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# CONSTITUTIONAL CONSIDERATIONS: STATE VERSUS FEDERAL ENVIRONMENTAL POLICY IMPLEMENTATION

FRIDAY, JULY 11, 2014

House of Representatives,

Subcommittee on Environment and the Economy,

Committee on Energy and Commerce,

Washington, D.C.

The subcommittee met, pursuant to call, at 9:18 a.m., in Room 2123, Rayburn House Office Building, Hon. John Shimkus, [chairman of the subcommittee] presiding.

Present: Representatives Shimkus, Gingrey, Whitfield, Murphy, Latta, Harper, McKinley, Johnson, Tonko, Green, DeGette, McNerney, Barrow, and Waxman (ex officio).

Staff Present: Charlotte Baker, Deputy Communications Director; Sean Bonyun, Communications Director; Leighton Brown, Press

Assistant; Allison Busbee, Policy Coordinator, Energy and Power; Jerry Couri, Senior Environmental Policy Advisor; Brittany Havens, Legislative Clerk; Kirby Howard, Legislative Clerk; David McCarthy, Chief Counsel, Environment and Economy; Tina Richards, Counsel, Environment; Chris Sarley, Policy Coordinator, Environment and Economy; Jeff Baran, Minority Staff Director for Energy and Environment; Jacqueline Cohen, Minority Senior Counsel; Caitlin Haberman, Minority Policy Analyst; and Ryan Schmit, Minority EPA Detailee.

Mr. Shimkus. The subcommittee will now come to order.

The chair recognizes myself for 5 minutes for an opening statement.

Before I want to start, I want to recognize Mike Pollock, who is our intern from American University. He is in the school of law. Because when I make my opening statement, you will know that I didn't write it. I am reading it. So I appreciate his work.

Today's hearing gives us an opportunity to discuss some important questions we face as lawmakers. When we create policies to protect human health and the environment, when should we defer to the States? When should policy be set at the national level but implemented at the State level? When should it be implemented at the national level?

At first, different provisions of the U.S. Constitution seem to offer different answers, but our job is to reconcile those provisions. That harmony will not come if we take the easy way out and say, on the one hand, that all these decisions are up to the States or, on the other hand, that what the Federal Government determines should rule, even right down to the most local level, thus making the States mere area offices of the Federal Government.

The Commerce Clause confers enormous power on Congress. Our friend, Rob Meltz, a leading constitutional scholar, will tell us just how sweeping it is and just how broad our options are. But Rob will

also help us remember that there is a 10th Amendment to our Constitution's Bill of Rights which reads, and I quote, "The powers not delegated to the United States by the Constitution nor prohibited by it to the States are reserved to the States respectively or to the people."

Let's not forget the Bill of Rights was the States' price of ratification. In fact, the States themselves created the Federal Government, but, in doing so, the States did not dissolve themselves.

So what did the States want from a national government that the Articles of Confederation did not give them? For one, they wanted open interstate trade or, and I quote, "regular commerce." Their vehicle for achieving this was Congress' power to regulate commerce with foreign nations among the several States and with Indian tribes.

During the 1930s, this commerce power was read so broadly by the Supreme Court that it seemed to have no bounds. In fact, a loaf of bread baked and consumed by a farmer using his own wheat was said to be interstate commerce for purposes of Congress' power to regulate it.

By the late 1990s, the Supreme Court began to rediscover some limits on the Commerce Clause. The Lopez decision, which we will ask Rob Meltz to explain, seemed to focus on Congress' power under the law more than on its reach. That case established that only economic activity may have a substantial effect on interstate commerce to be

regulated by the Commerce Clause.

So when we look at environmental policy and commerce regulation, we see an interesting mosaic. If someone tosses litter out his window, the punishment is entirely between him and the county sheriff applying State or local law. But when the sheriff records the time of the offense on the citation, he uses a time set by the Federal Government under the Standard Time Act of 1918, a law our committee amended in 2005 for daylight savings.

Drugs and medical devices, among many others, are regulated at the national level, in part because they are important but also because, once approved, they need to flow freely in interstate commerce. Consumers and the whole economy benefit enormously from a single market for these and other products that are made in one State, sold in another, and used in still others.

Professor Revesz described this as capturing economies of scale. Mass production, which makes so many of our everyday goods more economical, is pretty hard to do if each State demands its own custom batch.

Free trade among States leads also to free trade with foreign countries. When we work out international trade agreements that give our products, such as corn growers, access to foreign markets, part of the deal sometimes includes allowing those countries access to our

markets. That access is hollow if States have the option of closing off trade on their own. As a prior witness put it, the price of admission to the international trade negotiations is "one country, one voice."

So, in my view, where Congress has the inherent capability to protect health and the environment, we in Congress should defer to them. We in Congress must also have a rationale to step in where a State is not constituted to take the steps it needs to achieve that protection. And I believe we have a basis to step in where impacts are multi-State and doing so will facilitate trade in goods and services among States and internationally.

And then there is the middle ground, where either leaving the job entirely to the Federal or the State government is not warranted. Sometimes Congress sets national standards to be fair among the States but leaves implementation of those national standards to the States.

How stringent such Federal standards should be and whether benefits should outweigh the costs are all questions for another hearing. For today, we are only asking when should Congress consider acting and who should be the regulator. At our next hearing on July 23rd, we invite EPA, the States, and others to discuss steps to modernize State and Federal cooperation. Today, we will focus on the constitutional underpinnings of those basic decisions.

We appreciate all our witnesses appearing today and look forward to your testimony.

With that, I yield back my time and recognize the gentlemen from New York, Mr. Tonko, for 5 minutes.

[The prepared statement of Mr. Shimkus follows:]

******** COMMITTEE INSERT ********

Mr. Tonko. Thank you, Mr. Chair, and good morning.

Good morning to our witnesses.

The first hearing held by our subcommittee last February was on the same topic that we are going to discuss today, the balance between Federal and State authority. As I pointed out at the start of that hearing, this issue has been part of our national debate since the first Continental Congress. I don't expect we are going to resolve that issue today, if ever.

State and Federal involvement in environmental protection has been a part of our history for much longer than the past 70 or 80 years. Congress established our first national park, Yellowstone, in 1872 to protect the unique and beautiful landscape and its resources.

Federal involvement in environmental protection increased over the years when it became obvious to the public that individual State action was insufficient to protect essential common resources that were being severely damaged by pollution generated and disposed of by unregulated industrial and other human activities. Resources often are not contained within the border of a single State, especially air and water resources, and pollutants frequently do not respect State boundaries.

Over the course of this Congress, our subcommittee has held hearings on two issues, in particular, that have involved questions

of whether the States or the Federal Government should define the floor of environmental and public health protection for citizens: the disposal of coal ash for one, and the regulations of chemicals in Congress for another.

In both cases, the current level of guaranteed Federal protection is very low. This is especially true in the case of coal-ash disposal, a practice that for all intents and purposes is regulated by individual States. The failures of coal-ash disposal facilities that communities have experienced in recent years and the risk to the air and water resources are a clear demonstration of the hazardous situation being created by insufficient monitoring and insufficient regulation.

In the case of chemicals, the Federal law governing industrial chemicals has failed to generate basic information about hazards and exposure for the vast majority of chemicals that we are exposed to each and every day. In fact, we do not even have reliable information about how many chemicals are actually in use. Very few have been regulated or restricted through application of TSCA.

