Coopting Federalism

The administration is pushing more environmental programs to the states, accelerating a long-term trend of delegation. Meanwhile the White House is cutting back on EPA's budget. Unfortunately, many states are dramatically downsizing their pollution-control agencies at the same time

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The Environmental Protection Agency has been shrinking slowly over the past decade, leaving the current workforce of 14,172 at its lowest level since Ronald Reagan's second term in the White House more than 30 years ago. But downsizing EPA and "returning power to the states" won't hurt the environment or jeopardize public health, because states have assumed much greater responsibility for implementing laws like the Clean Air Act and Clean Water Act and are ready to fill any gaps as EPA retreats. Or so we are told by the Trump administration and their allies in Congress, conservative think tanks, and the fossil fuel industry.

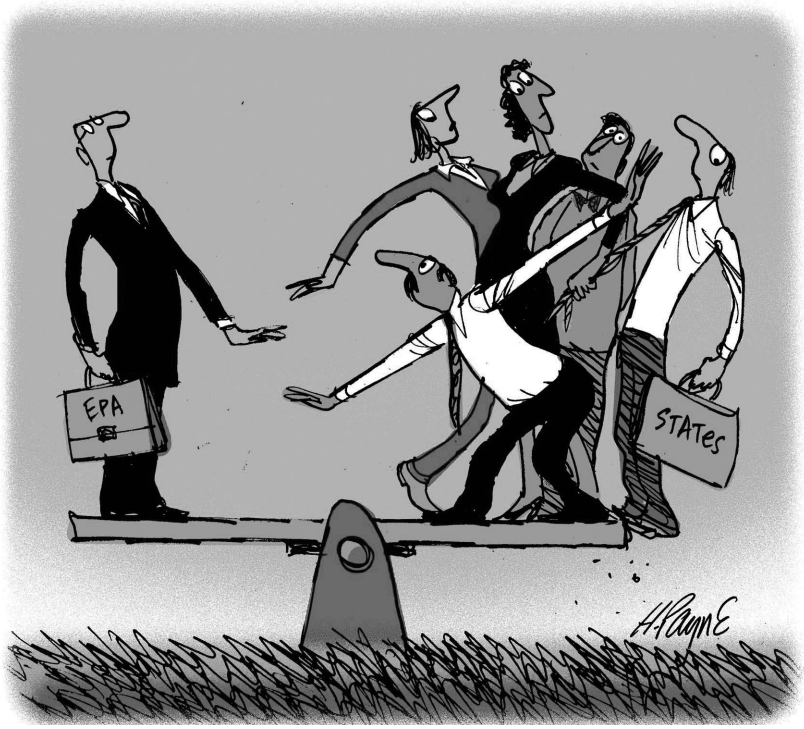
The reality is a little more complicated. As EPA contracts, the workforce among the state pollution control agencies that are supposed to be shouldering more of the burden under cooperative federalism has also dwindled. An in-depth review by my organization, the Environmental Integrity Project, found that environmental agency workforce levels declined in 40 states between 2008-18, with 10 states shedding 20 percent or more of their staff over the 10-year period. We shared our data with state environmental agencies and budget offices before our report was released, and the 18 states responding largely confirmed our findings.

The Great Recession that ended in 2009 cannot explain these cutbacks. After adjusting for inflation, total spending increased in states like North Carolina, Texas, and Wisconsin in the 10-year interval we studied, while their outlays for pollution-control agencies declined by more than a third. These opposing trends suggest that some states are making political decisions to short-change their own environmental agencies even when times are flush. We need to ask how they can take on so many federal program responsibilities after all these budget cuts.

The answer, you may hear from EPA and some states, is to squeeze more out of less through Lean Management practices that make environmental programs more efficient. This commitment to continuous improvement is derived from the Total Quality Management principles and the ISO 14001 environmental management system standard popular among so many corporations and at EPA in the 1990s. Almost everyone who works in government or pays taxes to support it will cheer any attempts to eliminate waste and focus on the most important tasks. The problem is that doing the best with what you have does not always mean that you have enough to get the job done.

The Arizona Department of Environmental Quality, one of the principal exponents of Lean Management, lost 32 percent of its workforce between 2008-18. ADEQ's 2016 CWA assessment reported that more than half of the state's perennial stream miles were not clean enough to meet one or more designated public uses, but also that, "due to declining monitoring resources," only 52 percent of total mileage was evaluated from 2010-15, compared to 76 percent in 2006-08. Whatever the virtues of Arizona's Lean Management, smaller monitoring budgets cut the number of stream miles assessed by about a third, leaving the state and its citizens in the dark about the quality of those waterways.

