133. In particular, the Court stated that “the evident breadth of congressional concern for protection of water quality and aquatic ecosystems suggests that it is reasonable for the Corps to interpret the term ‘waters’ to encompass wetlands adjacent to waters as more conventionally defined.” *Id.*

213. *Id.*

In view of the breadth of federal regulatory authority contemplated by the Act itself and the inherent difficulties of defining precise bounds to regulable waters, the Corps’ ecological judgment about the relationship between waters and their adjacent wetlands provides an adequate basis for a legal judgment that adjacent wetlands may be

language, policies, and history of the [CWA] compel a finding that the Corps has acted reasonably in interpreting the Act to require permits for the discharge of fill material into wetlands adjacent to the ‘waters of the United States.’”<sup>214</sup>

The Court in *SWANCC* found that “[i]t was the significant nexus between the wetlands and ‘navigable waters’ that informed our reading of the CWA in *Riverside Bayview Homes*,” and that the Court had left open the question of whether the permit program extended to wetlands that are not adjacent to traditionally navigable waters.<sup>215</sup> The Court held that the statute does not extend to ponds that are not adjacent to open water,<sup>216</sup> and declined in particular to take what the Corps regarded “as the next ineluctable step after *Riverside Bayview Homes*: holding that isolated ponds, some only seasonal, wholly located within two Illinois counties, fall under § 404(a)’s definition of ‘navigable waters’ because they serve as habitat for migratory birds.”<sup>217</sup> Responding to the Corps’ plea that the Court defer to its interpretation of the statute, the Court invoked the principle that “[w]here an administrative interpretation of a statute invokes the outer limits of Congress’s power, we expect a clear indication that Congress intended that result.”<sup>218</sup> The Court explained:

This requirement stems from our prudential desire not to needlessly reach constitutional issues and our assumption that Congress does not casually authorize administrative agencies to interpret a statute to push the limit of congressional authority. This concern is heightened where the administrative interpretation alters the federal-state framework by permitting federal encroachment upon a traditional state power.<sup>219</sup>

The Corps claimed that its rule applying the permit program to isolated waters that serve as habitat for migratory birds was a valid exercise of Congress’s power to regulate intrastate activities that “substantially affect” interstate commerce, particularly given the “national interest” in preserving migratory birds.<sup>220</sup> But the Court found that the Corps’ argument raised “significant constitutional

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defined as waters under the Act.

*Id.* at 134.

214. *Id.* at 139.

215. *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng’rs*, 531 U.S. 159, 167 (2001).

216. *Id.* at 168.

217. *Id.* at 171-72.

218. *Id.* at 172.

219. *Id.* at 172-73 (citation omitted).

220. *Id.* at 173.

questions,” and decided, in the absence of a clear statement of congressional intent to cover the affected waters, to read the statute narrowly “to avoid the significant constitutional and federalism questions raised by [the Corps’] interpretation.”<sup>221</sup>

The decision in *SWANCC* prompted a slew of lawsuits in which property owners challenged the applicability of the dredge and fill permit program to their land on both constitutional and statutory grounds. Most of the lower courts addressing those attacks have interpreted *SWANCC* narrowly as precluding only the application of the dredge and fill permit program to nonnavigable, isolated, and intrastate waters solely on the basis of the presence of migratory bird habitat.<sup>222</sup> In rejecting both the constitutional<sup>223</sup> and statutory<sup>224</sup> arguments raised in these cases, some courts have concluded that *SWANCC* did not overrule *Riverside Bayview Homes*.<sup>225</sup> Other courts, however, have read *SWANCC* as signaling a significant shift in the Supreme Court’s approach to the scope of the CWA that “call[s] into question the continuing validity of CWA jurisdiction over waters which are not either actually navigable or directly adjacent to navigable waters.”<sup>226</sup> The Fifth Circuit, in particular, has interpreted *SWANCC* as having imposed significant new limits on the scope of CWA jurisdiction and has relied on *SWANCC* to interpret narrowly the scope of the Oil Pollution Act,<sup>227</sup> whose jurisdictional scope also turns on the meaning of the term “navigable waters.”<sup>228</sup> The parameters of *SWANCC*’s constriction on Congress’s power to protect water quality in waters and wetlands

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221. *Id.* at 174. The Supreme Court has not always relied on federalism concerns as a justification for interpreting narrowly the scope of federal authority under environmental legislation. *See, e.g.*, *Alaska Dep’t of Env’tl. Conservation v. EPA*, 540 U.S. 461, 495 (2004) (holding that EPA has the authority under the CAA to veto a state-issued permit on the ground that the permit failed to impose emission limitations based on the best available control technology).

222. *See, e.g.*, *N. C. Shellfish Growers Ass’n v. Holly Ridge Assocs.*, 278 F. Supp. 2d 654, 674 (E.D.N.C. 2003).

223. *See, e.g.*, *United States v. Gerke Excavating, Inc.*, 412 F.3d 804, 807 (7th Cir. 2005); *United States v. Deaton*, 332 F.3d 698, 708, 711 (4th Cir. 2003).

224. *See, e.g.*, *United States v. Hubenka*, 438 F.3d 1026, 1032-33 (10th Cir. 2006); *Treacy v. Newdunn Assocs.*, 344 F.3d 407, 415-16 (4th Cir. 2003).

225. *See, e.g.*, *United States v. Johnson*, 437 F.3d 157, 170 (1st Cir. 2006); *United States v. Gerke Excavating, Inc.*, 412 F.3d 804, 808 (7th Cir. 2005).

226. *FD & P Enters., Inc. v. U.S. Army Corps of Eng’rs*, 239 F. Supp. 2d 509, 513 (D.N.J. 2003).

227. 33 U.S.C. §§ 2701-2761 (2000).

228. *Id.* § 2702(a). *See In re Needham*, 354 F.3d 340, 343-45 (5th Cir. 2003); *Rice v. Harken Exploration Co.*, 250 F.3d 264, 268-69 (5th Cir. 2001).

that are not traditionally navigable will have to await further Supreme Court explanation.<sup>229</sup>

## 2. *The Tenth Amendment*

As the discussion above indicates,<sup>230</sup> the Supreme Court in the *Hodel* case rejected a Tenth Amendment attack on SMCRA's steep slope mining standards. In 1992, however, the Court struck down as violative of the Tenth Amendment portions of the Low-Level Radioactive Waste Policy Amendments Act of 1985.<sup>231</sup> A previous version of the Act, adopted in 1980, was designed to solve the problem of insufficient nationwide capacity for the disposal of low-level radioactive wastes. The 1985 amendments required each state either to join an interstate waste compact, which would develop a new low-level waste disposal site, or develop its own site.<sup>232</sup> A disposal site run by a compact or by a so called stand-alone state would be authorized to prohibit the importation of low-level waste generated in a state that neither had its own site nor was a compact member. The host state for a compact-run site also could charge higher disposal fees for waste generated in states that were not members of the compact than for waste generated within the compact. Any state that failed to comply with its obligations by the end of 1992 (either by joining a compact that had developed a site or building its own site) would be required to take title to all low-level waste generated within its borders. The state also would assume liability for all damages incurred by the generator as a result of the state's failure to take possession of the waste.<sup>233</sup> In *New York v. United States*, the Supreme Court held that the "take title" provisions contravened the Tenth Amendment.<sup>234</sup> Despite

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229. Shortly before this Article went to press, the Supreme Court issued a decision in another case that required it to address the scope of the dredge and fill permit program. *Rapanos v. United States*, 126 S. Ct. 2208 (2006). The court splintered, with a plurality opinion joined by four Justices, a concurrence by Justice Kennedy, and a dissent joined by four Justices. *Rapanos* failed to clarify the scope of the dredge and fill permit program, and may even have exacerbated the confusion surrounding that question. The lower courts will have to continue to address the scope of the program on a case-by-case basis.

230. See *supra* notes 161-79 and accompanying text.

231. Pub. L. 99-240, 99 Stat. 1842.

232. See generally Robert L. Glicksman, *Interstate Compacts for Low-Level Radioactive Waste Disposal: A Mechanism for Excluding Out-of-State Waste*, in *LOW-LEVEL RADIOACTIVE WASTE REGULATION: SCIENCE, POLITICS AND FEAR* 63 (Michael E. Burns ed., 1988) (analyzing the legal foundation and possible problems with the Low-Level Radioactive Waste Policy Act as amended).

233. *New York v. United States*, 505 U.S. 144, 151-54 (1992).

234. *Id.* at 174-77. See generally Richard E. Levy, *New York v. United States: An Essay on the Uses and Misuses of Precedent, History, and Policy in*

concluding that Congress was authorized under the Commerce Clause to regulate the interstate market in radioactive waste disposal, and that Congress could have preempted all state regulation of radioactive waste,<sup>235</sup> the Court held that the take title provisions were unconstitutional.<sup>236</sup> It characterized those provisions as an effort to offer the states the “choice” of accepting ownership of low-level waste or regulating disposal according to federal instructions.<sup>237</sup> Because Congress lacked the constitutional authority to pursue either choice in isolation, it could not pursue them in combination:

[T]he take title incentive does not represent the conditional exercise of any congressional power enumerated in the Constitution. In this provision, Congress has not held out the threat of exercising its spending power or its commerce power; it has instead held out the threat, should the States not regulate according to one federal instruction, of simply forcing the States to submit to another federal instruction. 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>238</sup>

Thus, *New York* established that the federal government may not offer a state government “no option other than that of implementing legislation enacted by Congress.”<sup>239</sup>

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*Determining the Scope of Federal Power*, 41 U. KAN. L. REV. 493 (1993) (criticizing the Supreme Court’s decision in *New York v. United States* as establishing a rule that rests on a misapplication of constitutional principles of federalism).

235. *New York*, 505 U.S. at 160.

236. *Id.* at 174-77. The Court also held, however, that the surcharge provisions represented “an unexceptionable exercise of Congress’s power to authorize the States to burden interstate commerce,” *id.* at 171, and that conditioning the receipt of federal funds on compliance with the statute’s milestones for constructing or participating in a compact that constructed a waste disposal site was a valid exercise of the Spending Clause. *Id.* at 171-72. Likewise, Congress’s decision to authorize states and regional compacts with disposal sites to increase the cost of access and eventually deny all access to sites for the disposal of radioactive waste generated in states that do not meet federal deadlines was also a valid exercise of the Commerce Clause. *Id.* at 173-74.

237. *Id.* at 175.

238. *Id.* at 176 (quoting *Hodel v. Va. Surface Mining & Reclamation Ass’n*, 452 U.S. 264, 288 (1981) (citations omitted)).

239. *New York*, 505 U.S. at 177. The Court also stated that “[w]here a federal interest is sufficiently strong to cause Congress to legislate, it must do

Like the Court's decisions in *Lopez*, *Morrison*, and *SWANCC*, the *New York* decision has formed the basis for a renewed series of constitutional attacks on federal pollution control and natural resources legislation. Most of these attacks have not succeeded, in either the pollution control<sup>240</sup> or federal lands and resources contexts.<sup>241</sup> In at least two cases, however, the attacks succeeded in constraining the scope of federal regulatory authority. One case was a pollution control case, in which the Fifth Circuit held that a provision of the SDWA requiring states to establish remedial action plans for the removal of lead contamination from drinking water facilities in schools and day care centers violated the Tenth Amendment because it amounted to an attempt by Congress to force states to regulate pursuant to congressional direction, and therefore amounted to an impermissible effort to control state legislative processes.<sup>242</sup> The other case was a natural resource management case, in which the Ninth Circuit, shortly after the decision in *New York*, struck down as a violation of the Tenth Amendment a federal statute restricting the export of timber harvested on both federal and state public lands as a means of conserving timber and increasing timber supplies for domestic sawmills.<sup>243</sup>

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so directly; it may not conscript state governments as its agents." *Id.* at 178.

240. *See, e.g.*, *Nebraska v. EPA*, 331 F.3d 995, 999 (D.C. Cir. 2003) (rejecting a Tenth Amendment attack on the SDWA); *City of Abilene v. EPA*, 325 F.3d 657, 663 (5th Cir. 2003) (finding that conditions on EPA-issued storm water discharge permits did not violate the Tenth Amendment); *Env'tl. Def. Ctr. v. EPA*, 319 F.3d 398, 409 (9th Cir. 2003) (holding that EPA regulations under the CWA subjecting discharges from municipal storm sewers to discharge permit program did not violate the Tenth Amendment); *Virginia v. Browner*, 80 F.3d 869, 882 (4th Cir. 1996) (rejecting contention that provisions of CAA authorizing EPA to impose sanctions on states with inadequate permit programs violates the Tenth Amendment).

241. *See, e.g.*, *Nuclear Energy Inst., Inc. v. EPA*, 373 F.3d 1251, 1309 (D.C. Cir. 2004) (rejecting Tenth Amendment attack on designation of federal lands in Nevada as site for radioactive waste disposal repository); *Wyoming v. United States*, 279 F.3d 1214, 1227 (10th Cir. 2002) (holding that Fish and Wildlife Service's refusal to permit state to vaccinate elk on national wildlife refuge to prevent brucellosis did not violate Tenth Amendment); *Wyoming v. United States*, 360 F. Supp. 2d 1214, 1240-42 (D. Wyo. 2005) (holding that Interior Department's rejection of state plan for managing gray wolves as a condition of delisting them under the ESA did not violate the Tenth Amendment); *Gibbs v. Babbitt*, 31 F. Supp. 2d 531, 535-36 (E.D.N.C. 1998) (rejecting Tenth Amendment attack on Fish and Wildlife Service regulation), *aff'd on other grounds*, 214 F.3d 483 (4th Cir. 2000).

242. *ACORN v. Edwards*, 81 F.3d 1387, 1394 (5th Cir. 1996).

243. *Bd. of Natural Res. v. Brown*, 992 F.2d 937, 947 (9th Cir. 1993).

### 3. *The Eleventh Amendment*

Perhaps the most aggressive limitations that the Constitution's federalism provisions impose on federal legislative power that occurred during the Rehnquist Court resulted from the Court's interpretation of the Eleventh Amendment. In a series of cases decided in the late 1990s, the Court expanded the circumstances in which suits brought by private plaintiffs in federal court against a state are barred by sovereign immunity.<sup>244</sup> None of these cases was an environmental law case. The expansive interpretation of the Eleventh Amendment they reflect, however, has induced the lower courts on many occasions to block suits against states or state agencies seeking compliance with their responsibilities under federal environmental legislation.

