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# Uncooperative Environmental Federalism: State Suits Against the Federal Government in an Age of Political Polarization

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## ABSTRACT

*The conventional account of most U.S. environmental regulation goes something like this: cooperative federalism schemes accommodate state and federal interests while tapping into the respective strengths of centralized and decentralized regulation. In cooperative federalism arrangements, the federal government sets minimum environmental standards and invites the states to participate in achieving them, even by setting their own more stringent standards.*

*In recent years, however, states and the federal government have displayed a distinct lack of cooperation on environmental matters. With increasing frequency, they turn to the courts to resolve environmental policy disagreements. Under the Obama Administration, Texas emerged as a leading litigant in opposition to federal environmental policies. Under the Trump Administration, California has assumed a similar role. Though these recent suits have attracted much attention, state-versus-federal lawsuits are not a new phenomenon. As this Article demonstrates, states and the federal government have clashed in the courts almost since the beginning of the modern era of environmental law.*

*State-initiated environmental lawsuits against the federal government can be sorted into three categories: (1) challenges to the federal government's handling of public resources, (2) disputes over state prerogatives under cooperative federalism statutes and preemption provisions, and (3) litigation over national policy. Suits in the third category, which have exploded in recent years, have raised the greatest concerns about state standing and the appropriateness of such suits. Standing doctrine, however, generally does not bar such suits, and these suits may not be as problematic as might first appear. Even if states did not sue, private parties would likely challenge the same federal actions. Rather than causing political polarization, state suits are more likely a symptom of an already polarized society. Ultimately, state suits against the federal government might be viewed not as a problem, but as an important mechanism for articulating states' concerns, promoting accountability, and maintaining checks and balances against excessive federal power.*

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## INTRODUCTION

In recent years, states have challenged numerous federal actions in court. Some of the most contentious litigation has surrounded the Environmental Protection Agency's ("EPA") Clean Power Plan, which sought to regulate greenhouse gas ("GHG") emissions from coal-fired power plants. As soon as the plan was proposed, 12 states and an energy company petitioned the D.C. Circuit to block it.<sup>1</sup> Flatly noting that "a proposed rule is just a proposal," the court rejected the petition because "EPA ha[d] not yet issued a final rule."<sup>2</sup> Undaunted, the State of Oklahoma turned to a federal district court for relief, also to no avail.<sup>3</sup> Once EPA released the final version of the plan—but before it had been published in the Federal Register—15 states filed an emergency petition for extraordinary writ in the D.C. Circuit to stay the rule, a request the court denied.<sup>4</sup> Finally, after the Clean Power Plan appeared in the Federal Register, more than 100 parties, led by 26 states, filed dozens of petitions challenging the rule.<sup>5</sup> Eighteen states, along with various other entities, intervened in support of the rule.<sup>6</sup>

The Clean Power Plan litigation, while especially high-profile and contentious, is just one of many instances in which states have turned to the courts to resolve policy disagreements with the federal government. Under the Obama Administration, Texas emerged as a leading litigant against

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<sup>1</sup> See *In re Murray Energy Corp.*, 788 F.3d 330, 334 (D.C. Cir. 2015).

<sup>2</sup> *Id.* at 333–34.

<sup>3</sup> See *Oklahoma ex rel. Pruitt v. McCarthy*, No. 15-CV-0369-CVE-FHM, 2015 WL 4414384, at \*1 (N.D. Okla. July 17, 2015).

<sup>4</sup> Emergency Petition for Extraordinary Writ at iv, 1–2, *In re West Virginia*, No. 15-1277 (D.C. Cir. Aug. 13, 2015), [http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/case-documents/2015/20150813\\_docket-15-1277\\_petition.pdf](http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/case-documents/2015/20150813_docket-15-1277_petition.pdf); Order at 1, *In re West Virginia*, No. 15-1277 (D.C. Cir. Sept. 9, 2015), [http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/case-documents/2015/20150909\\_docket-15-1277\\_order.pdf](http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/case-documents/2015/20150909_docket-15-1277_order.pdf).

<sup>5</sup> LINDA TSANG & ALEXANDRA M. WYATT, CONG. RESEARCH SERV., R44480, CLEAN POWER PLAN: LEGAL BACKGROUND AND PENDING LITIGATION IN *WEST VIRGINIA V. EPA* 10 (2017).

<sup>6</sup> *Id.* at 11. The Supreme Court stayed the rule pending disposition of the petitions for review in the D.C. Circuit. *West Virginia v. EPA*, 136 S. Ct. 1000, 1000 (2016). The D.C. Circuit held the litigation in abeyance while the EPA—by then, under the Trump Administration—prepared a rule to replace the Clean Power Plan. Order at 2, *West Virginia v. EPA*, No. 15-1363 (D.C. Cir. Apr. 28, 2017), [http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/case-documents/2017/20170428\\_docket-15-1363\\_order.pdf](http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/case-documents/2017/20170428_docket-15-1363_order.pdf).

federal policies, particularly those focused on the environment.<sup>7</sup> The state's then-Attorney General, Greg Abbott, told one audience, "I go into the office, I sue the federal government, and I go home."<sup>8</sup> Under the Trump Administration, California has assumed a similar role. Then-Governor Jerry Brown declared, "We've got the scientists, we've got the lawyers, and we're ready to fight."<sup>9</sup> Indeed, more multi-state lawsuits were filed against the Trump Administration in its first two years than the total number of such suits filed during the respective presidencies of either Barack Obama or George W. Bush.<sup>10</sup>

What should we make of the seeming proliferation of lawsuits between states and the federal government? Are they a crucial mechanism for resolving inevitable intersovereign conflicts in our federal system? Are they legitimate means for voicing state dissent from federal policy, regardless of their outcomes? Or are they little more than partisan tools for circumventing democratic policymaking?

This Article considers these questions in the context of environmental and natural resource law, where many state-federal disputes are playing out. More than half of Texas's suits against the Obama Administration arose in this context, and a similar pattern can be found in California's suits against the Trump Administration.<sup>11</sup> Part I sets out the basic notions of cooperative federalism that informed the federal environmental statutes at

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<sup>7</sup> See, e.g., Dan Frosch & Jacob Gershman, *Abbott's Strategy in Texas: 44 Lawsuits, One Opponent: Obama Administration*, WALL STREET J. (June 24, 2016, 10:36 AM), <https://www.wsj.com/articles/abbotts-strategy-in-texas-44-lawsuits-one-opponent-obama-administration-1466778976> (reporting that as of June 2016 "[m]ore than half" of 44 cases filed by Texas against the Obama Administration named EPA as a defendant).

<sup>8</sup> David Montgomery & Julia Preston, *17 States Suing on Immigration*, N.Y. TIMES, Dec. 4, 2014, at A1.

<sup>9</sup> Richard Gonzales, *California Lawmakers Prepare for Trump, Hire Ex-Attorney General Eric Holder*, NPR (Jan. 4, 2017, 7:39 PM), <https://www.npr.org/sections/thetwo-way/2017/01/04/508265259/california-lawmakers-prepare-for-trump-hire-ex-attorney-general-eric-holder>.

<sup>10</sup> Maureen Groppe, *Multistate Lawsuits Against Trump in 2 Years Exceed Those Against Obama, Bush in 8 Years*, USA TODAY (Apr. 10, 2019, 6:16 PM), <https://www.usatoday.com/story/news/politics/2019/04/10/donald-trump-sued-more-often-democratic-attorneys-general/3143366002/>.

<sup>11</sup> See Frosch & Gershman, *supra* note 7; Anna M. Phillips, *In California vs. Trump, the State Is Winning Nearly All Its Environmental Cases*, L.A. TIMES (May 7, 2019, 4:00 AM), <https://www.latimes.com/politics/la-na-pol-california-trump-environmental-lawsuits-20190507-story.html> (reporting that at least 24 of 49 lawsuits filed by California against the federal government have involved challenges to policies established by EPA, the Department of the Interior, or other agencies handling environmental and natural resource matters).

their enactments and describes the more sophisticated understanding of state-federal interactions that has since developed. Part II canvasses state-initiated environmental lawsuits against the federal government and sorts them into three categories: (1) challenges to the federal government's disposition of public resources, (2) disputes over state prerogatives under cooperative federalism statutes and preemption provisions, and (3) litigation over national policy. Suits in the third category have exploded in recent years, raising concerns about states' standing to sue. Part III considers standing and other related doctrines and concludes that they offer relatively limited constraints on state suits against the federal government. Finally, Part IV turns to the normative questions surrounding state suits that challenge federal policy. Notwithstanding criticisms that states are overstepping their proper roles and burdening the courts, such suits may be less problematic than similar suits that other parties are likely to bring anyway. Indeed, state suits against the federal government can serve as important mechanisms for articulating states' concerns, promoting accountability, and maintaining checks and balances against excessive federal power.

### I. COOPERATIVE FEDERALISM

At first glance, the proliferation of state-versus-federal lawsuits in environmental law may seem puzzling. One might expect cooperative federalism, the predominant approach to structuring federal-state relationships in American environmental law, to foster peaceful power sharing and close collaboration. Through cooperative federalism statutes, Congress sought to harness the advantages of centralized and decentralized regulation while accommodating both state and federal interests.<sup>12</sup> Centralized regulation can offer the benefits of concentrated expertise and economies of scale, while a decentralized approach can account for local conditions and preferences.<sup>13</sup> In practice, however, federal-state relationships are hardly free of friction. The federal government ultimately calls the shots,<sup>14</sup> leaving litigation as potentially the best option for dissenting states to advance their distinct perspectives.

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<sup>12</sup> See HOLLY DOREMUS ET AL., ENVIRONMENTAL POLICY LAW 170 (6th ed. 2012).

<sup>13</sup> See *id.*

<sup>14</sup> See *id.*

### A. *The Conventional Story of Cooperative Federalism*

Prior to the 1970s, environmental regulation was primarily in the hands of the states, with the federal government merely providing fiscal and technical support.<sup>15</sup> The federal government assumed a more active role, however, as it recognized the inadequacy of states' responses to environmental threats.<sup>16</sup> Congress enacted the Clean Air Act ("CAA"),<sup>17</sup> Clean Water Act ("CWA"),<sup>18</sup> and other major environmental statutes.<sup>19</sup> Many of these statutes incorporated a cooperative federalism approach in which the federal government set minimum health and environmental standards, while inviting states to implement programs to achieve those standards.<sup>20</sup> States were free to decline the invitation but rarely did so, thanks to a combination of carrots and sticks.<sup>21</sup> Additionally, because the federal statutes typically set regulatory floors rather than ceilings, states retained the option to adopt more protective standards.<sup>22</sup>

Under the CAA, for example, the EPA sets national ambient air quality standards for specific pollutants, and states prepare state implementation plans ("SIPs") designed to achieve those standards.<sup>23</sup> The SIPs, which are subject to EPA approval, must include emission limits, permit requirements, and monitoring and reporting obligations, among other

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<sup>15</sup> See Robert L. Glicksman, *From Cooperative to Inoperative Federalism: The Perverse Mutation of Environmental Law and Policy*, 41 WAKE FOREST L. REV. 719, 729–30 (2006).

