

Competitive Federalism: Environmental Governance as a Zero-Sum Game

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Summary

When the major pollution control laws were passed in the 1970s, there was growing consensus that federal environmental regulations were essential to the protection of human health and the environment. At that time, many feared that states would engage in a “race to the bottom,” setting lax environmental regulations to attract industry and economic growth. Political support for new federal environmental regulation has since changed, with many states challenging such regulations as abuses of federal power. This has turned environmental governance into a zero-sum jurisdictional game; if the federal rule is invalidated, the state wins, and if the rule stands, the state loses. This Article, adapted from Chapter 9 of *Beyond Zero-Sum Environmentalism* (ELI Press 2019), investigates this recent turn to competitive federalism in the context of anti-pollution regulation. It concludes that despite the zero-sum rhetoric that pits environmental protection against economic growth, there is growing evidence that people do not view environmental protection and economic well-being in zero-sum terms.

The political climate that facilitated the passage of major pollution control statutes such as the Clean Air Act (CAA)¹ and the Clean Water Act (CWA)² is difficult to imagine today. When the U.S. Congress passed the major pollution control laws in the 1970s, it was responding to a growing consensus that federal environmental regulations were essential to the protection of human health and the environment. In their absence, many feared that states would engage in a “race to the bottom,” setting lax environmental regulations in an effort to attract industry and economic growth. Policymakers also recognized that environmental pollution increasingly presented problems of scale; pollutants emitted into the air and discharged into water bodies did not always remain within the political borders of a state. A federal role was perceived as a necessary means to ensure the efficient regulation of interstate pollution.

Today, political support for new environmental regulations at the federal level is less uniform, particularly given the resistance to federal regulation by a sizeable number of states during the Barack Obama Administration. Along with industry, states routinely filed lawsuits challenging new environmental regulations as abuses of federal power. Instead of thinking seriously about shared governance, the political default in many red states was to litigate with the hope of invalidating the federal rule. This turns environmental governance into a zero-sum jurisdictional game; if the federal rule is invalidated, the state wins, and if the rule stands, the state loses.

Of course, environmental regulation is not a zero-sum game; the optimal combination of local, state, and federal regulation depends on a number of factors, including geographic scale, existing regulatory structures, and various market forces. Unfortunately, when states treat environmental governance as a zero-sum game, they preclude the consideration of win-win shared-governance scenarios. Along the way, time, effort, and money are wasted in protracted legal battles that delay important protections for human health and the environment.

This Article investigates the recent turn to competitive federalism in the context of anti-pollution regulation. It begins with a brief overview of concurrent jurisdiction contemplated by antipollution statutes such as the CAA and CWA and the increase in state challenges to federal authority under the Obama Administration. The second part examines the states’ federalism arguments from both a constitutional and a theoretical perspective. I then explore some of the economic and political forces behind these cases. With the polarization of politics generally, the offices of state attorneys general have grown increasingly

1. 42 U.S.C. §§7401-7671q.
2. 33 U.S.C. §§1251-1387.

partisan. Republican and Democratic attorneys general now form coalitions and pursue national policy agendas, a phenomenon likely driven in part by the flow of big money into political campaigns since the U.S. Supreme Court's decision in *Citizens United v. Federal Election Commission*.³

The Article ends with some observations about the risks that this trend poses to the public welfare and democracy. The polarization of politics fueled by well-organized, wealthy interests leads to zero-sum rhetoric that pits environmental protection against economic growth. Despite this rhetoric, growing evidence suggests that people do not view environmental protection and economic well-being in zero-sum terms. The zero-sum rhetoric of public officials is therefore contrary to public preferences and values.

I. From Cooperative to Competitive Federalism

Somewhat ironically, today's landscape of state-federal litigation takes place against a model of shared state-federal governance. Every student of federal pollution control laws learns that they depend on a regulatory model often called "cooperative federalism." Under this model, the U.S. Environmental Protection Agency (EPA) uses its rulemaking authority to set minimum standards limiting the release of harmful pollutants into the environment, and state-level agencies typically implement and enforce these standards through permit processes. States also have some flexibility in deciding how to implement standards and meet other federal requirements. For example, under the CAA program that establishes ambient air quality standards for certain harmful pollutants, like carbon monoxide and ground-level ozone,⁴ states draft their own state implementation plans for meeting these standards. State policymakers therefore have an opportunity to tailor their emission control policies to fit their economic and social needs.

This model is theoretically "cooperative" because it depends on voluntary cooperation by state governments. States implement CAA and CWA permitting and enforcement because they prefer to have control over these processes and often receive federal money and assistance in return. But if states opt out (or fail to meet the federal requirements), the federal government can step in and implement the regulatory program at issue, an arrangement often called conditional preemption.⁵

Despite this cooperative model, the recent litigation practices of some states tell an uncooperative—even hostile—story. Consider Texas. According to media sources,⁶ the state of Texas sued the Obama Administration at least 48 times. In over one-half of these cases, Texas challenged EPA action regarding air and water quality standards. A sizeable subset of these lawsuits (eight) involved climate change regulation. The total bill for these challenges added up to more than \$1.8 million.

Texas is not, of course, the only state to challenge federal environmental laws. After EPA issued its Clean Power Plan in 2015, more than one-half of the states, along with utilities, energy companies, and other industry and labor groups, filed dozens of lawsuits alleging that EPA's plan for reducing carbon emissions from power plants violated the CAA and unconstitutionally intruded upon the states' authority to set energy policy.⁷ (These suits are now part of consolidated litigation before the U.S. Court of Appeals for the District of Columbia (D.C.) Circuit, although the Donald Trump Administration has successfully stayed the litigation pending its likely repeal of the Clean Power Plan.)⁸ The Clean Power Plan set emissions targets for each state with the goal of achieving a 32% reduction from 2005 levels by 2030.⁹

After the Supreme Court made the unusual decision to stay EPA's plan in January 2016, 19 states suspended their planning processes under the Clean Power Plan, further delaying meaningful planning for emissions reductions and threatening to undermine U.S. compliance with the Paris Climate Change Agreement.¹⁰ Notably, states are divided on the issue; 18 states, along with various local governments, nonprofit organizations, and industry groups, filed briefs in support of the plan.¹¹ In addition, after President Trump announced his intention to withdraw the United States from the Paris Agreement in June 2017,¹² 14 states announced that they would nevertheless meet their states'

3. 558 U.S. 310 (2010).

4. See U.S. EPA, *Criteria Air Pollutants*, www.epa.gov/criteria-air-pollutants.

5. See, e.g., Roderick M. Hills Jr., *The Political Economy of Cooperative Federalism: Why State Autonomy Makes Sense and "Dual Sovereignty" Doesn't*, 96 MICH. L. REV. 813, 866 (1998) (describing the "system of conditional preemption").

6. See Neena Satija et al., *Texas v. the Feds—A Look at the Lawsuits*, TEX. TRIB., Jan. 17, 2017, www.texastribune.org/2017/01/17/texas-federal-government-lawsuits/.

7. See E&E NEWS, *E&E's Power Plan Hub*, available at www.eenews.net/interactive/clean_power_plan.

8. In October 2017, EPA proposed a rule that would rescind the Clean Power Plan. Repeal of Carbon Pollution Emission Guidelines for Existing Stationary Sources, Electric Utility Generating Units, 82 Fed. Reg. 48035 (Oct. 16, 2017).

9. Carbon Pollution Emission Guidelines for Existing Stationary Sources, Electric Utility Generating Units, 80 Fed. Reg. 64661 (Oct. 23, 2015) (to be codified at 40 C.F.R. pt. 60).

10. See E&E NEWS, *E&E's Power Plan Hub, Supreme Court Stay Response*, www.eenews.net/interactive/clean_power_plan#planning_status_chart.

11. See E&E NEWS, *Clean Power Plan in the Courts, Battle Lines*, www.eenews.net/interactive/clean_power_plan/fact_sheets/legal_battle_lines.