Dismissals on the basis of sovereign immunity range across both the geographical and statutory landscapes. In one case, the Fourth Circuit held that sovereign immunity preserved by the Eleventh Amendment barred a citizen suit by environmental groups and individuals to prevent the director of a West Virginia environmental agency from continuing to issue permits under SMCRA for mountaintop-removal coal mining.<sup>245</sup> In another case, the Ninth Circuit held that a suit seeking to compel compliance by a state with its environmental assessment responsibilities was barred by the Eleventh Amendment.<sup>246</sup> The same court held that the Eleventh Amendment barred a suit against a state agency claiming

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244. *See, e.g., Alden v. Maine*, 527 U.S. 706, 749-54 (1999) (holding that states retain immunity from private suits in their own courts); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 72 (1996) ("Even when the Constitution vests in Congress complete lawmaking authority over a particular area, the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting states."). *See also Coll. Savs. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 691 (1999) (holding that federal courts did not have jurisdiction because state sovereignty was not validly abrogated by the Trademark Remedy Clarification Act nor voluntarily waived).

245. *Bragg v. W. Va. Coal Ass'n*, 248 F.3d 275, 297-98 (4th Cir. 2001). *See also Pa. Fed'n of Sportsmen's Clubs, Inc. v. Hess*, 297 F.3d 310, 328-30 (3d Cir. 2002) (holding that a suit alleging that state officials failed to comply with their responsibilities in administering an approved SMCRA program was barred by the Eleventh Amendment). *But cf. W. Va. Highlands Conservancy v. Norton*, 137 F. Supp. 2d 687, 695 (S.D. W. Va. 2001) (holding that suit against state official to maintain mandatory federal performance bond requirement was not barred by the Eleventh Amendment).

246. *City of S. Pasadena v. Mineta*, 284 F.3d 1154, 1158 (9th Cir. 2002). *See also Sweat v. Hull*, 200 F. Supp. 2d 1162, 1173-76 (D. Ariz. 2001) (holding that suit against state official to implement SIP under CAA was barred by the Eleventh Amendment).

violations of a CWA permit that required the agency to control polluted storm water runoff from roadways and maintenance yards.<sup>247</sup> The Second Circuit held that the Eleventh Amendment barred a citizen suit under RCRA and CERCLA for monetary and injunctive relief relating to contamination allegedly caused by the operation of a state prison.<sup>248</sup> The Sixth Circuit ordered the dismissal of a suit against a state in which the state allegedly violated the CWA by imposing improper conditions on a dredge and fill permit.<sup>249</sup> It also held that a citizen suit against a state natural resource management agency alleging violations of RCRA in polluting state-owned land with lead had to be dismissed.<sup>250</sup> While various strategies exist for circumventing state sovereign immunity to suits in federal court under the Eleventh Amendment,<sup>251</sup> the reinvigoration of the Eleventh Amendment during the late 1990s may present an obstacle to the private enforcement of federal environmental legislation against the states.

#### 4. Summary

The scope of Congress's constitutional authority to adopt legislation to protect the environment and conserve federally owned natural resources is not yet demonstrably narrower as a result of recent court decisions than it was in 1970. Nevertheless, led by the Supreme Court, the courts have recognized constraints on federal

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247. *Natural Res. Def. Council, Inc. v. Cal. Dep't of Transp.*, 96 F.3d 420, 427 (9th Cir. 1996). The court also held, however, that claims against state officials could proceed. *See also Williams v. Ala. Dep't of Transp.*, 119 F. Supp. 2d 1249, 1253-58 (M.D. Ala. 2000) (barring citizen suit under RCRA against state Department of Transportation for alleged improper hazardous waste disposal, but not against director of the agency).

248. *Burnette v. Carothers*, 192 F.3d 52, 57 (2d Cir. 1999). *See also Thomas v. FAG Bearings Corp.*, 50 F.3d 502, 507 (8th Cir. 1995) (precluding joinder of state natural resources agency in CERCLA cost recovery action).

249. *Mich. Peat v. EPA*, 175 F.3d 422, 429 (6th Cir. 1999).

250. *Rowlands v. Pointe Mouille Shooting Club*, No. 98-1514, 1999 WL 520110, at \*3 (6th Cir. July 14, 1999).

251. *See, e.g., Cox v. City of Dallas*, 256 F.3d 281, 307-09 (5th Cir. 2001) (allowing suit against state agency to prohibit further open dumping of solid waste in violation of RCRA to proceed); *Comm. to Save Mokelumne River v. East Bay Mun. Util. Dist.*, 13 F.3d 305, 309-10 (9th Cir. 1993) (seeking only prospective equitable relief against further violations of CWA permit program not barred by the Eleventh Amendment); *Ky. Res. Council, Inc. v. EPA*, 304 F. Supp. 2d 920, 929 (W.D. Ky. 2004) (allowing suit against state official to enforce SIP under CAA to proceed on the basis of *Ex parte Young*, 209 U.S. 123, 157 (1908)); *Clean Air Council v. Mallory*, 226 F. Supp. 2d 705, 715 (E.D. Pa. 2002) (holding that suit against state official, rather than against the state itself, was not barred). *See generally* McAllister & Glicksman, "New" Federalism Era, *supra* note 190.

power under both the Commerce Clause and the Tenth Amendment that were not apparent during the first decade of significant federal environmental protection activity. Even when the Constitution itself does not impose such constraints, the courts on occasion have interpreted narrowly the scope of agency regulatory authority under the environmental statutes in order to avoid the need to address constitutional questions that otherwise might have arisen. The prospect of an expansion, even a considerable one, by the courts of these constitutional limits on federal environmental regulatory authority in the future is not outside the realm of possibility. Finally, there is no question that the ability of Congress to authorize private enforcement of federal environmental legislation against state governments has shrunk as a result of the Supreme Court's recent expansive interpretations of the Eleventh Amendment.

*B. Statutory and Regulatory Developments that Reduce the Federal Role in Protecting the Environment*

The judiciary has not been the only branch of the federal government that has placed shackles on the authority of agencies, such as EPA and the federal land management agencies, to pursue environmental protection measures. Congress has contributed to the weakening of federal environmental law in several ways. First, it has loosened some of the obligations that federal agencies proposing actions with potential adverse environmental impacts have to factor those impacts into their decisionmaking processes. Second, it has exempted certain activities by federal agencies from substantive environmental constraints. Third, it has subjected agencies seeking to protect the environment, such as EPA, to a series of new obligations that, at a minimum, strain the agency's ability to fulfill their environmental protection function. The Executive branch has made its own contributions to the weakening of the federal government's ability to protect the environment, primarily by diluting some of the substantive programs designed to protect the public health and to prevent degradation of federal lands and resources.

*1. Activities by the Federal Government*

In recent years, Congress has removed both substantive and procedural constraints on activities that create risks of damage to public health, the environment, or federally owned lands and resources. Some of the statutes it has adopted eliminate or weaken procedural requirements that were designed to make it more difficult for federal agencies to engage in, or authorize others to

engage in, environmentally damaging activities. In the Healthy Forests Restoration Act of 2003,<sup>252</sup> for example, Congress lightened the Forest Service's obligation under NEPA to consider alternatives to "hazardous fuels reduction projects."<sup>253</sup> It also restricted the circumstances in which opponents of those projects may challenge in federal court the Forest Service's decision to authorize timber sales and other forms of "fuels reduction projects."<sup>254</sup> Under a host of other appropriations bills, Congress also has carved out or authorized federal agencies to create categorical exclusions from NEPA environmental assessment responsibilities.<sup>255</sup>

The federal government also has made efforts to remove substantive constraints on its ability to pursue activities potentially harmful to the environment. A prominent example has been the

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252. Pub. L. No. 108-148, 117 Stat. 1887 (codified at 16 U.S.C. §§ 6501-6591 (2000)).

253. 16 U.S.C. § 6514(c)-(d) (Supp. III 2003).

254. *Id.* § 6515(c). See Jesse B. Davis, Comment, *The Healthy Forests Initiative: Unhealthy Policy Choices in Forest and Fire Management*, 34 ENVTL. L. 1209, 1214 (2004) (arguing that the Healthy Forests Restoration Act was "an irresponsible and ill-considered exercise in land management" that was designed to maximize timber harvests, not produce healthier forests). See also Reda M. Dennis-Parks, Comment, *Healthy Forests Restoration Act—Will It Really Protect Homes and Communities?*, 31 ECOLOGY L.Q. 639, 653-57 (2004) (arguing that the Act is incapable of solving the wildfire problem and will instead exacerbate a dangerous situation by allowing timber companies to remove large trees that serve as the last line of defense for communities at risk of wildfires); Loni Radmall, Comment, *President George W. Bush's Forest Policy: Healthy Forest Restoration Act of 2003*, 24 J. LAND RESOURCES & ENVTL. L. 511 (2004) (discussing the history of forest politics and legislation as well as the Healthy Forest Restoration Act and its implications).

255. See, e.g., Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU), Pub. L. No. 109-59, § 6010(a), 119 Stat. 1144, 1877 (2005) (to be codified at 23 U.S.C. § 512 note) (authorizing the Secretary of Transportation to initiate a rulemaking to establish, "to the extent appropriate, categorical exclusions for activities that support the deployment of intelligent transportation infrastructure and systems"); 23 U.S.C.A. § 134(p) (Supp. 2006) (SAFETEA-LU provision exempting transportation improvement programs developed by metropolitan planning organizations from NEPA by declaring that they do not qualify as federal actions); Energy Policy Act of 2005, Pub. L. No. 109-58, § 390, 119 Stat. 594, 747 (to be codified at 42 U.S.C. § 15942) (creating a rebuttable presumption that certain oil and gas exploration or development activities authorized by the Secretaries of Interior or Agriculture under the Mineral Leasing Act qualify for categorical exclusion from NEPA); Pub. L. No. 108-447, § 339, 118 Stat. 2209 (2004) (appropriations bill provision excluding certain decisions by the Secretary of Agriculture to authorize grazing in the national forests from NEPA evaluation requirements, provided that monitoring indicates that current grazing management is meeting, or satisfactorily moving toward, objectives in the applicable land and resource management plan).

consistent efforts by the military and some congressional sponsors to exempt activities related to natural security matters from the environmental laws.<sup>256</sup> Some of these efforts have borne fruit. In a fiscal year 2003 appropriations bill,<sup>257</sup> Congress amended the Migratory Bird Treaty Act<sup>258</sup> by directing the Secretary of the Interior, with the concurrence of the Secretary of Defense, to issue regulations that allow the “incidental taking” of migratory birds during “training and operations of the Armed Forces that relate to combat” and during the testing of military equipment and weapons.<sup>259</sup> Congress also has resorted to appropriations legislation to water down the application of the ESA to certain military activities<sup>260</sup> and to narrow the activities deemed to constitute improper harassment of animals under the Marine Mammal Protection Act for “military readiness activities.”<sup>261</sup>

## 2. *Federal Regulation of Private Activities*

The federal government, acting through Congress, the President, and federal agencies, also has subjected environmental agencies to additional procedures that tend to make it more difficult

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256. One such initiative, sponsored by the Pentagon, was the Readiness and Range Preservation Initiative, which included proposals to amend the CAA, RCRA, CERCLA, the ESA, the Marine Mammal Protection Act, and the Migratory Bird Treaty Act to exempt certain military activities from those laws. See Stephen Dycus, *Osama's Submarine: National Security and Environmental Protection After 9/11*, 30 WM. & MARY ENVTL. L. & POL'Y REV. 1, 1-2 (2005). See also Ralph Vartabedian, *How Environmentalists Lost the Battle over TCE*, L.A. TIMES, Mar. 29, 2006, at A1 (detailing successful efforts by the Pentagon, through orchestration of “a withering attack” by the military and its contractors, to derail effort by EPA to limit exposure to trichloroethylene, a potential carcinogen that contaminates more than 1000 military properties nationwide).

257. Bob Stump National Defense Authorization Act for Fiscal Year 2003, Pub. L. No. 107-314, § 315, 116 Stat. 2458, 2509 (2002) (codified at 16 U.S.C. § 703 note (Supp. III 2003)).

258. 16 U.S.C. §§ 703-11 (2000).

259. Bob Stump National Defense Authorization Act for Fiscal Year 2003, Pub. L. No. 107-314, §§ 315(d), (f)(1), 116 Stat. 2458, 2509-10 (2002) (codified at 16 U.S.C. § 703 (Supp. III 2003)).

260. See, e.g., National Defense Authorization Act for Fiscal Year 2004, Pub. L. No. 108-136, § 318(a)(3), 117 Stat. 1433 (2003) (codified at 16 U.S.C. § 1533(a)(3)(B)(i) (Supp. III 2003)) (exempting certain areas subject to natural resources management plan from designation as critical habitat under the ESA).

261. The same statute also authorized increased incidental taking of marine mammals in the course of such military activities. National Defense Authorization Act for Fiscal Year 2004, Pub. L. No. 108-136, § 319(a), (c), 117 Stat. 1392, 1433-35 (2003) (amending 16 U.S.C. § 1362(18)).

for those agencies to abate threats to health, the environment, or federal lands and resources created by activities in the private sector. Some of this legislation applies across the board in a variety of regulatory contexts, while other legislation is more program-specific.

Both Congress and the Executive Branch have imposed on federal regulatory agencies a series of procedural mandates whose practical effect has been to make it more burdensome for the government to restrict environmentally damaging activity engaged in by others. As Tom McGarity has explained, beginning in the 1980s, the rulemaking process that provides the principal tool by which agencies such as EPA regulate environmentally damaging activities became “increasingly rigid and burdensome” through the adoption of “[a]n assortment of analytical requirements” such as cost-benefit analysis.<sup>262</sup> This phenomenon, dubbed the “ossification” of the rulemaking process by former EPA General Counsel E. Donald Elliott, has been exacerbated by “evolving judicial doctrines [that] have obliged agencies to take greater pains to ensure that the technical bases for rules are capable of withstanding judicial scrutiny.”<sup>263</sup> One example of a statute that subjects federal agencies to analytical requirements as a prerequisite to the adoption of regulation is the Unfunded Mandates Reform Act of 1995 (“UMRA”).<sup>264</sup> Under the UMRA, each federal agency, unless otherwise prohibited by another statute, must assess the effects of its regulatory actions on state, local, and tribal governments and the private sector. Before it issues regulations that include any “federal mandate” that may result in the expenditure by governments in the aggregate or by the private sector of one-hundred million or more in any one year, the agency must prepare a written statement that includes a qualitative and quantitative assessment of the anticipated costs and benefits of the mandate.<sup>265</sup> It also must estimate the future compliance costs of the mandate and any disproportionate budgetary effects on particular regions or on

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262. Thomas O. McGarity, *Some Thoughts on “Deossifying” the Rulemaking Process*, 41 DUKE L.J. 1385, 1385 (1992) [hereinafter McGarity, *Deossifying*]. See also Thomas O. McGarity, *The Courts and the Ossification of Rulemaking: A Response to Professor Seidenfeld*, 75 TEX. L. REV. 525, 530 (1997) (arguing that it is unlikely “that the judicial contribution to the ossification problem can be successfully brought under control by ‘operational’ modifications of the hard look doctrine”).