In the absence of a credible Federal program and in the face of evidence of increased exposure and risk of chemicals, States have responded to their citizens' demands for action. We need Federal laws to set strong standards to ensure all of our citizens a basic level of health, safety, environmental quality, and opportunity.

But that does not mean that individual States should be prevented from exercising their authority to act on behalf of and in response to the desires of their citizens. States should be able to go beyond Federal law and offer additional protections to address unique situations or to safeguard unique resources. And the model of Federal standards-setting with State-based implementation has worked well, giving States the flexibility to tailor requirements to their specific circumstances.

Through State and Federal environmental programs, we have fostered a dynamic economy and a healthy and clean environment. We need to build on the progress we have made, and we can do that with a strong partnership amongst the Federal Government and our States.

We have a very able and distinguished panel of witnesses, and I look forward to your testimony. And I want to thank all of you for participating in today's hearing, which will provide valuable direction and insight into the issues we address. Thank you so much.

And, with that, Mr. Chairman, I yield back.

[The prepared statement of Mr. Tonko follows:]

******** COMMITTEE INSERT ********

Mr. Shimkus. The gentleman yields back his time.

Does anyone on the majority side seek time?

If not, the chair recognizes the gentleman from California, the ranking member of the full committee, Mr. Waxman, for 5 minutes.

Mr. Waxman. Thank you very much, Mr. Chairman.

Two weeks ago, we marked a grim milestone. The House of Representatives took its 500th anti-environmental vote since the Republicans took control. With the Energy and Water Appropriations bill on the floor this week, the tally, I am sure, is now even higher.

This hearing examines what the Constitution has to say about State and Federal authority to protect the environment. Unfortunately, House Republicans appear more interested in weakening existing environmental protections than in using our constitutional authority to ensure that all Americans, wherever they may live, can breathe the air, drink the water, and avoid exposure to toxic chemicals.

In February of this year, a stormwater pipe under a retired coal-ash impoundment in North Carolina collapsed. It released up to 82,000 tons of coal ash and 27 million gallons of contaminated water. The effects of the spill were visible across 70 miles of the Dan River, crossing from North Carolina into Virginia, and affecting drinking-water sources for the citizens of Danville, Virginia, and Virginia Beach.

This is just the latest coal-ash spill to pollute drinking-water sources and damage resources across State lines. According to a recent estimate, the economic impacts of this spill could exceed $70 million. For the recreation industry around Danville, Virginia, the impact could even be more severe if the river loses its designation as a scenic river.

There is no question that water pollution, air pollution, and toxic chemicals cause widespread economic harm. It is also clear that Congress has the authority under the Constitution and responsibility to address risks from pollution. Courts have repeatedly upheld environmental statutes as appropriate exercises of our commerce power.

Over the years, Congress and States have developed and refined a proven model of cooperative federalism which has successfully reduced air and water pollution and ensured the public's access to safe drinking water. Under this model, Congress sets minimum national standards of environmental protection. States may take responsibility for implementing and enforcing these standards if their requirements are at least as protective as the Federal floor. EPA retains backstop enforcement authority, ensuring that every citizen in the United States receives a minimum level of protections from environmental risks. And States retain the authority to establish more protective standards and programs to meet their own individual circumstances.

At a hearing in this subcommittee last year, stakeholders told

us that protecting the environment through cooperative federalism is working. States are implementing over 96 percent of the environmental programs that can be delegated by the Federal Government to the States. These programs have an impressive track record of protecting Americans.

Despite this record of success, the majority has continued to pursue proposals that would upend this proven model, although there is no consistency in their approach. A core Federal responsibility is protecting one State from pollution of another. Well, that makes sense; we have to deal with cross-State boundaries, and pollution doesn't respect those boundaries. Yet this committee has voted over and over again to block EPA regulations that would do exactly this.

EPA promulgated regulations to reduce power-plant emissions that pollute the air in downwind States. Well, that makes sense. But the House Republicans voted to block implementation of those standards. The States can't deal with it by themselves if they are subject to downwind pollution, so they have to look to the other State to cooperate.

EPA issued standards to reduce mercury and other toxic air pollutants from power plants. That pollution crosses State boundaries and is a national problem. Our Republican majority voted to block those important public health standards, as well.

This hearing should remind us again that protecting public health

and the environment works best when both the Federal Government and State governments contribute. If not, polluting industries will play one State off another so that every State is forced to reduce their pollution protection for their citizens for fear that they will lose the jobs and industry will locate elsewhere.

Thank you, Mr. Chairman, for this opportunity to make this opening statement.

Mr. Shimkus. The gentleman yields back his time, and I thank the gentleman.

[The prepared statement of Mr. Waxman follows:]

******** COMMITTEE INSERT ********

Mr. Shimkus. Now we are going to go right to our panel. I will do an introduction, and then I will turn to you for your opening statement. I will do an introduction of the whole panel.

First of all, we have Robert Meltz. He is with the American Law Division of the Congressional Research Service, a service that we rely on a lot. And we appreciate you being here. Jon Adler, who is a professor of law at Case Western School of Law. We have Richard Revesz, who is from New York University School of Law. Thank you, sir. And Rena Steinzor, who is a professor at the University of Maryland School of Law. She has been here numerous times, and we thank her for coming back.

The ranking member helped set this debate, and I appreciate his comments. Again, what we asked was, when should Congress consider acting, and who should be the regulators, the question we posed.

With that, I will start with Mr. Meltz. Sir, your full statement is entered into the record, and you have 5 minutes.

And hit the microphone, and then pull it close so that it can get to the transcriber.

Mr. Meltz. Is it on now?

Mr. Shimkus. Yeah, but pull it close like you want to eat it.

**STATEMENTS OF ROBERT MELTZ, AMERICAN LAW DIVISION, CONGRESSIONAL RESEARCH SERVICE; JONATHAN H. ADLER, JOHAN VERHEIJ MEMORIAL PROFESSOR OF LAW, CASE WESTERN UNIVERSITY SCHOOL OF LAW; RICHARD L. REVESZ, LAWRENCE KING PROFESSOR OF LAW, DEAN EMERITUS, NEW YORK UNIVERSITY SCHOOL OF LAW; AND RENA STEINZOR, PROFESSOR, UNIVERSITY OF MARYLAND SCHOOL OF LAW, PRESIDENT, CENTER FOR PROGRESSIVE REFORM**

**STATEMENT OF ROBERT MELTZ**

Mr. Meltz. Mr. Chairman and members of the subcommittee, CRS is pleased to assist the subcommittee with its inquiry into the appropriate allocation of responsibilities in Federal environmental programs between Federal and State governments.

I am an attorney with the American Law Division of CRS, where I specialize in environmental law. I am going to summarize my formal statement, reviewing the constitutional constraints imposed on Congress by current Commerce Clause and 10th Amendment jurisprudence in crafting environmental legislation.

To cut to the chase, the Commerce Clause and the 10th Amendment, as currently construed by the Supreme Court, impose as a practical matter few significant constraints on Congress' legislating in the

environmental area. I will start with Congress' power to regulate commerce among the several States, the basis of not only most Federal environmental laws but also much of the social and economic legislation enacted by Congress.

Supreme Court decisions hold that Congress' commerce power allows it to regulate the channels and the instrumentalities of interstate commerce and, by far the most debated category, activities, even intrastate activities, that substantially affect interstate commerce either individually or in the aggregate.