12. See White House, Office of the Press Secretary, *Statement by President Trump on the Paris Climate Accord*, www.whitehouse.gov/the-press-office/2017/06/01/statement-president-trump-paris-climate-accord.

portions of the U.S. commitment to emissions reduction under the Paris Agreement.¹³

Roughly as many states¹⁴ also challenged EPA and the U.S. Army Corps of Engineers' (the Corps') 2015 Waters of the United States Rule (WOTUS Rule), a regulation that seeks to clarify which water bodies and wetlands are covered by the CWA.¹⁵ Supreme Court opinions regarding the relevant CWA language are splintered and leave many questions unanswered. In the WOTUS Rule, EPA and the Corps attempted to make their approach to CWA jurisdiction more predictable and transparent. But rather than waiting to see how the Clean Water Rule would function in practice, many states jumped to the zero-sum strategy: sue to invalidate. In litigation against both the WOTUS Rule and the Clean Power Plan, states have argued that federal regulation unconstitutionally alters the state-federal balance of power by expanding federal regulatory power into areas traditionally regulated by the states.

Significantly, this zero-sum view of environmental governance is not confined to the offices of state attorneys general. Legislators in several states introduced bills and resolutions that suspend state planning efforts under the Clean Power Plan or characterize the plan as an abuse of federal power. For example, a resolution introduced in the Arizona Legislature calls on the state governor and attorney general to defend the state against "overreaching regulations."¹⁶

Indeed, state officials routinely frame their objections to federal antipollution regulations in the language of state sovereignty. In announcing their decisions to challenge the Clean Power Plan, state attorneys general described their actions as necessary to "protect the powers constitutionally delegated to the states"¹⁷ and to prevent "federal 'coercion and commandeering' of energy policy."¹⁸ In some cases, these challenges were part of recently created "federalism units" within the office of Republican attorneys general.¹⁹ These new departments were explicitly established to fight

federal policies on issues ranging from immigration to environmental protection.

II. Is Zero-Sum Governance Grounded in the Constitution or Federalism Values?

In light of this state sovereignty rhetoric, an important question is whether these public campaigns against federal "coercion" or overreach can draw on constitutional law or democratic values for support. This part discusses the constitutional doctrine and federalism theory underlying recent challenges to antipollution regulations.

A. Federalism: Legal Doctrine

Although Republican state attorneys general challenged myriad federal environmental regulations under the Obama Administration, the language of state sovereignty has been particularly prevalent in the challenges to the Clean Power Plan and WOTUS Rule. State officials have repeatedly highlighted these rulemakings as examples of overreach by the federal government, characterizing the Clean Power Plan as usurping the states' prerogative to set energy policy and the WOTUS Rule as an expansion of federal jurisdiction over land use, a subject traditionally regulated by local and state governments. The challenges to these two rules therefore provide an opportunity to evaluate the strength of some states' federalism concerns.

I. State Challenges to the Clean Power Plan

The Clean Power Plan presents states with the classic cooperative federalism choice: implement federal standards at the state level or decline to do so, in which case EPA will craft and administer a federal implementation plan to meet emissions reduction targets. The state and industry petitioners argued that this choice constitutes unconstitutional coercion because it commandeers state regulatory authorities.²⁰

To make the case for state coercion, the petitioners argued that "even under a federal implementation plan, state agencies will have to be involved in decommissioning coal-fired plants, addressing replacement capacity, addressing transmission and integration issues, and undertaking all manner of related regulatory proceedings."²¹ But as EPA argued in response, the impacts on states of a federal plan are speculative (given that no such plan has been implemented), but even if generation shifting (from coal to natural gas and renewables) occurs under such a plan, states still have choices about how to respond.²² Tenth Amendment precedent has not gone so far as to suggest that conditional preemption is coercive simply because

13. Brad Plumer, *How Can U.S. States Fight Climate Change if Trump Quits the Paris Accord*, N.Y. TIMES, Sept. 20, 2017, www.nytimes.com/2017/09/20/climate/paris-climate-accord-trump.html.

14. See Timothy Cama, *27 States Challenge Obama Water Rule in Court*, THE HILL, June 30, 2015, <http://thehill.com/policy/energy-environment/246539-27-states-challenge-obama-water-rule-in-court>.

15. Clean Water Rule, Definition of "Waters of the United States," 80 Fed. Reg. 37053 (June 29, 2015).

16. See National Conference of State Legislatures, *States' Reactions to EPA Greenhouse Gas Emissions Standards*, Apr. 18, 2016, www.ncsl.org/research/energy/states-reactions-to-proposed-epa-greenhouse-gas-emissions-standards635333237.aspx.

17. Steven Verburg, *Wisconsin AG Fights Feds With New 5-Lawyer Unit*, WIS. ST. J., July 24, 2016, [http://host.madison.com/wsj/news/local/environment/wisconsin-ag-fights-feds-with-new-Lawyer-unit/article_7e3b1534-915e-59d3-ae85-6305152edf6b.html](http://host.madison.com/wsj/news/local/environment/wisconsin-ag-fights-feds-with-new-lawyer-unit/article_7e3b1534-915e-59d3-ae85-6305152edf6b.html).

18. Nichola Groom & Valerie Volcovic, *Most States on Track to Meet Emissions Targets They Call Burden*, REUTERS, Sept. 19, 2016, www.reuters.com/article/us-usa-climatechange-lawsuit-insight-idUSKCN1100E1.

19. See Mike Soraghan, *Pruitt Dismantled Environmental Unit in Okla.*, E&E NEWS, Dec. 16, 2016, www.eenews.net/stories/1060047302, and Verburg, *supra* note 17.

20. Opening Brief of Petitioners on Core Legal Issues at 78-86, *West Virginia v. EPA*, No. 15-1363 (D.C. Cir. Feb. 19, 2016).

21. *Id.* at 83.

22. Respondent EPA's Final Brief at 103, *West Virginia v. EPA*, No. 15-1363 (D.C. Cir. June 2, 2016).

the federal regulatory option may require states to make policy decisions about how to respond to the consequences of such regulation.²³ These kinds of indirect effects do not “conscript state [institutions] into the national bureaucratic army,”²⁴ nor do they leave states “no real option but to” agree to implement federal standards.²⁵ Indeed, if this form of state persuasion constituted a Tenth Amendment violation, then many cooperative regulatory programs would be vulnerable to challenge.²⁶

Given the implications, it is not surprising that this argument is last in the petitioners’ brief.²⁷ As EPA argued, the state and industry petitioners cannot expect the federalism argument to win on its own and are therefore using it to bolster stronger arguments based on statutory text.²⁸ If the fundamental interpretive questions presented by §111 of the CAA implicate constitutional concerns, the petitioners can credibly encourage the court to employ the constitutional avoidance canon and resolve them in favor of the states.²⁹

The fact that EPA had to rely on a statute not designed to regulate greenhouse gas (GHG) emissions, rather than comprehensive climate change legislation, may be due in part to our federalist system of government. After all, coal-producing states like West Virginia and Wyoming have equal votes in the U.S. Senate despite their relatively small populations. The same interests that promoted the zero-sum rhetoric of environment vs. the economy to undermine climate legislation have adopted the zero-sum rhetoric of state vs. federal jurisdiction to challenge executive rulemaking. Ironically, their victory in the political process undermines their federalism arguments in the courts. As the Supreme Court explained many years ago, state interests “are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power.”³⁰ The U.S. Constitution’s structure ensures states have considerable influence in selecting the legislative and executive branches of the federal government. Indeed, this influence was apparent in the last presidential election; President Trump won the election not because he won the popular vote, but because he secured the most votes in the Electoral College.

2. State Challenges to the WOTUS Rule

Although challengers to the Clean Power Plan raised questions about the balance of state-federal power, they seemed to concede that the rule is within the scope of the federal government’s power under the Constitution (statutory arguments aside). In contrast, challengers to the WOTUS Rule characterized the rule as an expansion of the federal government’s jurisdiction under the Commerce Clause, as well as an encroachment on traditional state authority to regulate land use.³¹ As in the Clean Power Plan litigation, difficult legal questions abound, but the strongest arguments are not ones of constitutional federalism or federal jurisdiction.