263. McGarity, *Deossifying*, *supra* note 262, at 1385.

264. Pub. L. No. 104-4, 109 Stat. 48 (1995). For criticism of the assumptions underlying adoption of the Unfunded Mandates Reform Act, see David A. Dana, *The Case for Unfunded Environmental Mandates*, 69 S. CAL. L. REV. 1 (1995).

265. 2 U.S.C. § 1532(a) (2000).

particular segments of the private sector, and it must estimate the effect of the rule on the national economy if it is feasible to do so.<sup>266</sup> The UMRA also requires that, before issuing a rule for which a written statement is required, the agency identify and consider a reasonable number of regulatory alternatives. It must then select from among them “the least costly, most cost-effective or least burdensome alternative that achieves the objectives of the rule” for state and local governments and the private sector.<sup>267</sup>

Congress has imposed a host of other analytical obligations on federal agencies in statutes such as the Regulatory Flexibility Act,<sup>268</sup> the Small Business Regulatory Enforcement Fairness Act,<sup>269</sup> and the Paperwork Reduction Act.<sup>270</sup> The most recently adopted of these statutory mechanisms is the Information Quality Act (“IQA”), also known as the Data Quality Act.<sup>271</sup> Tucked away in a lengthy appropriations bill enacted in 2000, the IQA requires the Office of Management and Budget (“OMB”) to issue guidelines that provide “policy and procedural guidance to Federal agencies for ensuring and maximizing the quality, objectivity, utility, and integrity of information (including statistical information) disseminated by Federal agencies.”<sup>272</sup> The IQA has provided the opponents of environmental regulation with a tool to delay its implementation and to censor information with which they disagree or which might put their activities in a bad light. Regulated entities have used the IQA to challenge environmentally protective decisions by federal agencies in the face of scientific uncertainty by characterizing those decisions as based on “bad science.”<sup>273</sup> As Professor Lisa Heinzerling

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266. *Id.* § 1532(a)(3)-(4).

267. *Id.* § 1535(a).

268. 5 U.S.C. §§ 601-612 (2000).

269. Pub. L. No. 104-121, 110 Stat. 857 (1996).

270. 44 U.S.C. §§ 3501-3520 (2000).

271. Pub. L. No. 106-554, § 515, 114 Stat. 2763, 2763A-153 to 154 (2000) (codified at 44 U.S.C. § 3516 note (2000)).

272. 44 U.S.C. § 3516 note (2000).

273. For criticism of the IQA, see generally Sidney A. Shapiro, *OMB's Dubious Peer Review Procedures*, 34 ENVTL. L. REP. 10064 (2004) (arguing that the IQA creates a procedural apparatus that is likely to stifle the government's efforts to provide useful information to the public about their safety and health risks and about risks to the environment); Sidney Shapiro, *The Case Against the IQA*, 22 ENVTL. F. 4, July/August 2005, at 26 (“[I]ndustry has used [the IQA] to obstruct, to avoid, and to challenge environmental, health, and safety regulations”); Sidney A. Shapiro, *The Information Quality Act and Environmental Protection: The Perils of Reform by Appropriations Rider*, 28 WM. & MARY ENVTL. L. & POL'Y REV. 339, 340-41 (2004) (arguing that the failure of Congress to define the scope of the rider invites special interests to “seek interpretations that inhibit the government's ability to protect individuals and

has asserted, the IQA “threatens to divert precious agency resources, requiring them to respond to petty and self-interested complaints from the industries regulated by the agencies.”<sup>274</sup>

The ossification of the regulatory process that has slowed down the output by federal agencies of environmentally protective regulations and other measures is a product of actions by the Executive Branch as well as Congress. Beginning early in Ronald Reagan’s administration, various Presidents have signed Executive Orders requiring agencies to engage in cost-benefit analysis as a prerequisite to issuing regulations with significant impacts on the economy.<sup>275</sup> Other Executive Orders have required federal agencies engaged in environmental protection initiatives to avoid regulatory actions that would amount to takings of private property without just compensation<sup>276</sup> and consider principles of federalism in regulatory decisionmaking processes,<sup>277</sup> among other things. Regulations, directives, policy statements, and the like issued by the OMB have elaborated on these and related requirements,<sup>278</sup> often making the statutory or presidentially imposed requirements even more onerous.<sup>279</sup>

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the environment”); Wendy E. Wagner, *Importing Daubert to Administrative Agencies Through the Information Quality Act*, 12 J.L. & POL’Y 589, 591 (2004) (discussing the impact and significance of the IQA on administrative agencies, particularly the Environmental Protection Agency); Stephen M. Johnson, *Ruminations on Dissemination: Limits on Administrative and Judicial Review Under the Information Quality Act*, 55 CATH. U. L. REV. 59, 61 (2005) (“[W]hether the [IQA] applies to rulemaking and whether judicial review is available to ensure compliance with the Act.”); Michelle V. Lacko, Comment, *The Data Quality Act: Prologue to a Farce or a Tragedy?*, 53 EMORY L.J. 305, 306 (2004) (discussing the possible repercussions of the IQA).

274. Lisa Heinzerling, *Risk and the Law: Risking It All*, 57 ALA. L. REV. 103, 111 (2005). Cf. Richard J. Lazarus, *Congressional Descent: The Demise of Deliberative Democracy in Environmental Law*, 94 GEO. L.J. 619, 648 (2006) (arguing that the IQA may play an “entirely positive” role “by promoting a more rational, coherent use of science” or “paralyze agency regulation efforts by encumbering the use of science.”).

275. See, e.g., Exec. Order No. 12,291, 3 C.F.R. 127 (1982), *reprinted in* 5 U.S.C. § 601 note (2000); Exec. Order No. 12,498, 3 C.F.R. 323 (1986), *reprinted in* 5 U.S.C. § 601 note (2000); Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (Sept. 30, 1993), *reprinted in* 5 U.S.C. § 601 note (2000).

276. Exec. Order No. 12,630, 53 Fed. Reg. 8859 (Mar. 18, 1988).

277. Exec. Order No. 12,612, 52 Fed. Reg. 41,685 (Oct. 30, 1987).

278. See, e.g., RICHARD J. LAZARUS, *THE MAKING OF ENVIRONMENTAL LAW* 241-42 (2004) (describing the OMB’s “aggressive” efforts under the George W. Bush Administration to accomplish regulatory reform by requiring greater use of techniques such as risk analysis).

279. See, e.g., OFFICE OF MGMT. & BUDGET, CIRCULAR A-4, 9-10 (2003), *available at* <http://www.whitehouse.gov/omb/circulars/a004/a-4.pdf> (providing guidance to federal agencies on how to comply with cost-benefit and other

Even assuming that each of these analytical requirements was adopted as part of a sincere effort to improve the federal government's capacity to make well-informed and rational decisions about the environment<sup>280</sup>—a premise with which not all observers would agree<sup>281</sup>—the application of this long series of analytical requirements has almost certainly played a role in slowing down if not stymieing, the efforts of federal agencies to pursue protective environmental initiatives.<sup>282</sup> By one account, a single agency could be subject, in theory, to some 120 different analytical steps before it may make a decision on a regulatory matter that bears on environmental protection.<sup>283</sup> It is far from clear that the benefits of improved regulation that may be attributable to the use of these analytical techniques exceeds the cost in terms of lost lives, illnesses exacerbated, and natural resources destroyed as a result of the delays in regulation caused by the statutory and regulatory analytical requirements described here.<sup>284</sup>

The federal government, particularly during the George W. Bush Administration, also has taken steps to weaken federal efforts to protect the environment from pollution and protect the integrity of federal lands and resources from the adverse effects of mineral extraction, timber harvesting, and other potentially detrimental uses. Some of these steps took the form of federal legislation. The Energy Policy Act of 2005, for example, exempted hydraulic fracturing, a process used to enhance the production of coal bed methane, from the SDWA's underground injection controls.<sup>285</sup> The same statute expanded the scope of an exemption for certain oil and

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analytical requirements and standardizing the manner in which regulatory costs and benefits are computed).

280. *But cf.* Amy Sinden, *In Defense of Absolutes: Combating the Politics of Power in Environmental Law*, 90 IOWA L. REV. 1405, 1408 (2005) (arguing that the use of cost-benefit analysis in the context of attempts to protect endangered species may provide inadequate protection due to the difficulty of placing a value on extinction).

281. *See, e.g.*, FRANK ACKERMAN & LISA HEINZERLING, PRICELESS: ON KNOWING THE PRICE OF EVERYTHING AND THE VALUE OF NOTHING 207-08 (2004) (describing the OMB's "heavy-handed intervention in regulatory matters" and the "partisan nature" of its application of cost-benefit analysis).

282. SIDNEY A. SHAPIRO & ROBERT L. GLICKSMAN, RISK REGULATION AT RISK: RESTORING A PRAGMATIC APPROACH 134 (2003).

283. *See* Mark Seidenfeld, *A Table of Requirements for Federal Administrative Rulemaking*, 27 FLA. ST. U. L. REV. 533, 536-37 (2000).

284. SHAPIRO & GLICKSMAN, *supra* note 282, at 138.

285. Energy Policy Act of 2005, Pub. L. No. 109-58, § 322, 119 Stat. 594, 694 (to be codified at 42 U.S.C. § 300h(d)(1)(B)(ii)).

gas drilling activities from the CWA's storm water permit requirements.<sup>286</sup>

Other steps that weaken federal environmental protection law have taken the form of Executive Branch decisions. According to one long-time environmental litigator, “[f]rom day one, the Bush Administration has set about the task of systematically and unilaterally dismantling over thirty years of environmental and natural resources law.”<sup>287</sup> The list of examples is lengthy. In the pollution control arena, the Bush Administration has sought to weaken regulatory restrictions that apply to activities that generate both air<sup>288</sup> and water pollution.<sup>289</sup>

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286. Energy Policy Act of 2005, Pub. L. No. 109-58, § 323, 119 Stat. 594, 694 (to be codified at 33 U.S.C. § 1362(24)); 33 U.S.C. § 1342(l)(2) (2000). *See also* Amendments to the National Pollutant Discharge Elimination System (NPDES) Regulations for Storm Water Discharges Associated With Oil and Gas Exploration, Production, Processing, or Treatment Operations, or Transmission Facilities, Notice of Proposed Rulemaking, 71 Fed. Reg. 894 (Jan. 6, 2006) (proposal to implement the statute).

287. Patrick Parenteau, *Anything Industry Wants: Environmental Policy Under Bush II*, 14 DUKE ENVTL. L. & POL'Y F. 363, 363 (2004). *See also* Robin Kundis Craig, *The Bush Administration and the Environment: An Overview and Introduction*, 25 W. NEW ENG. L. REV. 1, 11-22 (2003) (providing a lengthy list of Bush Administration decisions criticized by environmental groups). *But see* Victoria Sutton, *The George W. Bush Administration and the Environment*, 25 W. NEW ENG. L. REV. 221, 222-23 (2003) (raising the possibility that the Bush Administration's environmental policies represent “concerted efforts designed to provide faster and more efficient movements toward environmental protection” and contending that those policies seek “to implement new regulatory mechanisms that will lead to environmental progress, environmental enforcement, and ultimately a more realistic and more functional approach to environmental protection”).

288. *See, e.g.*, *New York v. EPA*, 443 F.3d 880, 890 (D.C. Cir. 2006) (vacating EPA regulations significantly expanding pre-existing exemption from the CAA's new source review (NSR) program for new and modified major stationary sources); *New York v. EPA*, 413 F.3d 3, 44 (D.C. Cir. 2005) (upholding in part and vacating in part other revisions to NSR program); Lisa Heinzerling & Rena I. Steinzor, *A Perfect Storm: Mercury and the Bush Administration, Part I*, 34 ENVTL. L. REP. 10297 (2004) (describing EPA regulations that create the risk of dangerously high levels of mercury); Lisa Heinzerling & Rena I. Steinzor, *A Perfect Storm: Mercury and the Bush Administration, Part II*, 34 ENVTL. L. REP. 10485 (2004) (same).

289. *See, e.g.*, *Arsenic and Old Rules: Bush Rolls Back Clinton Arsenic Standard*, ABC News.com, Mar. 21, 2001, at [http://abcnews.go.com/sections/US/DailyNews/bush\\_arsenic010321.html](http://abcnews.go.com/sections/US/DailyNews/bush_arsenic010321.html) (last visited June 2, 2006) (discussing efforts—ultimately unsuccessful—to increase limits on presence of arsenic in drinking water); National Primary Drinking Water Regulations; Arsenic and Clarifications to Compliance and New Source Contaminants Monitoring: Delay of Effective Date: Final Rule, 66 Fed. Reg. 28,342 (May 22, 2001) (delaying effective date of arsenic regulations issued by the Clinton

In the federal lands context, the Administration has displayed a hostility for preservation of federal lands, such as wilderness areas, and an affinity for easing access to those lands for resource extractive purposes, such as oil and gas leasing and timber harvesting.<sup>290</sup> The National Forest Service, for example, revoked regulations it had issued at the end of the Clinton Administration<sup>291</sup> that prohibited virtually all road construction and timber harvesting in roadless areas of the national forests. The Bush Administration's regulations for management of roadless areas in the national forests, adopted in 2005,<sup>292</sup> create a process that allows state governors to petition the Secretary of Agriculture for the imposition of protective measures on the use of roadless areas. Because the regulations contain no criteria whatsoever for assessment of state petitions,<sup>293</sup> the regulations appear to afford the Secretary unconstrained discretion to veto state efforts to limit road construction, timber harvesting, and other activities that might inflict damage on roadless areas of the national forests.<sup>294</sup> Similarly, changes in the Forest Service's planning regulations adopted during the Bush Administration have the potential to weaken the agency's ability to protect plant and animal diversity, as required by the National Forest Management Act.<sup>295</sup> The Bush Administration also

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Administration); Withdrawal of Revisions to the Water Quality Planning and Management Regulation and Revisions to the National Pollutant Discharge Elimination System Program in Support of Revisions to the Water Quality Planning and Management Regulation: Final Rule, 68 Fed. Reg. 13,608 (Mar. 19, 2003) (withdrawing Clinton Administration regulations governing water quality planning under the CWA).

290. See generally John D. Leshy, *Natural Resources Policy in the Bush (II) Administration: An Outsider's Somewhat Jaundiced Assessment*, 14 DUKE ENVTL. L. & POL'Y F. 347, 347 (2004) (attempting to "capture (and illustrate with examples) the principle themes" reflected in the natural resource policies of the Bush Administration).

291. Special Areas; Roadless Area Conservation: Final Rule, 66 Fed. Reg. 3244, 3246 (Jan. 12, 2001).

292. Special Areas; State Petitions for Inventoried Roadless Area Management: Final Rule, 70 Fed. Reg. 25,654 (May 13, 2005).

293. See *USDA Responds to Wyoming Inquiry on Roadless Areas*, GREENWIRE, Sept. 30, 2005, at 15 (describing a letter from the Agriculture Undersecretary Mark Rey to Wyoming Governor Dave Freudenthal, in which Rey stated that the 2005 regulations contain no standards for evaluation of state roadless area management petitions).

