



**CONSTITUTIONAL CONSIDERATIONS:  
STATE VS. FEDERAL ENVIRONMENTAL POLICY IMPLEMENTATION**

**Prepared Statement of**

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**Subcommittee on Environment and the Economy  
Committee on Energy and Commerce  
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Mr. Chairman, Representative Tonko, and members of this subcommittee, thank you for the invitation to testify on constitutional considerations that should inform the allocation of responsibility for environmental protection between the federal and state governments. My name is Jonathan H. Adler and I am the inaugural Johan Verheij Memorial Professor of Law and Director of the Center for Business Law & Regulation at the Case Western Reserve University School of Law where I teach courses in constitutional, environmental, and administrative law. I am also a Senior Fellow at the Property & Environment Research Center, an environmental think tank headquartered in Bozeman, Montana.

The subject of federalism in environmental policy has been a major focus of my academic work. For over twenty years I have researched and analyzed federal regulatory policies, with a particular focus on the intersection of federalism and environmental protection. My research has addressed both the constitutional limitations on environmental regulation as well as the policy considerations that should inform jurisdictional choice in environmental law. My testimony today draws heavily on this research and my academic publications on federalism and environmental policy. I have listed these articles in an appendix to my testimony and would be happy to provide copies of any of these works to the subcommittee if they would be of use.

## Overview

Both the federal and state governments play a role in environmental protection. Each has a comparative advantage in addressing particular types of environmental concerns. Apart from such policy considerations, however, the U.S. Constitution also constrains the sorts of environmental policies that may be adopted by each level of government. It is a fundamental principle of our constitutional order that the federal government is one of limited and enumerated powers, and that those powers not delegated to the federal government are reserved to the states and 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 as true for environmental protection as it is for national security or health care.

The constitutional system of “dual sovereignty” limits federal power and recognizes the “separate and independent autonomy” of the states.<sup>1</sup> At the same time, our federalist system constrains what states may do, through both express and implied structural limits on state authority. As a consequence, not every level of government may enact every potentially desirable for environmental protection. Rather, our constitutional structure leaves both the federal and state governments with realms in which they may operate to advance environmental goals while simultaneously providing for some degree of interjurisdictional competition among and between the several states.

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 carefully 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 in those areas where the federal government may do the most good. Specifically, the federal government should 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. For instance, there is a compelling case to be made that the federal government should take the lead in addressing interstate spillovers. Downstream and downwind jurisdictions should not be at the mercy of their upstream and upwind neighbors. Further, there is a powerful case to be made that the federal government should exercise leadership in scientific research on the nature and scope of environmental concerns and, in some areas, provide incentives for the development of environmentally friendly technologies. When it comes to developing and enforcing environmental standards for localized environmental concerns, however, the case for federal intervention is comparatively weak. Not coincidentally, the constitution constrains federal efforts to reach some localized environmental concerns. Again, however, such constraints need not compromise environmental protection. To the contrary, insofar as the constitution encourages policy makers to think carefully about the comparative strengths and weaknesses of federal intervention, it may actually enhance this nation’s system of environmental protection.

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<sup>1</sup> See *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991).

## Limited and Enumerated Federal Powers

A core component of the constitutional structure is the idea that the powers of the federal government are limited to those enumerated in the Constitution itself. As Chief Justice John Marshall explained in *Marbury v. Madison*: “The powers of the legislature are defined and limited; and that those limits may not be mistake and forgotten, the constitution is written.”<sup>2</sup> This principle has been reaffirmed by the Supreme Court from early years of the Republic to the present day, including the Supreme Court’s recent decisions in *NFIB v. Sebelius* and *Bond v. United States*.<sup>3</sup>

Most of the federal government’s powers are enumerated in Article I, section 8.<sup>4</sup> These include the powers to borrow and coin money, establish uniform laws governing naturalization and bankruptcy, and – most significantly for the regulation of energy and environmental concerns – the power to regulate commerce “among the several States.” Article I, section 8 also authorizes Congress to “lay and collect Taxes, Duties, Imposts, and Excises to pay the Debts and provide for the common Defence and general Welfare of the United States.” As interpreted by the courts, this empowers Congress to fund those projects and programs that Congress believes will advance the “general Welfare” of the United States.<sup>5</sup> Further, the Constitution also vests Congress with the power to “make all Laws which shall be necessary and proper for carrying into execution” the other powers enumerated in the Constitution.

Taken together, these powers grant Congress ample authority to address many environmental concerns. Such authority is not unlimited, however, and Congress must remain cognizant of the real constitutional constraints on federal regulatory power. As Chief Justice Roberts emphasized in *NFIB v. Sebelius*, “If no enumerated power authorizes Congress to pass a certain law, that law may not be enacted, even if it would not violate any of the express prohibitions in the Bill of Rights or elsewhere in the Constitution.”<sup>6</sup>

The Supreme Court’s recent federalism jurisprudence has two distinct strains. The first focuses on the federal government’s enumerated powers. These cases ask whether a given federal statute represents a proper exercise of one of Congress’s enumerated powers. In

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<sup>2</sup> See, e.g., *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803) (“The powers of the legislature are defined and limited; and that those limits may not be mistake and forgotten, the constitution is written.”).

<sup>3</sup> See *NFIB v. Sebelius*, 132 S. Ct. 2566, 2577 (2012) (“The federal government ‘is acknowledged by all to be one of enumerated powers.’”) (quoting *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 405 (1819)); *Bond v. U.S.*, 134 S. Ct. 2077, \_\_ (2014) (“In our federal system, the National Government possesses only limited powers; the States and the people retain the remainder”).

<sup>4</sup> Other powers may be found in the enforcement clauses of the Civil War Amendments, including the 14<sup>th</sup> Amendment, among other parts of the Constitution.

<sup>5</sup> See, e.g., *United States v. Butler*, 297 U.S. 1 (1936).