Arizona is one of the states that EPA has authorized to implement most federal environmental rules that reflect statutory obligations like the CWA's mandate to identify and clean up polluted waterways. For those not already familiar with that process, EPA regulations establish national standards to protect environmental quality or public health and define the minimum pollution control, monitoring, and permitting requirements that apply to the largest sources of pollution. EPA can authorize states to implement these rules by, for example, issuing permits or developing specific plans to achieve federal air or water quality standards. The states that assume these duties on behalf of the federal government must agree to minimum performance standards, with continued EPA oversight to make sure those promises are kept. With few exceptions, EPA always retains its statutory authority to object to permits that weaken federal standards and to enforce requirements where needed.



The Environmental Council of the States has long advocated for more flexibility and less EPA oversight of the state agencies implementing federal rules. In 2017, ECOS proposed to reshape the balance of power between EPA and the states in "Cooperative Federalism 2.0," a statement of principles on behalf of the state commissioners that ECOS represents. In brief, these principles assert that as state agencies have matured and assumed the primary responsibility for implementing federal programs, EPA should defer more often to their judgments, and avoid reviewing or objecting to specific state permit or other decisions in favor of after-the-fact program reviews. EPA should exercise the federal power to enforce only in limited circumstances, the council believes.

According to ECOS, "States should have flexibility to determine the best way for their programs to achieve national minimum standards that enables them to incorporate and integrate their unique geophysical, ecological, social, and economic conditions." Furthermore, "U.S. EPA should respect the states' role as the primary implementer of national environmental regulatory programs and not review individual state implementation decisions, including enforcement, on a routine or recurring basis unless programmatic audits identify this need or particular circumstances compel federal action."

Cooperative federalism has curbside appeal, and we do need a commonsense framework through which EPA and states coordinate and manage their respective responsibilities under federal environ-

mental laws. But the principles advanced by ECOS suffer from serious practical limitations. They do not really address how EPA can conduct the meaningful oversight of authorized state programs that is required under federal law, while also functioning as a partner that avoids "routine or recurring" review of state actions. Nor do they acknowledge or discuss the lack of capacity, legal authority, or political will that has compromised the ability of some states to meet minimum federal standards. And they ignore the elephant in the room, which is how many times cooperative federalism has been used as a political weapon to attack almost every significant environmental standard that EPA has proposed or adopted over the past 10 years.

Let's start with a closer look at what the Clean Air Act says about the relationship between EPA and states. The congressional findings that preface that law say "that air pollution prevention . . . or air pollution control at its source is the primary responsibility of states and local governments." That is followed by 230 pages of statutory text bursting with federally enforceable mandates that include very specific criteria for state implementation of CAA requirements, with detailed procedures for permitting major sources, identifying the best available pollution control and emissions test methods and when they apply, offsetting emissions from new sources in nonattainment areas, modeling to quantify emission increases from new projects, and safeguarding the public's right to review or challenge permits. States are also prohibited from approving any emission limit that is weaker than the requirements of its federally authorized CAA State Implementation Plan, without first obtaining public review and EPA's approval.

The Title V operating permits for major sources must include all federally enforceable standards and monitoring sufficient to assure compliance with those limits. EPA must either grant or deny petitions asking the federal agency to object to state-issued Title V permits that do not meet those requirements, and must rewrite a permit that it has identified as deficient if the state refuses to do so. EPA can be sued for its failure to perform these mandatory duties.

These are statutory mandates, notwithstanding congressional findings about states' "primary responsibility" for air pollution control. Former EPA Administrator Scott Pruitt and other conservative advocates of states rights like to invoke the rule of law. But one of the bedrock principles of that rule is that the specific requirements of a statute, so long as they are reasonably clear, will always trump general exhortations.

The Clean Air Act has 230 pages of statutory text bursting with federally enforceable mandates that include very specific criteria for state implementation of the law's requirements

Cooperative federalism anticipates that EPA will continue to write minimum national standards. But it glosses over the fact that federal environmental laws include specific, enforceable requirements that govern the implementation of those standards by authorized states. These requirements reflect important values like ensuring that state permit reviews are transparent and allow for real public participation, or that large new projects install the best available pollution controls in every state. While environmental laws allow for some flexibility, they also constrain states' ability to alter their implementation to, in ECOS's words, "incorporate and integrate their unique geophysical, ecological, social, and economic conditions."