The Court has strongly suggested that only economic activity may be aggregated to show a substantial effect on interstate commerce, but what is economic is very broadly construed -- not so broadly, however, as to have kept the Court from invalidating congressional enactments in 1995 and 2000, triggering speculation that certain Federal environmental laws might being on precarious constitutional footing, though in 2005 the speculation subsided a bit when a Supreme Court decision stressed that even noneconomic intrastate activity can be regulated by Congress if failure to do so would undercut interstate regulation.

Federal environmental laws, by and large, have fared well against Commerce Clause challenges. After the Supreme Court's decisions in 1995 and 2000, the vulnerabilities were suggested in the non-intrastate

applications of several of these laws: the Clean Air Act, the Clean Water Act, the Safe Drinking Water Act, the Superfund Act, and the Endangered Species Act. Yet the overwhelming majority of Commerce Clause challenges to Federal environmental laws were rejected by the lower courts, six out of six in the case of the Endangered Species Act, all with cert denials by the Supreme Court.

Some of these decisions arguably are hard to reconcile with the Supreme Court's Commerce Clause jurisprudence. To hazard a theory, it may be that the courts implicitly recognize the nationwide interconnectedness of environmental problems and the consequent need for broad Federal involvement. Or perhaps the courts simply are not ready to chip away at Federal environmental laws on the chance it would open to Commerce Clause attack other areas of Federal law, such as the civil rights laws and criminal laws.

Turning to the 10th Amendment, that amendment says that the powers not delegated to the Federal Government are reserved to the States or to the people. During the same period when the Court was setting out Commerce Clause limits on Federal power, it came to see in the 10th Amendment a bulwark of State sovereignty. Supreme Court decisions during this time, the 1990s, held that Congress can compel actions of State legislatures or actions of State executive branch officials in their sovereign capacity.

At the same time, the Supreme Court has been explicit that Congress may constitutionally encourage, though not compel, States to participate in Federal environmental programs. Congress may attach conditions on States receiving Federal money, with some constraints. Congress may offer States a choice between regulating according to Federal standards or having State law preempted by Federal regulation or having a Federal plan imposed, as by EPA.

Congress also may authorize sanctions triggered by State inaction but applying solely to private activity, such as the emission offset sanction in the Clean Air Act. And the 10th Amendment is not implicated when the State itself engages in an activity that Congress legitimately may regulate, as when a county operates a solid-waste landfill. As with the Commerce Clause, 10th Amendment challenges to Federal environmental laws have rarely succeeded.

So, in sum, Federal environmental programs largely have withstood both Commerce Clause and 10th Amendment challenge. And, barring a shift in the jurisprudence, the key considerations in how to divide Federal and State responsibilities in a Federal environmental program are likely to fall in the policy realm rather than the constitutional one.

Thank you for the opportunity to testify, and I look forward to your questions.

Mr. Shimkus. Thank you, sir.

[The prepared statement of Mr. Meltz follows:]

******** INSERT 1-1 ********

Mr. Shimkus. The chair now turns to Mr. Adler.

Sir, you are recognized for 5 minutes.

**STATEMENT OF JONATHAN H. ADLER**

Mr. Adler. Thank you, Mr. Chairman and members of this committee. I appreciate the opportunity to address the constitutional constraints on environmental regulation, a subject which I have studied now for close to 2 decades.

It is a fundamental principle of our constitutional order that the Federal Government is one of limited and enumerated powers, and those powers not delegated to the Federal Government are reserved to the States and to the people.

All Federal laws, no matter their value or purpose, must be enacted pursuant to the Federal Government's enumerated powers and may not transgress other constitutional constraints. This is true whether we are talking about national security, health care, or environmental protection.

While Federal power is broad -- and it certainly is, especially as interpreted by the Court's precedents -- it is not infinite. The Supreme Court has made clear, including in very recent cases such as NFIB v. Sebelius and in the unanimous judgment this spring in Bond v.

United States, that it will enforce limits on Federal power, it will invalidate laws that exceed those constitutional limits, and it will also construe statutes narrowly if that is necessary to avoid difficult constitutional questions -- something the Supreme Court has done twice with the Clean Water Act when regulations reaching wetlands and intrastate waters pushed the bounds of Federal authority to regulate commerce among the States.

Several environmental statutes and regulations, both on the books and proposed, raise serious constitutional questions that courts will have to address in the wake of decisions like NFIB, and these are also questions that Congress should consider. Because whether a statute or a regulation is constitutional is not solely a question for the courts; it is also a question for the legislative branch and something the legislative branch should consider when evaluating proposals for legislation.

Now, constitutional limits on Federal power need not come at the expense of environmental protection. The division of authority between the Federal and State governments counsels that Congress think careful about the nature and scope of Federal environmental regulation. Fiscal constraints and the inherent limits of centralized regulatory structures reinforce the wisdom of focusing Federal efforts on those areas where the Federal Government may do the most good.

The EPA cannot and should not try to address every environmental problem or concern that this Nation faces. It has neither the time nor the resources to do so. The Federal Government should instead concentrate its efforts in those areas where the Federal Government has a comparative advantage or where the separate States are unlikely to be able to address environmental concerns adequately.

This is true in the case of interstate spillovers. This is true in cases where there are serious economies of scale in Federal interventions. It is not true in the context of localized environmental problems that have relatively localized causes and localized effects. And if one looks at the U.S. Code, that describes much of Federal environmental regulation.

When it comes to developing and enforcing environmental standards for localized environmental concerns, the case for Federal intervention is comparatively weak. And if we want the Federal Government to do more to address things like interstate spillovers where there are economies of scale, we have to think seriously about what we might take off the EPA's plate so that it has the time and the resources to address these new and emerging problems.

And it is not coincidental that the Constitution constrains Federal efforts to reach some localized environmental concerns. There are some environmental problems that are very real but that do not

contain the necessary connection to commerce or to other nexuses of Federal power to justify the exercise of Federal regulatory authority.

Again, however, constitutional constraints need not compromise environmental protection any more than constitutional constraints compromise our Nation's ability and efforts to protect our national security or advance other important goals.

Insofar as the Constitution encourages policymakers to think carefully about the comparative strengths and weaknesses of Federal intervention, it may actually enhance this Nation's system of environmental protection, as it helps ensure that Federal resources are focused and targeted in those areas where Federal intervention can do the most good.

Thank you again for your invitation today, and I look forward to any questions you might have.

Mr. Shimkus. Thank you.

[The prepared statement of Mr. Adler follows:]

******** INSERT 1-2 ********

Mr. Shimkus. And the chair now recognizes Mr. Revesz for 5 minutes.

**STATEMENT OF RICHARD L. REVESZ**

Mr. Revesz. Thank you, Mr. Chairman and members of the subcommittee. I am Richard Revesz from the New York University School of Law. I also serve as the director of the American Law Institute.

I have written extensively in the area of federalism and environmental regulation, mostly in the matter of the policy domain, when should Congress act when it has the power to do so. I have not written as extensively in the constitutional domain but generally share the views of Mr. Meltz that the constitutional limits, while they definitely exist, leave a great scope of -- a great domain for action from Congress. So many of the important questions are questions of when Congress should decide to exercise that authority, rather than does Congress actually have that authority.

Mr. Shimkus. Excuse me. Could you make sure your mike is on and that it is pulled close to you?

Mr. Revesz. I am sorry.

Mr. Shimkus. That is okay. We have some old guys up here, and I could hear you fine, but --

Mr. Revesz. I will focus on three matters in this testimony.

First, the presence of interstate externalities provides the most compelling argument for Federal regulation. A State that sends pollution to another State obtains the labor and fiscal benefits of the economic activity that generates that pollution but does not suffer the full cost of the activity because the adverse health and environmental consequences are suffered by other States. As a result, a suboptimally large amount of pollution crosses State lines.