Rather, the difficult questions involve statutory interpretation; indeed, the intent behind the WOTUS Rule is to clarify how EPA and the Corps interpret the statutory words “navigable waters,” which are defined in the CWA as “the waters of the United States, including the territorial seas.”³² Established Supreme Court precedent interprets “navigable” broadly to encompass waters that are not, in fact, navigable.³³ But the Court has never reached clear consensus on the CWA’s coverage of wetlands, especially “isolated” intrastate wetlands such as prairie potholes, which lack continuous surface connections to waters traditionally covered by the CWA. At one point, the Court questioned whether Congress has the power to extend the Act’s reach to such wetlands.³⁴ In the Court’s latest attempt to resolve this question in *Rapanos v. United States*, a majority agreed that the CWA covers some wetlands not adjacent to traditionally covered waters, but the Justices did not agree on an approach to these determinations.³⁵

Most lower courts, as well as EPA and the Corps, chose to follow Justice Anthony Kennedy’s “significant nexus” text from *Rapanos*, a case-by-case analysis that asks whether “wetlands, either alone or in combination with similarly situated lands in the region significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as ‘naviga-

23. Federal Energy Reg. Comm’n v. Mississippi, 456 U.S. 742, 766, 12 ELR 20896 (1982) (“Thus it cannot be constitutionally determinative that the federal regulation is likely to move the States to act in a given way, or even to ‘coerc[e] the States’ into assuming a regulatory role by affecting their ‘freedom to make decisions in areas of “integral governmental functions.””).

24. *Id.* at 775 (O’Connor, J., concurring in judgment and dissenting in part).

25. National Fed’n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2605 (2012) (Roberts, C.J.) (plurality).

26. See Respondent EPA’s Final Brief, *supra* note 22, at 104-05 n.91-92 (noting cooperative regimes for interstate emissions trading of sulfur dioxide and other pollutants by power plants).

27. Opening Brief of Petitioners, *supra* note 20, at 78-86.

28. Respondent EPA’s Final Brief, *supra* note 22, at 106-07.

29. *Id.*

30. Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 552 (1985).

31. Although I focus here on the Commerce Clause arguments, the federalism arguments are also rather weak. State challengers simply state the unremarkable notion that states have “traditional and primary power over land and water use within their borders.” See, e.g., Complaint ¶ 88, Oklahoma v. EPA, No. 15-CV-381-CVE-FHM (N.D. Okla. July 8, 2015) [hereinafter Complaint]. The Supreme Court has, however, recognized the distinction between land use planning and environmental regulation. See California Coastal Comm’n v. Granite Rock Co., 480 U.S. 572, 587, 17 ELR 20563 (1987). Furthermore, many environmental laws affect how land may be used. The best argument is that expansion of federal power into this area of traditional state authority requires a clear statement from Congress. See *Rapanos v. United States*, 547 U.S. 715, 738, 36 ELR 20116 (2006) (Scalia, J., dissenting). Precedent does not clearly support the argument that the WOTUS Rule violates the Tenth Amendment.

32. 33 U.S.C. §1362(7).

33. See, e.g., *United States v. Riverside Bayview Homes*, 474 U.S. 121, 133, 16 ELR 20086 (1985) (“[T]he Act’s definition of ‘navigable waters’ as ‘the waters of the United States’ makes it clear that the term ‘navigable’ as used in the Act is of limited import.”).

34. *Solid Waste Agency of Northern Cook County v. Army Corps of Eng’rs*, 531 U.S. 159, 174, 31 ELR 20382 (2001).

35. 547 U.S. 715, 36 ELR 20116 (2006).

ble water.”³⁶ Because, as Justice Kennedy noted, wetlands “can perform critical functions related to the integrity of other waters—functions such as pollutant trapping, flood control, and runoff storage,” they are sufficiently connected to these waters and therefore well within the reach of federal regulatory power.³⁷ The WOTUS Rule is an attempt to add further clarity to this test. For example, the rule identifies excluded waters, such as groundwater and most ditches, defines adjacent waters and tributaries, and explains the application of the significant nexus test to wetlands.³⁸

The agencies’ attempt to make Justice Kennedy’s approach more clear and transparent predictably prompted litigation, much of it couched once again in the narrative of federal overreach. Under former EPA Administrator Scott Pruitt’s leadership as Oklahoma attorney general, Oklahoma filed a complaint raising questions of both federal jurisdiction and federalism.³⁹ Given the Supreme Court’s splintered opinions on the meaning of “navigable waters,” it is difficult to predict how it would resolve the fundamental question of statutory interpretation. But in light of recent Commerce Clause precedent, the state’s constitutional arguments are much weaker than the federal government’s.

The Court has been clear that Congress’ commerce power may extend to intrastate activities, even those that are “trivial” in isolation, when Congress has a rational basis to conclude that the “activities, taken in the aggregate, substantially affect interstate commerce.”⁴⁰ Decades ago, in *Wickard v. Filburn*, the Court held that Congress had the power to authorize regulation of intrastate wheat production not intended for commercial sale.⁴¹ More recently, in *Gonzales v. Raich*, the Court held that Congress’ power extended to purely intrastate, noncommercial cultivation and use of marijuana in compliance with state law.⁴² As long as the “general regulatory statute bears a substantial relation to commerce, the *de minimis* character of individual instances arising under that statute is of no consequence.”⁴³

Thus, under this precedent, CWA coverage of isolated intrastate wetlands seems well within the federal commerce power even when an isolated wetland’s connection to a navigable water is trivial on its own. Indeed, the

WOTUS Rule’s approach mirrors the Court’s aggregate effects approach: the significant nexus determination can be based on the aggregate effects of certain isolated wetlands that are similarly situated in a watershed.⁴⁴ Thus, when the fill, dredging, or pollution of these similarly situated waters would, in the aggregate, affect interstate or territorial waters, federal permitting requirements do not violate the Constitution.

Furthermore, the “general regulatory statute” at issue, the CWA, clearly “bears a substantial relation to commerce.” The Act regulates economic activity, requiring, for example, national pollutant discharge elimination system permits for discharges of wastewater and §404 permits for development activities that disrupt wetlands. Moreover, commercial activity can both contribute to and be injured by water pollution.⁴⁵ As in *Raich*, the state challengers of the WOTUS Rule are asking courts to “excise individual applications of a concededly valid statutory scheme.”⁴⁶ When Congress has the power to regulate a “class” of activities (here, activities affecting the integrity of the nation’s waters), “the courts have no power ‘to excise, as trivial, individual instances’ of the class.”⁴⁷

The reach of this aggregate effects approach is perhaps most apparent in cases challenging regulatory authority under the Endangered Species Act (ESA),⁴⁸ such as when a unanimous U.S. Court of Appeals for the Tenth Circuit panel upheld the ESA’s prohibition of the “take” of a purely intrastate species.⁴⁹ A group of landowners in Utah challenged a federal regulation prohibiting the take of the Utah prairie dog on nonfederal land.⁵⁰ Applying the aggregate effects doctrine from *Raich*, the panel concluded that “the Commerce Clause authorizes regulation of noncommercial, purely intrastate activity that is an essential part of a broader regulatory scheme, that as a whole, substantially affects interstate commerce.”⁵¹ According to the panel, the ESA’s “substantial relation to interstate commerce” is clear: the conservation of species requires limitations on economic development and commercial activity in the short term and promotes eventual commercial trade in species in the long term.⁵²

36. *Id.* at 780 (Kennedy, J., concurring in judgment).

37. *Id.* at 779 (Kennedy, J., concurring in judgment).

38. 33 C.F.R. §328.3(a)-(b); 40 C.F.R. §230.3(o) (2015).

39. Complaint, *supra* note 31. Other states, municipal entities, industry groups, and private landowners have challenged the rule in other federal district and circuit courts. Litigation has proceeded in different courts because the challengers disagree about which court has jurisdiction over the case. Various challenges to the rule have been stayed, and the jurisdictional question is currently before the Supreme Court. In the meantime, however, the Trump Administration is likely to rewrite the rule to narrow the definition of waters of the United States. For updated information about court challenges and EPA review of the rule, see the ABA Section of Environment, Energy, and Resources web site on this issue: www.americanbar.org/groups/environment_energy_resources/resources/wotus.html.

40. *Gonzales v. Raich*, 545 U.S. 1, 20, 22 (2005).

41. 317 U.S. 111, 128 (1942).

42. 545 U.S. at 33.

43. *Id.* at 17.

44. *See, e.g.*, 33 C.F.R. §328.3(a)(7).