With limited exceptions, states have been free to adopt standards that are more stringent than required under the Clean Air Act and other federal environmental laws. Some states have taken advantage of that flexibility to innovate and serve as the "laboratories of democracy" that Justice Brandeis hailed in his famous 1932 dissent in *New State Ice Co. v. Lieberman*. In that case, Justice Brandeis was actually defending a state's right to require the licensing of ice-making operations, not its authority to write a rule weaker than a corresponding federal regulation. That has not stopped conservatives like Ken Paxton, the Texas attorney general, from using the Brandeis dissent as a war cry in his fight against over-regulation by EPA and other meddling federal bureaucrats. "The states were designed to be the laboratories of democracy, not entities to be wholly ruled by the federal government," according to Paxton. "In a day and age where state sovereignty is perpetually under attack from the radical Left, attorneys general are on the front lines battling for states' freedoms."

In some cases, a surprising number of states have

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Sidebar

Cooperative Federalism Maximizes Results

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"Cooperative federalism is not about stepping back on environmental protection. It is about harmonizing the efforts of all partners . That will remain a challenge, but it is one that we are able to meet."

States are building a national environmental protection system that can efficiently deliver measurable and meaningful results toward the protection of public health and the environment. Often called *cooperative federalism*, this system relies on harmonizing the strengths and capabilities of the individual states, along with those of the federal government, to get the job done. Cooperative federalism should not be a tug-of-war for control between the states and the federal government, nor should it be an abdication of responsibility leaving anyone holding the bag.

States first began to implement federal environmental programs delegated to them about 50 years ago. Over time, states have become the primary implementers of the federal statutes and today have assumed more than 90 percent of the delegable authorities. States have built institutional infrastructure and expertise, and have gained the operational experience necessary to run these programs effectively. The vast majority of boots on the ground in environmental protection belongs to state employees, who write most of the permits, conduct most of the inspections, and produce most of the results.

The federal government is a necessary part of the equation and plays several leading roles in the process — setting national minimum standards, conducting scientific research, providing funding support, and assuring that state programs continue to meet its standards.

Managing the relationship between EPA and the states has been a challenge, and likely will continue to be. Discussions and disagreements about proper roles have been commonplace. How much and what kind of data should be reported? Which state permits need to be reviewed by EPA? When and where are federal inspections appropriate? What are the best measures of program performance?

While these issues will always need to be discussed and approaches revised over time, some recent progress provides reason for optimism. Policy memos from EPA Administrator Andrew Wheeler and from Assistant Administrator Susan Bodine describe how deference to states in implementing federally delegated programs will work and how joint planning and shared accountability in enforcement will operate. These policies, which are consistent with steps that states have advocated, can lead to clearer roles, reduced duplication of effort, and realization of shared goals.

Through a project jointly governed by EPA, states, and tribes called E-Enterprise for the Environment, we are building new tools to improve the business process of environmental protection. Platforms for the efficient collection, sharing, and use of environmental data will improve decisionmaking and inform the public while reducing a significant cost burden for states. Other tools will help state staff to better conduct inspections and much more efficiently prepare the reports needed to support enforcement actions.

Adequate funding for environmental programs at the federal and state levels is another challenge that will endure. The recent progress in cooperative federalism can go a long way toward improving the cost efficiency of our work and reducing duplication. States and Congress will nevertheless need to redouble efforts to support sustainable funding as the environmental challenges grow more complex.

One source of state revenue is permit fees, often based on the amount of emissions from permitted facilities. An irony of successful programs to reduce emissions is that fee revenues are reduced as well. Some states are developing new programs to more flexibly adjust fees to better cover the costs of running the permit programs. Others are stepping up to direct additional appropriations to meet emerging environmental challenges. States also believe that cooperative federalism requires adequate funding support from the federal government to carry out federally delegated authorities.

Cooperative federalism is not about stepping back on environmental protection. It is about harmonizing the efforts of all partners to maximize results. That will remain a challenge, but it is one that we are able to meet.

declined to exercise that freedom to do more than what EPA has required. For example, on June 19, 2017, a total of 21 states joined a letter asking EPA Administrator Scott Pruitt to torpedo the 2015 Waters of the United States rule clarifying CWA jurisdiction over wetlands and other waterways in the wake of Supreme Court decisions in *SWANCC* and *Rapanos*. The letter argued that EPA's regulation "significantly impinges on the states' traditional role as the primary regulators of land and water resources within their borders," and was not needed because, "Importantly, the states have robust powers to protect their own waters, *regardless of whether those waters are regulated under the CWA*." Emphasis added.