<sup>6</sup> *NFIB*, 132 S.Ct. at 2577.

these cases, the Court has held that the enumeration of distinct federal powers places affirmative limits on Congress’s power. Some matters – those not within the bounds of the enumerated powers – are simply beyond the reach of federal hands. The second centers on protecting state sovereignty. The focus in these cases is the extent to which residual state sovereignty immunizes states from federal efforts to direct or otherwise influence state resources and policy decisions. Together, these two jurisprudential strains limit both *what* Congress may do and *how* Congress may do it.

### *Commerce Power*

Article I, Section 8 of the Constitution grants Congress the power “to regulate Commerce . . . among the several states.” As explained by Chief Justice John Marshall, this clause—the Commerce Clause—grants Congress “the power to regulate; that is, to prescribe the rule by which commerce is to be governed.”<sup>7</sup> This, by its own terms, is a rather expansive power. Yet as broad as the commerce power may be, it is not without limits. In Marshall’s words, there remains an “immense mass of legislation, which embraces every thing within the territory of a State, not surrendered to the general government.”<sup>8</sup> Thus, as Chief Justice Roberts reminded us in *NFIB*, this power, like all federal powers, “must be read carefully to avoid creating a general federal authority akin to the police power.”<sup>9</sup>

Under current doctrine, the commerce power (as supplemented by the necessary and proper clause) enables Congress to reach nearly all manner of economic activity. Specifically, under *United States v. Lopez*, the Constitution grants Congress the power to regulate in three areas: 1) the use of the channels of interstate commerce; 2) the instrumentalities of interstate commerce, or persons or things in interstate commerce; and 3) those activities that “substantially affect” interstate commerce.<sup>10</sup> The first two categories are rather unambiguous. If an item is used or sold in interstate commerce, it may be regulated, as may the channels through which such items flow. Thus, for example, Congress may regulate or prohibit the sale of driver’s license information and other personal data collected by public and private entities because such information is a product sold in interstate commerce.<sup>11</sup> The contours of the “substantial effects” test, on the other hand, are less obvious.

As described and applied in *Lopez* and subsequent cases, the “substantial effects” test is more qualitative than quantitative. It is more concerned with the nature of the regulated activity or the regulatory scheme in question than with the aggregate economic impact of the regulated activity alone, or in combination with other similarly regulated activities. The key question is whether the activity subject to federal regulation is itself related to “‘commerce’ or any

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<sup>7</sup> *Gibbons v. Ogden*, 22 U.S. (9 Wheat) 1, 196 (1824).

<sup>8</sup> *Id.* at 203.

<sup>9</sup> *NFIB*, 132 S.Ct. at 2578.

<sup>10</sup> *Lopez*, 514 U.S. 549, 558-59 (1995).

<sup>11</sup> See *Reno v. Condon*, 528 U.S. 118 (2000) (upholding the Driver’s Privacy Protection Act as a proper exercise of Congress’s Commerce Clause power).

sort of economic enterprise” or whether the regulation is “an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated.”<sup>12</sup> Thus, Congress may regulate activities that are “economic in nature,”<sup>13</sup> such as industrial mining<sup>14</sup> or loan-sharking.<sup>15</sup> At the same time, Congress may reach relatively minor intrastate activities through broad economic regulatory schemes, such as a price maintenance regime for agricultural products or a comprehensive regulatory scheme governing the production, sale, and use of narcotics.<sup>16</sup>

That a given activity (or inactivity) might have a substantial economic impact, even when aggregated with all other instances of like conduct, is insufficient. The Supreme Court has explicitly rejected “the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct’s aggregate effect on interstate commerce.”<sup>17</sup> It has also concluded that the commerce power may not be used to compel activity, *ab initio*, so as to facilitate regulation.<sup>18</sup> In close cases, the Court has also interpreted statutes narrowly so as to avoid exceeding the bounds of federal power.

### *Spending Power*

Article I, section 8 of the Constitution also empowers Congress to “lay and collect Taxes, Duties, Imposts, and Excises to pay the Debts and provide for the common Defence and general Welfare of the United States.” The spending power is not merely the power to appropriate federal money for federal purposes. As interpreted by the courts, it is also the power to induce private or state action by attaching conditions to the expenditure of federal money. As the Court noted in *Fullilove v. Klutznick*,<sup>19</sup> the clause empowers Congress to impose conditions on the use of federal funds “to further broad policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with federal statutory and administrative directives.”<sup>20</sup>

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<sup>12</sup> *Lopez*, 514 U.S. at 561.

<sup>13</sup> *See Morrison*, 529 U.S. at 608.

<sup>14</sup> *See Hodel v. Virginia Surface Mining & Reclamation Ass’n*, 452 U.S. 264 (1981).

<sup>15</sup> *See Perez v. United States*, 402 U.S. 146 (1971).

<sup>16</sup> *See Wickard v. Filburn*, 317 U.S. 111 (1942) (upholding application of agricultural production quotas to production for a farmer’s own use because allowing such production would undermine the national price control scheme created by the Agricultural Adjustment Act of 1938); *Gonzales v. Raich*, 545 U.S. 1 (2005) (upholding application of the Controlled Substances Act to the intrastate possession and use of marijuana).

<sup>17</sup> *Morrison*, 529 U.S. 598, 617 (2000).

<sup>18</sup> *See NFIB*, 132 S.Ct.

<sup>19</sup> 448 U.S. 448 (1980).

<sup>20</sup> *Id.* at 474.