45. *See* ROBIN KUNDIS CRAIG, *THE CLEAN WATER ACT AND THE CONSTITUTION: LEGAL STRUCTURE AND THE PUBLIC’S RIGHT TO A CLEAN AND HEALTHY ENVIRONMENT* 147 (2d ed. 2009).

46. *Raich*, 545 U.S. at 23.

47. *Id.*

48. 16 U.S.C. §§1531-1544.

49. *People for the Ethical Treatment of Prop. Owners v. FWS*, 852 F.3d 990, 1008 (10th Cir. 2017).

50. *Id.* at 994.

51. *Id.* at 1002.

52. The panel did not reach the issue of whether ESA take prohibitions regulate economic activity, choosing instead to focus on the statute’s connection to economic activities under the *Raich* analysis. *Id.* at 1001 fn.6. Some courts have, however, taken this approach. *See id.* ESA take prohibitions and CWA permitting requirements are usually directed at economic activities (e.g., real estate development, agricultural practices), but an analysis that *requires* each activity to be economic or commercial in nature might place some activities (e.g., a landowner’s disruption of an isolated pond for noncommercial purposes) outside the reach of the commerce power.

Moreover, the Tenth Circuit panel noted that every other circuit court to address the constitutionality of ESA take prohibitions has held that they fall within Congress' commerce power.⁵³ Although at least one Supreme Court Justice has expressed skepticism regarding the ESA's jurisdiction over intrastate species,⁵⁴ the weight of federal judicial authority supports it. If the federal commerce power extends to a private landowner's taking of one Utah prairie dog, it surely extends to activities that threaten intrastate wetlands that support the chemical, physical, and biological integrity of our nation's waters.

B. Federalism Values

Although the arguments that environmental regulations infringe on state sovereignty enjoy limited support in judicial precedent, perhaps they nevertheless find support in theoretical justifications for our federalist structure. After all, depending on your view of judicial decision making, legal doctrine is a product of either reasoned debate or political preferences—either of which could shift under different conditions. Assuming judicial decisions are informed, at least to some extent, by reasoned debate, we might wonder whether states challenging federal authority can make principled arguments based on the values theoretically furthered by the vertical separation of governing authority between states and the federal government.

An extensive academic literature explores the liberal and democratic values ideally furthered by federalism. Although scholars examining these questions have nuanced views about the nature and number of these values, they generally fall within three broad categories: (1) personal liberty; (2) democratic process; and (3) economic efficiency and innovation.⁵⁵ Courts also frequently acknowledge these values, although they may not always analyze them in depth.⁵⁶

The first value, that of personal liberty, resonates with libertarian notions of limited government. The idea is that a competitive, dualistic system of government will check abuses of governmental power because citizens may use one government (state or federal) to address the overreach of the other. This narrative is powerful in red states where state attorneys general routinely challenged Obama-era regulations.

The problem, of course, is that dual sovereignty is a misleading narrative. Although states clearly do shape federal policy by participating in federal legislative and administrative processes, our constitutional federalism does not really endorse dual sovereignty; power is not evenly divided between federal and state governments. As long as

Congress acts according to a constitutionally enumerated power, the Supremacy Clause makes clear that federal law preempts state law. This undermines the narrative of liberty protected by competitive, *equal* sovereigns.

Furthermore, accounts premised on personal liberty tend to favor *some* people's liberty over others; in other words, they are easily manipulated to serve political ends. Challenges to the Clean Power Plan seek to further the liberty of individuals involved in the oil and gas industries, but they ignore others, especially future generations, whose liberties will be constrained by a climate-changed world. Similarly, challenges to the WOTUS Rule seek to protect the liberty of property owners (to do what they want with their land), but they ignore the constraints on liberty caused by water pollution and habitat destruction. In the end, environmental degradation will limit the life choices of far more people both now and in the future than the environmental regulation that seeks to prevent it.

What about democratic process values? The argument here is that state governments are more responsive and accountable to their electorates than the national government. Moreover, because they are closer to the people, they are also more likely to encourage citizen participation in democracy. This participation theoretically furthers democratic principles of deliberation toward the common good and increases the likelihood that political representatives will enact policies that satisfy the preferences of their citizens.

During his brief role as EPA Administrator, Scott Pruitt repeatedly touted the superior ability of states to regulate environmental concerns.⁵⁷ Some of his comments suggest that because states are more accountable to their citizens, EPA must listen to them (and perhaps defer to them) in order to claim democratic legitimacy.⁵⁸ In other words, increased state authority over environmental issues will ensure that policies satisfy the preferences of the electorate.

The problem with this argument is that both public opinion and state action undercut it. According to polls, the majority of U.S. citizens want EPA to have the same or more power than it did under the Obama Administration, suggesting that most people have not lost faith in the agency and do not view it as undemocratic.⁵⁹ Moreover, in states with significant oil and gas production, state

53. *Id.* at 1007.

54. See *Rancho Viejo v. Norton*, 334 F.3d 1158, 1160 (D.C. Cir. 2003) (Roberts, J., dissenting from denial of rehearing en banc).

55. See, e.g., ERWIN CHEMERINSKY, ENHANCING GOVERNMENT: FEDERALISM FOR THE 21ST CENTURY (2008); Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. CHI. L. REV. 1484 (1987).

56. A particularly well-known discussion of these values is in Justice Sandra Day O'Connor's opinion in *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991).

57. See, e.g., Coral Davenport, *Scott Pruitt, Testifying to Lead E.P.A., Criticizes Environmental Rules*, N.Y. TIMES, Jan. 18, 2017, www.nytimes.com/2017/01/18/us/politics/scott-pruitt-testifying-to-lead-epa-criticizes-environmental-rules.html?_r=0.

58. See Devin Henry, *Pruitt Says His EPA Will Work With the States*, HILL, Jan. 18, 2017, <http://thehill.com/policy/energy-environment/314786-pruitt-says-his-epa-will-work-with-the-states> (noting that Pruitt asserted EPA must "listen[] to the views of all interested stakeholders, including the states, so that it can determine how to realize its missions while considering true pragmatic impacts of its decisions on jobs, communities and most importantly families").

59. See, e.g., Niina Heikkinen, *Majority of Swing District Voters Oppose EPA Cuts—Poll*, CLIMATEWIRE, Apr. 28, 2017, www.eenews.net/climatewire/2017/04/28/stories/1060053742; Chris Kahn, *Poll: Unlike Trump, Americans Want EPA as Strong Environmental Regulator*, AOL NEWS, Jan. 17, 2017, www.aol.com/article/news/2017/01/17/poll-unlike-trump-americans-want-epa-as-strong-environmental-regulator/21656574/.

governments have preempted local authority to regulate or ban certain drilling practices. For example, in Oklahoma, when local communities took steps to ban hydraulic fracturing, the state legislature quickly passed legislation preventing these laws.⁶⁰ Such legislation is clearly contrary to democratic process values; it is not responsive to state citizens' preferences and it discourages active involvement in local democratic processes.⁶¹

The last federalism value concerns economic efficiency and innovation. In the environmental field, arguments about economic efficiency begin from the premise that optimal environmental regulation will occur at the level of government that can best internalize the costs and benefits of regulation.⁶² When an environmental problem is truly local in scope, e.g., water treatment issues, local regulation is likely more efficient *and* innovative because the costs and benefits are local and local regulators can explore options that best address the problem, rather than relying on a uniform national policy.⁶³ But when local or state regulation would fail to internalize costs and benefits, economic theory may support national or even international regulation. A state will fail, for example, to require sufficient limitations on emissions of an air pollutant that travels to another state because although the regulation would internalize the costs, the benefits are enjoyed elsewhere.⁶⁴

The Clean Power Plan and WOTUS Rule address classic "externality" problems. State regulation of GHG emissions is not likely to be efficient because the states would bear regulatory costs, but benefits are diffuse and global. Similarly, states are not likely to provide optimal protection for wetlands when they drain into watersheds that cross state lines where the benefits of increased protection would be realized. The economic arguments often used to justify vertical diffusion of governmental power simply do not apply in these contexts.