Section 11.506 of the Texas Water Code states that "if the state definition conflicts with the federal definition in any manner, the federal definition prevails"

Yet according to a 2013 study by the Environmental Law Institute, 15 of the 21 states signing the letter had statutes or regulations limiting their own jurisdiction over wetlands to those covered under the federal CWA. For example, Section 11.506 of the Texas Water Code states that "if the state definition conflicts with the federal definition in any manner, the federal definition prevails." Remember that when you hear promises that states will protect the wetlands and streams that will be cut out of the CWA if President Trump has his way.

The 1972 Clean Water Act pledged to, "restore and maintain the chemical, physical, and biological integrity of our nation's waters," and called for "fishable and swimmable waters by 1983." Even states opposing the Obama WOTUS rule have acknowledged that cleaning up rivers, streams, lakes, and estuaries and restoring them to public use is a primary federal obligation under the Clean Water Act. For example, the state letter opposing the 2015 WOTUS rule noted, "Every two years, states also must report to EPA on the condition of those waters . . and if waters do not meet their designated standards, the states must develop detailed pollution diets for those waters and submit those diets to EPA for approval."

Here, the CWA does give states some leeway to develop their own water quality criteria and to determine which waterways are polluted enough to "impair" recreational use, aquatic life, or drinking water sources. The results so far are discouraging. According to the latest data available from EPA, states had completed water quality assessments for less than a third of the 3.5 million total miles of U.S. rivers and streams; less than half of our 41.7 million acres of lakes; 64 percent of our 87.8 million square miles of bays and estuaries; and just over 1 percent of our wetlands. Unfortunately, most of those waterways that have been evaluated are not meeting CWA goals, with more than two thirds of lake acreage and estuary miles and over half of stream miles impaired by pollution. In hindsight, the 1972 goals were hopelessly optimistic, new science continues to expose new forms of pollution that were invisible half a century ago, and some states have done truly innovative work to identify and clean up contaminated waterways. But after almost fifty years, we are facing a massive backlog of cleanup work that will require additional federal support and more EPA oversight, not less.

The cooperative federalism articles approved by ECOS recognize that states must be able and willing to enforce CWA standards and other federal rules they agree to implement: "The robust enforcement of regulations is a key aspect of environmental assurance, both by stopping and remedying noncompliance and by creating a climate of deterrence for other potential deliberate violators." Congress established strict no-fault civil liability for violations of federal environmental laws that does not require proving they were "deliberate," making ignorance of the law no excuse for illegal pollution. While Congress also gave EPA authority to bring criminal prosecution against intentional violators, few states have the power or the capacity to do so, and their ability to recover penalties for civil violations is much more limited than EPA's.

For example, the 1977 Clean Air Act amendments initially authorized EPA to seek up to $25,000 per day for each violation of a federally enforceable SIP. Because federal penalties are indexed for inflation, the statutory ceiling for EPA is now $99,581 per day for violations that occur after November 15, 2015. In contrast, environmental agencies can obtain no more than $10,000 per day for violations of the same federal rules in states like Alabama, Arizona, Iowa, Missouri, North Dakota, Oklahoma, Pennsylvania, and Tennessee. The penalty caps in other authorized

states can range from $25,000 to $32,500 per day, which means that the penalty liability for violations of the same federal law can vary widely depending on where they occur and whether the case is brought by EPA or a state agency.

Most enforcement cases, including EPA's own, conclude with negotiated settlements and penalties far lower than the statutory maximum. But having the authority to recover much higher amounts can make it easier to negotiate consent decrees that secure needed money for pollution cleanup. The mismatch between the power of EPA and state environmental agencies to enforce needs more attention when cooperative federalism is discussed.

Cooperative federalism anticipates performance measures for state programs that emphasize compliance rates rather than the level of enforcement activity. That could be done by tracking the number of serious violators in each state, based on criteria in guidance documents that EPA and states have already agreed to. That effort will not succeed if we cannot close monitoring gaps that often make it impossible to know whether even the most obvious sources of pollution — like big wastewater treatment plants — are complying with federal environmental laws.

For example, EPA regulations include standards to limit the discharge of 129 "priority" toxic pollutants targeted for cleanup in the 1977 CWA amendments. In September, EPA Administrator Andrew Wheeler publicly criticized California for failing to take action against several large sewage treatment plants for discharges that violated specific limits for several of these priority pollutants. But a 2014 report by EPA's inspector general found that while California, Arizona, and Nevada require sewage treatment plants to monitor and report discharges of an average of 109 toxic pollutants, their counterparts in the other 47 states monitor an average of four.