294. See generally Robert L. Glicksman, *Traveling in Opposite Directions: Roadless Area Management Under the Clinton and Bush Administrations*, 34 ENVTL. L. 1143 (2004) (comparing the approaches of the two administrations to roadless area management and criticizing the Bush Administration's approach as insufficiently protective).

295. 16 U.S.C. § 1604(g)(3)(B) (2000). See generally Robert L. Glicksman,

has supported efforts to reduce the degree to which NEPA constrains the ability of federal agencies to engage in or authorize activities with potentially damaging environmental effects.<sup>296</sup>

The actions described above illustrate the procedural and substantive shackles that Congress and the Executive Branch have seen fit in recent years to place on federal agencies whose mission it is to protect human health and the environment (such as EPA). They also illustrate the removal of constraints on agencies whose responsibility it is to avoid taking actions that damage the environment (including all federal agencies subject to NEPA and the ESA). The inadequacy of the funding made available to environmental agencies by Congress and the President also has contributed, albeit more subtly, to the federal government's reduced power to protect the environment. During the Bush Administration, for example, EPA has experienced significant reductions in its budget.<sup>297</sup> One prominent example of the need for environmental agencies to make due with less money is the refusal of Congress and the President to reauthorize the corporate tax mechanisms previously used to provide funding for remediation of properties contaminated with hazardous substances following the expiration of those taxes in 1995.<sup>298</sup> Because federal and state agencies share responsibility for protecting the environment under many of the federal environmental statutes, a reduced federal presence might provide opportunities for enhanced state activity. At the same time,

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*Bridging Data Gaps Through Modeling and Evaluation of Surrogates: Use of the Best Available Science to Protect Biological Diversity Under the National Forest Management Act* (forthcoming).

296. See, e.g., Margaret Kriz, *Bush's Quiet Plan*, 34 NAT'L J. 3472, 3472, Nov. 23, 2002 ("The Bush Administration is quietly but systematically working to make the 32-year-old environmental law that's considered the Magna Carta of national environmental policy less of an impediment to development.").

297. See, e.g., Robert H. Cutting & Lawrence B. Cahoon, *Thinking Outside the Box: Property Rights as a Key to Environmental Protection*, 22 PACE ENVTL. L. REV. 55, 62 (2005); Clifford Rechtschaffen, *Enforcing the Clean Water Act in the Twenty-First Century: Harnessing the Power of the Public Spotlight*, 55 ALA. L. REV. 775, 790 (2004); Clifford Rechtschaffen, *Promoting Pragmatic Risk Regulation: Is Enforcement Discretion the Answer?*, 52 U. KAN. L. REV. 1327, 1347-48 (2004).

298. See Amy Pilat McMorrow, Comment, *CERCLA Liability Redefined: An Analysis of the Small Business Liability Relief and Brownfields Revitalization Act and Its Impact on State Voluntary Cleanup Programs*, 20 GA. ST. U. L. REV. 1087, 1092 (2004) (describing CERCLA's liability scheme). See also William W. Buzbee et al., *Regulatory Underkill: The Bush Administration's Insidious Dismantling of Public Health and Environmental Protections*, Center for Progressive Regulation White Paper 503 (February 2005), at 13-15, available at [http://www.progressivereform.org/articles/Underkill\\_503.pdf](http://www.progressivereform.org/articles/Underkill_503.pdf) (explaining the slow down in Superfund cleanups under the Bush Administration).

however, that Congress and the President have reduced funds for federal agencies to use in protecting the environment, they have made less money available to the states to implement their responsibilities under the environmental cooperative federalism statutes.<sup>299</sup> Indeed, the funding cuts have been so extensive that some states have considered giving up their right to administer federal regulatory programs under laws such as the CAA, the CWA, and RCRA, relying instead on EPA to fulfill the regulatory responsibilities that the states can no longer afford.<sup>300</sup>

Finally, the efficacy of federal regulatory limitations on potentially damaging activities has been impaired by the federal government's inability or unwillingness to enforce regulatory requirements rigorously. Funding cuts have hindered EPA's capacity to pursue alleged violations of the pollution control statutes in recent years.<sup>301</sup> In addition, EPA, as a matter of policy, refused to seek sanctions for certain categories of violations. The best example is the agency's decision under the Bush Administration to short-circuit a vigorous enforcement effort undertaken during the Clinton Administration against alleged violators of the CAA's new source review requirements.<sup>302</sup> In the natural resource management context, the Bush Administration has settled lawsuits against the United States on terms favorable to extractive industries in which commodity interests have challenged restrictions on their ability to use the federal lands and resources.<sup>303</sup>

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299. See Percival, *supra* note 14, at 1175 ("While the federal government increasingly has delegated responsibility for the operation of environmental programs to the states, federal financial assistance for administering these programs has been reduced sharply and most states have failed to replace lost federal funds for environmental programs with funds of their own."); Manu Raju, *Johnson Pledges to Review State Governments' Regulatory Costs*, INSIDE EPA, Aug. 5, 2005, 1, 8 ("States say they have borne the brunt of the funding cuts in EPA appropriations bills in recent years."); *Congress Faces Growing Pressure to Boost EPA Funds for PM Monitors*, INSIDE EPA, Mar. 17, 2006, at 14 (describing proposed cuts by the Bush Administration in funds for state and local governments to monitor air pollution).

300. See *Inhofe Concerned over State Threats to Return Programs to EPA*, INSIDE EPA, Mar. 17, 2006, at 10.

301. See Rechtschaffen, *Promoting Regulation*, *supra* note 297, at 1347.

302. See, e.g., Craig, *supra* note 287, at 14; R.T. Pierrehumbert, *Climate Change: A Catastrophe in Slow Motion*, 6 CHI. J. INT'L L. 573, 589 & n.38 (2006).

303. See generally Michael C. Blumm, *The Bush Administration's Sweetheart Settlement Policy: A Trojan Horse Strategy for Advancing Commodity Production on Public Lands*, 34 ENVTL. L. REP. 10397 (2004) (describing the Bush Administration's "get sued and supply a sweetheart settlement" policy).

*C. The Anemic Federal Leadership in Environmental and Natural Resource Protection*

The federal government embarked in 1970 on a mission to protect public health and the environment from pollution and to preserve the rich stock of public natural resources so that they would be available for use by future generations of Americans. In both the pollution control and federal lands management statutes, Congress vested federal agencies with ample authority to move the nation toward these goals. In recent years, through a combination of actions by all three branches of the federal government, this authority has been significantly constrained, both legally and practically.

The federal courts, led by the Supreme Court, have interpreted the Constitution in ways that narrow the scope of federal power to protect the environment, even if only at the margins. Even when they have not invalidated federal statutes or regulations on constitutional grounds, they have relied on doubts about the constitutional validity of the exercise of federal power to interpret the scope of environmental legislation narrowly.

Congress and the Executive Branch also have contributed to the decline in federal authority to protect the environment. The assault on federal power has come from many directions. Congress has narrowed the responsibilities of some federal agencies to consider the adverse environmental implications of their decisions by creating categorical exclusions from NEPA. It also has exempted some federal activities, primarily military activities, from pre-existing statutory constraints on their ability to pollute. In addition, Congress has made it more difficult for federal agencies, such as EPA, to restrict environmentally damaging conduct by others, in part by burying those agencies under a mountain of analytical paperwork and requiring agencies to employ analytical techniques that are inherently inimical to the protection of environmental values that are difficult to quantify. The Bush Administration has pursued a series of initiatives, in both the pollution and federal lands contexts, that make it more difficult for the federal government to prevent environmental harm, including the adoption of weaker regulations, the reduction of funds for environmental protection purposes, and a failure to enforce environmental laws and regulations against alleged violators.

The combined effect of these developments has been to leave a gap in the nation's environmental efforts. One way to fill that gap would be for state and local governments to enhance their role in implementing the shared responsibility of the federal and state governments under cooperative federalism regimes to protect the environment. In fact, in many instances, the states and localities

have done just that. As the next Part indicates, however, the federal government has not been satisfied with a reduction in its own efforts to protect the environment. Instead, all three branches of the federal government have contributed to a reduction of the capacity of these other levels of government to pick up the federal government's slack.

#### IV. THE BATTLE TO FILL THE VOID WITH INCREASED STATE AND LOCAL ACTIVITY

The recent reduction in federal authority to take actions to protect the environment that has resulted from the decisions of the federal courts, Congress, and the Executive Branch has created a partial vacuum. Some state and local governments, dissatisfied with the level of environmental protection being provided at the federal level, have taken steps to supplement federal environmental protection measures with their own initiatives. To some, this increase in state and local activity may have come as a surprise, given the conventional wisdom that states engaged in a race to the bottom to attract business have strong disincentives to adopt environmental protection measures that are more stringent than minimum federal requirements. Part.IV.A briefly explores why the states and localities may have engaged in a flurry of environmental protection activity and provides examples of that activity. Part.IV.B analyzes actions by all three branches of the federal government, as well as by the states themselves, that have the potential to frustrate state and local environmental protection measures that go beyond minimum federal requirements.

##### A. *Innovative State or Local Efforts to Move Beyond Federal Law*

Although state and local governments have the opportunity to serve as "laboratories" for social and economic experimentation,<sup>304</sup> Congress adopted the federal environmental laws, at least in part, based on the belief that those levels of government had neither the ability nor the inclination to provide adequate levels of environmental protection. Indeed, Congress relied on the states' past failures as a justification for shifting the federal government's role from a mere provider of technical and financial assistance to that of the primary body responsible for the establishment of environmental policy goals and the legal frameworks necessary to achieve them.<sup>305</sup> With the partial withdrawal of the federal government from this latter role, the states and local governments

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304. See *supra* note 9 and accompanying text.

305. See *supra* notes 77-90 and accompanying text.

have reemerged as vehicles for the adoption of ambitious and innovative environmental programs.

1. *The Reasons for State and Local Environmental Activism*

Various explanations have been offered for recent state environmental activism. Professor Buzbee asserts that the federal government long had the advantages of being the “first mover” in the development of environmental law and policy, including the development of expertise and the accumulation of qualified and dedicated employees.<sup>306</sup> Under the cooperative federalism programs that Congress began to establish in the 1970s, however, the states gradually closed this “institutional competence” gap in the course of exercising delegated authority to engage in activities such as crafting and enforcing SIPs under the CAA and administering the NPDES permit program under the CWA.<sup>307</sup> According to Professor Buzbee, increasing bureaucratization and inflexibility on the part of federal regulators provided further opportunities for the states to make inroads into the federal government’s previous predominance.<sup>308</sup>

But why were the states even interested in challenging the federal government’s leadership role? In some instances, state initiatives have been the product of environmental activism, ideological commitment by politicians, and the responsiveness of state politicians to their constituents’ demands for greater environmental protection.<sup>309</sup> State and local governments may

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306. Buzbee, *supra* note 10, at 35.

307. *Id.* at 39. Professor Buzbee has referred to the “learning function” that allows federal and state regulators to learn from each other. Buzbee, *supra* note 85, at 122. *See also* Kuehn, *supra* note 88, at 2379 (discussing the development of strong federal programs as models for the states, coupled with past technical and financial assistance from the federal government, as explanations for increased state environmental protection activity). According to Professor Adler, the states today “spend more money on environmental matters and employ more environmental bureaucrats than does the federal government.” Adler, *supra* note 157, at 628. Adler suggests that the economies of scale argument in favor of federal environmental regulation is no longer persuasive because, among other things, “[r]esearch on environmental issues has proliferated and is easily available through research libraries and the Internet,” and because the local and regional nature of many environmental problems requires local knowledge and expertise to solve them. *Id.* at 628-29.

308. Buzbee, *supra* note 10, at 41-42.

309. *Id.* at 48-49. Professor Buzbee has argued, however, that “[p]articuliar moments of political zeal or innovation may reveal little” and that “[r]ecent occasional state and local activism during a period of Republican ascendancy and arguable environmental retrenchment cannot establish that a federal environmental role is unnecessary.” Buzbee, *supra* note 85, at 113.

pursue environmental protection initiatives as a means of attracting new residents who place a high value on environmental amenities.<sup>310</sup> In other cases, however, state initiatives “cannot be assumed to reflect independent or durable state commitment to environmental protection.”<sup>311</sup> A state may be interested in establishing programs for the remediation of brownfields sites, for example, if the existence of such programs qualifies the state for additional federal financial assistance under statutes such as CERCLA.<sup>312</sup> Similarly, state and local governments may support environmental requirements in areas such as hazardous waste cleanups as providing opportunities to accelerate the placement of low-value, contaminated sites back on the local real estate tax rolls.<sup>313</sup> Those results are likely to be of less concern to federal officials.<sup>314</sup>

Still another incentive for the adoption of stringent state environmental protection measures is the avoidance of penalties for failing to meet the requirements of federal legislation.<sup>315</sup> Regulated entities may support state environmental initiatives if they perceive their adoption as likely to minimize federal intervention and believe that the states are more likely to provide flexible regulatory treatment in the form of variances, waivers, deadline extensions, and the like. Politicians may support such initiatives if they are convinced that state regulators will be more receptive to local conditions and that they can take political credit for adopting controls that would have been imposed by the federal government in the absence of state action.<sup>316</sup> Finally, state and local entities may adopt environmental protection measures in the hopes of forestalling the imposition of more rigorous federal controls.<sup>317</sup>

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310. See Barry G. Rabe et al., *State Competition as a Source Driving Climate Change Mitigation*, 14 N.Y.U. ENVTL. L.J. 1, 20-21 (2005).

311. Buzbee, *supra* note 10, at 55.

312. *Id.* at 50-51. David A. Dana, *State Brownfields Programs as Laboratories of Democracy?*, 14 N.Y.U. ENVTL. L.J. 86 (2005), argued that state brownfields programs amount to a “lost opportunity . . . to empirically test different approaches to real property remediation.” *Id.* at 86.

313. *Cf.* Rabe et al., *supra* note 310, at 18 (arguing that states may pursue programs to restrict emissions of greenhouse gases as a way of inducing greater use of renewable resources and providing protection against energy price fluctuations).

314. Buzbee, *supra* note 10, at 54.

315. *Id.* at 51 (citing as an example the sanctions states face for failure to meet the NAAQS under the CAA).

316. *Id.* at 52-53. Professor Buzbee also posits that the natural tendency of bureaucracies to expand their budgets and turfs may be responsible for state environmental activism. *Id.* at 53-54.

317. See Rabe et al., *supra* note 310, at 19.

## 2. *Examples of State and Local Environmental Activism*

The potential for state and local governments to serve as “laboratories” for experimentation with innovative environmental protection policies has perhaps never been as close to realization as it has during the last several years.<sup>318</sup> Along many fronts, the states and localities have provided concrete manifestations of their dissatisfaction with the efficacy of federal environmental protection measures. These governments have sought through legislation, administrative regulation, and litigation to supplement federal environmental protection laws with their own more extensive or rigorous endeavors. Most of these efforts have been geared to restrict harm to human health and the environment caused by pollution.