III. State Motivations

State sovereignty arguments may appeal to audiences predisposed to disfavor federal regulation, but they are not clearly supported by legal doctrine and theory. Perhaps, the competitive federalism reflected in state challenges to Obama era rules such as the Clean Power Plan and WOTUS

Rule is nevertheless grounded in something other than constitutional or federalism principles. Two possibilities come to mind. First, states may be justifiably motivated to challenge federal authority if federal rules are imposing burdens on state institutions that are costly enough to justify fighting them. Second, state attorneys general may be more likely to pursue litigation if they stand to benefit personally in some way. This part considers both theories and ultimately concludes that zero-sum environmental governance is deeply rooted in a kind of zero-sum politics that privileges the preferences of concentrated, well-financed, short-term interests.

A. A Response to Burdens on State Institutions?

If federal environmental rules impose significant costs on states, state actors might reasonably respond by challenging those rules. But although both the Clean Power Plan and the WOTUS Rule would change the regulatory landscape and require some action by states, the increased regulatory burden is incremental and the overall compliance costs for affected state industries and individuals are small. Both rules tap into familiar regulatory frameworks under the CAA and CWA. And neither rule would impose significant new costs on regulated entities.

I. Costs of the Clean Power Plan

The regulatory burdens imposed by the Clean Power Plan would vary from state to state. The plan gives states flexibility to determine how best to meet the targets and allows a range of regulatory tools, including market-based mechanisms such as trading. Whether states choose to participate in interstate trading or decide to implement more traditional emissions limitations via state permits, they will need to commit some resources to designing and implementing new regulatory strategies. But because states have traditionally regulated energy markets, they already have the necessary institutions and knowledge to facilitate these decisions. Moreover, if a state decides the regulatory burden is too much to bear, it may opt for a federal implementation plan.

What about the costs to industry and consumers? Despite the objection that the Clean Power Plan forces dramatic changes in energy policy, analyses show that most states are on course to reduce emissions by their federally specified targets. One 2015 analysis found that 21 of the 27 state challengers were on track to meet 2024 targets, and 18 of those states were likely to meet their 2030 targets without changing their current plans.⁶⁵ Indeed, some states like Texas are likely to benefit from the plan because they can profit from the export of wind and solar energy.⁶⁶

60. Joe Wertz, *Gov. Fallin Signs Bill to Prevent Towns, Cities and Counties From Banning Fracking*, STATEIMPACT, NPR, June 1, 2015, <https://stateimpact.npr.org/oklahoma/2015/06/01/gov-fallin-signs-bill-to-prevent-towns-cities-and-counties-from-banning-fracking/>.

61. Moreover, though EPA Administrator Pruitt talks about the virtues of state environmental regulation, he may change his view when state regulation is more protective than federal regulation. During confirmation hearings, he would not commit to granting California a waiver to implement vehicle emissions standards more stringent than the federal standards, a fairly uncontroversial practice historically. See Richard Revesz, *According to Scott Pruitt, States Only Have the Right to Pollute, Not Protect Their Environments*, L.A. TIMES, Mar. 20, 2017.

62. See Henry N. Butler & Jonathan R. Macey, *Externalities and the Matching Principle: The Case for Reallocating Environmental Regulatory Authority*, 14 YALE L. & POL'Y REV. 23, 25 (1996).

63. See Jonathan H. Adler, *Jurisdictional Mismatch in Environmental Federalism*, 14 N.Y.U. ENVTL. L.J. 130, 133 (2005).

64. See *id.* at 140.

65. Nichola Groom & Valerie Volcovic, *Most States on Track to Meet Emissions Targets They Call Burden*, REUTERS, Sept. 19, 2016, www.reuters.com/article/us-usa-climatechange-lawsuit-insight-idUSKCN1100E1.

66. *Id.*

Of course, a few states like West Virginia will bear costs in the short run because of their reliance on the use and export of coal. For the overwhelming majority, however, the compliance costs are minimal to nonexistent.

2. Costs of the WOTUS Rule

The WOTUS Rule defines the reach of CWA programs and regulations by defining the waters subject to the Act's jurisdiction. Any increased costs are therefore those that result from a theoretically expanded application of the CWA. The EPA-Corps' economic analysis for the rule emphasizes the possibility that jurisdiction will not expand and might even contract under the rule.⁶⁷ Wetlands, for example, that are currently considered "adjacent" to navigable waters and therefore covered might be beyond the distance limitations contained in the WOTUS Rule.⁶⁸ Similarly, the new definition of "tributary" could make some currently covered waters non-jurisdictional.⁶⁹

The economic analysis does, however, acknowledge the possibility of increased costs from expanded jurisdiction and attempts to quantify them. Because of limitations in the data on currently covered waters, the agencies chose to analyze the data on "negative" jurisdictional determinations by the Corps in 2013 and 2014.⁷⁰ Using this data, the agencies determined the percent change in jurisdictional determinations under the WOTUS Rule. The end result is a small 2.84% increase in positive jurisdictional determinations under the new rule.⁷¹ Even when adjusted to reflect the possibility that landowners did not request jurisdictional determinations for waters covered by the new rule, the analysis predicts only a 4.65% increase in positive jurisdictional determinations.⁷² These predictions are based on conservative assumptions, including the assumption that all currently covered waters would remain jurisdictional and that permits would be requested for newly jurisdictional waters.⁷³

Of course, even a small jurisdictional increase would impose costs,⁷⁴ but in assessing state arguments regarding costs, not all costs are relevant. Most significantly, the majority of the costs would result from expanded jurisdiction over dredge-fill activities affecting wetlands under §404 of the CWA, a program run by the Corps, rather than the states (with two exceptions).⁷⁵ According to the economic analysis, roughly 67% to 80% of the WOTUS Rule's costs would come from increased §404 permitting and mitigation⁷⁶; these are costs private

individuals (landowners and developers) would bear as a result of *federal*, not state, implementation.

Nevertheless, in Oklahoma's complaint challenging the WOTUS rule, the state insisted that expanded jurisdiction will result in costly burdens on the state. The state argued that it will have to set water quality standards for newly covered waters and then incur the costs of monitoring these waters and establishing total maximum daily loads (TMDLs) for waters that do not meet the water quality standards.⁷⁷ The reality, however, is that states typically develop water quality standards for *general* categories of waters, such as streams or wetlands, and these standards are already in place.⁷⁸ As the economic analysis explains, the state may have to determine whether existing standards apply to a newly covered water, but the rule will impose "no additional costs relating to development or revision of water quality standards."⁷⁹ The claim that monitoring will increase costs is also misleading. States have established budgets for water quality monitoring, and they make choices about which waters to sample in gathering data about "general trends" in water quality.⁸⁰ Similarly, states have flexibility in the TMDL process, which typically targets high-priority waters clearly covered under the CWA.⁸¹ The new rule would not therefore result in a "net cost increase" to state monitoring and TMDL programs.

B. Zero-Sum Governance: The Polarization of Politics and Influence of Organized Interests

Since the late 1950s, public choice scholars have been writing about how interest groups form and how they affect legislation, particularly at the federal level.⁸² Mancur Olson's well-known theory predicts that relatively small, wealthy groups will overcome collective action problems and lobby legislators for legislation that serves their interests at the expense of the public. Subsequent work in the public choice field has questioned aspects of this theory, demonstrating, for example, that larger interest groups may form under

67. U.S. EPA & U.S. ARMY CORPS OF ENGRS, ECONOMIC ANALYSIS OF THE EPA-ARMY CLEAN WATER RULE 8 (May 2015), available at www.eenews.net/assets/2017/07/07/document_gw_05.pdf.

68. *Id.*

69. *Id.*

70. *Id.* at 7.

71. *Id.* at 13.

72. *Id.*

73. *Id.* at 8, 14.

74. The economic analysis predicts that these costs will be offset by the benefits of regulation.

75. *Id.* at 53-55. The two exceptions are Michigan and New Jersey. *See id.* at 57.

76. *Id.*

77. Complaint, *supra* note 31, ¶¶ 46-48, 50.

78. ECONOMIC ANALYSIS, *supra* note 67, at 15. States generally set water quality standards by establishing the designated uses (e.g., recreation, agriculture, public water supply) for particular water bodies and developing water quality criteria for specific pollutants that apply to these designated uses. *See* U.S. EPA, WATER QUALITY STANDARDS HANDBOOK ch. 3 (2d ed. 1994), available at www.epa.gov/wqs-tech/water-quality-standards-handbook. Federal regulation allows (but does not require) state development of site-specific water quality criteria when the national criteria are under- or overprotective due to the specific conditions of a particular water body. Site-specific criteria are departures, however, from the typical approach and require EPA approval.