The spending power is unquestionably broad, but it is not unlimited. In 1987, in *South Dakota v. Dole*,<sup>21</sup> the Supreme Court identified five restraints upon Congress’s use of conditional federal spending. First, the appropriation of funds must be for the “general welfare” and not for a narrow special interest.<sup>22</sup> In making this determination, however, courts are “to defer substantially to the judgment of Congress.”<sup>23</sup> Second, there can be no independent constitutional bar to the condition imposed upon the federal spending.<sup>24</sup> In other words, Congress may not seek to use the spending power to induce states to engage in conduct that would otherwise be unconstitutional. Third, any conditions imposed upon the receipt of federal funds must be clear and unambiguous.<sup>25</sup> Recipients of federal funds must have notice of any conditions with which they must comply, and the scope of their obligation. As the Court noted in 1981, “the legitimacy of Congress’s power to legislate under the spending power . . . rests on whether the State voluntarily and knowingly accepts the terms of the ‘contract.’”<sup>26</sup> Fourth, and most significant, the conditions themselves must be related to the federal interest that the exercise of the spending power is itself supposed to advance. In the Court’s words, “the condition imposed by Congress is directly related to one of the main purposes for which . . . funds are expended.”<sup>27</sup> As reaffirmed in *New York*, the “conditions must . . . bear some relationship to the purpose of the federal spending, otherwise, of course the spending power could render academic the Constitution’s other grants and limits of federal authority.”<sup>28</sup>

*Dole* also suggested a fifth limitation on the use of conditional spending: “coercion.” Specifically, the Court noted that “in some circumstances the financial inducement offered by Congress might be so coercive as to pass the point at which ‘pressure turns into compulsion.’”<sup>29</sup> This point has been reiterated in subsequent cases.<sup>30</sup> While not explaining what amount or degree of financial inducement would be necessary for an exercise of the spending power to become coercive, the *Dole* majority noted that here Congress only conditioned “a relatively small percentage of certain federal highway funds”<sup>31</sup>—specifically five percent of the funds from specific highway grant programs. Such an imposition

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<sup>21</sup> *United States v. Dole*, 483 U.S. 203 (1987).

<sup>22</sup> *Id.* at 207.

<sup>23</sup> *Id.*

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

<sup>25</sup> *Id.*

<sup>26</sup> *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981).

<sup>27</sup> *Dole*, 483 U.S. at 208.

<sup>28</sup> *New York*, 505 U.S. at 167 (citations omitted).

<sup>29</sup> *Dole*, 483 U.S. at 211.

<sup>30</sup> *See, e.g., College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 687 (1999) (noting that, in some instances, “the financial inducement offered by Congress might be so coercive as to pass the point at which pressure turns into compulsion” (quotation omitted)). *See also New York*, 505 U.S. at 167 (noting limits of federal spending power).

<sup>31</sup> *Dole*, 483 U.S. at 211.

represents “relatively mild encouragement to the States,” thereby leaving states with the ultimate decision as to whether to conform to federal dictates, and is therefore not coercive.<sup>32</sup>

In striking down the conditions imposed on the Medicaid expansion, the Supreme Court reaffirmed the five requirements of conditional spending outlined in *Dole* and reiterated that “Spending Clause legislation is much in the nature of a *contract*.”<sup>33</sup> The conditions placed on the Medicaid expansion easily satisfy most of the *Dole* requirements, however. The spending is for the “general welfare,” as this has long been understood, and did not require states to engage in unconstitutional conduct as a condition of receiving the funds. The conditions placed on the spending were also clearly related to the purpose of the spending: increasing the availability of health care services to those in need.

Where the Medicaid expansion ran into trouble was that it arguably represented a fundamental change in the nature of the “contract” between states and the federal government. The Medicaid expansion was, in the Court’s eyes, “a shift in kind, not merely degree.”<sup>34</sup> Further, the sheer amount of money at stake made this effort to leverage state reliance unduly coercive. As Chief Justice Roberts explained, the federal government was doing far more than conditioning the receipt of new funds on state willingness to comply with conditions on how those funds would be used or related matters. Rather, Congress was leveraging state reliance on prior funding to induce states to participate in a new program. There was no purpose for the condition other than to induce compliance. As Chief Justice Roberts explained, when “conditions take the form of threats to terminate other significant independent grants, the conditions are properly viewed as a means of pressuring the States to accept policy changes.”<sup>35</sup> While recognizing that the spending power is broad, the Chief Justice also recognized that it was not unlimited – indeed, that it could not be unlimited without undoing the anticommandeering principle and other previously recognized limits on federal power.

While the Court struck down the conditions placed on the Medicaid expansion as going too far, it did not identify the precise point at which constitutionally permissible “pressure” becomes unconstitutional “coercion.” Chief Justice Roberts was explicit on this point, noting the Court had “no need to fix a line” in this case.<sup>36</sup> It was sufficient to note that “wherever that line may be, this statute is surely beyond it.”<sup>37</sup> In this manner the Court reaffirmed the need for a limit on the federal government’s spending power, even if it could not identify precisely where that limit was.

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<sup>32</sup> *Id.*

<sup>33</sup> *NFIB*, 132 S.Ct. at 2602 (quoting *Barnes v. Gorman*, 536 U.S. 181, 186 (2002) (internal citation omitted)).

<sup>34</sup> *Id.* at 2605.

<sup>35</sup> *Id.* at 2604.

<sup>36</sup> *Id.* at 2606.

<sup>37</sup> *Id.*

*State Sovereignty*

The enumeration of Congress’s delegated powers is not the only limit on the scope of federal power. There are constitutional limits on the exercise of federal power, both explicit (as in the Bill of Rights) and implicit (as in those found in the Constitution’s history and structure). The Supreme Court has found within the Constitution significant structural limits on the exercise of federal power that arise from the residual “sovereign” status of state governments. Building on the concept of “dual sovereignty” the Court has invalidated federal actions that impede upon, or affront the “dignity” of, states qua states.<sup>38</sup> In particular, the Court has held that the federal government may neither command states to participate in or implement a federal regulatory program,<sup>39</sup> nor may the federal government abrogate state sovereign immunity from suits for money damages save in limited circumstances.<sup>40</sup> These doctrines are not derived from the Constitution’s text, but rather from structural considerations and unspoken assumptions in the document. They are nonetheless key components of the contemporary Court’s federalism jurisprudence.