<sup>16</sup> See Kirsten H. Engel, *Harnessing the Benefits of Dynamic Federalism in Environmental Law*, 56 EMORY L.J. 159, 179–80 (2006).

<sup>17</sup> Clean Air Act Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1676 (1970).

<sup>18</sup> Federal Water Pollution Control Act Amendments of 1972 ("Clean Water Act"), Pub. L. No. 92-500, 86 Stat. 816 (1972).

<sup>19</sup> See, e.g., Engel, *supra* note 16, at 180 n.110 (collecting major environmental statutes).

<sup>20</sup> See David E. Adelman & Kirsten H. Engel, *Adaptive Federalism: The Case Against Reallocating Environmental Regulatory Authority*, 92 MINN. L. REV. 1796, 1811–12 (2008); Philip J. Weiser, *Towards a Constitutional Architecture for Cooperative Federalism*, 79 N.C. L. REV. 663, 669–71 (2001); Engel, *supra* note 16, at 180.

<sup>21</sup> Robert L. Fischman, *Cooperative Federalism and Natural Resources Law*, 14 N.Y.U. ENVTL. L.J. 179, 189–90 (2005).

<sup>22</sup> See William W. Buzbee, *Asymmetrical Regulation: Risk, Preemption, and the Floor/Ceiling Distinction*, 82 N.Y.U. L. REV. 1547, 1566–67 (2007); Glicksman, *supra* note 15, at 743.

<sup>23</sup> See 42 U.S.C. §§ 7409–7410 (2012). Under the CWA, which is also a cooperative federalism statute, the EPA establishes technology-based pollution discharge standards and may delegate to states the authority to issue permits incorporating these standards. See 33 U.S.C. §§ 1311(b), 1342(b) (2012).

components.<sup>24</sup> States may also adopt regulatory standards that are more stringent than those mandated by the statute or the EPA.<sup>25</sup> Through financial incentives and the prospect of some local control, states are strongly encouraged, but not required, to prepare SIPs.<sup>26</sup> If a state declines to prepare a SIP or fails to prepare an adequate SIP, the EPA may write a federal implementation plan instead.<sup>27</sup>

Although cooperative federalism is particularly common in pollution control statutes, some natural resource statutes also incorporate elements of cooperative federalism. The Surface Mining Control and Reclamation Act of 1977,<sup>28</sup> a federal law aimed at regulating the adverse effects of surface coal mining operations, allows states to assume regulatory authority over such operations if they prepare a program satisfying minimum federal standards.<sup>29</sup> The Coastal Zone Management Act of 1972 (“CZMA”)<sup>30</sup> offers financial support to states in their development of coastal zone management plans and requires that federal projects be consistent with state plans.<sup>31</sup> Even statutes governing the management of federal land, where one might expect complete federal control, often contemplate roles for the states.<sup>32</sup>

Unlike dual federalism, which calls for exclusive federal control over certain matters and exclusive state control over others, cooperative federalism recognizes that the federal and state governments interact extensively in the modern administrative state.<sup>33</sup> Cooperative federalism schemes are not, however, entirely free of coercion; typically, states must choose between “regulating . . . according to federal standards or having

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<sup>24</sup> See 42 U.S.C. § 7410(a)(2).

<sup>25</sup> See *id.* § 7416.

<sup>26</sup> See Fischman, *supra* note 21, at 189, 193.

<sup>27</sup> See 42 U.S.C. § 7410(c)(1).

<sup>28</sup> Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. §§ 1201–1328 (2012).

<sup>29</sup> See 30 U.S.C. § 1253; see also Patrick C. McGinley, *From Pick and Shovel to Mountaintop Removal: Environmental Injustice in the Appalachian Coalfields*, 34 ENVTL. L. 21, 51–53 (2004).

<sup>30</sup> Coastal Zone Management Act of 1972, 16 U.S.C. §§ 1451–1466 (2012).

<sup>31</sup> See *id.* §§ 1455, 1456(c) (stating planning provisions and consistency requirement).

<sup>32</sup> See, e.g., 43 U.S.C. § 1712(c)(9) (2012) (requiring land management plans prepared by Bureau of Land Management to be consistent with state and local plans to the extent that they are consistent with federal law and the purposes of the Federal Land Policy and Management Act); see also Fischman, *supra* note 21, at 200–04.

<sup>33</sup> See ROBERT A. SCHAPIRO, POLYPHONIC FEDERALISM: TOWARD THE PROTECTION OF FUNDAMENTAL RIGHTS 55, 90 (2009); Engel, *supra* note 16, at 174–76.



state law pre-empted by federal regulation.”<sup>34</sup> Indeed, while their details vary, these schemes all contemplate federal dominance.<sup>35</sup> Again, the CAA offers an example. The EPA establishes not only national ambient standards, but also nationally uniform emission standards for new stationary sources and new motor vehicles.<sup>36</sup> Furthermore, the EPA determines whether a state program is likely to achieve federal standards, oversees state implementation of the program, retains the power to modify or reject illegal state permits, and may withdraw its approval of any state program that proves inadequate.<sup>37</sup> Although states play critical roles in the day-to-day implementation of the statute, the EPA is clearly in command.

In theory, cooperative federalism advances several objectives. First, it ensures “a minimum level of environmental protection” and counters incentives for states to engage in a regulatory race to the bottom.<sup>38</sup> Second, it preserves an important role for the states in tailoring regulation to local circumstances and preferences, and in engaging in policy experimentation.<sup>39</sup> Third, state choices within the constraints of cooperative federalism schemes serve an expressive function, offering “a powerful criticism of the federal approach,” and “remind[ing] officials and citizens of the possibility of choosing other solutions.”<sup>40</sup>

Overlapping state and federal authority in cooperative federalism regimes can also yield benefits of plurality and redundancy.<sup>41</sup> Scholars have suggested various theories—dynamic federalism, polyphonic

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<sup>34</sup> *New York v. United States*, 505 U.S. 144, 167 (1992); see Adam Babich, *The Supremacy Clause, Cooperative Federalism, and the Full Federal Regulatory Purpose*, 64 ADMIN. L. REV. 1, 24 (2012) (noting that some commentators characterize cooperative federalism schemes as “coercive” federalism).

<sup>35</sup> See Glicksman, *supra* note 15, at 740.

<sup>36</sup> See 42 U.S.C. §§ 7409, 7411, 7521 (2012). Similarly, the CWA allows states to apply for authority to issue discharge permits, but vests in the EPA the authority to identify categories of point source dischargers and set nationally uniform discharge standards for each category. See 33 U.S.C. § 1311 (2012).

<sup>37</sup> See Babich, *supra* note 34, at 31–41.

<sup>38</sup> *Id.* at 29–30. But cf. Richard L. Revesz, *Rehabilitating Interstate Competition: Rethinking the “Race-to-the-Bottom” Rationale for Federal Environmental Regulation*, 67 N.Y.U. L. REV. 1210, 1210 (1992) (challenging “race-to-the-bottom” arguments and suggesting that, even if the arguments were valid, federal regulation may not be an effective response).

<sup>39</sup> See Glicksman, *supra* note 15, at 726; Buzbee, *supra* note 22, at 1598; Babich, *supra* note 34, at 27–29.

<sup>40</sup> Robert A. Schapiro, *Toward a Theory of Interactive Federalism*, 91 IOWA L. REV. 243, 289 (2005).

<sup>41</sup> See Robert A. Schapiro, *Justice Stevens’s Theory of Interactive Federalism*, 74 FORDHAM L. REV. 2133, 2142 (2006); see also Engel, *supra* note 16, at 176.

federalism, iterative federalism, and interactive federalism—that all emphasize the importance of this overlap.<sup>42</sup> Multiple approaches to a single problem can make regulation more effective, as state and federal actors learn from each other’s distinct regulatory efforts and refine their own regulatory approaches.<sup>43</sup> Additionally, redundancy can offer “alternative avenues for policy action when one regulator is unable to act,” whether because of policy gridlock, agency capture, or other reasons.<sup>44</sup> The possibility of common law liability can serve as an especially important counterweight to federal or state regulatory failures.<sup>45</sup> Overlapping authority nonetheless has its downsides; it can obscure responsibility for policies, engender confusion, waste resources, and raise regulated parties’ compliance burdens.<sup>46</sup> The involvement of multiple regulators also can undermine uniformity and finality.<sup>47</sup>

### B. *Uncooperative Federalism*

Even within cooperative federalism schemes, states may resist federal mandates, a phenomenon Jessica Bulman-Pozen and Heather Gerken dub “uncooperative federalism.”<sup>48</sup> The federal government’s dependence on the states in implementing national policy offers states leverage and

<sup>42</sup> See, e.g., SCHAPIRO, *supra* note 33, at 95 (discussing “polyphonic” federalism as “characterized by the existence of multiple, independent sources of political authority,” where federal and state governments have presumptive authority over any subject matter); Ann E. Carlson, *Iterative Federalism and Climate Change*, 103 NW. U. L. REV. 1097, 1100 (2009) (explaining that federal law sometimes designates specific states to regulate, “and relies on that regulatory arrangement to enhance compliance with federal standards”); Engel, *supra* note 16, at 176 (using “dynamic federalism” to refer to arrangements in which “federal and state governments function as alternative centers of power and any matter is presumptively within the authority of both”).

<sup>43</sup> See William W. Buzbee, *Contextual Environmental Federalism*, 14 N.Y.U. ENVTL. L.J. 108, 122–23 (2005); Adelman & Engel, *supra* note 20, at 1809–11; Engel, *supra* note 16, at 171–72; Schapiro, *supra* note 41, at 2142; Schapiro, *supra* note 40, at 288.

<sup>44</sup> Albert C. Lin, *Fracking and Federalism: A Comparative Approach to Reconciling National and Subnational Interests in the United States and Spain*, 44 ENVTL. L. 1039, 1067 (2014); see also Engel, *supra* note 16, at 178–79.

<sup>45</sup> See Buzbee, *supra* note 22, at 1598–99.

<sup>46</sup> See Buzbee, *supra* note 22, at 1610; Schapiro, *supra* note 41, at 2142–43; Schapiro, *supra* note 40, at 290–91.

<sup>47</sup> See Adelman & Engel, *supra* note 20, at 1828–29.