State and local governments have made efforts to move beyond federal regulatory requirements through the adoption of legislation, the issuance of environmental regulations by state environmental agencies, and the pursuit of litigation by state attorneys general and similar officials.<sup>319</sup> The most prominent examples of such efforts relate to global climate change.<sup>320</sup> The United States is not a signatory to the Kyoto Protocol, the most significant international effort to curb greenhouse gas emissions that contribute to global warming.<sup>321</sup> Carbon dioxide is not currently regulated by EPA under the CAA.<sup>322</sup> State and local governments, however, have taken a variety of actions to address the potential adverse climatic changes that may result from continued greenhouse gas emissions.

One of the most ambitious of the recent state efforts to combat global warming has been the one involving a group of northeastern and mid-Atlantic states. These states signed a Memorandum of

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318. See, e.g., David L. Markell & Martha F. Davis, *Introduction to A Conversation on Federalism and the States: The Balancing Act of Devolution*, 64 ALB. L. REV. 1087, 1087 (2001) (contending that, in recent years, the pendulum of environmental law and policymaking power “has swung decisively back toward the states”); Buzbee, *supra* note 85, at 116 (arguing that “underkill” by federal regulators “creates opportunities for . . . state actors (such as state attorneys general) to supplement federal enforcement or challenge the legal adequacy of the newly relaxed regulatory environment”).

319. See generally *Symposium: The Role of State Attorneys General in National Environmental Policy*, 30 COLUM. J. ENVTL. L. 335 (2005).

320. See generally John C. Dernbach, *Introduction to Symposium, Facing Climate Change: Opportunities and Tools for States*, 14 WIDENER L.J. 1 (2004).

321. GLICKSMAN ET AL., *supra* note 63, at 488.

322. See, e.g., *Massachusetts v. EPA*, 415 F.3d 50 (D.C. Cir. 2005), *rehearing en banc denied*, 433 F.3d 66 (D.C. Cir. 2005) (upholding EPA’s refusal to regulate emissions of greenhouse gases from new motor vehicles under the Clean Air Act, 42 U.S.C. § 7521(a)(1) (2000)), *cert. granted*, 126 S. Ct. 2960 (2006).

Agreement in December 2005 that committed them to develop a regional cap-and-trade program, known as the Regional Greenhouse Gas Initiative ("RGGI"), to help control Carbon dioxide emissions from power plants.<sup>323</sup> Shortly thereafter, the states issued a draft "model rule."<sup>324</sup> The RGGI program is not the only regional global warming initiative. Legislators from six Midwestern states—Illinois, Iowa, Michigan, Minnesota, Ohio, and Wisconsin—also have initiated a regional effort to reduce greenhouse gas emissions.<sup>325</sup>

Other state actions have been unilateral in nature. At least seven states, led by California, have adopted regulations requiring reductions in greenhouse gas emissions from automobiles.<sup>326</sup> In

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323. See Regional Greenhouse Gas Initiative, An Initiative of the Northeast & Mid-Atlantic States of the U.S., <http://www.rggi.org/> (last visited June 2, 2006); Resources for the Future, *Resources for the Future's Work on the Regional Greenhouse Gas Initiative*, [http://www.weathervane.rff.org/solutions\\_and\\_actions/United\\_States/rggi.cfm](http://www.weathervane.rff.org/solutions_and_actions/United_States/rggi.cfm) (last visited June 2, 2006); Dean Scott, *Administration to Focus on Voluntary Efforts as More States Move to Regulate Emissions*, 37 ENV'T REP. S-11, Jan. 20, 2006; Barclay G. Jones, *States Take Lead to Cut Power Plant Emissions*, CHI. SUN TIMES, Mar. 25, 2006, at 16; CONSERVATION LAW FOUND., REGIONAL GREENHOUSE GAS INITIATIVE (2006), available at <http://www.clf.org/programs/cases.asp?id=341>. Some states debated whether to join RGGI or adopt their own greenhouse gas controls. See, e.g., *Maryland Legislators Push Carbon Rules if State Does Not Join Regional System*, ELEC. UTIL. WEEKLY, Jan. 30, 2006, at 16. See generally Kirsten H. Engel, *Mitigating Global Climate Change in the United States: A Regional Approach*, 14 N.Y.U. ENVTL. L.J. 54 (2005) (favoring a regional approach).

324. Lucy Kafanov, *Northeast States Ready to Release Draft Rule on Regional Emissions Pact*, GREENWIRE, at 16, Mar. 22, 2006; Gerald B. Silverman, *Work Nearly Complete on Draft Model Rule for Northeast States to Reduce Emissions*, 37 ENV'T REP. 335, Feb. 17, 2006.

325. *Midwest Lawmakers Move to Reduce Greenhouse Gases*, ELEC. POWER DAILY, Feb. 8, 2006, at 1. The constitutional validity of state cap-and-trade programs has been questioned. See, e.g., Yvonne Gross, Note, *Kyoto, Congress, or Bust: The Constitutional Invalidity of State CO<sub>2</sub> Cap-and-Trade Programs*, 28 T. JEFFERSON L. REV. 205 (2006).

326. See, e.g., Alex Kaplun, *Maine Becomes 6th State to Impose California Emissions Standards*, GREENWIRE, Dec. 1, 2005, at 7; Diane Dietz, *Report: New Rules Will Slash Car Pollution*, THE REGISTER-GUARD, Oct. 5, 2005, at D1 (discussing Oregon regulations); Press Release, State of Rhode Island, Carcieri Announces Plans to Adopt New California Vehicle Emissions Standards (Oct. 13, 2005), available at <http://www.ri.gov/press/view.php?id=682>; Brian Hansen, *State Air Officials, Auto Industry Battle Over Clean Air Act Provision*, INSIDE ENERGY WITH FEDERAL LANDS, Dec. 19, 2005, at 8 (discussing industry's opposition to state adoption of California standards for controlling greenhouse gas emissions); Gerald B. Silverman, *Final Approval Given for California Rules to Cut Greenhouse Gases From Vehicles*, 36 ENV'T REP. 2367, Nov. 18, 2005 (discussing New York rules). A bill was introduced in the California legislature in April 2006 that would require reductions in emissions of all greenhouse gases by twenty-five percent from 1990 levels by 2020. If the bill is adopted,

2005, New Mexico signed onto the Chicago Climate Exchange, which operates the only emission trading market in the United States to induce reductions in greenhouse gas emissions.<sup>327</sup> Illinois has offered farmers and other landowners the opportunity to earn and sell greenhouse gas emission credits by adopting conservation practices that reduce those emissions.<sup>328</sup> The state of Washington ordered a twenty percent reduction in state vehicles' petroleum use.<sup>329</sup> Some local governments also have made efforts to reduce greenhouse gas emissions through actions such as switching to biodiesel fuels to run city-owned vehicles and retrofitting municipal buildings to make them more energy-efficient.<sup>330</sup>

Another area in which the states have pursued more stringent pollution control measures than EPA relates to the control of emissions of other kinds of air pollutants from motor vehicles.<sup>331</sup> The CAA generally prohibits the states or their political subdivisions from adopting any standards for controlling emissions from new motor vehicles or motor vehicle engines.<sup>332</sup> As early as the 1967 version of the CAA, Congress took the position that the existence of a multitude of federal and state standards for controlling auto

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California would become the first state to impose limits on the emission of all greenhouse gases. John Holusha, *California Bill Calls for Cuts in Emissions*, N.Y. TIMES, Apr. 4, 2006, at A19.

327. See Tania Soussan, *N.M. Seeks Energy Policy Blueprint; Governor Touts Renewable Power*, ALBUQUERQUE J., Feb. 24, 2006, at B3. See also Susan Dienenhouse, *Cleaning up the Air One Trade at a Time*, CHI. TRIB., Feb. 23, 2006, at 1 (describing voluntary trading of air pollution reduction credits through the Chicago Climate Exchange). Members of the Exchange reduced their emissions eight percent below the amounts to which they committed themselves in the first two years of the program. Jill Schachner Chanen, *Good Climate for Business*, A.B.A. J., October 2005, at 26.

328. See Charlyn Fargo, *Farmers Can Earn, Sell Greenhouse-Gas Emission Credits*, THE STATE J.-REG., Jan. 27, 2006, at 23; Press Release, Illinois Dep't of Agric., Illinois Launches First State Program To Offer Greenhouse Gas Emissions Credits (Jan. 27, 2006), available at <http://www.agr.state.il.us/newsrel/r0127061.html>.

329. April Reese, *"Patchwork" of State GHG Curbs Emerging in the West*, GREENWIRE, Sept. 21, 2005, at 9.

330. See, e.g., *Berkeley Reports 14-percent Reduction in Carbon Emissions*, GLOBAL WARMING TODAY, Sept. 28, 2005; Patrick Hoge, *Greenhouse Emissions Reduced by Biodiesel*, S.F. CHRONICLE, Sept. 13, 2005, at B3.

331. See generally ALISON CASSADY, U.S. PIRG EDUCATION FUND, *POWER TO PROTECT: THE CRITICAL ROLE STATES PLAY IN CLEANING UP POLLUTION FROM MOBILE SOURCES 10-14* (2005), available at [http://uspirg.org/reports/power\\_toprotect.pdf](http://uspirg.org/reports/power_toprotect.pdf) (describing importance of retention of state authority under the CAA to adopt mobile source controls more stringent than those adopted by EPA).

332. 42 U.S.C. § 7543(a) (2000).

exhaust would result in “increased costs to consumers nationwide, with benefit only to those in one section of the country.”<sup>333</sup> Congress recognized, however, that California faced “unique problems . . . as a result of its climate and topography.”<sup>334</sup> In addition, California took steps in the 1960s to control auto emissions even before the federal government did. These factors induced Congress to allow California to apply to EPA for a waiver of the CAA’s preemption of state emission control standards that differ from the federal standards.<sup>335</sup> In 1977, Congress amended the CAA to allow other states to adopt and enforce motor vehicle emissions controls that are identical to any California standards for which EPA had already granted a waiver.<sup>336</sup> Several states, particularly in the northeast, have taken advantage of this provision by adopting standards equivalent to the more stringent California standards approved by EPA.<sup>337</sup>

Similar state and local efforts to take stronger steps to combat pollution than those the federal government has been willing to take have arisen in a variety of other pollution control contexts.<sup>338</sup> Some states have objected to EPA’s “imprudently” broad proposed exemptions from hazardous waste management requirements under RCRA.<sup>339</sup> Other examples of state rules that either apply to substances not regulated by EPA or impose more stringent controls

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333. H.R. Rep. No. 90-728, at 42 (1967).

334. *Id.*

335. 42 U.S.C. § 7543(b)(1) (2000).

336. *Id.* § 7507.

337. *See, e.g.,* Motor Vehicle Mfrs. Ass’n of U.S. v. N.Y. State Dep’t of Env’tl. Conservation, 79 F.3d 1298, 1307 (2d Cir. 1996) (approving New York standards).

338. The states also have urged EPA and other federal agencies to adopt more stringent controls on polluting activities. *See, e.g.,* Darren Samuelsohn, *State, Local Regulators Challenge EPA’s Soot Cleanup Strategy*, GREENWIRE, Nov. 30, 2005 (discussing attacks by state and local officials on EPA’s proposed fine particulate matter NAAQS under the CAA on the ground that it is insufficiently protective of health); *EPA Draws Criticism For Failure to Regulate PM<sub>2.5</sub> Precursors*, INSIDE EPA, Feb. 10, 2006, at 18 (same); Anthony Lacey, *States Raise Concern over Possible Elimination of Some Air Toxics Rules*, INSIDE EPA, Jan. 13, 2006, at 7 (discussing state concern that EPA might eliminate controls on some industrial emissions of toxic air pollutants).

339. *See* Press Release, Office of the Governor of Illinois, Governor Blagojevich Proposes Aggressive Mercury Emission Controls for Illinois Power Plants (Jan. 5, 2006), available at <http://www.illinois.gov/PressReleases/ShowPressRelease.cfm?SubjectID=3&RecNum=4565>; *Illinois’ Stringent Mercury Proposal May Serve as Model for States*, INSIDE EPA, Jan. 13, 2006, at 17; *States Vow to Limit Adoption of Waste Rule if EPA Backs Broad Waivers*, INSIDE EPA, Dec. 2, 2005, at 1, 4-5. EPA published its proposed rules and solicited comments on them in 2003. Revisions to the Definition of Solid Waste, 68 Fed. Reg. 61,558 (proposed Oct. 28, 2003).

than those reflected in EPA regulatory programs include the adoption by various states of controls on emissions of mercury from power plants,<sup>340</sup> efforts by Massachusetts to adopt cleanup and drinking water standards for chemicals that exceed EPA standards,<sup>341</sup> and the New Mexico Governor's executive order on environmental justice that requires regulators to conduct "community impact assessments" before permitting new facilities in "vulnerable" areas.<sup>342</sup> EPA actions that restrict the scope of federal regulation have sometimes directly prompted efforts to strengthen controls at the state level.<sup>343</sup>

State and local governments also have resorted to litigation as a means of enhancing the levels of environmental protection provided by the federal government. North Carolina, for example, filed a common law public nuisance action against the Tennessee Valley Authority to force it to reduce its emission of air pollutants that include Sulfur dioxide, oxides of nitrogen, and mercury.<sup>344</sup> In

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340. See, e.g., Brian Hansen, *Groups Offer States, Local Governments Stricter Alternatives to Mercury Rule*, INSIDE ENERGY WITH FEDERAL LANDS, Nov. 21, 2005, at 8 (discussing multi-state model rule); Dawn Reeves, *Pennsylvania Mercury Plan Could Limit Credits for EPA Trading Scheme*, INSIDE EPA, Feb. 24, 2006, at 1; *Illinois' Stringent Mercury Proposal May Serve as Model For States*, ENERGY WASH. WEEK, Jan. 18, 2006, at 16; Jeff Nesmith, *Stricter Rules on Mercury Pollution Proposed: EPA Plan Called 'Totally Inadequate'*, ATLANTA J.-CONST., Nov. 15, 2005, at A12 (same); Michael Janofsky, *Groups Propose Alternative to E.P.A. Rules on Mercury*, N.Y. TIMES, Nov. 14, 2005, at A17;; *State Mercury Pact Seeks Midpoint Between EPA Rule, Activist Demands*, INSIDE EPA, Nov. 28, 2005, at 14. EPA issued its final mercury rules in 2005. Standards of Performance for New and Existing Stationary Sources: Electric Utility Steam Generating Units, 70 Fed. Reg. 28,606 (May 18, 2005); Press Release, Office of the Governor of Illinois, Governor Blagojevich Proposes Aggressive Mercury Emission Controls for Illinois Power Plants, (Jan. 5, 2006), available at <http://www.illinois.gov/PressReleases/ShowPressRelease.cfm?SubjectID=3&RecNum=4565>.