To provide a cheaper alternative to the kind of systematic monitoring that California requires, EPA developed "whole effluent toxicity" tests that count the number of brine shrimp or minnows that die when exposed to effluent at various concentrations. But the IG's 2014 report found that this backup plan wasn't working either, because only a third of the largest wastewater treatment plants in the United States were required to conduct WET tests, less than half of those reported their results, and states do not systematically follow up when testing identifies discharges lethal to aquatic life. The problem is obvious: states that require less monitoring will find fewer violators and report higher compliance rates that do not reflect reality.

Similarly, some states regularly approve flexible CAA emission caps that are supposed to represent a facility's total potential to emit carcinogens like benzene from hundreds of sources that include tanks, cooling towers, leaking production units, and flares, which allow companies to demonstrate compliance based on self-serving estimates of emissions that are little more than guesswork. New data required under a 2015 CAA rule have shown that concentrations of benzene, a known carcinogen, along refinery fencelines are much higher than EPA expected based on emission reports from the same facilities. The underreporting of emissions is well documented in other areas and needs more attention before states can credibly claim high compliance rates.

For cooperative federalism to succeed, we need more plain talk about the kind of capacity, authority, and performance we expect from both EPA and authorized states

For cooperative federalism to succeed, we need more plain talk about the kind of capacity, authority, and performance we expect from both EPA and authorized states, and a serious plan for fixing the problems — such as the lack of monitoring — that make it impossible to determine compliance or measure environmental results. We should have that conversation based on an understanding that both EPA and state agencies are essential and should work together to solve these problems whenever possible.

Neither EPA nor state environmental agencies have the resources to meet their responsibilities under the law. While funding gaps will persist we can surely do better. The primary goal should be to determine if states have what they need to effectively manage the federal environmental programs they have taken on. Efficiency improvements are welcome, but should not force a shrinking staff to frantically rubberstamp their way through a mountain of permit applications at an ever faster rate. Congress should increase funding for EPA and for authorized states that agree not to reduce their own contribution to their environmental agencies. To its

credit, ECOS has advocated for more funding for EPA as well as states.

As ECOS anticipates, EPA should continue to conduct periodic reviews of a state's performance using the criteria established under annual grant agreements and under federal laws that apply to authorized states. EPA headquarters should play a more direct role in these evaluations, working with regions to make them more consistent. While the review process could be more efficient, ECOS needs to say more about why it thinks record reviews should not be detailed or routine, why the public should have confidence in more limited evaluations, and how implementation of federal rules will be tailored to each state's "unique geophysical, ecological, social, and economic conditions," the state council's mantra.

These state reviews should include transparent measures of performance that the public can understand and appreciate. Agencies can determine compliance rates by tracking violations and how quickly they are corrected, especially for the more serious noncompliance events that are well defined in guidance EPA has already negotiated with states. EPA's Environmental Compliance History Online should provide the national public repository for this information. The results will not be credible, however, unless EPA and states can close the monitoring gaps that leave so much pollution unreported and so many violations undetected. It is fair to insist that California enforce toxic discharge limits that it has established for sewage treatment plants, but not without acknowledging that so few states have bothered to either limit or monitor these pollutants in the first place.

Performance can also be evaluated based on progress in achieving long-term environmental goals, such as attaining and preserving federal air and water quality standards. To encourage a race to the top, EPA's reviews can do more to compare (or at least expose) how much progress each state is making toward program goals relative to other states. Again, that will only work to the extent monitoring is reliable enough to measure performance.

EPA's inspector general should play a larger role investigating and reporting on critical weaknesses in both EPA and state programs, as it has the kind of independence needed for unbiased reviews. EPA program offices already respond to the findings and recommendations in IG reports and states should be given the same opportunity, with the IG following up to see whether the problems identified have been resolved.

What kind of accountability will we get when a state keeps failing its performance test? Not much. ECOS can suggest that EPA take over failing state programs, as it does in "Cooperative Federalism 2.0," secure in the knowledge that has never happened and never will. While EPA can take that step under federal law, the political costs and EPA's own limited budget have made that option impractical. Performance reviews hopefully inspire continuous improvement, but that can be a very slow process in government bureaucracies. At the current rate, for example, it will take another forty years just to finish assessing the condition of our nation's rivers and streams, and we will still be a long way from restoring them to environmental health.