Of the structural limitations on federal power, the “anti-commandeering” principle is of the greatest potential importance for federal environmental law. Under this doctrine, “the Federal Government may not compel the states to implement, by legislation or executive action, federal regulatory programs.”<sup>41</sup> As the Court declared in *New York v. United States*, “while Congress has substantial power under the Constitution to encourage States” to enact federally desired measures, “the Constitution does not confer upon Congress the ability simply to *compel* the States to do so.”<sup>42</sup> Indeed, the Court in *New York* explained, “the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress’s instructions.”<sup>43</sup> To hold otherwise, the Court noted, would be to reject the idea that the states themselves retain substantial sovereignty within the federal system. It would also undermine accountability within the federal system.

The Court’s holding in *New York* laid out simple ground rules for federal efforts to enlist State assistance in regulatory programs: “The Constitution enables the Federal Government to pre-empt state regulation contrary to federal interests, and it permits the Federal Government to hold out incentives to the States as a means of encouraging them to adopt suggested regulatory schemes. It does not, however, authorize Congress simply to direct the States” to adopt Congress’s policy prescriptions.<sup>44</sup> In simple terms: “Whatever the outer

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<sup>38</sup> *Alden v. Maine*, 527 U.S. 706, 749 (1999).

<sup>39</sup> *Printz v. United States*, 521 U.S. 898, 935 (1997) (“The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States’ officers, or those of their political subdivisions, to administer or enforce a federal regulatory program.”).

<sup>40</sup> *See, e.g., Alden*, 527 U.S. 706 (1999).

<sup>41</sup> *Printz*, 521 U.S. at 925.

<sup>42</sup> *New York*, 505 U.S. 144, 149 (1992) (emphasis added).

<sup>43</sup> *Id.* at 162.

<sup>44</sup> *Id.* at 188.



limits of [State] sovereignty may be, one thing is clear: The Federal Government may not compel the States to enact or administer a federal regulatory program.”<sup>45</sup>

This limitation applies equally to efforts to commandeer a state or local government executive as a state legislature.<sup>46</sup> Congress is no more able to direct the activities of local law enforcement than it is a state senate. To hold otherwise would enable Congress to sidestep *New York* by directly ordering state officials to implement federal measures, bypassing the state legislature in the process.<sup>47</sup> Such federal power to direct state executive officials would infringe upon state legislatures’ ability to control state policy. For this reason, the Supreme Court in *Printz v. United States* invalidated portions of a federal statute directing state law enforcement officials to perform background checks for handgun purchases. That the background-check requirement was arguably little more than a ministerial obligation, and did not impose a substantial burden on the local law enforcement officers, was deemed immaterial.<sup>48</sup>

Where Congress is unwilling to instruct the federal executive to regulate directly, it may seek to induce voluntary state participation in a federal scheme.<sup>49</sup> The most obvious means of accomplishing this is to offer funds to the states with conditions attached, or to threaten to cut off an existing funding stream if specified conditions are not met.<sup>50</sup> Such encouragement has significant force, but it also has constitutional limits. Indeed, the structural constraints on federal power imposed by *New York* and *Printz* imply such limits on the use of federal funds. While *New York* and *Printz* did not impose substantive restraints upon Congress’s power, they did place structural impediments to the enactment of laws that would excessively intrude into the States’ sovereign realms, and thereby threaten individual liberty.

### **Federalism Constraints on Environmental Regulation**

Federal environmental regulation arguably represents the most expansive assertion of federal authority. Even where federal environmental programs are cooperative in nature, environmental regulation calls upon the federal government to affect, influence, and regulate a wider range of behavior – economic and otherwise – than any other area of federal concern.

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<sup>45</sup> *Id.*

<sup>46</sup> *Printz v. United States*, 521 U.S. 898 (1997).

<sup>47</sup> *Id.* at 929-30.

<sup>48</sup> *Id.* at 935 (“[N]o case-by-case weighing of the burdens or benefits is necessary; such commands are fundamentally incompatible with our constitutional system of dual sovereignty.”).

<sup>49</sup> The court noted that there are “a variety of methods, short of outright coercion, by which Congress may urge a State to adopt a legislative program consistent with federal interests.” *New York*, 505 U.S. at 167.

<sup>50</sup> *Id.* at 167 (“[U]nder Congress’s spending power ‘Congress may attach conditions on the receipt of federal funds.’” (citing *South Dakota v. Dole*, 483 U.S. 203, 206 (1987))).

Only federal environmental regulation, for example, could purport to regulate local activities ranging from home construction to recreational behavior on private land.<sup>51</sup>

Despite the ambitious sweep of federal environmental legislation, there was little, if any, thought given to the constitutional justification for such enactments.<sup>52</sup> Congress adopted environmental statutes governing a wide range of activities and phenomena never-before subject to federal regulation without questioning whether any such legislation might exceed the scope of Congress’s enumerated powers. Nearly all the major environmental statutes give a passing nod to the historic state role in addressing pollution concerns, yet then proceed to expand the federal government’s reach into such terrain.<sup>53</sup>

Congress retains substantial Commerce Clause authority to regulate economic activities and their environmental impacts. Recent precedents do not undermine federal statutes that explicitly regulate commercial or industrial activity as such. There is some question, however, about the extent to which Congress may use its Commerce Clause authority to regulate local land-use or reach non-economic activity. As the Supreme Court noted in *FERC v. Mississippi*, “regulation of land use is perhaps the quintessential state activity.”<sup>54</sup> It will not be subsumed by federal legislation lightly.

While the logic of the Court’s federalism decisions suggests limitations on Congress’s ability to authorize the regulation of non-economic activity and the environmental impacts of such activity, lower courts have not been eager to enforce such limits. Indeed, lower federal appellate courts have uniformly rejected Commerce Clause challenges to the scope of federal environmental regulation. Constitutional challenges to the application of the Clean Air Act,<sup>55</sup>

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<sup>51</sup> See, e.g., 58 Fed. Reg. 45,008, 45,020 (Aug. 25, 1993) (U.S. Army Corps of Engineers’ assertion of authority to regulate “walking, bicycling or driving a vehicle through a wetland” because such activities could result in the “discharge of dredged material”).