341. See, e.g., *Massachusetts to Propose Nation's Strictest Perchlorate Standards*, INSIDE EPA, June 10, 2005, at 11.

342. Exec. Order 2005-056, State of New Mexico, Environmental Justice Executive Order (Nov. 18, 2005); *New Mexico Moves to Implement Landmark Environmental Justice Order*, INSIDE EPA, Jan. 18, 2006, at 1, 14; *Richardson Signs Environmental Justice Executive Order*, Concerned Citizens for Nuclear Safety ("CCNS"), (Nov. 23, 2005), available at <http://www.nuclearactive.org/news/112305.html>; Tania Soussan, *Order Boosts Environmental Justice; Policy Gives Public a Say on Decisions Concerning Air, Water and Noise Pollution*, ALBUQUERQUE J., Nov. 19, 2005, at E3.

343. See, e.g., *State Lawmaker Plans California TRI Program to Counter EPA Rule*, INSIDE EPA, Feb. 17, 2006, at 3 (describing California legislator's proposal to establish toxic chemical reporting program that is more expansive than EPA's program under EPCRA).

344. Complaint, North Carolina v. Tenn. Valley Auth., No. 1:06CV20

addition, the states have filed amicus briefs in cases involving the validity or interpretation of the federal environmental statutes in which they have supported expansive application of those laws.<sup>345</sup>

*B. Developments that Decrease State or Local Power to Move Beyond Federal Law*

The catalog of state and local environmental protection initiatives described above illustrates the potential benefits of a federal system of government. In areas in which the federal government has adopted environmental and natural resource management policies that the states and localities have deemed insufficient, the states and their political subdivisions have resorted to a variety of legislative, regulatory, and judicial devices to fill in gaps in the coverage of federal environmental law. At the same time that all three branches of the federal government have contributed to a weakening of environmental law at the federal level, however, they have also made decisions that hamper the ability of state and local governments to adopt measures designed to provide levels of environmental protection that exceed those provided by federal regulation. These decisions have prevented the states and localities from achieving their full potential as laboratories of environmental policymaking.

*1. Judicial Developments*

The courts have used various doctrines to restrict the scope of state and local authority to control activities with the potential to harm the environment to a degree that extends beyond the federal government's regulatory programs. These include invalidation of state or local environmental regulations that are found to violate the

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(W.D.N.C. Jan. 30, 2006). See *North Carolina Case Could Test Air Act Preemption of Nuisance Suits*, INSIDE EPA, Feb. 17, 2006, at 1, 8-9; *Mounting Global Warming Evidence Bolsters N.C. Suit Against TVA's Air Pollution*, ASHEVILLE CITIZEN-TIMES, Feb. 1, 2006, at 6A. See generally Thomas W. Merrill, *Global Warming as a Public Nuisance*, 30 COLUM. J. ENVTL. L. 293 (2005) (exploring litigation of global warming as a public nuisance); Jason J. Czarnezki & Mark L. Thomsen, *Advancing the Rebirth of Environmental Common Law*, Marquette Law School Legal Studies Paper No. 06-21, 13-20 (April 2006), available at <http://ssrn.com/abstract=895221> (exploring public nuisance suits in lieu of the CAA).

345. See, e.g., Brief for the Ass'n of State Wetland Managers et al. as Amici Curiae Supporting Respondent United States, *Rapanos v. United States*, Nos. 04-1034, 04-1384 (Jan. 13, 2006), 2006 WL 139206 (supporting application of CWA dredge and fill permit program to wetlands adjacent to navigable waters); Brief for the States Of New York et al. as Amici Curiae Supporting Respondents, *Rapanos v. United States*, Nos. 04-1034, 04-1384 (Jan. 13, 2006), 2006 WL 139208 (same).

dormant Commerce Clause, that are preempted, or that amount to takings without just compensation. In addition, in at least one case, a court dismissed an attempt to pursue state common law claims against activities that contribute to environmental damage as a nonjusticiable political question.

a. *The Dormant Commerce Clause.* One of the constitutional bases for restricting state and local regulatory authority is the dormant Commerce Clause, which restricts the ability of states and localities to control the flow of interstate commerce or discriminate against out-of-state commerce. Beginning in 1976, with its decision in *City of Philadelphia v. New Jersey*,<sup>346</sup> the Supreme Court has repeatedly struck down state and local attempts to prohibit the importation of wastes generated elsewhere or otherwise to control the flow of waste.<sup>347</sup> The lower courts also have struck down other kinds of state and local measures with purported environmental protection goals as violations of the dormant Commerce Clause.<sup>348</sup>

b. *The Supremacy Clause.* The courts also have invalidated state and local environmental regulations under the preemption doctrine. Unlike the dormant Commerce Clause, which the courts

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346. 437 U.S. 617, 629 (1978).

347. See *C&A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 394-95 (1994); *Or. Waste Sys., Inc. v. Or. Dep't of Env'tl. Quality*, 511 U.S. 93, 107 (1994); *Chem. Waste Mgmt., Inc. v. Hunt*, 504 U.S. 334, 344-46 (1992); *Fort Gratiot Sanitary Landfill, Inc. v. Mich. Dep't of Natural Res.*, 504 U.S. 353, 361 (1992). See also *Waste Mgmt. Holdings, Inc. v. Gilmore*, 252 F.3d 316, 336 (4th Cir. 2001) (holding that statute capping amount of municipal solid waste that may be accepted by Virginia landfills violated the dormant Commerce Clause); *Env'tl. Tech. Council v. Sierra Club*, 98 F.3d 774, 787 (4th Cir. 1996) (striking down laws that restricted in-state treatment and disposal of hazardous waste generated in other states).

348. See, e.g., *Wendover City v. W. Wendover City*, 404 F. Supp. 2d 1324, 1331 (D. Utah 2005) (invalidating ordinance allegedly enacted to provide healthy and safe water to city's residents); *Biogenic Safety Brands, Inc. v. Ament*, 174 F. Supp. 2d 1168, 1184, 1187 (D. Colo. 2001) (holding that state statute prohibiting manufacturers of pesticides exempt from regulation under FIFRA from making safety claims on labels violated the dormant Commerce Clause); *Blue Circle Cement, Inc. v. Bd. of County Comm'rs*, 917 F. Supp. 1514, 1522-23 (N.D. Okla. 1995) (holding that county ordinance restricting hazardous waste treatment and recycling violated the dormant Commerce Clause). *But cf.* *Nat'l Audubon Soc'y v. Davis*, 307 F.3d 835, 857-58 (9th Cir. 2002) (holding that state law restricting the use of leg-hold traps to catch fur-bearing animals did not violate the dormant Commerce Clause), *amended and rehearing denied*, 312 F.3d 416 (9th Cir. 2002); *Croplife Am., Inc. v. City of Madison*, 373 F. Supp. 2d 905, 914-16 (W.D. Wisc. 2005) (holding that city and county ordinances barring sale of commercial fertilizers containing phosphorus did not violate the dormant Commerce Clause).

invoke in the absence of federal legislation,<sup>349</sup> the preemption doctrine provides a basis for striking down state and local laws based on judicial interpretation of congressional intent. State and local laws do not always fall by the wayside when attacked on preemption grounds. The Supreme Court held in 2005, for example, that FIFRA does not preempt state common law claims such as breach of warranty against pesticide manufacturers.<sup>350</sup> The courts also have held that federal statutes do not preempt state regulations that seek to promote the manufacture and use of fuel-efficient appliances.<sup>351</sup>

In other cases, however, the courts have concluded that state or local environmental protection laws are invalid under the Supremacy Clause. In *Engine Manufacturers Ass'n v. South Coast Air Quality Management District*<sup>352</sup> for example, the Supreme Court addressed the validity of fleet rules adopted by the South Coast Air Quality Management District, which is responsible for air pollution control in the Los Angeles metropolitan area. Those rules prohibited the purchase or lease by various public and private fleet operators of vehicles that did not comply with stringent emission requirements. In particular, they required the purchase or lease of alternative-fuel vehicles or vehicles that met emission specifications established by the California Air Resources Board. The Court held that section 209(a) of the CAA,<sup>353</sup> which bars states or local governments from adopting or enforcing "standards" to control auto emissions, preempted the fleet rules. Even though standards typically target vehicle or engine manufacturers, the Court reasoned that

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349. See PLATER ET AL., *supra* note 68, at 341 ("When the Commerce Clause has not been used by Congress to pretermitt state legislation, its power still exists, lying 'dormant' until the courts apply it to strike down protectionist laws."). On the Supreme Court's dormant Commerce Clause jurisprudence, see generally Lisa Heinzerling, *The Commercial Constitution*, 1995 SUP. CT. REV. 217 (1995).

350. *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 449-50 (2005). In other cases, the courts have found that FIFRA and other federal legislation preempted state common law causes of action. See, e.g., *Wilcox v. Homestake Mining Co.*, 401 F. Supp. 2d 1196, 1201 (D.N.M. 2005) (holding that the Price-Anderson Act preempted common law strict liability causes of action for groundwater contamination allegedly caused by uranium milling facility).

351. See *Air Conditioning & Refrigeration Inst. v. Energy Res. Conservation & Dev. Comm'n*, 410 F.3d 492, 505 (9th Cir. 2004) (holding that California regulations were not preempted by the Energy Policy and Conservation Act, 42 U.S.C. §§ 6297, 6316 (2000)), *cert. denied*, 126 S. Ct. 2887 (2006).

352. 541 U.S. 246 (2004). See also *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 874-75 (2000).

353. 42 U.S.C. § 7543(a) (2000).

[a] command, accompanied by sanctions, that certain purchasers may buy only vehicles with particular emission characteristics is as much an “attempt to enforce” a “standard” as a command, accompanied by sanctions, that a certain percentage of a manufacturer’s sales volume must consist of such vehicles. We decline to read into § 209(a) a purchase/sale distinction that is not to be found in the text of § 209(a) or the structure of the CAA.<sup>354</sup>

Similarly, the courts have held that the CAA preempted state regulations requiring that minimum percentages of new vehicles certified for sale in a state be zero-emission vehicles.<sup>355</sup>

The courts have found state air pollution protection laws other than those applicable to motor vehicles to be violative of the Supremacy Clause. In one case, for example, New York enacted a statute that restricted the ability of New York public utilities subject to the CAA’s acid deposition control program to sell their Sulfur dioxide allowances to utilities located in upwind states.<sup>356</sup> The state legislature feared that Sulfur dioxide emissions in upwind states would exacerbate rather than alleviate acid rain in New York. The Second Circuit held that the CAA preempted New York’s Air Pollution Mitigation Law.<sup>357</sup> It found that the state statute interfered with the nationwide allowance transfer system created by Congress for regulating Sulfur dioxide emissions<sup>358</sup> by effectively banning allowance sales to utilities in upwind states.<sup>359</sup> The courts also have concluded that other federal pollution control laws, including RCRA,<sup>360</sup> the Hazardous Materials Transportation Act,<sup>361</sup> and CERCLA, preempted state and local pollution control laws.<sup>362</sup>

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354. *Engine Mfrs. Ass’n*, 541 U.S. at 255.

355. *Ass’n of Int’l Auto. Mfrs., Inc. v. Comm’r, Mass. Dep’t of Env’tl. Protection*, 208 F.3d 1, 8 (1st Cir. 2000) (quoting *Am. Auto. Mfrs. v. Cahill*, 152 F.3d 196, 201 (2d Cir. 1998)). Compare *Am. Auto. Mfrs. Ass’n v. Mass. Dep’t of Env’tl. Protection*, 163 F.3d 74, 86-87 (1st Cir. 1998) (remanding to EPA under primary jurisdiction doctrine to resolve related statutory interpretation questions concerning the validity of the state’s zero-emission vehicle quota requirement). Other state and local efforts to protect air quality have survived preemption attacks. See, e.g., *Oxygenated Fuels Ass’n v. Pataki*, 293 F. Supp. 2d 170, 183 (N.D.N.Y. 2003) (upholding state law banning use, sale, or importation in New York of fuels containing additives).

356. *Clean Air Mkts. Group v. Pataki*, 338 F.3d 82, 84 (2d Cir. 2003).

357. *Id.* at 89.

358. 42 U.S.C. § 7651b (2000).

359. *Clean Air Mkts. Group*, 338 F.3d at 84.

360. See, e.g., *Boyes v. Shell Oil Prods. Co.*, 199 F.3d 1260, 1270 (11th Cir. 2000) (holding that a state program for remediation of contamination from underground storage tanks that had not been approved by EPA was preempted by RCRA); *Blue Circle Cement, Inc. v. Bd. of County Comm’rs*, 917 F. Supp. 1514, 1520 (N.D. Okla. 1995) (holding that RCRA preempted county ordinance

EPA is not the only federal agency whose organic statutes and implementing regulations have had preemptive effect. In one case, for example, the D.C. Circuit concluded, in affirming the district court's denial of a preliminary injunction, that a rail carrier was substantially likely to succeed in its argument that regulations issued by the Department of Transportation under the Federal Rail Carrier Safety Act<sup>363</sup> preempted more stringent regulations adopted by the District of Columbia that restricted the transportation of hazardous materials by rail near the U.S. Capitol Building.<sup>364</sup> Some state and local efforts to minimize the dangers posed by nuclear waste also have fallen by the wayside based on the preemptive effect of the Atomic Energy Act.<sup>365</sup>

The courts have found that legislation governing management of the federal lands preempts some state and local environmental regulation. The Eighth Circuit, for example, held that the General Mining Law preempted a county ordinance prohibiting the issuance of new permits for surface metal extraction in the national forests.<sup>366</sup> In another case, the court held that the Magnuson Fishery Conservation and Management Act<sup>367</sup> preempted state regulations

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restricting hazardous waste treatment and recycling that amounted to a de facto ban on burning of hazardous waste fuels).

361. *See, e.g.*, N.Y. Dep't of Envtl. Conservation v. U.S. Dep't of Transp., 37 F. Supp. 2d 152, 162 (N.D.N.Y. 1999) (holding that state regulations prohibiting the consolidation and transfer of hazardous wastes were preempted).

362. *See, e.g.*, Fireman's Fund Ins. Co. v. City of Lodi, 302 F.3d 928, 956-57 (9th Cir. 2002) (holding that various provisions of local hazardous waste remediation and compensation ordinance were preempted by CERCLA); United States v. City and County of Denver, 100 F.3d 1509, 1513 (10th Cir. 1996) (holding that local zoning ordinance restricting hazardous waste disposal was preempted because it conflicted with remedial order issued by EPA under CERCLA).

363. 49 U.S.C. § 20106 (2000).