But the fact that some form of Federal regulation is necessary to properly control interstate externalities does not mean that any type of Federal regulation is well-suited for the task. The Clean Air Act provides a compelling example of this problem. Even though it has been in effect since 1970, we still have not properly succeeded at controlling interstate pollution.

Let me give you two bookends. The first significant litigated case in this area was Air Pollution Control District of Jefferson County v. EPA and was decided by the Court of Appeals for the Sixth Circuit in 1984. Interestingly, at that time, Mitch McConnell, the current Senate minority leader, was the judge/executive for Jefferson County, Kentucky, which brought this action to try to compel Indiana to reduce its interstate externalities.

Kentucky actually controlled its local power plant very

stringently, and that power plant had at the time spent $138 million in pollution control, which would be more than $300 million in today's dollars. But Jefferson County, despite having done that, was not able to obtain the benefits of the regulation because prevailing winds from Indiana deposited in Jefferson County pollution from an Indiana plant that was essentially uncontrolled. The Kentucky plant emitted 1.2 pounds of sulphur dioxide per million BTU of heat input, and the Indiana plant emitted 6 pounds -- five times as much.

Jefferson County was actually unsuccessful in that case in its effort to compel the U.S. Environmental Protection Agency to order the reduction in the Indiana emissions. And, in fact, it wasn't until more than 30 years later, until this past April, when the U.S. Supreme Court, in EPA v. EME Homer City Generation, held that under the good-neighbor provision of the Clean Air Act the pollution control burden to upwind and downwind States could be allocated in a way that minimized the overall cost of meeting the Federal ambient standards.

This cost-minimization formula strikes me as eminently rational, and the court decided this on a six-two vote. If this rule had been in effect in 1984, then-Judge/Executive Mitch McConnell's citizens would have gotten the Federal redress that they had sought and that they actually deserved.

My second point: The issue of interstate externalities is now

being raised by a more recent environmental problem arising from hydraulic fracturing, or fracking, which is a technique used to extract oil and natural gas from shale.

Some of the environmental ills from fracking, such as increased seismic activity and groundwater contamination, are localized. But at least one significant consequence of fracking, the emission of fugitive methane, can wreak harm far from the wellhead. Fugitive methane's interstate and, indeed, international impacts make it particularly well-suited for Federal regulation.

Methane, as you know, is a potent greenhouse gas with an estimated global-warming potential 21 to 25 times greater than that of carbon dioxide. Natural gas itself is composed of more than 80 percent methane, and, during the production and distribution processes, some portion of methane leaks or is vented into the atmosphere. While fugitive methane emissions can result from all drilling techniques, some studies suggest that fracking is associated with significantly higher leakage rates.

Like carbon dioxide, methane emissions become well mixed in the upper atmosphere, making their harmful effects global rather than local.

The U.S. Environmental Protection Agency recently began the process of regulating greenhouse gas emissions associated with the

ultimate combustion of natural gas by proposing performance standards for new and existing power plants. Those standards, however, will do nothing to reduce pollution emitted at earlier stages in the gas's lifecycle, including extraction, processing, storage, and delivery. Such upstream emissions can be quite significant, accounting for 20 to 30 percent of the natural gas lifecycle emissions.

My last point refers to a related question: When, if ever, should the Federal Government preempt more stringent State standards?

So the most compelling argument for doing that is in the case of product standards where there are products that exhibit significant economies of scale in production. If these products were subjected to inconsistent State standards, those economies of scale would be lost.

And the most compelling example of this case are automobiles. And, in fact, for the most part, we do have uniform auto standards. In fact, we have two in the country; we have the Federal standards, and we have the California standards, and States can opt for one or the other but can't choose anything in between.

There are other products that exhibit significant economies of scale in production, but not all products do. And where products don't exhibit those economies of scale, the argument for Federal preemption of more stringent State standards is much weaker.

The argument for Federal preemption of more stringent State standards is even weaker in the case of --

Mr. Shimkus. We are going to have to get you to wrap up.

Mr. Revesz. Yes, I --

Mr. Shimkus. I know you are very close.

Mr. Revesz. I am done, basically.

In the case of process standards, because inconsistent process standards do not impede the proper trading of products in a national market.

And, with that, my summary is done, and I am happy to at some point take your questions.

Mr. Shimkus. Thank you, sir.

[The prepared statement of Mr. Revesz follows:]

******** INSERT 1-3 ********

Mr. Shimkus. Now we will turn to Rena Steinzor, a professor from the University of Maryland.

Welcome back, and you are recognized for 5 minutes.

**STATEMENT OF RENA STEINZOR**

Ms. Steinzor. Mr. Chairman, Ranking Member Tonko, and members of the subcommittee, I appreciate the opportunity to testify today on cooperative federalism, which is the term used to describe --

Mr. Shimkus. Can you check your mike also or pull it closer?

Ms. Steinzor. -- the constitutional and the political policy and legal relationship between the Federal and State governments with respect to environmental policies and law.

As I understand the situation, the subcommittee's leadership called this hearing in part to explore the contradiction between the notion that legislation to reauthorize the Toxic Substances Control Act should preempt any State authority to regulate chemical products with the notion that the Federal Government should depend on the States to regulate coal ash and has no role to play in protecting the public from such threats.

These positions are a dichotomy if there ever was one. The contradictory ideas that the Federal Government must dominate the field

in one area but that State government should be exclusively in control in another seems irreconcilable as a matter of principle.

Of course, as a practical matter, these irreconcilable positions have consistent pragmatic outcomes: They help big business. The chemical industry feels much more confident about its ability to browbeat the EPA into quiescence under the weak provisions of the TSCA legislation under discussion so long as proactive States like California are knocked out of the equation. The electric power industry is much happier submitting to State regulators, who, as the recent spill in North Carolina clearly illustrates, have done almost nothing to control the severe hazards of improper coal-ash disposal. Or, in other words, States should prevail as long as they aren't doing much to gore the ox of big business.

This debate has been going on in one iteration or another for decades. Congress has grappled with it. The Supreme Court has grappled with it. The States have participated in the debate, as has the executive branch. And out of all this intense debate have come two fundamental principles well-recognized by mainstream constitutional scholars:

One, the wide range of Federal programs dealing with health, safety, and the environment are grounded appropriately in the Commerce Clause. While the Supreme Court has imposed some limits on Federal

authority, they do not apply to the structure of Federal environmental law.

Two, a coherent set of eminently reasonable principles defines the cooperative partnership that prevails in the health, safety, and environmental areas.

So what are those principles? As everyone has said, pollution does not stop at State lines, and, in many cases, strong Federal laws are the only way to control so-called transboundary pollution. My State, Maryland, suffers tremendously from transported pollution from Ohio. Coal-fired power plants is just one example. We actually send a plane up every time those emissions increase because the State agency is so anxious to demonstrate that it can't control this pollution.

But there are other principles. A second one is that uniform national standards crafted by the Nation's best and brightest technical experts are efficient, avoiding the need to reinvent the wheel 50 times.

A third and very important one is that all citizens should receive equal protection under the law. That is, everyone should be able to expect a minimal set of effective safeguards no matter what State they happen to live in.

Businesses should compete on a level playing field. If they operate in States that choose strong protections, they should not be undercut by businesses operating in States that choose weak

protections. And States should avoid a race to the bottom in competing for new industry.