<sup>48</sup> Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 YALE L.J. 1256, 1263 (2009); see also Robert B. Ahdieh, *Dialectical Regulation*, 38 CONN. L. REV. 863, 865 (2006) (suggesting “a close intermingling of regulatory conflict and cooperation” between federal and state regulators, as well as other regulators at different levels).

opportunities to try to change that policy.<sup>49</sup> Specifically, Bulman-Pozen and Gerken contend that state resistance may occur through licensed dissent, regulatory gaps, and civil disobedience.<sup>50</sup> Licensed dissent describes states' statutory authorization to experiment in their efforts to achieve statutory goals.<sup>51</sup> Regulatory gaps are practical limits to federal authority that allow states to depart from federal policy.<sup>52</sup> Civil disobedience involves states' express rejection of federal policy through refusals to implement or enforce federal statutory requirements.<sup>53</sup> Through political and administrative channels of resistance, states may advance their positions and pressure the federal government to engage with them.<sup>54</sup>

Discussions of cooperative federalism and uncooperative federalism have tended to focus on the state and federal governments' political branches, while devoting less attention to the courts.<sup>55</sup> Yet states also can dissent—and increasingly have done so—by filing suits against federal laws and policies pertaining to the environment, immigration, health care, same-sex marriage, and other matters.<sup>56</sup> The federal government may not be sued absent a waiver of sovereign immunity,<sup>57</sup> of course, but relevant waivers—such as the one set forth in the Administrative Procedure Act (“APA”)<sup>58</sup>—allow these challenges to be brought in federal court.

The predominance of cooperative federalism in environmental law makes the field a particularly promising area for exploring state-federal conflicts that have arisen in the courts. Environmental problems often give rise to intense state-federal conflicts because state interests in activities

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<sup>49</sup> See Bulman-Pozen & Gerken, *supra* note 48, at 1266–68.

<sup>50</sup> *Id.* at 1271–78.

<sup>51</sup> *Id.* at 1274–75.

<sup>52</sup> *Id.* at 1276–78.

<sup>53</sup> *Id.* at 1278–80.

<sup>54</sup> *Id.* at 1285–87.

<sup>55</sup> See SCHAPIRO, *supra* note 33, at 90.

<sup>56</sup> See, e.g., Margaret H. Lemos & Kevin M. Quinn, *Litigating State Interests: Attorneys General as Amici*, 90 N.Y.U. L. REV. 1229, 1262 (2015) (finding that state amicus briefs filed in Supreme Court increasingly reflect partisan divides); Margaret H. Lemos & Ernest A. Young, *State Public-Law Litigation in an Age of Polarization*, 97 TEX. L. REV. 43, 45–46 (2018); Paul Nolette, *State Litigation During the Obama Administration: Diverging Agendas in an Era of Polarized Politics*, 44 PUBLIUS 451, 451–52 (2014) (examining state attorney general participation in lawsuits and amicus filings and concluding that such activity became increasingly polarized during the Obama Administration).

<sup>57</sup> Gregory C. Sisk, *A Primer on the Doctrine of Federal Sovereign Immunity*, 58 OKLA. L. REV. 439, 440 (2005).

<sup>58</sup> See 5 U.S.C. § 702 (2012).

occurring within their respective jurisdictions and federal interests in regulating resultant harms that cross state boundaries are equally compelling.<sup>59</sup> Cooperative federalism systems recognize these competing interests but can nonetheless generate “conflicts over who plays the primary role in interpreting standards, who has the final say in enforcement decisions, and whether challenges to state action must proceed through state institutions.”<sup>60</sup>

While it may seem obvious that state-federal interactions under cooperative federalism statutes will lead to conflict, the pertinent environmental statutes do not identify an explicit role for the states in litigating federal actions. Rather, the provisions authorizing judicial review of federal actions are general. For example, section 307 of the CAA simply specifies that certain EPA actions under the CAA are subject to judicial review in the federal courts of appeals.<sup>61</sup> Similarly, section 304 of the CAA authorizes “any person” to challenge in federal district courts the EPA’s failure to perform nondiscretionary acts mandated by the statute.<sup>62</sup> Neither provision singles out the states, or anyone else, as potential plaintiffs—both merely authorize suit.<sup>63</sup> Congress may not have anticipated a prominent role for states in litigating environmental federalism, but it certainly left the door open for those issues to be widely aired in the courts.<sup>64</sup>

## II. STATE-VERSUS-FEDERAL LAWSUITS IN ENVIRONMENTAL LAW

State-versus-federal litigation over environmental regulation and federally owned resources is not new. States began to sue the federal government under the nation’s major environmental statutes soon after their enactments, and state-federal disputes over the use of natural resources have even longer histories. Recent and ongoing state-initiated environmental lawsuits can be placed into three broad categories: (1) challenges to the federal government’s handling of public resources, (2) disputes over state prerogatives under cooperative federalism statutes

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<sup>59</sup> See Erin Ryan, *Negotiating Environmental Federalism: Dynamic Federalism as a Strategy for Good Governance*, 2017 WIS. L. REV. FORWARD 17, 21–22.

<sup>60</sup> DOREMUS ET AL., *supra* note 12, at 170.

<sup>61</sup> See CAA Amendments of 1970 § 307, 42 U.S.C. § 7607 (2012).

<sup>62</sup> CAA Amendments of 1970 § 304, 42 U.S.C. § 7604(a) (2012).

<sup>63</sup> See *id.* § 7607(b).

<sup>64</sup> See PAUL NOLETTE, *FEDERALISM ON TRIAL: STATE ATTORNEYS GENERAL AND NATIONAL POLICYMAKING IN CONTEMPORARY AMERICA* 156 (2015) (discussing CAA as an example of “adversarial legalism,” in which nonfederal parties, including states, were authorized to enforce federal statutes by suing the federal government).

and preemption provisions, and (3) litigation over national policy. Lawsuits in the first two categories echo earlier conflicts between the states and the federal government, whereas disputes over national policy represent a more novel phenomenon.

A. *Disputes Over Federal Resources*

The federal government owns approximately 30% of the land in the United States, including more than 50% of some Western states' acreage.<sup>65</sup> Not surprisingly, states and the federal government have historically clashed over the federal government's handling of land, minerals, and other natural resources within certain states. The control of offshore oil and gas resources has been particularly contentious, but other resources have also given rise to disputes.

1. *Offshore Oil & Gas*

The most prominent recent controversy over federal resources has centered on the federal government's proposal to open much of the United States' offshore oil and gas resources to development. Under the Trump Administration's January 2018 draft five-year leasing plan, 90% of federal waters would be made available for lease.<sup>66</sup> In response, nearly every coastal state sought to be excluded from the plan.<sup>67</sup> California, New Jersey, and Oregon created roadblocks by adopting laws or orders prohibiting infrastructure development that would support offshore oil and gas drilling.<sup>68</sup> The federal government might challenge the validity of these

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<sup>65</sup> See CHRISTINE A. KLEIN ET AL., NATURAL RESOURCES LAW: A PLACE-BASED BOOK OF PROBLEMS AND CASES 38 (4th ed. 2018).

<sup>66</sup> See generally BUREAU OF OCEAN ENERGY MGMT., 2019–2024 NATIONAL OUTER CONTINENTAL SHELF OIL AND GAS LEASING DRAFT PROPOSED PROGRAM (2018). Interior Secretary David Bernhardt indicated in April 2019 that the plan may not be finalized until related court challenges are resolved. See Nathan Rott, *Trump Administration Puts Offshore Drilling Plan on Hold After Setback in Court*, NPR (Apr. 25, 2019, 5:16 PM), <https://www.npr.org/2019/04/25/717214683/trump-administration-puts-offshore-drilling-plan-on-hold-after-setback-in-court>.

<sup>67</sup> See Pamela King, *States Call for the Fla. Treatment in Their Case Against Drilling*, E&E NEWS (Jan. 18, 2018), <https://www.eenews.net/stories/1060071269>.

<sup>68</sup> See N.J. STAT. ANN. §§ 13:19–47 to –51 (West 2018); S.B. 834, 2017–2018 Leg., Reg. Sess. (Cal. 2018) (prohibiting State Lands Commission from entering into “any new lease or other conveyance authorizing new construction of oil- and gas-related infrastructure upon tidelands and submerged lands within state waters”); Or. Exec. Order No. 18–28 (Oct. 24, 2018), [https://www.oregon.gov/gov/Documents/executive\\_orders/eo\\_18-28.pdf](https://www.oregon.gov/gov/Documents/executive_orders/eo_18-28.pdf); Andrew Selsky, *Ore. Governor Joins Other States in Ban*, E&E NEWS: GREENWIRE (Oct. 26, 2018), <https://www.eenews.net/greenwire/stories/1060104479/print> (reporting that Oregon

state initiatives under the Commerce Clause and preemption doctrine.<sup>69</sup> If the federal government finalizes its current proposal, states are almost certain to turn to the courts.

Such litigation would represent just the latest chapter in a long history of conflict between coastal states and the federal government over offshore resources.<sup>70</sup> These conflicts initially concerned the ownership of such resources and later turned to the regulation of offshore leasing and development.<sup>71</sup> Following a 1947 Supreme Court ruling that the federal government had full sovereignty over offshore lands,<sup>72</sup> political pressure led to federal legislation addressing the issue.<sup>73</sup> The Submerged Lands Act of 1953 (“SLA”)<sup>74</sup> relinquished to the states ownership of seabed resources within three miles of the coast,<sup>75</sup> and the Outer Continental Shelf Lands Act (“OCSLA”)<sup>76</sup> asserted federal jurisdiction over the seabed beyond that three-mile line.<sup>77</sup> Notwithstanding these enactments, the federal government and the states continued to litigate the control of offshore resources into the 1970s, as states disputed the implementation of the SLA and also objected to the environmental consequences of offshore drilling.<sup>78</sup>

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Governor Kate Brown had issued an order to bar such infrastructure, and that California and New Jersey previously had adopted similar measures).

<sup>69</sup> See generally Breck C. Tostevin, Note, “*Not on My Beach*”: *Local California Initiatives to Prevent Onshore Support Facilities for Offshore Oil Development*, 38 HASTINGS L.J. 957, 987–1006 (1987) (concluding that preemption and commerce clause challenges to similar local ordinances enacted in 1980s would likely fail).

<sup>70</sup> See Edward A. Fitzgerald, *The Seaweed Rebellion: Federal-State/Provincial Conflicts Over Offshore Energy Development in the United States, Canada, and Australia*, 7 CONN. J. INT’L L. 255, 256–61 (1992).