364. CSX Transp., Inc. v. Williams, 406 F.3d 667, 673 (D.C. Cir. 2005).

365. *See, e.g.*, Skull Valley Band of Goshute Indians v. Nielson, 376 F.3d 1223, 1247-48 (10th Cir. 2004) (holding that state statute regulating storage of spent nuclear fuel was preempted by the Atomic Energy Act); United States v. Kentucky, 252 F.3d 816, 823-24 (6th Cir. 2001) (holding that restrictions imposed by state environmental agency on amount of radioactive materials that could be placed in landfill were preempted by the Atomic Energy Act); Abraham v. Hodges, 255 F. Supp. 2d 539, 555-56 (D.S.C. 2002) (holding that governor's executive order blocking federal shipments of uranium into the state was preempted by the Atomic Energy Act).

366. S.D. Mining Ass'n v. Lawrence County, 155 F.3d 1005, 1011 (8th Cir. 1998). *Compare* Mount Olivet Cemetery Ass'n v. Salt Lake City, 164 F.3d 480, 488 (10th Cir. 1998) (holding that the BLM's approval of a lease on property in which the federal government owned a possibility of reverter did not preempt a local zoning ordinance).

367. 16 U.S.C. §§ 1801-1822 (2000).

that prohibited the use of gill nets to take rockfish in federal waters.<sup>368</sup>

c. *The Takings Clause.* Beginning in the late 1980s, the Supreme Court reinvigorated the Takings Clause as a constraint on the power of all levels of government to regulate the use of private property. In cases such as *Lucas*,<sup>369</sup> *Nollan*,<sup>370</sup> and *Dolan*,<sup>371</sup> the Court found that state and local regulations amounted to impermissible takings of private property for a public use without just compensation. Despite more recent Supreme Court decisions rejecting takings attacks on state and local environmental regulations,<sup>372</sup> the Takings Clause remains a potentially significant obstacle to state and local efforts to control uses of land that contribute to public health risks and environmental degradation.<sup>373</sup>

d. *Article III Justiciability Obstacles.* Some states have resorted to common law litigation to supplement federal environmental protection efforts. In one case, for example, several states filed a common law nuisance action against public utilities in which the states sought an order abating the utilities' emissions of greenhouse gases that allegedly contributed to global warming. A federal district court dismissed the action on the ground that the case raised non-justiciable political questions that federal courts

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368. See *Vietnamese Fishermen Ass'n of Am. v. Cal. Dep't of Fish & Game*, 816 F. Supp. 1468, 1476 (N.D. Cal. 1993). See also *Se. Fisheries Ass'n, Inc. v. Chiles*, 979 F.2d 1504, 1509 (11th Cir. 1992) (concluding that the Magnuson Act occupied the field of fishery management in the exclusive economic zone). But see *Davrod Corp. v. Coates*, 971 F.2d 778, 784-87 (1st Cir. 1992) (holding that Magnuson Act did not preempt state regulation of squid fishing in off-shore waters); *Noe v. Henderson*, 373 F. Supp. 2d 939, 944 (E.D. Ark. 2005) (holding that the Migratory Bird Treaty Act, 16 U.S.C. §§ 703-711 (2000), did not preempt state regulation of captive-reared mallard ducks not covered by the federal statute).

369. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1027-31 (1992).

370. *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 841-42 (1987).

371. *Dolan v. City of Tigard*, 512 U.S. 374, 396 (1994).

372. *E.g.*, *Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 333-42 (2002) (holding that moratorium on building was not a per se taking under the Takings Clause).

373. See, *e.g.*, *Tarlock*, *supra* note 140, at 1339 (claiming that federal takings law "is insufficiently deferential to local situations in a way that impedes the protection of biodiversity"). State or local regulation of activities that pose threats to the public health and the environment in the nature of nuisance-like uses may be immune from takings attacks. See generally Robert L. Glicksman, *Making a Nuisance of Takings Law*, 3 WASH. U. J.L. & POL'Y 149 (2000).

lacked the authority to resolve under Article III of the Constitution.<sup>374</sup>

2. *Congressional Efforts to Weaken State Regulatory Authority*

Congress can constrain the authority of state and local governments to adopt environmental legislation by explicitly barring those governments from doing so. Although it has not done so frequently, Congress on occasion has blocked or limited the ability of the states to protect the environment in ways that differ from those envisioned by regulatory programs. The CAA, as indicated above,<sup>375</sup> preempts state control of motor vehicle emissions and fuel additives except in limited circumstances.<sup>376</sup> The CAA also explicitly preempts state and local standards that control aircraft emissions.<sup>377</sup> FIFRA bars the states from imposing any requirements for labeling or packaging of pesticides in addition to or different from those required by EPA.<sup>378</sup>

A more recent example of Congress's exercise of its authority to preempt state authority to adopt measures that go beyond federal regulatory standards appears in the Energy Policy Act of 2005.<sup>379</sup> That law vests in a federal agency the exclusive power "to approve or deny an application for the siting, construction, expansion, or operation of [a liquefied natural gas] terminal,"<sup>380</sup> thereby preventing state or local governments from imposing land use controls or other restrictions they deem more protective of the public health and safety and the environment than federal regulatory measures provide. Additional legislative proposals to preempt state and local authority to protect health, safety, and the environment have proliferated in recent years. Congress has considered legislation, for example, that would curtail the ability of the states to adopt food safety regulations that are more stringent than federal standards issued by the Food and Drug Administration.<sup>381</sup> Congress

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374. *Connecticut v. Am. Elec. Power Co., Inc.*, 406 F. Supp. 2d 265, 273 (S.D.N.Y. 2005). See generally Lori R. Baker, *Global Warming: Attorneys General Declare Public Nuisance*, 27 U. HAW. L. REV. 525 (2005) (analyzing the viability and ultimate strategy behind *Connecticut v. Am. Elec. Power Co.*).

375. See *supra* notes 332-36 and accompanying text.

376. 42 U.S.C. §§ 7543(a), 7545(c)(4) (2000).

377. *Id.* § 7573.

378. 7 U.S.C. § 136v(b) (2000).

379. Pub. L. No. 109-58, § 311(c)(2), 119 Stat. 594, 686 (2005).

380. 15 U.S.C. § 717b(e)(1) (2000). The federal government is required to consult with state officials, however. *Id.* § 717b-1.

381. See, e.g., National Uniformity for Food Act of 2003, H.R. 2699, 108th Cong. (2003); Marian Burros, *Bill May Undo States' Rules on Safe Food*, N.Y.

has considered but not yet acted upon legislation that would bar the states from regulating chemicals not regulated by EPA under TSCA.<sup>382</sup>

### *3. Administrative Efforts to Weaken State Regulatory Authority*

Efforts to preempt state and local measures to protect the environment have not been confined to Congress. EPA and other federal agencies also have used their regulatory powers to bar states from adopting such measures. In one instance, a court overturned on procedural grounds a regulation issued by EPA under the CAA that prohibited state environmental agencies from imposing more rigorous air pollution monitoring requirements on power plants holding state-issued permits.<sup>383</sup> Within a few days, EPA announced that it would propose a new rule to restrict the power of the states to impose monitoring requirements that go beyond EPA's own regulations.<sup>384</sup> EPA's efforts to waive environmental requirements as a means of facilitating reconstruction along the Gulf Coast in the wake of Hurricanes Katrina and Rita in 2005 raised concerns that any such waivers would preclude the affected states from enforcing their own environmental rules.<sup>385</sup> The states also have expressed concerns that final or proposed regulations issued by EPA were drafted in a manner that would preempt more stringent state approaches on issues such as the ability of the states to restrict the use of pesticide studies conducted on humans.<sup>386</sup> EPA has contemplated the adoption of additional regulations that would preclude the states from adopting emissions controls for Sulfur

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TIMES, Mar. 1, 2006, at A14.

382. See *House GOP's Chemical Treaty Bill Faces State Preemption Concerns*, INSIDE EPA, Mar. 3, 2006, at 15; Pat Phibbs, *Attorneys General Say Bill to Amend TSCA Would Limit States' Ability to Protect Citizens*, 37 ENV'T REP. 456, Mar. 3, 2006 (discussing H.R. 4591).

383. *Env'tl. Integrity Project v. EPA*, 425 F.3d 992, 997-98 (D.C. Cir. 2005). Cf. *EPA RCRA Burden Reduction Rule Falls Short of Key State Requests*, INSIDE EPA, Apr. 7, 2006, at 3 (discussing EPA's rejection of state requests that only independent engineers be allowed to certify compliance with regulatory requirements under RCRA for design of drip pads for waste containers); Resource Conservation and Recovery Act Burden Reduction Initiative, 71 Fed. Reg. 16,862, 16,868-69 (Apr. 4, 2006) (explaining EPA's reasons for rejecting approach favored by the states).

384. *State Monitoring Requirements Preserved Pending New EPA Air Rule*, INSIDE EPA, Oct. 14, 2005, at 16.

385. See *Possible State Preemption Raises New Queries on EPA Waivers Bill*, INSIDE EPA, Oct. 31, 2005, at 14.

386. *EPA Rule on Human Studies Prompts New Concerns Over State Control*, INSIDE EPA, Jan. 26, 2006, at 1, 8.

dioxide and oxides of nitrogen that are more stringent than those contained in EPA's Clean Air Act Interstate Rule<sup>387</sup> and that would restrict state authority to regulate oil and gas industry activities that contribute to surface water pollution.<sup>388</sup>

EPA is not the only federal agency that has taken the position that its actions preempt state efforts to protect health and the environment that extend beyond federal requirements. The National Highway Traffic Safety Administration ("NHTSA"), for example, stated in the preamble to a proposed rule establishing corporate average fuel economy standards for light trucks that, pursuant to the Energy Policy and Conservation Act ("EPCA"),<sup>389</sup> "a state may not impose a legal requirement relating to fuel economy, whether by statute, regulation or otherwise, that conflicts with this rule. A state law that seeks to reduce motor vehicle carbon dioxide emissions is both expressly and impliedly preempted."<sup>390</sup> Further, the federal government has supported suits by industry attacking state environmental, health, and safety regulations on the ground that they are preempted by federal legislation.<sup>391</sup>

In the federal lands context, several state governors have objected to the Forest Service's replacement of the virtual ban on

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387. See Anthony Lacey, *EPA Drafting Federal Rule that Could Preempt States on CAIR*, INSIDE EPA, June 10, 2005, at 1, 10. The Clean Air Act Interstate Rule was promulgated in 2005. Rule to Reduce Interstate Transport of Fine Particulate Matter and Ozone (Clean Air Interstate Rule); Revisions to Acid Rain Program; Revisions to the NOx SIP Call, 70 Fed. Reg. 25,162 (May 12, 2005).

388. See *Groups Charge EPA Stormwater Rule May Undermine State Authority*, INSIDE EPA, Mar. 10, 2006, at 5.

389. 49 U.S.C. 32919(a) (2000) ("When an average fuel economy standard prescribed under this chapter is in effect, a State or a political subdivision of a State may not adopt or enforce a law or regulation related to fuel economy standards or average fuel economy standards for automobiles covered by an average fuel economy standard under [EPCA].").

390. Average Fuel Economy Standards for Light Trucks, Model Years 2008-2011: Notice of Proposed Rulemaking, 70 Fed. Reg. 51,414, 51,457 (Aug. 30, 2005).

391. See, e.g., Bog Egelko, *FDA Opposing State Warnings on Canned Tuna; Top Official Sides with Firms in Mercury Suit*, S.F. CHRONICLE, Aug. 20, 2005, at B1 (describing the Bush Administration's decision to side with tuna companies challenging California labeling requirements on the ground that regulation by the Federal Food and Drug Administration bars supplemental state regulation). For discussion of the Bush Administration's efforts to use federal regulations to preempt more stringent state regulations in a wide variety of areas, see Myron Levin & Alan C. Miller, *Industries Get Quiet Protection from Lawsuits; Federal Agencies Use Arcane Regulations and Legal Opinions to Shield Automakers and Others from Challenges by Consumers and States*, L.A. TIMES, Feb. 19, 2006, at A1.

road construction and timber harvesting in roadless areas of the national forests that was adopted during the Clinton Administration with the state petitions approach adopted in regulations issued by the Forest Service during the Bush Administration in 2005.<sup>392</sup> The petition process created under the 2005 regulations requires that the states incur the costs of developing a petition requesting the imposition of use restrictions on roadless acreage found in the national forests in their states and of creating a plan in the event the Secretary of Agriculture grants a petition. These burdens, as well as the possibility that the Secretary will deny petitions, have dissuaded some states from even trying to secure roadless area protections under the petitions process.<sup>393</sup> The Governors of Oregon and Washington have requested that the Forest Service allow them to protect roadless areas within their states more quickly than is possible under the petitions process, but the Forest Service has rebuffed these efforts.<sup>394</sup> Several states, including California, New Mexico, Oregon, and Washington, filed suit challenging the Forest Service's decision to replace the Clinton roadless rule with the petitions process.<sup>395</sup>

The other federal land management agencies also have sought to scuttle state and local efforts to protect natural resources from development. The BLM, for example, has taken the position that a Wyoming statute that provides compensation for surface owners for losses in land value caused by mineral development imposes inappropriate economic burdens on mineral developers.<sup>396</sup> The BLM itself owns the mineral rights to about 12.5 million acres of split-estate lands in Wyoming.<sup>397</sup>

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392. For further discussion of the two approaches, see *supra* notes 292-94 and accompanying text.

393. April Reese, *Western States Mull Options Under New Roadless Rule*, LAND LETTER, June 23, 2005 (quoting analyst at the Wilderness Society, who characterized states as reluctant to use the petition process).

394. See Dan Berman, *Enviros Urge Democrats to Join States' Lawsuit Against Bush Roadless Plan*, GREENWIRE, Nov. 2, 2005.

395. See *California ex rel. Lockyer v. U.S. Dep't of Agric.*, No. CO5-03508 EDL, 2006 WL 708914 (N.D. Cal. Mar. 16, 2006) (describing state suit); *Washington Joins Roadless Rule Suit to Prohibit Development in Wild Areas*, PLATTS COAL OUTLOOK, Feb. 13, 2006, at 13. The suit, filed in the federal district court for the Northern District of California, contends, among other things, that the Forest Service violated NEPA. *Id.* Montana and Maine filed briefs in support of the challenge. *Quarter-Million Americans Petition for Roadless Rule Reinstatement*, ENVIRONMENT NEWS SERVICE, Mar. 3, 2006.