<sup>52</sup> Denis Binder, *The Spending Clause as a Positive Source of Environmental Protection: A Primer*, 4 CHAP. L. REV. 147, 147 (2001) (“As the number of statutes approach the century mark, little thought has been given by Congress to the constitutional basis of the legislation.”); *id.* at 148 (“[W]hen the statutes were adopted, the underlying assumption was that the Commerce Clause grants virtually carte blanche authority to legislative for environmental protection.”); Philip Soper, *The Constitutional Framework*, in FEDERAL ENVIRONMENTAL LAW 20, 24 (1974) (observing that applying contemporary Commerce Clause jurisprudence “to the environmental context results in a picture of congressional power that appears practically unbounded at least as far as concerns control over the typical areas of pollution”). *But see id.* at 21-22 (citing commentators who argued, in the 1960s, that some environmental concerns may lie beyond the scope of federal power).

<sup>53</sup> See e.g., Federal Water Pollution Control Act (Clean Water Act), 26 U.S.C. § 1251(b) (2002) (“It is the policy of the Congress to recognize, preserve, and protect the primary responsibility of States . . .”); Clean Air Act, 42 U.S.C. § 7402(a) (2002) (“The Administrator shall encourage cooperative activities by the States and local governments . . . and encourage the making of agreements between States for the prevention and control of air pollution.”); Endangered Species Act, 16 U.S.C. § 1531(c)(2) (2002) (“It is further declared to be the policy of Congress that federal agencies shall cooperate with State and local agencies to resolve water resource issues in concert with conservation of endangered species.”).

<sup>54</sup> 456 U.S. 742, 768 n.30 (1982).

<sup>55</sup> See *Allied Local and Reg’ Mfrs. Caucus v. EPA*, 215 F.3d 61 (D.C. Cir. 2000).

Clean Water Act,<sup>56</sup> Endangered Species Act,<sup>57</sup> and Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)<sup>58</sup> to intrastate activities have all failed thus far. In many of these cases, federal regulatory authority was upheld because the statute or regulations in question regulated explicitly industrial or commercial activity. For the most part, the result in district courts has been the same, upholding federal environmental statutes and regulations in the face of Commerce Clause challenges.<sup>59</sup> This phenomenon is not isolated to environmental law. Federal courts, generally, were reluctant to apply *Lopez* and *Morrison* so as to curtail the reach of federal Commerce Clause authority.

Despite this pattern, it seems likely that some environmental statutes exceed the scope of the Commerce Clause power delineated in *Lopez* and *Morrison*. Most vulnerable are the Endangered Species Act (ESA) and portions of the Clean Water Act (CWA). Neither the ESA nor the CWA explicitly regulates commercial activities, as such. Under the ESA, any and all activities that harm endangered species, including modest habitat modification, are potentially subject to federal regulation. Regulation under the CWA is confined to “navigable waters,” which the federal government has defined to include all waters and wetlands irrespective of their navigability or relationship to interstate commerce. In each case, the federal government may have asserted regulatory authority beyond that authorized by the Commerce Clause.

While there is no doubt that the conservation of endangered species is an important and popular public policy goal, the appellate decisions have had a difficult time identifying a coherent rationale for upholding the ESA’s take prohibition as against Commerce Clause challenge. As noted by then-Judge Roberts in *Rancho Viejo v. Norton*, the rationales set forth by the various courts, while appealing, are inconsistent with each other and appear to be inconsistent with analytical approach adopted by the Supreme Court.<sup>60</sup>

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<sup>56</sup> See, e.g., *United States v. Deaton*, 332 F.3d 698 (4th Cir. 2003).

<sup>57</sup> See *Rancho Viejo v. Norton*, 323 F.3d 1062, 1065 (D.C. Cir. 2003); *GDF Realty Inv., Ltd. v. Norton*, 326 F.3d 622 (5th Cir. 2003); *Gibbs v. Babbitt*, 214 F.3d 483 (4th Cir. 2000); *Nat’l Ass’n of Home Builders v. Babbitt*, 130 F.3d 1041 (D.C. Cir. 1997).

<sup>58</sup> See *Freier v. Westinghouse Elec. Corp.*, 303 F.3d 176 (2nd Cir. 2002); *United States v. Olin Corp.*, 107 F.3d 1506 (11th Cir. 1997).

<sup>59</sup> See, e.g., *FD&P Enter., Inc. v. United States*, 239 F. Supp. 2d 509 (D.N.J. 2003) (upholding federal wetland regulations); *United States v. Domenic Lombardi Realty*, 204 F. Supp. 2d 318 (D.R.I. 2002) (upholding CERCLA); *United States v. Red Frame Parasail*, 160 F. Supp. 2d 1048 (D. Az. 2001) (upholding Airborne Hunting Act); *United States v. Glidden*, 3 F. Supp. 2d 823 (N.D. Ohio 1997) (upholding CERCLA); *United States v. NL Industries*, 936 F. Supp. 545 (S.D. Ill. 1996) (upholding CERCLA); *Nova Chemicals, Inc. v. GAF Corp.*, 945 F. Supp. 1098 (E.D. Tenn. 1996) (upholding CERCLA). *But see* *United States v. Olin Corp.*, 927 F. Supp. 1502 (S.D. Ala. 1996) (invalidating CERCLA for *inter alia* exceeding the scope of Congress’ commerce clause power), *rev’d* 107 F.3d 1506 (11th Cir. 1997).

<sup>60</sup> See *Rancho Viejo, LLC v. Norton*, 334 F.3d 1158, 1160 (D.C. Cir. 2003) (Roberts, J., dissenting from denial of rehearing en banc) (noting the panel’s approach “seems inconsistent with the Supreme Court’s holdings” in *Lopez* and *Morrison*, and “conflicts with the opinion of a sister circuit”).