<sup>71</sup> Robert B. Wiygul, *The Structure of Environmental Regulation on the Outer Continental Shelf: Sources, Problems, and the Opportunity for Change*, 12 J. ENERGY, NAT. RESOURCES & ENVTL. L. 75, 84 (1992).

<sup>72</sup> *United States v. California*, 332 U.S. 19 (1947). For an account of the developments leading up to the decision in *United States v. California*, see Daniel S. Miller, *Offshore Federalism: Evolving Federal-State Relations in Offshore Oil and Gas Development*, 11 ECOLOGY L.Q. 401, 405–10 (1984).

<sup>73</sup> See GEORGE C. COGGINS ET AL., *FEDERAL PUBLIC LAND AND RESOURCES LAW* 592 (7th ed. 2014).

<sup>74</sup> Submerged Lands Act (SLA) of 1953, 43 U.S.C. §§ 1301–1315 (2012).

<sup>75</sup> See *id.* §§ 1311(a), 1312.

<sup>76</sup> Outer Continental Shelf Lands Act (OCSLA) of 1953, 43 U.S.C. §§ 1331–1356a (2012).

<sup>77</sup> See *id.* §§ 1331(a), 1332, 1333; COGGINS ET AL., *supra* note 73, at 592.

<sup>78</sup> See, e.g., *United States v. Maine*, 420 U.S. 515 (1975) (confirming United States’ sovereign rights over seabed underlying the Atlantic Ocean located more than three miles from coast); *United States v. Louisiana (Texas Boundary Case)*, 394 U.S. 1 (1969)

Congress amended the OCSLA in 1978 in an effort to speed up offshore oil and gas development while simultaneously protecting the environment and giving states an explicit role in the decisionmaking process.<sup>79</sup> The amended statute mandated the preparation of five-year leasing plans with the input of affected states.<sup>80</sup>

That same year, Congress recognized a further role for states through amendments to the CZMA. The amendments require federal activities affecting the coastal zone, including oil and gas development, to be “consistent to the maximum extent practicable” with a state’s coastal zone management plan.<sup>81</sup> The CZMA’s implementing regulations set out a process for a state to object to a federal agency’s consistency determination, as well as mechanisms to resolve such disputes.<sup>82</sup> The CZMA intended to promote “coordination and cooperation” between the federal government and the states,<sup>83</sup> and states have concurred with the vast majority of federal actions reviewed.<sup>84</sup> Nonetheless, the CZMA’s new opportunities for state involvement have also given rise to additional lawsuits challenging federal leasing decisions as well as five-year leasing plans.<sup>85</sup>

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(interpreting the term “coast line” within SLA); *United States v. California*, 381 U.S. 139 (1965) (addressing extent of submerged lands granted to state under SLA, with reference to term “inland waters”); *United States v. Louisiana*, 363 U.S. 1 (1960) (resolving claims over lands and resources underlying waters of Gulf of Mexico more than three miles seaward from the coast); *see also* Edward A. Fitzgerald, *The Tidelands Controversy Revisited*, 19 ENVTL. L. 209 (1988) (recounting litigation pertaining to SLA); Wiygul, *supra* note 71, at 81–82.

<sup>79</sup> *See* H.R. REP. NO. 95-590, at 53, 119 (1977), *as reprinted in* 1978 U.S.C.C.A.N. 1450, 1460, 1525; Wiygul, *supra* note 71, at 82–83; *see generally*, COGGINS ET AL., *supra* note 73, at 592.

<sup>80</sup> *See* 43 U.S.C. § 1344; LAURA B. COMAY ET AL., CONG. RESEARCH SERV., R44504, THE BUREAU OF OCEAN ENERGY MANAGEMENT’S FIVE-YEAR PROGRAM FOR OFFSHORE OIL AND GAS LEASING: HISTORY AND PROPOSED PROGRAM FOR 2017–2022, at 3–4 (2016).

<sup>81</sup> 16 U.S.C. § 1456(c)(1)(A) (2018). A similar consistency requirement applies to applicants for federal licenses or permits required to conduct an activity. *See id.* § 1456(c)(3)(A). A proposed activity may not proceed unless the state concurs with an applicant’s certification that the activity is consistent with the plan, the federal government finds the activity to be consistent with the objectives of the CZMA, or the federal government finds the activity “is otherwise necessary in the interest of national security.” *Id.*

<sup>82</sup> *See* 15 C.F.R. § 930.43 (2019).

<sup>83</sup> 16 U.S.C. § 1452(4)–(5).

<sup>84</sup> *See* Erin Ryan, *Negotiating Federalism*, 52 B.C. L. REV. 1, 61–62 (2011).

<sup>85</sup> *See California ex rel. Brown v. Watt*, 712 F.2d 584, 590 n.18 (D.C. Cir. 1983) (consolidated challenges by California, Alaska, Florida, Washington, and Oregon against a national leasing program spanning from 1980 to 1985); Frances L. McChesney & Michael

States ultimately succeeded in blocking further offshore oil and gas development in many areas. Although a 1984 Supreme Court decision held that the CZMA's consistency requirement did not apply to offshore lease sales,<sup>86</sup> Congress soon revised the law to overturn that holding.<sup>87</sup>

Numerous local jurisdictions in California adopted ordinances to prohibit the siting of refineries, pipelines, and other onshore facilities that could support offshore drilling activities.<sup>88</sup> Since the 1980s, successive congressional bans and presidential moratoria have prevented offshore oil and gas development on the Atlantic and Pacific coasts.<sup>89</sup> The Trump Administration's plan to reopen these areas to oil and gas leasing represents a sharp break from this no-development policy and, not surprisingly, has rekindled the conflict over offshore resource development.<sup>90</sup>

## 2. Other Federal Resources

Offshore oil and gas are not the only federal resources subject to disputes between states and the federal government. Recent litigation brought by the state of California has targeted the management of federal lands. California challenged the Department of the Interior's efforts to delay and repeal a rule updating the calculation of federal mineral royalties that are divided between the federal government and the states.<sup>91</sup> California also sued to reinstate rules that would require hydraulic fracturing operations on federal lands to adhere to performance, design, and disclosure standards.<sup>92</sup> Furthermore, California sued to block coal leasing on federal lands,<sup>93</sup> and to require the federal government to comply with various environmental statutes in constructing barriers on the California-

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Chernau, Comment, *CZMA Consistency and OCS Leasing: Supreme Court to Review California v. Watt*, 13 ENVTL. L. REP. NEWS & ANALYSIS 10266, 10266 & n.3 (1983).

<sup>86</sup> *Sec'y of the Interior v. California*, 464 U.S. 312, 321–43 (1984).

<sup>87</sup> See *COGGINS ET AL.*, *supra* note 73, at 593.

<sup>88</sup> See *Tostevin*, *supra* note 69, at 959–61. An industry challenge to these ordinances was ultimately dismissed as unripe for review. See *W. Oil & Gas Ass'n v. Sonoma Cty.*, 905 F.2d 1287, 1291 (9th Cir. 1990).

<sup>89</sup> See *COMAY ET AL.*, *supra* note 80, at 21–22, 24–25.

<sup>90</sup> See, e.g., *King*, *supra* note 67.

<sup>91</sup> *California v. U.S. Dep't of the Interior*, 381 F. Supp. 3d 1153 (N.D. Cal. 2019) (vacating final rule repealing Valuation Rule and reinstating pre-Valuation Rule regulations); *Becerra v. U.S. Dep't of the Interior*, 276 F. Supp. 3d 953 (N.D. Cal. 2017) (holding that postponement of rule violated the APA).

<sup>92</sup> Complaint, *California v. U.S. Bureau of Land Management*, No. 3:18-cv-00521 (N.D. Cal. Jan. 24, 2018).

<sup>93</sup> Complaint, *California v. Zinke*, No. 4:17-cv-00042-BNM (D. Mont. May 9, 2017).



Mexico border.<sup>94</sup> In addition to pursuing litigation, the state enacted legislation to “discourage conveyances that transfer ownership of federal public lands in California from the federal government.”<sup>95</sup> The law was motivated by fears that the federal government would sell off valuable resources to industry.<sup>96</sup> Although the federal government eventually obtained a court order invalidating California’s statute, its original enactment embodied state opposition to federal policies that were perceived as environmentally destructive.<sup>97</sup>

These recent disputes echo earlier disagreements between the states and the federal government over the ownership, disposition, and management of federal lands. These prior disputes concerned not only claims of title,<sup>98</sup> distribution of revenue,<sup>99</sup> propriety of federal land

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<sup>94</sup> *In re* Border Infrastructure Envtl. Litig., 915 F.3d 1213, 1218 (9th Cir. 2019).

<sup>95</sup> *United States v. California*, No. 2:18-cv-721-WBS-DB, 2018 WL 5780003, at \*1 (E.D. Cal. Nov. 1, 2018) (quoting CAL. PUB. RES. CODE § 8560(b)(1) (West 2018)) (finding that California’s conveyance law violated the Supremacy Clause). The statute, known by its bill number, SB 50, declared that “conveyances of federal public lands in California are void ab initio unless the [State] was provided with the right of first refusal to the conveyance or the right to arrange for the transfer of the federal public land to another entity.” CAL. PUB. RES. CODE § 8560(b)(2)(A) (West 2018).

<sup>96</sup> See Bob Egelko, *Judge Knocks Down California Law to Stop Trump Administration Land Sales*, S.F. CHRON. (Nov. 4, 2018, 12:58 PM), <https://www.sfchronicle.com/news/article/Judge-knocks-down-California-law-to-stop-Trump-13359436.php>.

<sup>97</sup> See *id.*

<sup>98</sup> See, e.g., *Idaho v. United States*, 533 U.S. 262, 263 (2001) (holding that United States holds title in trust for tribe to lands underlying lake and river); *Montana v. United States*, 450 U.S. 544, 544–45 (1981) (holding that title to riverbed had not been conveyed via treaties to Crow Tribe and had instead passed to state upon admission); *Utah v. United States*, 403 U.S. 9, 10 (1971) (recognizing Utah’s claim to shorelands around the Great Salt Lake, premised on navigability of lake on date of statehood); *United States v. Oregon*, 295 U.S. 1, 1 (1935) (resolving claims of title to lands based on whether they underlay navigable waters on date of statehood); *United States v. Utah*, 283 U.S. 64, 64 (1931) (resolving claims of title to beds of various rivers); see also *Andrus v. Idaho*, 445 U.S. 715, 716 (1980) (holding that Idaho was not automatically entitled to 2.4 million acres of desert land under Carey Act); *Andrus v. Utah*, 446 U.S. 500, 519–20 (1980) (holding that federal government had discretion to refuse to convey extremely valuable oil-shale lands to Utah). These lawsuits aside, several western states enacted legislation claiming ownership to vast tracts of federal land within their boundaries. See Jeffrey Schmitt, *A Historical Reassessment of Congress’s “Power to Dispose of” the Public Lands*, 42 HARV. ENVTL. L. REV. 453, 509 (2018) (discussing laws passed during the so-called Sagebrush Rebellion of the 1970s).