396. John Pendergrass, *Can't We All Just Get Along Here?*, 22 ENVTL. F. 8, September/October 2005.

397. See Matt Micheli, *Showdown at the OK Corral—Wyoming's Challenge to U.S. Supremacy on Federal Split Estate Lands*, 6 WYO. L. REV. 31, 41-42 (2006);

#### 4. *Self-Imposed Restraints on State Regulatory Authority*

Part.IV.A above explored the reasons why state and local governments may be willing to adopt environmental protection measures that go beyond those required by federal law. In some jurisdictions, however, movement beyond federal minimum standards is legally impossible. As far back as the 1970s, some state legislatures restrained their environmental agencies from adopting measures more stringent than the regulations in effect at the federal level.<sup>398</sup> The incidence of such legislation increased during the late 1980s and 1990s. Some of these state statutes apply only to specified environmental media (air, water, or land)<sup>399</sup> or industries,<sup>400</sup> while others impose across-the-board prohibitions on the promulgation of any regulations more stringent than those adopted by Congress or federal agencies.<sup>401</sup> Some state regulators have even sought to roll back state standards issued before the promulgation of more lenient federal controls.<sup>402</sup> Industry continues to support

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Pendergrass, *supra* note 396, at 8.

398. See Jerome M. Organ, *Limitations on State Agency Authority to Adopt Environmental Standards More Stringent Than Federal Standards: Policy Considerations and Interpretive Problems*, 54 MD. L. REV. 1373, 1377 (1995).

399. See, e.g., R.I. GEN. LAWS § 23-23-5(12) (2001) (limiting state environmental agency's authority to regulate emission characteristics of fuels in a manner that is more stringent than mandatory federal standards); WISC. STAT. ANN. § 285.21(1)(i) (2004) (prohibiting, with limited exceptions, state environmental agency from promulgating an ambient air quality standard that is more restrictive than the federal standard); *id.* § 285.27(1)(a) (same with respect to emission standards for new stationary sources of air pollution); WYO. STAT. ANN. § 35-11-1416(a)(i) (2005) (authorizing agency to adopt regulations governing underground storage tanks that "shall be no less or no more stringent than the federal standards").

400. See, e.g., OHIO REV. CODE ANN. § 3746.04(B)(1)(e) (2005) (stating that state cleanup standards for the petroleum industry "shall be consistent with and equivalent in scope, content, and coverage to any applicable standard established by federal environmental laws and regulations," including the CWA, TSCA, CERCLA, and the SDWA).

401. Organ, *supra* note 398, at 1380 (citing S.D. CODIFIED LAWS § 1-40-4.1 (2004)) (prohibiting issuance of any rules that are "more stringent than any corresponding federal law, rule, or regulation governing an essentially similar subject or issue").

402. See, e.g., WISC. STAT. ANN. § 283.11(3)(d) (2004) (authorizing state agency to modify effluent limitations to conform with subsequently issued federal limitations); *Wisconsin's Paradoxical Steps on Mercury Rule Underscores State Limits*, INSIDE EPA, Dec. 2, 2005, at 7 (referring to promise made by state environmental agency to state legislature that it would revise plan for controlling mercury emissions to match EPA's regulations).

legislation to strip state regulators of the authority to exceed federal standards in specific contexts.<sup>403</sup>

These kinds of statutes may be the result of a desire to minimize the commitment of state budgetary resources to environmental measures perceived of as the outgrowth of unfunded federal mandates.<sup>404</sup> They also may reflect a desire by state legislators to protect industry within the state from the need to incur additional compliance costs, particularly if such costs will place local industries at a competitive disadvantage vis-à-vis industries located in states lacking requirements that go beyond minimum federal environmental standards.<sup>405</sup> Finally, statutes that preclude state agencies from adopting environmental requirements stricter than the federal requirements may make sense if the industries protected by the legislation provide significant social and economic benefits within the state but create externalities experienced primarily in other states.<sup>406</sup>

State statutes that prohibit or restrict the adoption by state agencies or local governments of environmental measures more stringent than minimum federal requirements transform the federal standards into ceilings rather than floors. Such statutes would preclude affected states, for example, from regulating development in wetlands excluded from the scope of the CWA's dredge and fill permit program if the courts adopt narrow interpretations of the scope of federal regulatory authority.<sup>407</sup> Such legislation also may provide support for the thesis that a federal presence in the environmental protection arena is necessary to mitigate the race to the bottom in which the states would otherwise engage.<sup>408</sup>

Regardless of the effect that these preclusive statutes may have on the continuing debate over the proper normative role of the federal and state governments as environmental policymakers in a federal system, it is clear that statutes that disable state environmental initiatives that go beyond federal law prevent the states from acting as "laboratories" of experimentation in the environmental policy arena. If the federal government continues to shrink its own authority to regulate activities that pollute and to

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403. See, e.g., Anthony Lacey, *Industry Makes Landmark Bid to Strip Ohio EPA of Toxics Authority*, INSIDE EPA, June 3, 2005, at 3 (describing industry efforts to divest Ohio EPA of authority to regulate air toxics other than those regulated by EPA under the CAA).

404. Organ, *supra* note 398, at 1388.

405. *Id.* at 1388-89.

406. *Id.* at 1389.

407. See *States Face Hurdles in Event High Court Scales Back Water Act Scope*, INSIDE EPA, Mar. 10, 2006, at 20.

408. Organ, *supra* note 398, at 1392-93.

manage natural resources to achieve sustainable use, the effect of these state statutes will be to contribute to a decline in the institutional capacity of government at all levels to address threats to public health and the environment.

One more self-imposed restraint that has the potential to significantly impair the ability of states and localities to protect the environment through regulation deserves mention. Some states have enacted laws that require the government to compensate landowners whose properties are adversely affected by regulation, even in circumstances when neither the federal nor state constitutions require them to do so. Perhaps the most far-reaching of these measures is an Oregon statute, adopted by ballot measure in 2004. The Oregon legislation provides, among other things, that “[i]f a public entity enacts or enforces a new land use regulation . . . that restricts the use of real property . . . and has the effect of reducing the fair market value of the property . . . then the owner of the property shall be paid just compensation.”<sup>409</sup> The Supreme Court has never interpreted the Fifth Amendment’s Takings Clause to require the payment of just compensation merely because regulation results in a decline in the value of the regulated property. The Oregon Supreme Court rejected a series of attacks on the statute, holding that it does not impose unconstitutional limitations on the government’s plenary power to regulate land use or the Oregon Constitution’s separation of powers principles and that it does not amount to an impermissible waiver of the state’s sovereign immunity.<sup>410</sup> If other states follow Oregon’s lead, state and local regulators will likely refrain from adopting some land use controls they would otherwise deem desirable as a means of protecting the environment due to the financial impact of the compensation requirement.

*C. Devolution of Authority to Weaken Federal Environmental Protection Programs*

The final aspect of the perverse mutation of cooperative federalism discussed in this Article involves affirmative delegation by the federal government to the states of the power to weaken

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409. OR. REV. STAT. § 197.352(1) (2005). That requirement does not apply, however, to land use regulations that restrict or prohibit activities that are “commonly and historically recognized as public nuisances under common law,” or activities for the protection of public health and safety, including “solid or hazardous waste regulations, and pollution control regulations.” *Id.* § 197.352 (3)(A)-(B).

410. *MacPherson v. Dep’t of Admin. Servs.*, 130 P.3d 308, 315, 319, 320 (Or. 2006).

federal regulatory programs. As indicated above, both Congress and the Executive Branch have taken steps to preclude states from adopting environmental protection measures that are more stringent than those adopted by Congress or federal agencies. At the same time, Congress on occasion has delegated to the states the authority to undercut federal standards or processes designed to protect the environment. The Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users ("SAFETEA-LU") provides one example of Congress's willingness to devolve power to the states in a manner that weakens environmental protection programs rather than supplementing federal protective measures.<sup>411</sup> SAFETEA-LU authorizes the Secretary of Transportation to assign to a state the responsibility for determining whether certain activities are categorically excluded from NEPA because they fall within classes of action identified by the Secretary.<sup>412</sup> A state that assumes responsibility for making a categorical exclusion determination is solely responsible for complying with and carrying out any federal laws applicable to the activity.<sup>413</sup>

Another example of the delegation of authority to weaken the impact of federal environmental legislation is provided by recent efforts to amend the ESA. Legislation that was introduced in Congress but that has not yet been adopted would delegate to the states the authority to issue incidental take permits to landowners whose activities affect endangered species without any requirement that the states consult with or receive the prior approval of any federal agency.<sup>414</sup>

A third example of federal willingness to allow states to weaken federal environmental protection laws involves proposed federal legislation that would empower the states, rather than the federal government, to authorize energy exploration within 125 miles of their coasts, rather than limiting that power to activities that take place within only a few miles of their coasts, as under current law. Supporters of the legislation seek to remove existing restrictions on exploration that stem from a federal moratorium on drilling in parts

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411. Pub. L. No. 109-59, § 6004(a), 119 Stat. 1144, 1867-68 (2005) (to be codified at 23 U.S.C. § 326).

412. 23 U.S.C.A. § 326(a)(1) (2005). A state's determination that an activity qualifies for a categorical exclusion must be consistent with criteria established by the Secretary. *Id.* § 326(a)(2).

413. *Id.* § 326(b)(2).

414. See Mike Ferullo, *Senators Seek to Overhaul Species Law with Greater State Role, New Incentives*, 36 ENV'T REP. 2645, Dec. 23, 2005 (citing Collaboration for the Recovery of Endangered Species Act, S. 2110, 109th Cong. (2005)).

of the Outer Continental Shelf that has been in place since the 1980s.<sup>415</sup>

*D. The Lost Opportunity of Cooperative Federalism*

For a variety of reasons discussed above,<sup>416</sup> in recent years the states and their political subdivisions have embarked upon a series of environmental protection initiatives that is probably unparalleled since the beginning of the modern environmental era in the United States. Acting alone and on regional bases, the states have taken aim at the generation of greenhouse gases thought to be contributing to global climate change, largely because the federal government completely abdicated its responsibility to tackle the problem. Although the global warming initiatives adopted by state and local governments have been the most prominent examples of the capacity and willingness of these levels of government to undertake innovative environmental programs, at least under certain circumstances, state and local efforts have extended to other areas.<sup>417</sup>

This flurry of state and local activity provided an opportunity to achieve a new level of cooperation among federal, state, and local actors in the pursuit of a cleaner, healthier environment and the protection of a stock of natural resources that will sustain future generations. Although the more visible state and local commitment to environmental protection has been welcome to some, it has been greeted rudely by others. In particular, the federal government—through a variety of judicial decisions, legislative enactments, and agency regulations—has reduced state and local regulatory power, thereby thwarting some of the newly minted state and local initiatives. Indeed, in a few instances, Congress has delegated (or contemplated delegating) increased authority to the states, not to protect the environment, but to water down federal regulatory programs such as NEPA and the ESA.

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415. Michael Janofsky, *Offshore Drilling Plan Widens Rifts over Energy Policy*, N.Y. TIMES, Apr. 9, 2006, at 25; Lynn Garner, *House Members Urge Interior Appropriators to Continue Moratorium on Offshore Drilling*, 37 ENV'T REP. 699, Mar. 31, 2006.

416. See *supra* notes 304-17 and accompanying text.

417. See Christopher H. Schroeder, *Federalism's Values in Programs to Protect the Environment*, in STRATEGIES, *supra* note 118, at 247, 249 ("State governments have been filling the policy vacuum" created by the environmental policy paralysis that characterized the federal government "in a number of important areas, including global warming, local air pollution problems, alternative energy development, land conservation, wetlands management, and problems of urban sprawl.").

## V. CONCLUSION

The purpose of this Article is not to endorse federal regulation on the one hand or state and local regulation on the other as the superior mode of setting and achieving environmental protection goals. Persuasive arguments exist to justify the existence of the authority to establish environmental law and policy at both levels of government, and both levels of government have played an important role in the development of environmental law and policy in the United States. Before 1970, the states dominated the environmental policy landscape, while the federal government was content to provide technical and financial assistance to the states. When a sufficient number of members of Congress concluded that the states had not appropriately taken up the reins, Congress embarked upon an ambitious agenda of cleaning up the nation's air, water, and land, and constraining destructive uses of the federally owned lands and resources.

The new federal role did not put an end to state involvement, however. Instead, statutes such as the CAA and the CWA reflected a commitment to cooperative federalism. The federal government would set the nation's minimum environmental goals but would allow the states to determine in many contexts the appropriate ways to achieve those goals through administration of permit programs like the CWA's NPDES program, allow the states to share the responsibility to enforce state requirements adopted to implement federal regulatory programs, and allow the states to adopt regulatory standards more stringent than the federal government has seen fit to adopt. Although the pattern of cooperative federalism has not been as uniform in the federal lands context, the statutes governing the management and use of those lands also provide opportunities for both the federal government and the states to contribute to the preservation of a sustainable federal resource base.

In recent years, various new state environmental programs have provided concrete evidence of the ability of the states to make meaningful contributions to environmental protection. These programs highlight the value of what Chris Schroeder has referred to as "the availability of concurrent governments capable of providing a meaningful forum for public concerns."<sup>418</sup> The existence of overlapping federal and state authority to adopt environmental protection programs allows citizens to have access to multiple forums for seeking government assistance in promoting the protection of health, safety, and the environment.<sup>419</sup>

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418. *Id.* at 252.

419. *Id.*

Despite the rise of environmental activism at the state level, the model of cooperative federalism reflected in federal environmental and natural resource management legislation has faltered, not flourished. On the one hand, the authority of the federal government (or the willingness of the federal government to exercise that authority) has declined as a result of the combined effects of the decisions of the courts, Congress, and federal administrative agencies. On the other hand, these same actors have placed significant obstacles in the path of state or local efforts to pick up the slack created by the federal government's withdrawal from its previous role as prime environmental policymaker. Through doctrines such as the dormant Commerce Clause, preemption, and regulatory takings, the federal courts have constrained the ability of state and local governments to achieve levels of environmental and resource protection that exceed those required by federal legislation. Congress has blocked supplemental state and local measures in some instances. Federal agencies have interpreted their enabling acts to have that effect even if the statutes do not explicitly so provide. Perhaps the most perverse trend of all completely turns cooperative environmental federalism on its head by delegating to the states the authority to carve out exceptions from federal environmental mandates.

Before the 1960s, the United States relied on a system in which the states had virtually exclusive authority to control activities with potentially damaging environmental consequences. Congress found that system to be lacking, and adopted a spurt of environmental legislation that vested in the federal government an environmental leadership role. Despite recognition that a federal leadership role was appropriate, the nation has not tried to create a system in which the federal government exercises exclusive authority to protect the environment (or even exclusive authority to determine the fate of the federal government's own land and resources). Given the respect due to state sovereignty under our federal system of government, there is little, if any, chance that such a system will ever be tried as a means of adopting and implementing environmental protection measures. Accordingly, the question since 1970 has not been whether to vest exclusive authority to control environmentally damaging activities in either the federal government or the states. Nor has the United States tried during the modern environmental era to create a system in which neither level of government has the requisite authority to protect the nation's people and resources from environmental threats. Recent trends in environmental federalism—during which inroads have been made into the authority of all levels of government to protect

health, safety, and the environment—make it clear just how unattractive that final option is.