It is easy to write a law, as you know, and much harder to make sure it is implemented and enforced fairly and aggressively throughout our vast country. Governments at all levels struggle to be effective and efficient and must remain accountable to their citizens. In areas as important as protecting public health and the environment, everyone, no matter where they live, deserves equal protection. Making States responsible for delivering on this crucial goal is a key part of EPA's mission.

Thank you.

Mr. Shimkus. Thank you, Ms. Steinzor.

[The prepared statement of Ms. Steinzor follows:]

******** INSERT 1-4 ********

Mr. Shimkus. I am going to start just by making a statement. You made some assumptions as to why or why we didn't call this hearing, but I don't remember you ever asking me, the chairman of the subcommittee, why I called it. So just in future times you come before us, if you want to know why, come ask me. Don't make an assumption and weave a story that may or may not be true.

Mr. Meltz, for non-lawyers like me, could you please explain the difference between the Supremacy Clause and the Commerce Clause and how preemption in Federal environmental law is constitutionally based?

Mr. Meltz. Well, the Supremacy Clause in Article 6 says that the Federal law is the supreme law of the land, so that when there is a conflict, either express or implied or in fact, the non-Federal law has to give way to the Federal prescription.

Preemption considerations arise in just about every Federal environmental law I have ever encountered. In fact, I have a CRS report compiling all the preemption provisions in all the environmental statutes, and they run the gamut from total preemption -- a State cannot act, and there is no waiver even -- all the way to the other extreme, where the State has complete freedom to do what it wishes, whether or not the Federal Government acts.

So, depending on the circumstances, Congress has seen the full gamut of possibilities appropriate.

Mr. Shimkus. Hence the dilemma and why we have you here today, to help us try to figure out that.

Professor Adler, how is it that in some ways an historical accident -- that is, leadership in environmental policy -- was supplanted by Federal regulation?

Mr. Adler. That is a long subject, and --

Mr. Shimkus. Well, don't be too long.

Mr. Adler. Yeah. And given that I live in Cleveland, it is a somewhat of a, I guess, a personal subject given that an infamous fire on the Cuyahoga River is often credited with helping to drive the enactment of many Federal environmental statutes.

And just to use as an example, that event in June of 1969 was seen as evidence that most measures of environmental quality were getting much worse, that State and local governments were not acting, and that, therefore, Federal intervention was necessary.

But when one looks at the historical record, that, in fact, isn't true. If one just looks at the case of river fires, river fires on the Cuyahoga River, in Michigan and Pennsylvania and Maryland, all throughout the country, had actually at one point been common throughout the late 19th and early 20th century. Rivers used for industrial purposes were often dumping grounds for various flammable and other wastes. And it was a problem that was easily identified and

one that State and local governments readily addressed.

If one looks at water pollution more generally, one sees that States in the 1960s were becoming very active in enacting water pollution control statutes. We see a similar pattern in air. California, in particular, was quite aggressive. And measures of things like ambient air quality for the pollutants with the greatest health effects that were understood at the time were actually declining before Federal environmental statutes were enacted.

So whether we think these Federal environmental statutes are good or bad as a matter of policy, the general story that we tell, that they were necessary to stem a precipitous decline in environmental quality that was occurring in the late 20th century, just doesn't square with the actual historical record.

Mr. Shimkus. So is it safe to say that it is under your opinion that the environmental policy might be improved if States regained a more historic role?

Mr. Adler. Sure. I think that if both State governments and the Federal Government are able to focus on those areas where they have comparative advantage, we would improve the overall levels of environmental protection. It would be both more efficient and more effective.

In areas like interstate spillovers, as has already been

discussed, the downwind State can't do anything about an upwind State's pollution. And as we look at the history of things like the Clean Air Act, those sorts of concerns have been the focus of a tiny fraction of EPA's time and effort and a tiny fraction of what is actually in the U.S. Code.

And if we stood back and actually tried to rationalize where is Federal intervention truly necessary and where can State and local governments take the lead, I think we would have a more rational, more efficient, less costly, and more effective approach to environmental protection.

Mr. Shimkus. Thank you.

Professor Revesz, you noted at the end of your statement about the national fuel efficiency standard for cars, California differently from other States, but you did not seem to defend the decision with the policy on constitutional rationale. Do you have one?

Mr. Revesz. The decision for California to have different standards than the Federal standards?

Mr. Shimkus. Yes, sir.

Mr. Revesz. It is a historical accident. I mean, clearly, Congress has the authority to allow States to do that. I don't think there is any serious constitutional argument that somehow or other once the Federal Government acts it needs to preempt more stringent State

standards.

The reason the California standards are more stringent is because in 1970, when the Clean Air Act was enacted, California already had State standards for automobiles, and Congress decided not to preempt those standards and did it as a matter of policy. And it was actually not --

Mr. Shimkus. Yeah, let me just jump in. Do you think it is fair for Congress to discriminate among States in its regulation of trade in the same articles?

Mr. Revesz. Well, as a practical matter, Congress gave other States the choice to choose the California standards or the Federal standards. So, basically, every State could do something. It is true that they couldn't pick other standards.

But I think Congress had good reason for doing that, and I think it is definitely constitutional for Congress to do it. I don't think there is a serious constitutional argument that would stand in the way of Congress making those distinctions if it thought that they were good as a matter of policy. They would need to think they are good as a matter of policy for this to actually be a good idea.

I think in that particular case, given the history of that provision, it made sense for Congress in 1970 to do what it did. And it was not a controversial issue then; there was strong bipartisan

support for that provision.

Mr. Shimkus. Great. Thank you.

The chair now recognizes Mr. Tonko for 5 minutes.

Mr. Tonko. Thank you, Mr. Chair.

On many issues within this subcommittee's jurisdiction, the States have led the way. When risks are not adequately addressed at the Federal level, State protections are essential. My home State of New York has taken significant steps to protect its citizens and its resources from DDT, MTBE, flame retardants, risks posed by hydraulic fracturing, or fracking.

I served in the New York State Assembly for some 25 years, so I have a strong appreciation for the work of State governments to protect the environment. But there is also an important role for the Federal Government in environmental protection, ensuring a minimum level of protection for all citizens. A cooperative approach, where the Federal Government sets a floor and States remain free to set more stringent standards, has proven effective and successful.

Ms. Steinzor, can you briefly describe the principles of cooperative federalism in environmental law, please?

Ms. Steinzor. Yes.

Environmental law has set up a system where the States can apply to be delegated to have authority to implement the law. As was

mentioned earlier, 96 percent of the environmental programs covered by these laws have been delegated to the States.

So EPA sets the Federal standards by which we operate, and then the States implement the law. Most of these laws say the States can enact more stringent provisions if they want to. And the States also receive financial support for implementing their programs.

Because the States are volunteering to do this, there are no constitutional impediments. The main impediment, constitutionally, is that the Federal Government is not allowed to commandeer a State government's resources. And we saw that in the New York v. United States case that I mentioned in my written testimony.

Mr. Tonko. Uh-huh.

Ms. Steinzor. So what we have is a situation where the States and the Federal Government have gotten married, and, like most marriages, there are points of friction and differences. I am not going to pretend that these partnerships are always happy, especially when there is money lacking. And I think that is a problem at both the Federal- and the State-level resources.

Mr. Tonko. Thank you.

Have recent proposals from this committee comported with those principles?

Ms. Steinzor. I actually do not think that the effort to preempt

all State law under the Toxic Substances Control Act is consistent with those principles. The Toxic Substances Control Act is implemented primarily by EPA, but States are allowed to do more stringent laws, as you just mentioned.