<sup>99</sup> See, e.g., *Watt v. Alaska*, 451 U.S. 259, 259–60 (1981) (determining which of two federal statutes governed distribution of revenues from oil and gas leases on national wildlife refuges).

exchanges,<sup>100</sup> and authority over federal lands,<sup>101</sup> but also federal authority over activity on nonfederal lands that threatened the designated purpose of federal lands.<sup>102</sup> Numerous disputes have centered on water rights and resources.<sup>103</sup> Furthermore, states, which have primary control and responsibility over wildlife, frequently have clashed with the federal government over the management of animals on both federal<sup>104</sup> and nonfederal lands.<sup>105</sup>

Conflicts between states and the federal government over publicly owned resources are unsurprising and frequently manifest in calls for local control. Federal policies ostensibly reflect national interests but may give short shrift to state and local interests in federal resources located within those states. In some instances, national interests in resource development may conflict with state interests in environmental protection. In other instances, national interests in resource conservation may conflict with

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<sup>100</sup> See, e.g., *Wyoming ex rel. Sullivan v. Lujan*, 969 F.2d 877, 877 (10th Cir. 1992) (challenging exchange of federally owned coal for conservation easement).

<sup>101</sup> See, e.g., *New Mexico v. EPA*, 114 F.3d 290 (D.C. Cir. 1997) (challenging EPA criteria for certifying nuclear waste disposal facility on federal land); *Virginia v. Reno*, 955 F. Supp. 571 (E.D. Va. 1997) (challenging District of Columbia's operation of correctional facility on federal land).

<sup>102</sup> See, e.g., *Minnesota v. Block*, 660 F.2d 1240, 1259 (8th Cir. 1981) (upholding federal authority to restrict motor vehicle use on nonfederal lands and waters within borders of Boundary Waters Canoe Area Wilderness).

<sup>103</sup> See, e.g., *United States v. New Mexico*, 438 U.S. 696, 705–17 (1978) (holding that the United States, in establishing a national forest, reserved water from river only to preserve timber and secure favorable water flows, and not for recreational, wildlife preservation, or stock-watering purposes); *Alaska v. Babbitt*, 72 F.3d 698, 703–04 (9th Cir. 1995) (holding reasonable federal agencies' conclusion that public lands include those navigable waters in which the United States has an interest by virtue of reserved water rights); *United States v. Idaho*, 23 P.3d 117, 128 (Idaho 2001) (rejecting federal government's claim of reserved water rights for islands within national wildlife refuge).

<sup>104</sup> See, e.g., *Kleppe v. New Mexico*, 426 U.S. 529, 534 (1976) (challenging the constitutionality of a federal statute asserting authority over unclaimed horses and burros on public lands); *Hunt v. United States*, 278 U.S. 96, 99–101 (1928) (affirming denial of Arizona's challenge to federal program to manage excess deer population); *Wyoming v. United States*, 279 F.3d 1214, 1218 (10th Cir. 2002) (litigating U.S. Fish and Wildlife Service's refusal to permit state to vaccinate elk on the National Elk Refuge); *New Mexico State Game Comm'n v. Udall*, 410 F.2d 1197, 1201–02 (10th Cir. 1969) (holding that federal officials had authority as part of research study to kill deer on federal land without obtaining state permit); *Alaska v. Andrus*, 429 F. Supp. 958, 961–62 (D. Alaska 1977) (holding that the Secretary of Interior had power to halt a state program to kill wolves on federal land).

<sup>105</sup> See, e.g., *Wyoming v. U.S. Dep't of the Interior*, 360 F. Supp. 2d 1214, 1224 (D. Wyo. 2005) (challenging federal government's rejection of state plan to manage endangered wolf population).

state preferences for economic development. When both sets of interests cannot be accommodated through political or administrative processes, these conflicts will often wind up in court. Although cases involving such conflicts have yielded a wide range of outcomes, courts generally recognize broad federal authority over public resources under the Property and Supremacy Clauses when state and federal laws conflict.<sup>106</sup>

*B. Lawsuits Defending State Prerogatives Under Cooperative Federalism Schemes or Against Federal Preemption*

A second set of state-federal environmental disputes centers on the scope and exercise of state policymaking powers under or alongside federal statutes. These disputes include conflicts arising under cooperative federalism schemes as well as conflicts over the preemptive effect of federal law.

*1. CAA Litigation*

Many disputes within this second category have arisen under the CAA, which contemplates close federal oversight of state regulation and threatens substantial sanctions on states that fail to cooperate. Indeed, the statute has been described as “the greatest source of federal-state conflict” among federal environmental statutes.<sup>107</sup> As noted above, the CAA requires the EPA to set national air quality standards and anticipates that states will write SIPs to achieve those standards.<sup>108</sup> Dating back to the 1970s, states and the EPA have clashed frequently in the courts over EPA decisions rejecting SIPs or mandating SIP revisions.<sup>109</sup> During the early years of

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<sup>106</sup> See, e.g., *Kleppe*, 426 U.S. at 545 (holding that the Property Clause empowered Congress to protect wildlife on federal lands, notwithstanding traditional state power over wild animals); *Hunt*, 278 U.S. at 100–01 (barring state from interfering with federal program to manage excess deer population). Under the federal treaty power, federal authority over wildlife may extend to private lands within a state as well. See *Missouri v. Holland*, 252 U.S. 416, 435 (1920) (rejecting state’s claim of exclusive authority over migratory birds, and noting that the national interest in protecting migratory birds “can be protected only by national action in concert with that of another power,” as through the Migratory Bird Treaty Act).

<sup>107</sup> Jonathan H. Adler & Nathaniel Stewart, *Is the Clean Air Act Unconstitutional? Coercion, Cooperative Federalism and Conditional Spending After NFIB v. Sebelius*, 43 *ECOLOGY L.Q.* 671, 684 (2016).

<sup>108</sup> See *supra* text accompanying notes 23–27.

<sup>109</sup> See *Michigan v. EPA*, 213 F.3d 663, 669 (D.C. Cir. 2000) (challenging EPA rule mandating that certain states revise SIPs to address emissions that affected downwind states); *Virginia v. Browner*, 80 F.3d 869, 869–70 (4th Cir. 1996) (rejecting state’s petition for review of EPA’s disapproval of SIP pertaining to Title V of CAA); *Pennsylvania v.*

CAA implementation, states also challenged the EPA's efforts to force state governments to implement transportation controls, including restrictions on gasoline sales, motorcycle use, and parking, as well as vehicle inspection and maintenance programs.<sup>110</sup>

State-driven litigation over the development and implementation of SIPs has not abated with time. In 1996, Virginia challenged an EPA rule requiring the state to revise its SIP in order to incorporate stricter motor vehicle emissions standards.<sup>111</sup> In 2004, the Supreme Court rejected Alaska's argument that the EPA lacked the ability to invalidate a state air pollution permit.<sup>112</sup> And under the Obama Administration, states filed numerous challenges to the federal rejection of their SIPs and the subsequent establishment of replacement federal plans,<sup>113</sup> as well as EPA determinations that states had failed to achieve federal air quality standards.<sup>114</sup>

Other CAA cases have focused on the EPA's role in addressing interstate pollution rather than on the states' roles in developing and implementing SIPs. States have sued the EPA to compel action under CAA

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EPA, 932 F.2d 269, 272 (3d Cir. 1991) (upholding EPA denial of state's request for reconsideration of supplement to proposed SIP); *Arizona v. Thomas*, 824 F.2d 745, 746 (9th Cir. 1987) (seeking review of EPA's partial disapproval of SIP revisions); *Texas v. EPA*, 499 F.2d 289, 293–94 (5th Cir. 1974) (challenging EPA disapproval of SIP and imposition of its own regulations); *Missouri v. United States*, 918 F. Supp. 1320, 1320 (E.D. Mo. 1996), *vacated*, 109 F.3d 440 (8th Cir. 1997) (challenging sanctions imposed by EPA for failing to submit revised SIP).

<sup>110</sup> See *District of Columbia v. Train*, 521 F.2d 971, 979 (D.C. Cir. 1975); *Maryland v. EPA*, 530 F.2d 215, 220 (4th Cir. 1975); *Arizona v. EPA*, 521 F.2d 825, 826 (9th Cir. 1975); *Brown v. EPA*, 521 F.2d 827, 829–30 (9th Cir. 1975) (challenging transportation control plan that EPA sought to impose on California). The Supreme Court vacated the judgments of the Courts of Appeals in each of these cases after EPA conceded that the transportation plans would have to be modified. See *EPA v. Brown*, 431 U.S. 99, 103–04 (1977).

<sup>111</sup> *Virginia v. EPA*, 108 F.3d 1397, 1399 (D.C. Cir. 1997).

<sup>112</sup> *Alaska Dep't. of Env'tl. Conservation v. EPA*, 540 U.S. 461, 502 (2004) (upholding EPA's ability to reject a state-issued permit).

<sup>113</sup> See, e.g., *Texas v. EPA*, 829 F.3d 405, 410–11 (5th Cir. 2016) (challenging EPA's disapproval of SIPs and agency's imposition of own plans instead); *Utah v. EPA*, 750 F.3d 1182, 1186 (10th Cir. 2014) (dismissing petitions for review of EPA's partial rejection of SIP); *North Dakota v. EPA*, 730 F.3d 750, 755 (8th Cir. 2013) (challenging EPA's partial disapproval of SIPs and agency's imposition of own plans to address disapproved portions of SIPs); *Texas v. EPA*, 726 F.3d 180, 185–86 (D.C. Cir. 2013) (challenging establishment of federal implementation plan under which EPA would issue permits governing GHG emissions); *Oklahoma v. EPA*, 723 F.3d 1201, 1224 (10th Cir. 2013) (upholding EPA's rejection of SIP and agency's promulgation of its own plan instead); *Texas v. EPA*, 690 F.3d 670, 674 (5th Cir. 2012) (successfully challenging EPA's rejection of SIP).

<sup>114</sup> See, e.g., *Miss. Comm'n on Env'tl. Quality v. EPA*, 790 F.3d 138 (D.C. Cir. 2015).