In the context of wetland regulation, the Supreme Court has twice cautioned the Environmental Protection Agency and U.S. Army Corps of Engineers that their assertion of broad regulatory authority under the CWA may exceed the scope of the federal government’s authority. In *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers (SWANCC)*<sup>61</sup> and *Rapanos v. United States*, the Court adopted a narrowing construction of the CWA out of a concern that a broad interpretation of the CWA would “push the limit of congressional authority” under the Commerce Clause.<sup>62</sup> In both cases, the Court limited the scope of the CWA to those wetlands and waters that have a “significant nexus” to truly navigable waters. Insofar as the EPA and Army Corps seek to extend CW authority beyond such waters or wetlands, they may be exceeding the scope of the federal government’s constitutional authority.

The constitutional prohibition on commandeering limits the federal government’s ability to make states cooperate in the enforcement and implementation of federal environmental laws. The doctrine here is clear and explicit. As a consequence, most federal environmental statutes adopt a “cooperative federalism” model under which the federal government seeks to induce state cooperation by providing a series of incentives. Under most such statutes, the federal government gives states the option of taking the lead in implementing the federal regulatory program within the state and may offer some degree of financial assistance. Should a state fail to accept this offer, however, the federal government will regulate in place of the state. The use of financial incentives and conditional federal regulation has been expressly approved by the Supreme Court in numerous cases, but the Court has also cautioned against the creation of incentives that could become coercive. Encouragement is permissible; coercion is not.

The constitutional prohibition on commandeering is one reason the Supreme Court has insisted that the power to place conditions on the receipt of federal spending is limited. The Supreme Court made this abundantly clear in *NFIB v. Sebelius* when seven justices voted to strike down Congress’s effort to condition the receipt of all Medicaid funding on state willingness to expand the Medicaid program. This decision means that Congress must be careful not to place too much pressure on states to cooperate, such as by conditioning receipt of substantial federal funds for one program on state willingness to implement another. The logic of the *NFIB* decision would also seem to preclude the use of other incentives, such as the threat of punitive regulation in non-cooperative states, that could cross the line from inducement to coercion.

One statute that may be vulnerable to constitutional challenge after *NFIB* is the Clean Air Act. Specifically, insofar as the Act conditions state receipt of federal highway funds on Clean Air Act compliance, this may exceed the scope of federal power under *NFIB*. This is so for several reasons. First, the Clean Air Act conditions the receipt of money for one program (highway construction) on compliance with conditions tied to a separate program (air pollution control). This may be problematic because a majority of the Court thought

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<sup>61</sup> 531 U.S. 159 (2001).

<sup>62</sup> *Id.* at 173.

Congress was trying to leverage state reliance on funding for one program (traditional Medicaid) to induce participation in another program (the Medicaid expansion). While the money at stake under the Clean Air Act is far less – most states receive substantially less in highway funds than in Medicaid funds – highway funding remains a substantial part of many state budgets and is less directly related to air pollution control (particularly from stationary sources) than traditional Medicaid is to the Medicaid expansion.

It may also be relevant that highway funds are raised from a dedicated revenue source in gasoline taxes and placed in the Highway Trust Fund. For many states, federal highway funds represent the lion’s share of their transportation budget. As a consequence, threatening to take highway funds may strike some courts as unduly coercive under *NFIB*. In the 1980s the Supreme Court upheld conditioning five percent of a state’s highway funds on setting an 21-years-old drinking age. Under the Clean Air Act, however, a state can lose *all* highway funds, save those that will reduce emissions or are necessary for traffic safety, for failure to adopt a complete pollution control plan that satisfies the federal EPA.

The Court in *NFIB* also stressed that conditional grants of federal funds operate much like a contract, and that the parties are limited in their ability to unilaterally revise the terms. This could expose another vulnerability in the Clean Air Act because while the statutory requirements don’t regularly change, what states must actually do to comply with the Clean Air Act’s terms do. The requirements for state pollution control plans are constantly changing, as the EPA tightens or otherwise revises federal air quality standards and additional pollutants become subject to Clean Air Act regulation. Given the challenges that many states will face complying with current and proposed NAAQS standards, I would not be surprised should some states seek to challenge the EPA’s authority to cut off federal highway funds or impose other sanctions on uncooperative states.

### **Limits on State Regulation**

The primary constitutional limits on federal power derive from the delegation of limited and enumerated powers. The federal government only has those powers delegated to it. The states, on the other hand, have all those powers not delegated to the federal government or constrained by other constitutional provisions. Put another way, whereas the federal government’s powers are limited and enumerated, the states possess a residual and plenary police power. Nonetheless, there are constitutional constraints on the sorts of environmental policies states may enact.

#### *Supremacy Clause*

The federal government’s powers are limited, but they are also supreme. Article VI of the Constitution provides that the federal Constitution and “the Laws of the United States which shall be made in pursuance thereof” are “the supreme law of the land.” Thus, where federal and state laws conflict, federal law prevails.

A consequence of the Supremacy Clause is that the federal government retains the authority to preempt state regulation of those matters within the reach of federal regulatory authority. Preemption may be express or implied.<sup>63</sup> Express preemption occurs when Congress enacts legislation that explicitly overrides or bars the application of state law.<sup>64</sup> Implied preemption, on the other hand, occurs when there is some degree of tension or incompatibility between federal and state law. This may occur when a federal statute covers an entire field of law so pervasively that there is no room for additional state or local regulation – so-called “field preemption”<sup>65</sup> – or when it is costly if not impossible for a regulated entity to comply with both federal law and state law simultaneously – so-called “conflict preemption.”<sup>66</sup> Courts are generally reluctant to find preemption without either an express claim of preemption by Congress, or some other indication of implied preemption, such as a direct conflict between federal and state law.<sup>67</sup> Nonetheless, as a constitutional matter, there is no question that Congress retains the authority to use its enumerated powers to preempt or limit state laws that conflict with or are otherwise contrary to federal objectives.