And the States resent become being preempted precisely because of what Professor Adler said, which is that they want to make sure that they are not following a one-size-fits-all, they want to tailor the requirements, and so they home in on problems that are specific to their State and take whatever action they think appropriate.

And you have a letter from attorneys general in several States that is attached to my written testimony that explains these principles.

Mr. Tonko. Uh-huh.

Well, I was particularly concerned by the preemption provisions in the majority's draft bill to amend TSCA, as you focused on that issue. The draft bill could have had widespread impacts on State laws, including laws on fracking. More than 20 States have new enacted laws or regulations requiring some level of public disclosure of the chemical contents of hydraulic fracturing fluids. Other States have successfully imposed requirements for groundwater testing and restrictions on disposal of flow-back water and even prohibitions on the use of certain chemicals.

Ms. Steinzor, does the Commerce Clause require that preemption?

Ms. Steinzor. Absolutely not.

Mr. Tonko. Is there any constitutional provision that necessitates that preemption?

Ms. Steinzor. Absolutely not.

Mr. Tonko. Do you have concerns about the effects of broad preemption in TSCA reform on State fracking laws and other environmental protections?

Ms. Steinzor. Yes, I do. I think that it would be extremely unwise to stifle the States in this way and that actually preempting them in such a harsh manner contradicts all the other discussion about letting them have a greater role in environmental protection. Right now, we have a cooperative partnership. This would make the partnership completely one-sided and kick them out of the field.

And fracking is just an example of an emerging problem where they have been able -- as we have called them in the past, laboratories of democracy -- they have been able to step forward and be creative and lead the way for the Federal Government.

Mr. Tonko. Thank you very much.

I yield back.

Mr. Shimkus. The gentleman yields back his time.

For the sake of keeping peace on my side, the chair is to recognize

Mr. Whitfield, but I am going to ask unanimous consent that the gentleman from West Virginia go out of order for his 5 minutes. Is there objection?

Okay. The chair recognizes the gentleman from Kentucky.

Mr. Whitfield. You all are so nice. Thank you very much.

Well, I would like to thank the panel for being here today.

And I am going to approach this a little differently. As you know, President Obama has been under a lot of criticism lately of deciding which laws he will try to prosecute and which laws he will not prosecute. And, as you know, the House of Representatives now is considering a lawsuit, but because of the standing issue, it is very difficult to bring those lawsuits on the behalf of Congress as an institution.

But what made me think a little bit about this was Ms. Steinzor, in her opening statement, talked about the unreconcilable positions that Congress is in right now as it approaches reauthorization of TSCA, doing one thing, and addressing the coal-ash-regulation issue by doing another thing. And she said that the only -- to read her language here, "They have consistent pragmatic outcomes. These are unreconcilable positions, and the only outcome is that they help big business." So the assumption here is that the Republican Congress is doing this because it helps big business.

Well, it raised an issue with me, in that she is talking about two laws here, that we have not reauthorized TSCA yet, and we have not been able to pass legislation the way we would like to on coal ash yet by the Congress.

But the Migratory Bird Act, for example, is a Federal law, and there is a Federal law that protects golden eagles and bald eagles. And yet this administration, with the spill in the Gulf in the latter part of the Bush administration, the Federal Government instituted a fine of $100 million against British Petroleum for killing migratory birds in that spill. And yet this administration has granted an exemption from the Migratory Bird Act and the Golden and Bald Eagle Protection Act to windmills.

So it appears that this administration, rather than just being in favor of big business in general, it is determined upon whether or not they like the big business. And, for example, Google is a large company that is taking advantage of some Federal tax codes to invest in the wind industry.

And so, for this administration to basically say we are not going to enforce, we are going to grant exemptions to certain big businesses from the Migratory Bird Act and the Golden and Bald Eagle Protection Act -- I would ask if any of you would like to make a comment on that, how this administration has -- we have two Federal laws, and this

administration has affirmatively said we are going to grant exemptions from these Federal laws for certain industries that we agree with what they are doing.

You don't have to comment.

Mr. Shimkus. You can offer to answer it, or you can pass.

Mr. Adler. I will just say briefly that, as a general matter, if the executive branch believes that certain industries or activities should be exempt from Federal regulation, as it is currently written, they should either, if it is legal, redraft the existing regulations and repromulgate them or they should ask Congress to amend the law, and that disparate application of existing laws and regulations to different industries based on their political or other characteristics is not the sort of thing any executive branch should engage in.

Mr. Shimkus. The gentleman from Kentucky?

Mr. Whitfield. I yield back.

Mr. Shimkus. The gentleman yields back the time.

The chair now recognizes the gentleman from Texas, Mr. Green, for 5 minutes.

Mr. Green. Thank you, Mr. Chairman, for holding the hearing today on this important issue.

I would like to also thank our distinguished panelists for joining us this morning.

States play an essential role in environmental regulation, creating specific requirements to reflect the reality of circumstances in each State. But there is an important role for the Federal Government as a partner.

Like my colleague from New York, I served 20 years in the State legislature in Texas and am familiar with our relationship with EPA and TCEQ. I used to joke, it must be in Texas' DNA to complain about the EPA literally from my first term in 1973. But this issue, it has been cooperative.

In fact, one of my frustrations 2 years ago, that the State of Texas decided not to issue carbon-based permits because of politics, and so we ended up having them issued through EPA, which delayed those permits months, if not years. We are working through that backlog. The most recent legislative session corrected that. And so now our Texas Environmental Quality Commission is actually doing what they should be doing, because it is a cooperative basis.

Mr. Meltz, do you agree that, generally, environmental regulation is done in a partnership with States and the Federal Government?

Mr. Meltz. I agree that that has been the pattern of Federal enactments, and --

Mr. Green. Okay. Yeah, generally, EPA sets some standards, and the State then negotiates with the EPA on how they can reach those

standards.

Mr. Meltz. With many of the statutes, not all, yes.

Mr. Green. Is there anything in the Constitution or caselaw that says regulation can't be done that way, as a partnership?

Mr. Meltz. Nothing in the Constitution, no.

Mr. Green. Okay.

I would like to turn a minute to the Superfund statute, which has played an important role in our district in cleaning up the San Jacinto Waste Pits. Our office has worked with both the State of Texas and Harris County and EPA to get that site listed on the national priority list. And, most recently, we sent a letter to EPA calling for more environmental protective remediation to be taken at the site. This is a clear example of local and Federal officials working together to protect a local community and ensure that taxpayers don't bear that cleanup cost.

Mr. Meltz, in your testimony, you mentioned that challenges have been brought alleging that Superfund and other environmental statutes were not authorized by the Commerce Clause. Is that correct?

Mr. Meltz. Yes. That has been -- yes. Several statutes.

Mr. Green. Okay. And courts have found these statutes, including Superfund, are constitutional, correct?

Mr. Meltz. Yeah. The one exception has been the challenges to

the Corps and EPA, expansive definition of waters of the United States under the Clean Water Act to include isolated waters and remote adjacent wetlands, yeah.

Mr. Green. Okay.

You know, again, my experience, both as a State legislator and in Congress, when there was a need for a Superfund site, I was actually first approached by the State of Texas. And I know there were some issues a few months ago in Congress about, you know, the States not being a part of it. Believe me, we have a dioxin facility that was there before we had an EPA. And our States are typically the ones that are more proactive, at least in Texas.

RPTS DEAN

DCMN WILTSIE

[10:15 a.m.]