§ 126,<sup>115</sup> which requires the EPA to respond to state petitions seeking regulation of out-of-state facilities that are causing downwind violations of air quality standards.<sup>116</sup> States have also challenged the EPA's approval of SIP revisions for upwind states alleged to be contributing to pollution in downwind states.<sup>117</sup>

Finally, ongoing litigation between California and the EPA centers on the EPA's regulation of vehicle emissions and California's unique authority to set its own vehicle emission standards. Title II of the CAA empowers the EPA to set new vehicle tailpipe standards and generally preempts states from doing so.<sup>118</sup> Under CAA § 209, California can request a waiver to set more stringent standards, although the EPA can deny such a request if it finds that more stringent standards are unnecessary "to meet compelling and extraordinary conditions."<sup>119</sup> In 2011, the Obama Administration set gradually more stringent new vehicle tailpipe standards for 2022 through 2025, subject to a mid-term evaluation in 2018.<sup>120</sup> In that evaluation, the Trump Administration found the standards "too stringent" and subsequently proposed freezing new vehicle tailpipe standards at 2020 levels through the year 2025.<sup>121</sup> The administration also sought to revoke a

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<sup>115</sup> See, e.g., *Maryland v. Pruitt*, 320 F. Supp. 3d 722, 725 (D. Md. 2018) (noting EPA concession that it had failed to fulfill its § 126 duty to act on state's petition within 60-day deadline); *Connecticut v. Pruitt*, No. 3:17cv796 (WWE), 2018 WL 745953, at \*3 (D. Conn. Feb. 7, 2018) (holding that EPA failed to fulfill its § 126 duty to act on state's petition within 60-day deadline); *New York v. Ruckelshaus*, Civ. A. No. 84-0853, 1984 WL 13953, at \*1 (D.D.C. 1984).

<sup>116</sup> 42 U.S.C. § 7426 (b)–(c) (2018).

<sup>117</sup> See, e.g., *California ex. rel. Air Res. Bd. v. EPA*, 774 F.2d 1437, 1439 (9th Cir. 1985) (addressing petitions for review filed by California and Nevada to challenge EPA's approval of each other's SIP); *New York v. EPA*, 716 F.2d 440, 441 (7th Cir. 1983) (challenging EPA's approval of Illinois's SIP revision); *New York v. Adm'r, EPA*, 710 F.2d 1200, 1201 (6th Cir. 1983) (challenging EPA's approval of Tennessee's SIP revision); *Connecticut v. EPA*, 656 F.2d 902, 904 (2d Cir. 1981) (challenging EPA's approval of New York's SIP revision).

<sup>118</sup> 42 U.S.C. §§ 7521, 7543 (2018).

<sup>119</sup> *Id.* § 7543(b)(1)(B). The CAA's "me-too" provision allows other states to adopt tailpipe standards identical to California's standards for which EPA has granted a waiver. See *id.* § 7507.

<sup>120</sup> See Maxine Joselow, *Court Will Review Challenge to Rollback*, E&E NEWS: CLIMATEWIRE (Nov. 26, 2018), <https://www.eenews.net/climatewire/stories/1060107247/print>.

<sup>121</sup> Mid-Term Evaluation of Greenhouse Gas Emission Standards for Model Year 2022–2025 Light-Duty Vehicles, 83 Fed. Reg. 16,077 (Apr. 13, 2018); The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule for Model Years 2021–2026 Passenger Cars and Light Trucks, 83 Fed. Reg. 42,986 (proposed Aug. 24, 2018) (to be codified at 40 C.F.R. pts. 85, 86).

waiver allowing California to set more stringent standards.<sup>122</sup> California and other states have filed lawsuits challenging the mid-term evaluation<sup>123</sup> as well as the revocation of California's waiver,<sup>124</sup> and they have promised to challenge EPA's new tailpipe standards now that they have been finalized.<sup>125</sup>

The existence of cases challenging implementation of the CAA's cooperative federalism provisions should come as no surprise.<sup>126</sup> The statute's basic structure is one in which the EPA first sets overarching standards, states then write plans to meet those standards, and the EPA finally reviews those plans.<sup>127</sup> This process practically invites litigation both by states whose plans are rejected and by states adversely affected by a neighboring state's approved plan. The statute does offer administrative avenues for resolving state-federal disagreements; for example, the EPA may allow states to revise and resubmit plans,<sup>128</sup> the EPA may condition approval of a plan on a state's commitment to adopt specific measures,<sup>129</sup> and downwind states may express their concerns about upwind pollution during the plan-writing process.<sup>130</sup> These avenues, however, are often

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<sup>122</sup> See *supra* note 121.

<sup>123</sup> E.g., *California v. EPA*, 940 F.3d 1342, 1350–53 (D.C. Cir. 2019) (dismissing challenge to “Mid-Term Evaluation of Greenhouse Gas Emissions Standards for Model Year 2022–2025 Light-Duty Vehicles” for lack of judicially reviewable final agency action).

<sup>124</sup> E.g., Petition for Review, *California v. Wheeler*, No. 19-1239 (D.C. Cir. filed Nov. 15, 2019); Complaint, *California v. Chao*, No. 1:19-cv-02826 (D.D.C. filed Sept. 20, 2019) (challenging National Highway Traffic Safety Administration rule purporting to preempt California GHG emission standards).

<sup>125</sup> See Jennifer Hijazi, Greens, States Vow to Sue Over “Tone-Deaf” Rollback, E&E NEWS: CLIMATEWIRE (Apr. 1, 2020), <https://www.eenews.net/climatewire/stories/1062754911>; EPA, The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule for Model Years 2021–2026 Passenger Cars and Light Trucks, 85 Fed. Reg. 24,174 (Apr. 30, 2020) (to be codified at 40 C.F.R. pts. 86 and 600)E.

<sup>126</sup> See Heather K. Gerken, *Federalism 3.0*, 105 CALIF. L. REV. 1695, 1704 (2017) (contending that “precisely because the states and federal government are so deeply intertwined[, f]ederal-state tussles are inevitable.”); Amy J. Wildermuth, *Why State Standing in Massachusetts v. EPA Matters*, 27 J. LAND, RESOURCES, & ENVTL. L. 273, 289 (2007) (“[T]he modern administrative state has led to an intertwined state-federal relationship that is bound to cause increasing disagreements between those parties.”).

<sup>127</sup> Cf. Tara Leigh Grove, *When Can a State Sue the United States*, 101 CORNELL L. REV. 851, 875 (2016) (contending that states should have standing to defend state laws enacted as part of cooperative federalism programs).

<sup>128</sup> See 42 U.S.C. § 7410(k)(5) (2012).

<sup>129</sup> See *id.* § 7410(k)(4).

<sup>130</sup> See *id.* § 7410(a)(2)(D).

insufficient to resolve disagreements to the satisfaction of all parties. Litigation offers an additional opportunity for states to express their views and perhaps to invalidate decisions adverse to their interests.

## 2. *Other Cooperative Federalism Statutes*

Other environmental cooperative federalism statutes have, like the CAA, been the subject of state-versus-federal litigation for many years. Under the CWA, states have challenged the EPA's veto of state-issued pollution discharge permits,<sup>131</sup> the EPA's disapproval of state water quality standards and subsequent promulgation of federal standards in their place,<sup>132</sup> the EPA's administration of grants for constructing sewage treatment facilities,<sup>133</sup> and federal approval of a project without a state certification that discharges associated with the project comply with state water quality standards.<sup>134</sup> Under the Resource Conservation and Recovery Act of 1976 ("RCRA"),<sup>135</sup> states have challenged the scope of EPA's approval of a state hazardous waste program.<sup>136</sup> And under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"),<sup>137</sup> states and the EPA have fought over states' roles in hazardous waste cleanups.<sup>138</sup> CERCLA instructs the EPA to provide "for substantial and meaningful involvement by each State in initiation, development, and selection of remedial actions to be undertaken in that State."<sup>139</sup> States have used this language as a basis for challenging EPA regulations that restrain such state participation.<sup>140</sup>

Furthermore, in addition to these challenges to federal actions, states have frequently litigated federal facilities' asserted sovereign immunity

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<sup>131</sup> See, e.g., *Washington v. EPA*, 573 F.2d 583, 585–86 (9th Cir. 1978).

<sup>132</sup> See, e.g., *Miss. Comm'n on Nat. Res. v. Costle*, 625 F.2d 1269, 1271 (5th Cir. 1980); Complaint at 1, *Washington v. EPA*, No. 2:19-cv-00884-RAJ (W.D. Wash. filed June 6, 2019).

<sup>133</sup> See, e.g., *California v. EPA*, 689 F.2d 217, 217 (D.C. Cir. 1982); *Minnesota v. EPA*, 512 F.2d 913, 913 (8th Cir. 1975).

<sup>134</sup> See, e.g., *North Carolina v. FERC*, 112 F.3d 1175, 1180 (D.C. Cir. 1997).

<sup>135</sup> 42 U.S.C. § 6901–6992k (2018).

<sup>136</sup> See, e.g., *Wash., Dep't of Ecology v. EPA*, 752 F.2d 1465, 1466 (9th Cir. 1985).

<sup>137</sup> 42 U.S.C. §§ 9601–9675 (2018).

<sup>138</sup> See, e.g., *Ohio v. EPA*, 997 F.2d 1520, 1524–26 (D.C. Cir. 1993); see also Christopher J. Redd, *The Adversarial Relationship Between the States and EPA: Conflict over State Authority Under CERCLA*, 3 DICK. J. ENVTL. L. & POL'Y 101, 101–02 (1993).

<sup>139</sup> 42 U.S.C. § 9621(f)(1).

<sup>140</sup> See Redd, *supra* note 138, at 105.

from permit requirements and civil liability under these statutes.<sup>141</sup> In sum, the close interaction contemplated by cooperative federalism statutes causes friction and often leads to litigation.

### 3. *Federalism Conflicts Outside Cooperative Federalism Statutes*

Although many federal environmental statutes incorporate a cooperative federalism approach, some environmental statutes preempt state regulation in part or altogether. Federal preemption can facilitate interstate commerce by establishing a uniform national standard in place of multiple, potentially conflicting state standards.<sup>142</sup> At the same time, preemption can stifle local innovation and be unresponsive to local concerns.<sup>143</sup> The Hazardous Materials Transportation Act,<sup>144</sup> Ports and Waterways Safety Act,<sup>145</sup> and Federal Insecticide, Fungicide, and Rodenticide Act<sup>146</sup> exemplify statutes that promote interstate commerce through preemption provisions.<sup>147</sup> States and the federal government have frequently litigated the preemptive effect of these statutes as well as state efforts to impose more stringent standards.<sup>148</sup> Preemption's constricting

<sup>141</sup> See *U.S. Dep't of Energy v. Ohio*, 503 U.S. 607, 611 (1992) (holding that federal government had not waived immunity from liability for civil fines imposed by state for past violations of CWA or RCRA); *United States v. New Mexico*, 32 F.3d 494, 495–96 (10th Cir. 1994) (holding that RCRA waived immunity from certain state imposed permit conditions at federal facility); *Maine v. Dep't of the Navy*, 973 F.2d 1007, 1010–11 (1st Cir. 1992) (holding that federal government did not waive sovereign immunity from state-imposed, punitive, civil penalties under RCRA or CERCLA); *United States v. Washington*, 872 F.2d 874, 875 (9th Cir. 1989) (holding that federal government had not waived immunity from RCRA penalties imposed by state administrative agency); *United States v. Pa. Dep't of Env'tl. Res.*, 778 F. Supp. 1328, 1332–34 (M.D. Pa. 1991) (holding that CWA and RCRA waived immunity from permit requirements).