79. *Id.*

80. *Id.*

81. *Id.* at 15-16. Under the WOTUS Rule, states would likely incur some administrative costs associated with §401 certifications (of federal permits and licenses resulting in discharges) and §402 NPDES permitting, particularly with regard to general stormwater and CAFO permits. *Id.* at 19-22. Individual NPDES permits are not likely to increase, however. *Id.* at 21. The incremental administrative costs associated with general permits and state certifications are relatively small when spread across states. *See id.* at 20, 26-27, 29-30.

82. Important seminal works include ANTHONY DOWNS, AN ECONOMIC THEORY OF DEMOCRACY (1957), and MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION (1965).

certain conditions.⁸³ Scholars have also studied the ways in which legislators respond to rent-seeking interest groups by seeking to “extract” their own rent in the form of campaign contributions, gifts, and other benefits.⁸⁴ To keep beneficial subsidies and discourage new taxes, interest groups funnel financial benefits to lawmakers.

In the field of environmental law, public choice theories suggest that legislation furthering environmental and public health protections will encounter well-organized opposition because the benefits are diffuse (often in time and space) and the costs are concentrated (usually on industries previously allowed to externalize the costs of pollution and resource depletion). This same dynamic also favors policies that subsidize industry because the benefits flow to well-organized, concentrated interests and the costs are distributed over time to an unorganized public. Moreover, even when environmental interests successfully lobby for legislation, legislators will likely delegate most of the lawmaking to an agency in order to appease both sides.⁸⁵

These theories focus on legislative institutions, rather than executive branch institutions such as administrative agencies. Another well-developed body of literature does, however, focus on whether and how interest groups can affect and even “capture” regulatory processes.⁸⁶ What is largely missing, however, is an account of how interest groups might influence the offices of state attorneys general.

Historically, these offices have been most concerned with enforcing state laws, rather than setting national policy. But as the state challenges to the Obama Administration’s rules make clear, the role of the state attorney general is undergoing a profound change. State attorneys general are more likely now to pursue partisan political agendas in coordinated fashion. Recent studies link this development to the increasing polarization of politics and the influence of organized interests seeking to shape the national regulatory agenda.⁸⁷

Since the 1990s, multistate litigation has been on the rise. State attorneys general have worked together to extract large settlements from powerful industries such as the pharmaceutical and tobacco industries.⁸⁸ The settlements go beyond monetary damages, dictating conditions on pricing and advertising that Congress could never successfully legislate.⁸⁹ These largely *bipartisan* efforts have

been so consequential that scholars have described them as “regulation by litigation.”⁹⁰

As state attorneys general began setting national consumer protection policy through these large settlements, Democratic attorneys general also sought to challenge the deregulatory policies of Republican administrations. For example, state attorneys general doggedly fought the George W. Bush Administration’s efforts to modify New Source Review under the CAA.⁹¹ And in *Massachusetts v. EPA*, 12 state attorneys general (only one a Republican) joined cities and advocacy groups in challenging EPA’s denial of a petition to regulate GHG emissions from new vehicles.⁹² According to Paul Nolette, a political scientist who has studied the modern litigation practices of state attorneys general, “more aggressive and coordinated conservative state litigation emerged only after state litigation matured as a method of unorthodox policymaking, particularly after the tobacco settlement and lawsuits against the George W. Bush administration.”⁹³

The emergence of partisan litigation also coincides with what Nolette calls the “trickle-down polarization” of politics.⁹⁴ He observes that even during the George W. Bush Administration’s second term “one could speak of a distinction between the polarized national environment and a less polarized state-level politics.”⁹⁵ In recent years, however, more and more state-level elections have resulted in undivided governments, where one party controls the state legislature, governor’s office, and attorney general’s office.⁹⁶ Moreover, these elections increasingly follow voting patterns for national office, resulting in a surge of Republican state attorneys general.⁹⁷ Reflecting partisan trends, both Republican and Democratic attorneys general have formed political organizations (the Republican Attorneys General Association, or RAGA, and the Democratic Attorneys General Association, or DAGA) to facilitate collective action on partisan priorities and support partisan elections for their offices.⁹⁸

The entry of state attorneys general into national policymaking did not go unnoticed by well-financed, organized interest groups. Fearing consumer protection litigation, companies have sponsored conference events at lavish hotels and resorts and have donated millions of dollars to RAGA and DAGA and contributed both directly and indirectly to individual campaign funds.⁹⁹ For example, according to a 2014 *New York Times* report, the U.S. Chamber of Commerce contributed \$2.2 million in one year to RAGA.¹⁰⁰ The report also documents the network

83. See, e.g., Allan Cigler & Burdett Loomis, *Introduction*, in *INTEREST GROUP POLITICS* 9-10 (Allan Cigler & Burdett Loomis eds., 8th ed. 2011).

84. See FRED McCHESNEY, *MONEY FOR NOTHING: POLITICIANS, RENT EXTRACTION, AND POLITICAL EXTORTION* (1997).

85. See MICHAEL HAYES, *LOBBYISTS AND LEGISLATORS: A THEORY OF POLITICAL MARKETS* (1981).

86. See, e.g., *PREVENTING REGULATORY CAPTURE: SPECIAL INTEREST INFLUENCE AND HOW TO LIMIT IT* (Daniel Carpenter & David A. Moss eds., 2014).

87. See, e.g., CHISUN LEE ET AL., *BRENNAN CENTER FOR JUSTICE, AFTER CITIZENS UNITED: THE STORY IN THE STATES* (2014), and Eric Lipton, *Lobbyists, Bearing Gifts, Pursue Attorneys General*, N.Y. TIMES, Oct. 28, 2014, www.nytimes.com/2014/10/29/us/lobbyists-bearing-gifts-pursue-attorneys-general.html.

88. PAUL NOLETTE, *FEDERALISM ON TRIAL: STATE ATTORNEYS GENERAL AND NATIONAL POLICYMAKING IN CONTEMPORARY AMERICA* (2015).

89. See *id.* at 61-64, 80-84.

90. See, e.g., ANDREW P. MORRIS ET AL., *REGULATION BY LITIGATION* (2009).

91. See NOLETTE, *supra* note 88, at 122-27.

92. See *id.* at 139.

93. Nos. 05-1120, 37 ELR 20075 (U.S. Apr. 2, 2007). See also NOLETTE, *supra* note 88, at 192.

94. NOLETTE, *supra* note 88, at 190.

95. *Id.*

96. See *id.* at 190-91.

97. Before the state-level polarization of politics, the majority of attorneys general had traditionally been Democrats. See *id.*

98. See *id.* at 191-92.

99. See Lipton, *Lobbyists, Bearing Gifts, Pursue Attorneys General*, *supra* note 87.

100. *Id.*

of close relationships between industry representatives and state attorneys general.¹⁰¹ Industry representatives have used these connections to urge state attorneys general to advocate their positions with the federal government.¹⁰² In many cases, attorneys general have simply copied the content of documents drafted by industry onto the state's letterhead and submitted them to federal agencies considering a policy that industry disfavors.¹⁰³

It is well-documented that Pruitt, as Oklahoma attorney general and leader of RAGA, engaged in this practice on behalf of oil and gas interests. Energy companies provided him with letters designed to “block regulations on greenhouse gas emissions from oil and gas wells, ozone air pollution and chemicals used in hydraulic fracturing.”¹⁰⁴ Thousands of released e-mails demonstrate Pruitt's close collaboration with energy companies and utilities in opposing various environmental rules.¹⁰⁵ Indeed, the turn in red states toward state litigation of federal “overreach” was highly coordinated with industry. In 2013, for example, attorneys general and energy industry representatives came together in Oklahoma City for the “Summit on Federalism and the Future of Fossil Fuels.”¹⁰⁶ After the summit, 19 state attorneys general came together to form the “Federalism in Environmental Policy task force.”¹⁰⁷ In some cases, Republican attorneys general established “federalism units” in their home offices to further these interests. Indeed, not long after he was elected the attorney general of Oklahoma, Pruitt created a federalism unit to advocate “states’ rights” and shut down a section devoted to environmental issues.¹⁰⁸