#### *Dormant Commerce Clause*

Even when Congress fails to act, state laws will be held invalid if they impermissibly burden interstate commerce. The same Commerce Clause which authorizes Congress to regulate commerce “among the several states” has also been interpreted by the courts to constrain state regulation that unduly interferes with such commerce.<sup>68</sup> This “negative” aspect of the Commerce Clause – the so-called “Dormant Commerce Clause” – is “driven by a concern about ‘economic protectionism –that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors.’”<sup>69</sup>

Under current doctrine, state laws that discriminate against out-of-state actors are subject to a form of strict scrutiny and are “virtually *per se* invalid.”<sup>70</sup> States cannot discriminate against

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<sup>63</sup> See *Gade v. Nat’l Solid Wastes Mgmt. Ass’n*, 505 U.S. 96, 98 (1992) (“Pre-emption may be either expressed or implied, and ‘is compelled whether Congress’ command is explicitly stated in the statute’s language or implicitly contained in its structure and purpose.’”) (citations omitted) (quoting *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977)).

<sup>64</sup> See *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993).

<sup>65</sup> See *Arizona v. United States*, 132 S. Ct. 2492, 2502 (2012).

<sup>66</sup> See *Sprietsma v. Mercury Marine*, 537 U.S. 51, 64 (2002).

<sup>67</sup> See, e.g., *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 533 (1992) (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part); *Camps Newfound/Owatonna, Inc. v. Town of Harrison, Me.*, 520 U.S. 564, 616 (1997) (Thomas, J., dissenting).

<sup>68</sup> See, e.g., *Dep’t. of Revenue of Ky. v. Davis*, 553 U.S. 328, 337 (2008) (“[A]lthough its terms do not expressly restrain ‘the several states’ in any way, we have sensed a negative implication in the provision since the early days.”).

<sup>69</sup> *Id.* at 337-38 (quoting *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 273-74 (1988)).

<sup>70</sup> See *Or. Waste Sys., Inc. v. Dep’t. Env’tl. Quality of Or.*, 511 U.S. 93, 99 (1994).

out-of-state actors or articles of commerce unless there is a “reason, apart from their origin, to treat them differently.”<sup>71</sup> A discriminatory state law, such as a law that imposes higher taxes or regulatory burdens on goods produced out-of-state, will only be upheld if the state can show that the challenged provisions “advance[] a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives.”<sup>72</sup> As the Court has explained, a state may not adopt a discriminatory state law “if reasonable non-discriminatory alternatives, adequate to conserve legitimate local interests, are available.”<sup>73</sup> Current Dormant Commerce Clause doctrine is also particularly suspicious of extraterritorial legislation, understood as laws that attempt to “control conduct beyond the boundary of a state.”<sup>74</sup>

Non-discriminatory state laws may be invalidated under the Dormant Commerce Clause as well. Under the *Pike* test, named for *Pike v. Bruce Church, Inc.*, it is unconstitutional for a state to enact a law that imposes a burden on interstate commerce that is “excessive in relation to the putative local benefits.”<sup>75</sup> This, for instance, the Supreme Court has invalidated state laws that unnecessarily burdened commerce through the state, such as state laws requiring trucks on state highways to be shorter than those allowed in neighboring states<sup>76</sup> or requiring a specific type of mudguard.<sup>77</sup> Both the prohibition of discrimination and the *Pike* test operate as default rules that may be altered by Congress through the exercise of its power to regulate commerce.<sup>78</sup>

In recognition of the distinction between “States as market participants and States as market regulators,” the Court has created a “market-participant” exception to the Dormant Commerce Clause.<sup>79</sup> Under this exception, state entities are permitted to participate in markets, buying and selling goods and services or providing public goods, in a discriminatory fashion.<sup>80</sup> As the Court has explained, “[n]othing in the purposes animating the Commerce Clause prohibits a State . . . from participating in the market and exercising the right to favor its own citizens over others.”<sup>81</sup> So, for instance, a state agency may adopt

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<sup>71</sup> *City of Philadelphia v. New Jersey*, 437 U.S. 617, 626-27 (1978).

<sup>72</sup> *Or. Waste Sys.*, 511 U.S. at 101.

<sup>73</sup> *Dean Milk Co. v. Madison*, 340 U.S. 349, 354 (1951).

<sup>74</sup> *See Healy v. Beer Inst.*, 491 U.S. 324, 336-37 (1989).

<sup>75</sup> *See* 397 U.S. 137, 142 (1970).

<sup>76</sup> *See Kassel v. Consol. Freightways Corp. of Del.*, 450 U.S. 662 (1981). *See also So. Pac. Co. v. Arizona*, 325 U.S. 761 (1945) (invalidating a state limit on train length within the state).

<sup>77</sup> *See Bibb v. Navajo Trucking Freight Lines*, 359 U.S. 520 (1959).

<sup>78</sup> *See, e.g., Prudential Ins. Co. v. Benjamin*, 328 U.S. 408 (1946) (rejecting, as against a dormant Commerce Clause challenge, discriminatory state insurance regulations authorized by the McCarran-Ferguson Act).

<sup>79</sup> *See Reeves, Inc. v. Stake*, 447 U.S. 429, 436 (1980); *see also Hughes v. Alexandra Scrap Corp.*, 426 U.S. 794 (1976).

<sup>80</sup> *See United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 343 (2007).

<sup>81</sup> *Hughes*, 426 U.S. at 810 (footnote omitted).

purchasing policies that favor in-state businesses or provide services on preferential terms to in-state residents.