While under federal law EPA can take the step of taking over a state program, the political costs and EPA's own limited budget have made that option impractical

Given their limitations, it would be a very bad idea to let state performance reviews erode EPA's ability to object to bad permits or take enforcement actions when needed. These are statutory responsibilities that EPA needs to exercise when, in its best judgment, the circumstances require it. States have frequently used the threat of EPA action to negotiate better permit terms or persuade a violator to comply. Clipping the federal agency's wings reduces that leverage. Environmental groups are more likely to challenge federal permits that are grossly deficient, creating the kind of uncertainty and delay that could have been resolved if EPA's review had flagged the problems earlier.

Permit reviews can also be the most effective way to correct a system-wide failure. For example, EPA recently granted our objection to a state-approved CAA operating permit which kept certain emission limits "confidential." EPA's decision, unless appealed to a federal court, establishes a bright line that should discourage a practice that appeared to be spreading in this particular jurisdiction.

Regarding enforcement, the agency only con-

cludes about a hundred civil cases a year in federal court and obtains fewer than 1,500 administrative penalty orders. That is not very many in a country of more than 330 million, and these federal enforcement actions usually target large corporate defendants, big oil or chemical spills, parties responsible for Superfund cleanup, and programs not delegated to states or that are undertaken in response to state requests for help. Judging from the number of unresolved serious violations that accumulate year after year, we need more enforcement instead of less, and we definitely don't need another elaborate bureaucratic minuet to slow things down. People care about pollution in the places where they live or work, and don't have much time for the finer points of cooperative federalism or agency squabbles over turf. They want the government's help here and now, not a performance review years later that acknowledges in muffled government prose that they got stuck with bad permits or were exposed to illegal pollution far too long.

Federalism is baked into our Constitution, and who can argue against cooperation without, well, sounding uncooperative? But along with "states' rights" and other slogans that sound benign, cooperative federalism is repeatedly invoked by political interests primarily interested in rolling back environmental regulations and making it harder for communities to challenge big new industrial projects. Over the past ten years, states like Texas, Oklahoma, and Arizona have asked federal courts to overturn a long list of EPA regulations, including rules to tighten ozone standards, clarify federal Clean Water Act jurisdiction, limit mercury, hazardous air pollution, and greenhouse gases from power plants, reduce smog-forming chemicals and methane from oil and gas operations, require additional measures to reduce the risk of chemical accidents that endanger neighborhoods, and eliminate loopholes that excuse emissions caused by poor maintenance or repeated equipment breakdowns.

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These lawsuits, brought by ambitious state attorneys general frequently running for higher office, are fanned by press releases that under the Obama administration repeatedly accused EPA of job-killing, land-grabbing, and blatant and unconstitutional overreach. "Cooperative federalism" pops up again and again in these public statements and legal briefs. EPA will not respond in kind (even in previous administrations) by, for example, publicly blasting the Texas Commission on Environmental Quality for fighting standards to reduce the risk of chemical accidents despite the fires and explosions that have shut down schools and evacuated neighborhoods in the Houston Ship Channel last year. An EPA left to tiptoe through this deep political divide is not in a good position to criticize performance in a state led by politicians who regularly blast the federal agency for usurping its authority and violating the Constitution.

Some of the loudest advocates for state primacy can switch sides and call for federal preemption when it suits their purpose. Former EPA Administrator Scott Pruitt talked endlessly about returning power to the states during his brief tenure at the federal agency. But as Oklahoma's attorney general, he filed an unsuccessful federal lawsuit on behalf of his state's egg producers arguing that California's animal welfare standards for poultry houses were prohibited under the Constitution's commerce clause. Ken Paxton, the Texas attorney general who has attacked EPA relentlessly in the name of states' rights, filed an amicus brief that opposed New York's right to sue Exxon for its failure to disclose in-house global warming research to the company's stockholders. Andrew Wheeler, the former coal industry lobbyist now running EPA and a frequent exponent of cooperative federalism, released a 163-page proposal last year to limit state authority to review and object to pipelines and other energy projects. Count on these "federalists" to wave the states' rights banner one day and call for preemption the day after without blushing, if that's what it takes to get environmental, health, and safety rules out of industry's way.

Cooperative federalism has to be something more than a means to an end for interest groups pushing regulatory rollbacks. Otherwise, its promise will never be fulfilled and it will become yet another empty phrase among the many that already litter our political landscape. **TEF**