Not surprisingly, these close connections are underwritten by money. Several major energy companies are members of RAGA and give the organization “hundreds of thousands” of dollars.¹⁰⁹ In fact, to facilitate fundraising, RAGA established the “Rule of Law Defense Fund,” a “legal entity that allows companies benefiting from the actions of . . . Republican attorneys general to make anonymous donations in unlimited amounts.”¹¹⁰ In 2014, RAGA alone had collected \$16 million, “nearly four times

the amount it collected in 2010.”¹¹¹ It spent the money on campaign advertisements in support of Republican candidates for state attorney general.¹¹²

The uptick in political donations since 2010 is partly the result of polarized politics and industry opposition to a Democratic administration at the national level. But it also follows the national trend of large contributions from wealthy donors unleashed by the Supreme Court's 2010 decision in *Citizens United*.¹¹³ After the Court struck down as unconstitutional all limits on independent campaign expenditures by corporations and unions, elections at all levels of government have been inundated with big money.¹¹⁴ Often, only nominally “independent,” super PACs spend unlimited amounts of money on elections.¹¹⁵ Furthermore, the use of certain nonprofit organizations, e.g., §501(c)(4) social welfare groups, enables the spending of so-called dark money from anonymous donors because these groups are not legally required to disclose their donors.¹¹⁶ The Rule of Law Defense Fund established by RAGA and formerly chaired by Pruitt is one such organization.¹¹⁷

Although the effect of *Citizens United* has attracted less attention at the state and local levels, a 2014 report documents clear trends indicating a rise in outside spending in state elections.¹¹⁸ In 2014, for example, outside spending in gubernatorial races was “4 to 20 times higher” than 2010.¹¹⁹ The *Citizens United* decision also invalidated similar state bans on independent corporate expenditures on election ads.¹²⁰ According to one study, interest-group spending increased by 80% in 2010 in the states where these bans were lifted.¹²¹ Spending by outside interests is on the rise in elections for virtually all state and local offices, including state attorneys general.¹²²

Given the increased political access of interest groups, the lessons of public choice theory both explain and predict the policy agendas of state attorneys general. Well-organized, well-financed interests have influenced the priorities of these offices. Because the costs of these policies will be distributed diffusely over both geographic and temporal scales, the public does not sufficiently mobilize against them.

101. *Id.*

102. *Id.*

103. *Id.*

104. Coral Davenport & Eric Lipton, *The Pruitt Emails: E.P.A. Chief Was Arm in Arm With Industry*, N.Y. TIMES, Feb. 22, 2017, www.nytimes.com/2017/02/22/us/politics/scott-pruitt-environmental-protection-agency.html.

105. *Id.* The *New York Times* published one example, a letter to the EPA Administrator drafted by Devon Energy and objecting to EPA's methodology for estimating methane emissions from natural gas production. See *A Letter From Oklahoma's Attorney General, Written Almost Entirely by Energy Company Officials*, N.Y. TIMES, www.nytimes.com/interactive/2014/12/07/us/politics/oklahoma-attorney-general-letter-written-almost-entirely-by-energy-company.html.

106. Eric Lipton, *Energy Firms in Secretive Alliance With Attorneys General*, N.Y. TIMES, Dec. 6, 2014, www.nytimes.com/2014/12/07/us/politics/energy-firms-in-secretive-alliance-with-attorneys-general.html.

107. *Id.*

108. Emily Hoden, *How Scott Pruitt Rode a Wave of Federalism to Power*, E&E NEWS, Jan. 18, 2017, www.eenews.net/stories/1060048547.

109. Lipton, *Energy Firms in Secretive Alliance With Attorneys General*, *supra* note 106.

110. *Id.*

111. *Id.*

112. *Id.*

113. 558 U.S. 310 (2010).

114. See LEE ET AL., *supra* note 87, at 5.

115. See *id.* at 8.

116. See *id.*

117. Nick Bowlin, *Dems Introduce “Dark Money” Disclosure Bill for Cabinet Picks*, E&E NEWS, May 19, 2017, www.eenews.net/eedaily/2017/05/19/stories/1060054792 (noting that Rule of Law Defense Fund, once chaired by Pruitt, is a §501(c)(4) organization).

118. LEE ET AL., *supra* note 87.

119. *Id.* at 5.

120. *Id.*

121. *Id.*

122. *Id.* at 6; see also Kent Cooper, *Republican Attorneys General Association Starts Super PAC*, ROLL CALL, Apr. 6, 2014, www.rollcall.com/news/home/republican-attorneys-general-association-starts-super-pac, and Emma Green, *The Local Consequences of Citizens United*, ATLANTIC, July 2, 2015, www.theatlantic.com/politics/archive/2015/07/the-local-consequences-of-citizens-united/397586/ (discussing the impact of *Citizens United* on local elections, especially local and state judicial elections).

Indeed, while serving as EPA Administrator, Pruitt remained loyal to the energy interests that long supported him. In his early days in office, his calendar contained numerous meetings with executives from the fossil fuel industry.¹²³ He had few meetings with environmental organizations; a recent report could only name one meeting with two such groups on Earth Day.¹²⁴ His collaboration with industry also enjoyed the support of a coalition of Republican attorneys general, once led by Pruitt. In response to President Trump's Executive Order directing agencies to identify costly, ineffective regulations, a group of Republican attorneys general submitted a letter to Pruitt advocating the rollback of 20 environmental rules, many of them Obama Administration efforts to improve air quality.¹²⁵

When he assumed his federal role, former EPA Administrator Pruitt criticized the zero-sum framing of environmental policy, calling for the rejection of "the false paradigm that if you're pro-energy you're anti-environment, and if you're pro-environment you're anti-energy."¹²⁶ He said that "we as a nation can be both pro-energy and jobs and pro-environment" and "don't have to choose between the two."¹²⁷ He is correct: in reality, environmental protection is rarely a zero-sum game. Zero-sum frames are usually a reductionist strategy used to obscure a much more complicated set of problems. Unfortunately, Pruitt's win-win framing of the environment and economy was yet another strategic effort to mask his true priorities. To see what those priorities really were, we need only look at his calendar.

IV. The Consequences for Public Welfare and Democracy

The confluence of these trends—the polarization of politics at all levels and the influx of money from concentrated interests—weakens the ability of democratic institutions to respond to the needs of *all* its citizens. Public choice theories of legislation are not normative theories; they are descriptive. They may describe or even predict outcomes under certain conditions, but they are silent when it comes to preferences. In other words, while they may help explain why state attorneys general challenged federal authority under the Obama Administration, they have little to say about how these practices square with democratic values. We are left wondering what—if anything—we lose if state attorneys general respond predictably to interest-group politics. This question is perhaps an oversimplification of what

is happening in the offices of state attorneys general, but it does capture what appears to be a fundamental change in the conditions under which attorneys general operate.

Because this is shifting ground, we would do well to evaluate the implications. Public choice theories draw on traditional economic models that assume public welfare is best served by maximizing aggregate wealth, namely, by enlarging the pie of things that can be priced by the "market." The more individual preferences we satisfy, the larger the pie, and the preferences of well-organized, wealthy groups are valued the most. Wealth maximization is labeled optimal, efficient, and rational, while questions of equitable distribution, ecological sustainability, and the welfare of future generations are labeled inefficient and irrational because they undercut short-term, aggregate financial gains. These economic models inevitably invite zero-sum frames that pit environmental values against economic gains.

Most people do not, however, wish to live in such a world. Many years ago, philosopher Mark Sagoff challenged the idea that we should make policies based on "consumer" choices.¹²⁸ He argued that individuals can make self-interested, individualistic choices that privilege consumerism over environmental sustainability, but that their choices shift with context.¹²⁹ If people know they are making decisions that affect their political, social, and ecological communities, they are more likely to think in terms of "citizen" preferences, rather than consumer preferences.¹³⁰ For example, they are more likely to favor environmental policies that further a decarbonized economy, even if that means they pay a little more for gas and electricity.