Mr. Green. Now turning to Ms. Steinzor, do you agree that the constitutional footing of the Superfund is strong?

Ms. Steinzor. The -- I am sorry, sir.

Mr. Green. The constitutional footing of the Superfund --

Ms. Steinzor. Yes.

Mr. Green. -- is strong.

Ms. Steinzor. I do agree to that.

Mr. Green. Okay. I have a few questions for Mr. Revesz.

Mr. Revesz, in your testimony, you agreed that it is prudent policy of the Federal Government to preempt State regulation on goods that exhibit significant economies of scale and production, such as cars and pesticides.

Mr. Revesz. That is right.

Mr. Green. Okay. Do you believe that industrial chemicals such as those that are regulated under the Toxic Substance Control Act also exhibit significant economies of scale and production?

Mr. Revesz. It is an empirical question. Many probably don't. Some might.

And I think to justify preemption and to display State autonomy, to display the State's ability to protect their citizens at a level that is more stringent than what the Federal Government can do nationwide is a big decision and should only be done if the empirical evidence is very compelling.

I believe, in the case of cars, it is quite compelling, and Congress has acted accordingly since 1970. I don't think it is compelling in the case of every product.

I don't think it is compelling in the case of every product that is regulated under the Toxic Substance Control Act. So I don't think that across-the-board preemptions without empirical justification would be justified.

Mr. Green. Well, do you believe that industrial chemicals such as under the Toxic Control Act -- would you agree that the argument for Federal preemption in a State regulation is strongest when its Federal standards are regulating the consequences of these products themselves?

Mr. Revesz. Well, I think we are talking about a situation where there is Federal regulation -- Federal substantive regulation and where the States are trying to regulate the same product in a more stringent way.

Clearly, less stringent State regulations would be preempted.

So if the States are trying to regulate the same product in a more stringent way, the propriety of Federal preemption would depend on the strength of these economies of scale.

And it is -- as a result, it is not a question that can really be answered across the board. It would have to be examined, basically, industry by industry or compound by compound.

Mr. Green. Mr. Chairman, I appreciate your patience. Although, if we are going to do cars, then why shouldn't we do bleaches and other things that have some national standard?

I yield back.

Mr. Shimkus. The gentleman yields back his time.

The Chair now recognizes the gentleman from Ohio, Mr. Latta, for 5 minutes.

Does the gentleman from Ohio want to go?

Mr. Latta. Mr. Chairman, I thought you said you were recognizing the --

Mr. Shimkus. No. Let's go. We are running out of time.

Mr. Latta. Thank you very much, Mr. Chairman.

Professor Adler, if I could start the question with you.

In your testimony, you discussed a proposed policy of ecological forbearance under which States could petition Federal agencies for waivers from Federal requirements where there are no compelling reasons

to enforce the Federal rule.

Can you think of a current example where this would be applicable in the State of Ohio or elsewhere?

Mr. Adler. Well, I think there are lots of areas where State regulators have complained that they are forced, as part of the existing regulatory structure, to devote time and resources to meeting standards or fulfilling requirements that aren't of particular importance in that State.

One of the most obvious areas where this occurs is under the Safe Drinking Water Act where you have requirements to test for certain substances or to bring levels of certain contaminants below Federally approved levels. That may or may not be the greatest concern in particular local areas.

And sometimes this has led to some States even challenging the listing of such substances. The State of Nebraska, for example, challenged the tightening of Federal standards for arsenic, arguing both that this was not a serious health concern for people in Nebraska, but, secondly, insofar as this would increase the costs of providing water through regulated water systems, this would drive many consumers, particularly those in lower incomes, to opt out of using water systems and use unregulated well water, which in many cases would actually be more risk -- more dangerous to public health.

Nebraska, therefore, sued, arguing -- and it failed in its lawsuit, but I think that is an example of where States will sometimes have very good reasons for wanting to devote their resources to a different set of environmental priorities than what is specified under Federal law.

And it would be good if there is a mechanism whereby States could seek relief from Federal requirements so that they may devote their resources in ways -- or to problems that are of greater concern to their citizens and are in alignment with what the demands of local citizens are.

We don't now really have a mechanism that is very effective at doing that. And so, in my testimony, I suggest an idea that has also been suggested by Professor Farber at the University of California at Berkeley of one way of giving States the opportunity for that kind of flexibility.

Mr. Latta. Let me follow up.

Also, is there empirical evidence to support the assertion that leaving environmental regulation to the States will precipitate a race to the bottom?

Mr. Adler. No. There actually really isn't such evidence. There is one study that relies upon survey data that shows that State regulators are responsive to competitive concerns, but that is not

sufficient to show there is race to the bottom.

Professor Revesz has written what is probably the seminal article on the theoretical arguments related to race to the bottom, I think showing quite compellingly that, as an analytical matter, the "race to the bottom" theory rests on a lot of a assumptions that are hard to justify.

As an empirical matter, I have done work in the area of wetlands, showing that the pattern of State wetland regulation prior to Federal regulation is the exact opposite of what the "race to the bottom theory" would predict.

There is a significant amount of literature in both the economic literature and the political science literature looking empirically at patterns of State regulation, again showing that the patterns of State regulation are not consistent with the idea of a race to the bottom.

And, in fact, there is some scholarship that suggests that States, in fact, learn from each other and that, when one State, whether it is California or New York or what have you, regulates more stringently or to enhance environmental protection, that neighboring States become more likely to follow suit and more likely to increase their levels of environmental protection as well as they learn from the positive experience of their neighbors.

And then there is also some work -- I have done some work and others have done work about suggesting that even non-preemptive Federal regulation alters the incentives that State regulators face and, in some cases, will discourage States from being innovative and being more aggressive and experimental in trying to address environmental problems because of the way it alters the political and other incentives for State action.

So even non-preemptive Federal regulation can discourage States from being the laboratories of democracy that we would like them to be.

Mr. Latta. Thank you very much, Mr. Chairman. I yield back.

Mr. Shimkus. The gentleman yields back.

The Chair now recognizes the gentleman from California, Mr. McNerney.

Mr. McNerney. Thank you, Mr. Chairman.

Mr. Shimkus. You are welcome.

Mr. McNerney. Ms. Steinzor, have you ever heard of the word "chemical trespass" -- the term?

Ms. Steinzor. I am actually not familiar with that.

Mr. McNerney. Okay. Professor Revesz, you discussed fracking and the fugitive emissions of methane.

Is the commerce clause broad enough, in your opinion, to permit

the EPA -- or the Federal Government to regulate fugitive emissions of methane?

Mr. Revesz. Oh, definitely. The -- I mean, fugitive emissions of methane are an interstate problem. They are actually a global problem. They would affect the negotiating posture of the United States in climate change negotiations.

I don't think there is any plausible argument that would stand in the way of Congress choosing to act to regulate those emissions, should Congress choose to do that.

And, moreover, I think that, because of the significant interjurisdiction externalities posed by fugitive emissions of methane as a matter of policy, there is a very compelling reason for congressional action.

Mr. McNerney. Thank you.

Professor Steinzor, could you describe how the States and the Federal Government work together to implement Federal environmental programs.

Ms. Steinzor. Yes. The States have delegated authority to implement the programs so they work closely with EPA. EPA will set the minimum standards of what kind of protection is offered.

And then the States write permits or otherwise take enforcement action against regulated entities to make sure they comply with those

standards.

And most of them are based on the protection of public health or the environment, and many have a cost-effectiveness requirement.

Mr. McNerney. Thank you.