<sup>142</sup> See, e.g., *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984) (discussing conflict preemption); Paul S. Weiland, *Federal and State Preemption of Environmental Law: A Critical Analysis*, 24 HARV. ENVTL. L. REV. 237, 276 (2000).

<sup>143</sup> See Weiland, *supra* note 142, at 280–81.

<sup>144</sup> 49 U.S.C. §§ 5101–5128 (2018).

<sup>145</sup> 33 U.S.C. §§ 1221–1223 (2012) (repealed 2018).

<sup>146</sup> 7 U.S.C. §§ 136–136y (2018).

<sup>147</sup> See *id.* § 136v (Federal Insecticide, Fungicide, and Rodenticide Act preemption provision); 49 U.S.C. § 5125 (Hazardous Materials Transportation Act preemption provision); *Ray v. Atlantic Richfield Co.*, 435 U.S. 151 (1978) (discussing preemptive effect of Ports and Waterways Safety Act).

<sup>148</sup> See, e.g., *United States v. Locke*, 529 U.S. 89, 112–16 (2000) (holding that state regulations governing oil tanker design, equipment, reporting, and operating requirements were preempted by Ports and Waterways Safety Act); *California v. FERC*, 495 U.S. 490, 506–07 (1990) (holding that Federal Power Act preempted state minimum stream flow requirements that state sought to impose on hydroelectric facility); *United States v.*



effects on state sovereignty make these cases unsurprising, if not predictable.

Other federalism-related environmental disputes between states and the federal government have centered on the Tenth Amendment, which reserves for the states the powers not delegated to the federal government.<sup>149</sup> The leading case interpreting the Tenth Amendment, *New York v. United States*,<sup>150</sup> involved a challenge to a federal law that directed states either to regulate radioactive waste disposal in a specified manner or to take title to the waste.<sup>151</sup> The Supreme Court held the statute invalid under the Tenth Amendment because it “‘commandeer[ed]’ state governments into the service of federal regulatory purposes.”<sup>152</sup> The Court noted, however, that the federal government may offer states a choice between regulating according to federal standards and having state law preempted.<sup>153</sup> In subsequent cases where states have raised Tenth Amendment claims, lower courts have accordingly upheld federal schemes that offered states such a choice and rejected those that did not.<sup>154</sup>

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Massachusetts, 493 F.3d 1, 18–25 (1st Cir. 2007) (addressing claims that federal Ports and Waterways Safety Act preempted Massachusetts’ Oil Spill Prevention Act); *United States v. Kentucky*, 252 F.3d 816, 822–25 (6th Cir. 2001) (holding that state permit conditions relating to disposal of radioactive waste were preempted by Atomic Energy Act); *Massachusetts v. U.S. Dep’t of Transp.*, 93 F.3d 890, 896–97 (D.C. Cir. 1996) (rejecting federal government’s statutory interpretation concluding that Hazardous Materials Transportation Act preempted state bonding requirement for hazardous waste carriers); *New York ex rel. Dep’t of Env’tl. Conservation v. U.S. Dep’t of Transp.*, 37 F. Supp. 2d 152, 161–62 (N.D.N.Y. 1999) (upholding federal government’s determination that Hazardous Materials Transportation Act preempted state regulation).

<sup>149</sup> U.S. CONST. amend. X.

<sup>150</sup> 505 U.S. 144 (1992).

<sup>151</sup> *Id.* at 150–54. For an extensive discussion of the negotiated legislation that was the subject of *New York v. United States*, see ERIN RYAN, *FEDERALISM AND THE TUG OF WAR WITHIN* 217–30 (2011).

<sup>152</sup> *New York v. United States*, 505 U.S. at 175.

<sup>153</sup> *Id.* at 167.

<sup>154</sup> See, e.g., *Bd. of Nat. Res. v. Brown*, 992 F.2d 937, 947 (9th Cir. 1993) (holding that federal law restricting export of timber harvested from state public lands violated Tenth Amendment); *Wyoming v. U.S. Dep’t of the Interior*, 360 F. Supp. 2d 1214, 1241 (D. Wyo. 2005) (upholding federal government’s offer to allow state to establish a wolf management plan consistent with the Endangered Species Act or continue federal preemption of state’s wolf regulation); *Missouri v. United States*, 918 F. Supp. 1320, 1331–32 (E.D. Mo. 1996) (holding that CAA sanctions provisions do not violate Tenth Amendment), *vacated*, 109 F.3d 440 (8th Cir. 1997).

### C. *Litigation Over National Policy*

The third category of state-federal disputes consists of disagreements over national policy. This category features some of the most high-profile environmental lawsuits in recent years, including battles over federal climate change policy and the scope of the CWA. National policy disputes are not abstract disagreements; much like the disputes falling within the first two categories, plaintiff-states have real stakes in their outcomes. In contrast to cases in the prior two categories, though, the cases here concern federal policy choices that affect the states in roughly equal ways. This third category is practically equivalent to the concept of “state public-law litigation” that Margaret Lemos and Ernest Young define as state litigation “intended to have a legal and/or political impact that transcends the individual case and the jurisdiction where the action takes place.”<sup>155</sup> In contrast to “vertical” conflicts between states and the federal government over intergovernmental distribution of authority—which often feature disputes over the scope of federal power under the Commerce Clause or the Spending Clause—these “horizontal” conflicts pit groups of states against each other, as well as against the federal government, in “fights for the right to control national policy.”<sup>156</sup> Although sometimes based on cooperative federalism statutes, state-federal disputes over national policy are categorized as such if the state-federal disagreement centers on national policy choices as opposed to localized applications of cooperative federalism.

#### 1. *Recent National Policy Litigation*

The Clean Power Plan lawsuits mentioned at the outset of this Article constitute just part of the state-versus-federal litigation that federal climate change policy has spawned over the last 15 years. Frustrated by federal inaction on climate change, Massachusetts and other states sued in 2003 to compel the EPA to regulate GHG emissions from new motor vehicles.<sup>157</sup> That litigation culminated in the landmark *Massachusetts v. EPA*<sup>158</sup> decision, in which the Supreme Court rejected EPA’s claim that it lacked the authority to regulate GHGs.<sup>159</sup> Following *Massachusetts v. EPA* and a change in presidential administrations, the EPA employed various CAA

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<sup>155</sup> Lemos & Young, *supra* note 56, at 66–67.

<sup>156</sup> *Id.* at 96.

<sup>157</sup> See *Massachusetts v. EPA*, 549 U.S. 497, 505 (2007).

<sup>158</sup> 549 U.S. 497 (2007).

<sup>159</sup> See *id.* at 528–32.

provisions to regulate GHG emissions from a wide range of sources.<sup>160</sup> Conservative states sued at almost every step along the way, challenging the EPA's GHG standards for new motor vehicles,<sup>161</sup> new stationary sources,<sup>162</sup> and existing fossil fuel-fired power plants.<sup>163</sup>

State challenges to federal climate policy have continued as the Trump Administration has rolled back federal climate initiatives. Now, however, progressive states, rather than their conservative counterparts, are the plaintiffs. As already noted, California and other states are challenging the EPA's freezing of vehicle tailpipe standards.<sup>164</sup> States also are leading challenges to the Affordable Clean Energy rule, which is the Trump Administration's replacement for the Clean Power Plan.<sup>165</sup> Eight states sued to block the Department of Transportation from repealing a rule requiring states to measure GHG emissions created by motor vehicles in the use of the national highway system.<sup>166</sup>

States also have challenged federal policies relating to GHGs other than carbon dioxide. These policies include: the EPA's relaxing of methane leak monitoring requirements for new oil and gas wells;<sup>167</sup> the EPA's

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<sup>160</sup> ROBERT MELTZ, CONG. RESEARCH SERV., R41103, FEDERAL AGENCY ACTIONS FOLLOWING THE SUPREME COURT'S CLIMATE CHANGE DECISION IN *MASSACHUSETTS V. EPA*: A CHRONOLOGY 1–10 (2014).

<sup>161</sup> See, e.g., *Coal. for Responsible Regulation, Inc. v. EPA*, 684 F.3d 102, 118–19, 126–27 (D.C. Cir. 2012) (rejecting claims by states and industry challenging both EPA's determination that GHG emissions endanger public health and welfare, and EPA's regulation of GHG emissions from new motor vehicles).

<sup>162</sup> See, e.g., *Util. Air Reg. Grp. v. EPA*, 573 U.S. 302 (2014) (partially rejecting claims brought by states and industry challenging EPA regulation of GHG emissions from new stationary sources under CAA Prevention of Significant Deterioration provisions).

<sup>163</sup> See, e.g., *West Virginia v. EPA*, 136 S. Ct. 1000 (2016) (mem.) (issuing a stay of the Clean Power Plan until the D.C. Circuit resolves the case).

<sup>164</sup> See *supra* text accompanying notes 119–125.

<sup>165</sup> See Pamela King, *Blue States Urge Court to Take Down Trump Carbon Rule*, E&E NEWS: GREENWIRE (Aug. 13, 2019), <https://www.eenews.net/stories/1060940949>; Pamela King & Jennifer Hijazi, *Trump's Carbon Rule Hits Legal Deadline. Who's Suing?*, E&E NEWS: ENERGYWIRE (Sept. 9, 2019), <https://www.eenews.net/stories/1061111541>.

<sup>166</sup> See Michael Laris, *Trump Administration Reverses Under Legal Pressure, Requires Measuring Greenhouse Gases from Cars and Trucks*, WASH. POST (Sept. 28, 2017), [https://www.washingtonpost.com/local/trafficandcommuting/trump-administration-under-legal-pressure-reverses-itself-on-measuring-greenhouse-gases-from-cars-and-trucks/2017/09/28/86ae48c4-a476-11e7-b14f-f41773cd5a14\\_story.html](https://www.washingtonpost.com/local/trafficandcommuting/trump-administration-under-legal-pressure-reverses-itself-on-measuring-greenhouse-gases-from-cars-and-trucks/2017/09/28/86ae48c4-a476-11e7-b14f-f41773cd5a14_story.html).