Some empirical studies support the idea that people's preferences are shaped by more than personal economic interests. Moreover, as Sagoff theorized, people's preferences appear to change with context; they can think more like "citizens" when questions are framed in terms of overall social welfare. For example, in one study, survey respondents were asked about their willingness to pay to conserve land with valuable habitat and threatened species.¹³¹ When respondents were asked to consider the question from the standpoint of a citizen concerned about society's welfare, they were more likely to agree to a tax than when asked to consider only their personal welfare.¹³² Another study found support for the hypothesis that people care as much about equity in pollution control policy as they do about efficiency.¹³³ Study participants disapproved of policies (regardless of their efficiency) that they "perceived to be regressive and/or to 'let the polluter get away with it.'"¹³⁴

123. Kevin Bogardus, *Meetings With Energy Chiefs Filled Pruitt's Calendar*, E&E NEWS, June 15, 2017, www.eenews.net/stories/1060056130.

124. *Id.*

125. Sean Reilly, *GOP Attorneys General Pan 20 EPA Rules*, E&E NEWS, May 17, 2017, www.eenews.net/eenewspml/2017/05/17/stories/1060054709.

126. Coral Davenport, *Scott Pruitt, Testifying to Lead E.P.A., Criticizes Environmental Rules*, N.Y. TIMES, Jan. 18, 2017, www.nytimes.com/2017/01/18/us/politics/scott-pruitt-testifying-to-lead-epa-criticizes-environmental-rules.html?_r=0.

127. Brady Dennis & Chris Mooney, *Pruitt to EPA Employees: "We Don't Have to Choose" Between Jobs and the Environment*, WASH. POST, Feb. 21, 2017, www.washingtonpost.com/news/energy-environment/wp/2017/02/21/pruitt-to-epa-employees-we-dont-have-to-choose-between-jobs-and-the-environment/?utm_term=.a979217ee245.

128. MARK SAGOFF, *THE ECONOMY OF THE EARTH: PHILOSOPHY, LAW, AND THE ENVIRONMENT* 97 (1988).

129. *Id.* at 93-94.

130. *Id.* at 88.

131. Ville Ovasikainen & Matleena Kniivila, *Consumer Versus Citizen Preferences in Contingent Valuation: Evidence on the Role of Question Framing*, 49 AUSTRALIAN J. AGRIC. & RESOURCE ECON. 379 (2005).

132. *Id.* at 385-86.

133. Simon Dietz & Giles Atkinson, *The Equity-Efficiency Trade Off in Environmental Policy: Evidence From Stated Preferences*, 86 LAND ECON. 423 (2010).

134. *Id.* at 440.

The normative implication for policy design is that “public preferences do not support making efficiency the only goal of policy, at the expense of equity.”¹³⁵

Broader social trends also cut against traditional economic models that assume individual preferences favor short-term aggregate gains over environmental benefits. One relatively recent poll demonstrates a remarkable increase in the number of people, particularly young people, who are willing to pay more for sustainable products.¹³⁶ This trend suggests that even *consumer* preferences are shaped by values other than short-term economic interest. Growing interest in environmental issues among shareholders tells a similar story. Shareholders now regularly advance proposals for company proxy ballots that are devoted to environmental and other social issues.¹³⁷ In 2017, three of these proposals were supported by a majority of shareholders.¹³⁸ These proposals asked three energy companies to prepare annual reports estimating the financial impacts of climate change policies designed to keep global warming below two degrees Celsius (in line with the goals of the Paris Agreement).¹³⁹ Interestingly, these proposals received significantly less support in 2016, meaning that support increased after the transition to a presidential administration hostile to climate change mitigation policies—a change that arguably reduced the energy companies’ financial risks.¹⁴⁰ This counterintuitive result suggests that shareholder preferences may be influenced by more than just wealth maximization.

Ideally, elected officials and representatives would seek to further public preferences, and our public policies would reflect the growing evidence that people’s preferences are shaped by more than short-term, economic interests. We need public officials to think beyond interest-group, consumer preferences. New economic theory stresses the “deep interrelationship between law and economics” and exposes the fictional dichotomy of markets and state.¹⁴¹ It rejects simple binaries (environment vs. jobs, regulation vs. free market) and acknowledges that there are few zero-sum games. Our states’ top law enforcers should reject these reductionist frames as well.

V. Conclusion

The nature of cooperative (or competitive) federalism shifts with each administration’s regulatory agenda. After

serving as EPA Administrator for just over two weeks, Pruitt publicly questioned the scientific consensus that emissions of GHGs are “a primary contributor” to global warming.¹⁴² Soon thereafter, President Trump directed EPA to begin the long process of modifying or rescinding both the Clean Power Plan and the WOTUS Rule.¹⁴³ Pruitt initiated administrative efforts to dismantle these and other regulations, and his successor, Acting Administrator Andrew Wheeler, continues to oversee these rollbacks and initiate new ones.

We are already seeing some states play a very different role: one designed to defend EPA and cooperative federalism. States that acted early to curb carbon emissions, for example, are likely to oppose federal efforts to reconsider regulations and climate policies. Indeed, California’s former governor, Jerry Brown, promised to work with other states and nations in implementing the goals of the Paris Agreement.¹⁴⁴ Other states made similar pledges. Because the fossil-fuel industry has less of a presence in these states, their state attorneys general are less likely to be influenced by these outside interests.

In fact, the new frontier for attorneys general in states with industry ties may be interstate litigation. Republican attorneys general, for example, have threatened to sue California’s insurance commissioner over rules that require insurance companies to disclose their investments in fossil fuels.¹⁴⁵ The attorneys general have argued that only the federal government has jurisdiction to pass such rules.¹⁴⁶ This is still a zero-sum jurisdictional argument, but one based on an expansive view of federal power, rather than federalism principles or states’ rights. If interstate challenges continue, Republican attorneys general are likely to disband their federalism units in favor of something else entirely.

Indeed, as Democratic attorneys general prepare to challenge the Trump Administration’s policies on climate change and other environmental issues, states like Oklahoma are likely to abandon competitive federalism and side with the federal government. As in the case of California’s disclosure rules, one argument that Republican attorneys general will make to oppose their Democratic counterparts is that states may not regulate because only the *federal* government has jurisdiction. This ironic reversal—favoring federal over state authority—exposes the zero-sum framing of environmental governance for what it really is: an antiregulatory strategy at all levels of government.

135. *Id.*

136. Nielsen, *Green Generation: Millennials Say Sustainability Is a Shopping Priority* (Nov. 5, 2015), www.nielsen.com/us/en/insights/news/2015/green-generation-millennials-say-sustainability-is-a-shopping-priority.html (noting that a Nielsen global poll found that nearly three out of four Millennial respondents would pay more for a sustainable product in contrast to about one-half of the respondents in this age group the year before).

137. See JAMES R. COPLAND & MARGARET M. O’KEEFE, PROXY MONITOR 2017 FINDING 1: CLIMATE CHANGE PROPOSALS BREAK THROUGH (2018), www.proxymonitor.org/Forms/2017Finding1.aspx.

138. *Id.*

139. *Id.*

140. *Id.*

141. Martha T. McCluskey et al., *Law and Economics: Contemporary Approaches*, 35 YALE L. & POL’Y. REV. 297, 305 (2016).

142. See Coral Davenport, *EPA Chief Doubts Consensus View of Climate Change*, N.Y. TIMES, Mar. 9, 2017, www.nytimes.com/2017/03/09/us/politics/epa-scott-pruitt-global-warming.html.

143. See Coral Davenport, *Trump Order Will Aim to Roll Back a Clean Water Rule*, N.Y. TIMES, Feb. 27, 2017, www.nytimes.com/2017/02/27/us/politics/trump-clean-water-epa.html.

144. See Chris Megerian et al., *Gov. Jerry Brown, America’s Unofficial Climate Change Ambassador in the Trump Era, Heads to China*, L.A. TIMES, June 1, 2017, www.latimes.com/politics/la-pol-sac-jerry-brown-china-trip-20170601-story.html.

145. Michael Hiltzik, *13 Red States Threaten to Sue Over a California Initiative to Fight Climate Change*, L.A. TIMES, June 21, 2017, www.latimes.com/business/hiltzik/la-fi-hiltzik-insurance-oil-20170620-story.html.

146. *Id.* (containing a link to the letter).