Mr. Meltz, regarding this model that was just described, in your opinion, does the case law call into question this model of environmental cooperation?

Mr. Meltz. Absolutely not. It is well established. It has been going on at least since 1970. And -- I mean, States, of course, have their own inherent police power to deal with these environmental problems. It is not that they get their authority to do so from the Federal Government.

It is just that the Federal Government can set preemptive standards and then allow States to come in with their own programs and run the program within the State, if they would rather. But States have their own inherent authority, if not preempted.

Ms. Steinzor. That was a great clarification.

Mr. McNerney. I will yield the rest of my time to the gentlewoman from Colorado.

Ms. DeGette. Thank you very much in the effort of efficiency.

Mr. Chairman, first of all, I apologize for being late. We had a hearing upstairs on 21st Century Cures, which, as you know, I am the

cochair with Chairman Upton.

But I do want to take a minute to welcome Dean Revesz here. He is the dean of my alma mater -- the dean emeritus of my alma mater, NYU law school, and he did a wonderful job when he was dean.

Mr. Shimkus. That might make me reconsider a next invitation. So I am not sure that is helpful.

Ms. DeGette. I knew that that would be, and that will save him a trip down here. So it is all good.

Dean Revesz, I just wanted to ask a follow-up question to what you were talking to Mr. Green about, which is, really, the propriety of the Federal Government preempting State laws. What you were saying is oftentimes it is an economy of scale issue and what is the specific State concern.

I am wondering how we, as Congress, can take that sort of general principle into consideration as we really look at fracking legislation or Tosca or all of the other issues we have been talking about this morning. How do we weigh those equities?

Mr. Revesz. Well, it is a hard question, and you have a hard job.

But there are some important guidelines. I mean, first, there is a significant distinction between product standards and process standards.

The economies of scale argument really doesn't apply to process

standards. You know, process standards can be very different across the country and products can still trade in national markets.

So tracking the process standards, you don't have to worry about that. You know, whether its action is good or bad will have to be decided on other reasons, but you don't have to worry about the economy of scale.

For products, you might have to. I mean, generally, bigger isn't always better. And, you know, we know that in all kinds of contexts.

So I think some categorical boxes are fairly clear to draw. And you can learn about the manufacture of cars. It probably won't take that long to figure out that there are significant economies of scales.

For most products -- you know, products are produced in the centralized way across the country, product economies of scale are less.

And you can also give some flexibility to the Federal regulator. Often these standards are going to be set by Federal regulators and there can be some flexible mechanisms, including some cooperative flexible mechanisms where they can work with the States.

So I think you can make some broad generalizations, delegate some authority to do the Federal regulators, and then have them work cooperatively with the States. You will probably end up with an outcome that is pretty good.

Ms. DeGette. Thank you very much.

Mr. Shimkus. I want to thank my colleague.

There is 11 minutes left before the vote is called.

I want to recognize the gentleman from West Virginia for 5 minutes.

Mr. McKinley. Thank you, Mr. Chairman.

I will try to be brief. I have many more questions here to ask with this, but given the time frame with it -- Mr. Chairman, with all due respect to your expectations at this hearing, I really would like to ask Ms. Steinzor some other questions, especially after your testimony that you said that industry is browbeating the EPA.

Is that a fair statement of what you said?

Ms. Steinzor. Yes. I believe that is a fair statement.

Mr. McKinley. Do you think that Congress is also pushing back against the EPA in a browbeating way?

Ms. Steinzor. Yes.

Mr. McKinley. I find that pretty incredible.

That is why I like these discussions. We get off game here a little bit because I know he had intention, but here is a chance for us to have a dialogue about that because, quite frankly, many of us think that the EPA is a bully in the playground.

It is imposing things on small individuals, small farmers,

individuals, and we are trying to be their voice. We are trying to raise the awareness around the country that the EPA is overextending its bounds.

So I am glad that you think that we are because it helps me understand a little bit better where you are coming from, whatever adjective we want to add to that.

Do you think the EPA wage garnishment is fair, is right?

Ms. Steinzor. I am not familiar with the circumstances where that happened.

Mr. McKinley. Do you think the navigable waterways on our agricultural farms -- do you think that is fair, their ruling?

Ms. Steinzor. I actually think --

Mr. McKinley. Just a "yes" or "no," given the time.

Do you think it is "yes"? I am hearing a "yes."

I heard that -- on coal ash, did you even read the bill?

Ms. Steinzor. I am sorry?

Mr. McKinley. We passed it four times, by the way. The Senate is not taking the coal ash bill up. We could have resolved this issue and the North Carolina situation probably would not have happened if the Senate had taken that bill up.

So we are trying to work with that -- the Congress has actually -- the House is actually working a way to try to address this

problem, and the Senate, because of an ideology, is preventing that from going forth.

So, apparently, you are not aware.

Ms. Steinzor. I am very familiar with the coal ash bill. I don't think it would have solved the problem in North Carolina.

Mr. McKinley. Oh. You don't think the collapse of the dam --

Ms. Steinzor. I don't think so because you would have left it to North Carolina at the State level.

Mr. McKinley. Well, you are not an engineer. So I can't image you would understand that.

What about Spruce Mine? Do you think it was appropriate that the EPA has the ability to withdraw -- retroactively withdraw a permit?

Ms. Steinzor. I am not familiar with that situation.

Mr. McKinley. What I am pointing out -- and this is what America needs to understand -- that is why we are pushing back against this bully in the playground.

These are just examples of things that the EPA is doing to our community, our businesses, our farms, all across America, and someone has to stand up to them.

Because individuals like the Alts over in eastern panhandle or the Sacketts out in Idaho, they don't have the resources. They need somebody here in Congress to stand up and push back against this bully.

Have you ever experienced a bully?

Ms. Steinzor. Yes, I have.

Mr. McKinley. Then, you understand. You ought to be able to relate to that, about someone in the power --

Ms. Steinzor. I disagree that EPA is a bully.

Mr. McKinley. You do you agree that EPA is a bully?

Ms. Steinzor. I do not agree that EPA is a bully.

Mr. McKinley. Oh. Okay. Well, I guess that is why we are just going to disagree with that.

But, nevertheless, many of us perceive that, when we see them attacking industries, attacking families and their farms, we are talk -- individuals trying to -- in Idaho -- I could go on and on with examples of that.

I do hope you do get another chance to read the Fly Ash Bill because we passed it four times and we think it will address that.

Actually, the EPA supports this legislation. They've indicated that they find it a workable document. If you are not aware of that, you might want to check into that a little bit.

And the President did not issue a veto threat with that. So this was a document that could have gone to save that problem -- prevent that problem. But because of the ideology of people in the other body, apparently, they didn't want to do that.

So I am sorry. In deference to time, let me not waste any more. And I yield back the balance of my time.

Mr. Shimkus. The gentleman yields back his time.

We want to thank the panel. There is still about 6 minutes left before we need to get to the floor. We talked about the time frame beforehand. So we are going to adjourn this in a minute. We are not going to call you back.

Be prepared for some folks to follow up with questions. And if you would respond. You know, we try to primarily focus on the questions when should Congress consider acting and who should be the regulator.

You got some very good questions. I was hoping for clarity. I think I got more confusion. But I guess that is what you guys live with and ladies live with when you deal with constitutional law and States' rights and the like.

This was helpful to me. I appreciate your attendance.

With that, I am going to call the hearing as adjourned.

[Whereupon, at 10:32 a.m., the subcommittee was adjourned.]