Environmental laws do not get a pass from the Dormant Commerce Clause. The bar on discriminatory legislation applies unless and until such state measures are authorized by Congress. The Supreme Court has been quite explicit on this point. In *City of Philadelphia v. New Jersey*, in which the Garden State sought to defend a prohibition on the import of out-of-state waste, the Court stressed that “all objects of interstate trade merit Commerce Clause protection.”<sup>82</sup> Sound environmental intentions are not enough to insulate state laws from challenge. “Even if environmental preservation were the central purpose” of a challenged state law, the Court has explained, “that would not be sufficient to uphold a discriminatory regulation.”<sup>83</sup>

Many state measures enacted to address concerns about climate change face Dormant Commerce Clause scrutiny. Legal challenges to some such laws are pending, and it is likely that some state climate measures, particularly those that discriminate against out-of-state energy producers or obstruct the flow of interstate commerce, will be struck down. Under the Dormant Commerce Clause states retain ample ability to enact environmental regulations and otherwise control the environmental effects of energy use and production within their borders. Where states potentially run into trouble is where they seek to insulate themselves from the potential competitive effects of enacting potentially costly regulations or extend the reach of their regulatory choices to those in other jurisdictions.

One cautionary note is in order. For much of the past two centuries the Dormant Commerce Clause has been a powerful check on state regulations that threaten to burden or constrain interstate commerce. The Court was particularly aggressive in its enforcement of the Commerce Clause’s “negative” aspects during the Burger and early Rehnquist Courts. In recent years, however, some Justices on the Supreme Court have expressed reservations about current Dormant Commerce Clause doctrine, and the Court has taken a permissive view of state legislation designed to “protect governmental operations from out-of-state competition.”<sup>84</sup> Both Justices Thomas and Scalia have expressed concern about the use of an atextual doctrine to invalidate state laws.<sup>85</sup> Concluding the doctrine “has no basis in the Constitution and has proved unworkable in practice,” Justice Thomas would “discard” it entirely.<sup>86</sup> Justice Scalia, on the other hand, adopts a more moderate view, agreeing to apply

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<sup>82</sup> 437 U.S. 617, 622 (1978).

<sup>83</sup> *W. Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 204 (1994).

<sup>84</sup> See Norman R. Williams & Brannon P. Denning, *The New Protectionism and the American Common Market*, 85 NOTRE DAME L. REV. 247, 250 (2009).

<sup>85</sup> See *W. Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 209 (1994) (Scalia, J., concurring). *United Haulers*, 550 U.S. at 349 (Thomas, J., concurring in the judgment).

<sup>86</sup> *United Haulers*, 550 U.S. at 349 (Thomas, J., concurring in the judgment).



the doctrine “only when *stare decisis* compels” him to do so.<sup>87</sup> If these views prevail, the Dormant Commerce Clause may recede in importance.

### **Improving Environmental Protection**

As I noted at the outset, the Constitution does limit some of the things that the federal and state governments may do to address environmental concerns, but this need not come at the expense of environmental protection. To the contrary, in seeking to align federal environmental laws with the constitution’s structure, there is an opportunity to enhance environmental protection by ensuring a more rational allocation of authority between the federal and state governments.

There are many reasons to believe that environmental protections would be more successful, and environmental programs would be more cost-effective, were responsibility divided between the federal and state governments in a more justifiable manner. Ideally, the federal government should reorient its efforts toward those areas in which the federal government possesses an institutional advantage, due to economies of scale (as with scientific research), or where state and local governments are incapable of addressing environmental problems, such as where there are substantial interstate spillovers. Ensuring a greater “match” between the scope of environmental problems and the institutions entrusted with addressing such concerns would enhance the efficiency, effectiveness, and equity of existing environmental protection efforts.<sup>88</sup>

Seeking to expand federal environmental regulations to the outermost limits of federal regulatory authority is not a recipe for effective environmental policies. The federal government, like all governments, has limited resources. Congress only appropriates so much money to federal regulatory agencies and there is only so much time federal regulators may devote to any given concern. In addition, there are inherent limits to what central regulatory agencies are able to accomplish due to information and other constraints. These realities strongly counsel focusing federal efforts on those environmental concerns that have a distinctively federal character and in those areas where states are particularly unlikely or unable to address environmental problems, such as when activities in one state spill over into another. Authorizing – or, worse, mandating – the federal government to oversee and regulate all manner of localized environmental concerns is wasteful and inefficient – and sacrifices opportunities for meaningful environmental gains.

Short of rewriting existing environmental statutes, one way of providing greater state flexibility and freeing the federal government to focus on truly national concerns would be to create a formal mechanism whereby states could opt out of some federal regulatory requirements. Elsewhere I have proposed a policy of “ecological forbearance,” under which states could petition federal agencies for waivers from federal requirements where there are

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<sup>87</sup> *Dep't of Revenue of Ky. v. Davis*, 553 U.S. 328, 359 (2008) (Scalia, J., concurring in part).

<sup>88</sup> See generally, Jonathan H. Adler, *Jurisdictional Mismatch in Environmental Federalism*, 14 NYU ENVTL. L. J. 130 (2005).

no compelling reasons to enforce the federal rule.<sup>89</sup> Such a policy would enable states to experiment with alternative means of environmental protection, thereby reopening the laboratories of democracy in environmental policy. It also would have the potential to free up federal resources to focus on those areas in which interstate spillovers or economies of scale require greater federal involvement.

Despite the environmental successes of the past three decades, the overlapping and contradictory state and federal rules do not lead to efficient or effective environmental protection. It is in some senses an historical accident that state leadership in environmental policy was supplanted by federal regulation, and environmental policy could be improved if states regained more of their historic role. The federal government did not come to dominate environmental policy because a more decentralized system was leading to environmental ruin, and much of the what the federal government does in environmental policy could be left to the states. Thus constitutional constraints on federal power in environmental policy is nothing to fear. Indeed, environmental protection could be improved if federal dominance was confined to those areas in which the federal government has something unique to contribute.

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Thank you again for the opportunity to present my views on this important subject, Mr. Chairman. I hope that my perspective has been helpful to you, and will seek to answer any additional questions you might have.

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<sup>89</sup> See Jonathan H. Adler, *Letting Fifty Flowers Bloom: Using Federalism to Spur Environmental Innovation*, in *THE JURISDYNAMICS OF ENVIRONMENTAL PROTECTION: CHANGE AND THE PRAGMATIC VOICE IN ENVIRONMENTAL LAW* (J. Chen ed., 2004).

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