<sup>167</sup> See Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources Reconsideration, 83 Fed. Reg. 52,056 (proposed Oct. 15, 2018) (to be codified at 40 C.F.R. pt. 60).

failure to regulate methane emissions for existing oil and gas wells;<sup>168</sup> the EPA's failure to implement rules governing methane emissions from landfills;<sup>169</sup> EPA guidance purporting to rescind restrictions on the use of hydrofluorocarbons, a set of powerful greenhouse gases;<sup>170</sup> and the Bureau of Land Management's repeal of rules governing methane waste from oil and gas wells on federal lands.<sup>171</sup> The Department of Energy's delay and rollback of heightened energy efficiency standards have also been the subject of state suits.<sup>172</sup>

State challenges to federal air pollution policies have not been limited to climate change. Over the last two decades, different groups of states have taken turns attacking federal regulation of conventional air pollutants—claiming it to be either too stringent or not stringent enough.<sup>173</sup> Under the George W. Bush Administration, multi-state coalitions blocked EPA rules designed to reduce air pollution permit requirements for industrial facilities.<sup>174</sup> EPA efforts to address interstate air pollution under

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<sup>168</sup> See Complaint at 1, *New York v. Pruitt*, No. 1:18-cv-00773 (D.D.C. Apr. 5, 2018).

<sup>169</sup> See Complaint at 2, *California v. EPA*, No. 4:18-cv-03237-SK (N.D. Cal. May 31, 2018).

<sup>170</sup> See Brief for Petitioner at 7, *New York v. Pruitt*, No. 18-1174 (D.C. Cir. June 26, 2018).

<sup>171</sup> See Complaint at 1–2, *California v. Zinke*, No. 3:18-cv-05712 (N.D. Cal. Sept. 18, 2018).

<sup>172</sup> See *NRDC v. Perry*, 302 F. Supp. 3d 1094, 1096–97 (N.D. Cal. 2018) (granting summary judgment motion by states and environmental groups compelling Department of Energy to publish energy conservation standards); Keith Goldberg, *DOE Halts Energy Efficiency Rule Delay for Ceiling Fans*, LAW360, (May 25, 2017, 5:59 PM), <https://www.law360.com/articles/928447/doe-halts-energy-efficiency-rule-delay-for-ceiling-fans> (reporting that Department of Energy ended delay of energy efficiency rules for ceiling fans after New York and other states sued in the Second Circuit).

<sup>173</sup> See, e.g., *Michigan v. EPA*, 135 S. Ct. 2699, 2706 (2015) (challenging EPA's refusal to consider costs in establishing regulatory standards for hazardous air pollutants from power plants); *Mississippi v. EPA*, 744 F.3d 1334, 1342 (D.C. Cir. 2013) (challenging revisions to national ambient air quality standards ("NAAQS") on grounds that, according to some states, they are not protective enough and, according to other states, they are too protective); *Nat'l Env'tl. Dev. Ass'n's Clean Air Project v. EPA*, 686 F.3d 803, 805 (D.C. Cir. 2012) (challenge by states and industry to NAAQS for sulfur dioxide); *Am. Farm Bureau Fed'n v. EPA*, 559 F.3d 512, 519 (D.C. Cir. 2009) (challenge by states to adequacy of NAAQS for particulates).

<sup>174</sup> See, e.g., *New Jersey v. EPA*, 517 F.3d 574, 583–84 (D.C. Cir. 2008) (successfully challenging EPA decision exempting mercury emitting coal- and oil-fired power plants from regulation under CAA § 112 and regulating such emissions instead under a different CAA provision); *New York v. EPA*, 443 F.3d 880, 890 (D.C. Cir. 2006) (invalidating equipment replacement rule of New Source Review program); *New York v. EPA*, 413 F.3d 3, 10–11 (D.C. Cir. 2005) (upholding and invalidating in part rule that interpreted the term

both the Bush and Obama Administrations faced challenges by both upwind states, objecting to mandated reductions in emissions, and downwind states, demanding further reductions.<sup>175</sup> Under the Trump Administration, a coalition of 16 states sued to block an EPA order that would have allowed the manufacture of highly polluting trucks with refurbished diesel engines.<sup>176</sup> California also sued the Trump EPA for repealing a policy that required the installment and maintenance of equipment used to reduce hazardous air pollution.<sup>177</sup>

Recent state suits have challenged a wide range of national environmental policies, not just those relating to climate change and air pollution. Several states sued the National Highway Transportation Safety Administration for delaying the implementation of an increase in civil penalties for automakers that failed to meet fuel economy standards.<sup>178</sup> A group of states has also sued the Interior Department for interpreting the Migratory Bird Treaty Act of 1918<sup>179</sup> to exclude protection for bird species subject to incidental takings.<sup>180</sup> In addition, California, Maryland, and New York sued to prevent the EPA from suspending pesticide safety training requirements,<sup>181</sup> and several states have joined nongovernmental

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“modification” of a stationary source for purposes of New Source Review program); NOLETTE, *supra* note 64, at 125–27 (discussing litigation).

<sup>175</sup> See, e.g., *EPA v. EME Homer City Generation, L.P.*, 572 U.S. 489, 500 (2014) (challenge by various upwind states and industry to Transport Rule, which curtailed emissions in 27 upwind states); *North Carolina v. EPA*, 531 F.3d 896, 903, 929 (D.C. Cir. 2008) (invalidating Clean Air Interstate Rule); *Michigan v. EPA*, 213 F.3d 663, 669 (D.C. Cir. 2000) (challenging EPA rule mandating certain states to revise SIPs to address emissions that affected downwind states).

<sup>176</sup> See Maxine Joselow, *Wheeler Scraps Pruitt’s Order on High-Emission Trucks*, E&E NEWS: GREENWIRE (July 27, 2018), <https://www.eenews.net/greenwire/2018/07/27/stories/1060091389>; see also Maxine Joselow, *AGs Slap EPA with 2nd Suit over High-Emission Rigs*, E&E NEWS: GREENWIRE (July 20, 2018), <https://www.eenews.net/greenwire/2018/07/20/stories/1060089951>.

<sup>177</sup> See Press Release, Cal. Dep’t of Just., Attorney General Becerra Sues EPA over Illegal Decision to Let Polluters Off the Hook (Apr. 10, 2018), <https://oag.ca.gov/news/press-releases/attorney-general-becerra-sues-epa-over-illegal-decision-let-polluters-hook>.

<sup>178</sup> See generally *NRDC v. Nat’l Highway Traffic Safety Admin.*, 894 F.3d 95 (2d Cir. 2018).

<sup>179</sup> 16 U.S.C. §§ 703–712 (2018).

<sup>180</sup> See Complaint at 1–4, *New York v. U.S. Dep’t of the Interior*, No. 1:18-cv-08084 (S.D.N.Y. Sept. 5, 2018).

<sup>181</sup> See Miranda Green, *EPA Backpedals on Suspending Pesticide Rule Following Lawsuit*, HILL (June 15, 2018, 12:39 PM), <https://thehill.com/policy/energy-environment/392485-epa-backpedals-on-suspending-pesticide-rule-following-lawsuit>.

organizations in challenging the EPA's failure to address health concerns arising out of exposure to the pesticide chlorpyrifos in food.<sup>182</sup>

Most prominently, multiple states are targeting the Trump Administration's ongoing revisions to the definition of "waters of the United States" under the CWA.<sup>183</sup> That definition is critical to determining the geographic scope of the statute, and the latest revisions to the rule would exempt ephemeral streams and isolated wetlands from the statute's protections and permitting requirements.<sup>184</sup> The previous rule, as well as the Trump Administration's attempt to suspend it, has already been the subject of multiple state-filed lawsuits.<sup>185</sup> State-filed litigation over the latest rule has just begun.<sup>186</sup> State challenges to national environmental policies have become commonplace, with state participation in litigation often occurring along partisan lines.<sup>187</sup>

## 2. *Earlier National Policy Litigation*

In general, public lawsuits by state governments "have increased in number and salience over the last few decades," a trend that corresponds to the increased polarization of American politics.<sup>188</sup> State-initiated lawsuits specifically aimed at national environmental policies have likewise risen dramatically but are not an entirely new phenomenon. Rather, they date back to litigation campaigns crafted by Northeastern states in response to

<sup>182</sup> See *League of United Latin Am. Citizens v. Wheeler*, 899 F.3d 814 (9th Cir. 2018).

<sup>183</sup> See 33 U.S.C. § 1362(7) (2018); Complaint at 2–3, *New York v. Wheeler*, No. 1:19-cv-11673 (S.D.N.Y. Dec. 20, 2019).

<sup>184</sup> See *The Navigable Waters Protection Rule: Definition of "Waters of the United States"*, 85 Fed. Reg. 22,250 (Apr. 21, 2020) (to be codified at 33 C.F.R. pt. 328; and 40 C.F.R. pts. 110, 112, 116, 117, 120, 122, 230, 232, 300, 302 and 401).

<sup>185</sup> See *Nat'l Ass'n of Mfrs. v. Dep't of Def.*, 138 S. Ct. 617, 624, 634 (2018) (holding Sixth Circuit lacked jurisdiction over challenge to 2015 rule defining waters of the United States); *Texas v. EPA*, 389 F. Supp. 3d 497, 499–500 (S.D. Tex. 2019) (remanding but declining to vacate 2015 rule); *S.C. Coastal Conservation League v. Pruitt*, 318 F. Supp. 3d 959, 961 (D.S.C. 2018) (issuing nationwide injunction against suspension of 2015 rule); *New York v. Pruitt*, No. 18-CV-1030 (JPO), 2018 WL 1684341, at \*1 (S.D.N.Y. Apr. 5, 2018); *North Dakota v. EPA*, 127 F. Supp. 3d 1047, 1051, 1060 (D.N.D. 2015) (enjoining implementation of 2015 rule in 13 states).

<sup>186</sup> Complaint, *California ex rel. Becerra and California State Water Resources Control Bd. v. Wheeler*, No. 3:20-cv-03005 (N.D. Cal., filed May 1, 2020), available at [https://www.eenews.net/assets/2020/05/01/document\\_pm\\_01.pdf](https://www.eenews.net/assets/2020/05/01/document_pm_01.pdf).

<sup>187</sup> See generally Jessica Bulman-Pozen, *Partisan Federalism*, 127 HARV. L. REV. 1077, 1080 (2014) ("Put in only slightly caricatured terms, Republican-led states challenge the federal government when it is controlled by Democrats, while Democratic-led states challenge the federal government when it is controlled by Republicans.").

<sup>188</sup> Lemos & Young, *supra* note 56, at 43.

the political branches' failure to address acid rain pollution in the 1980s.<sup>189</sup> At the time, legislators from the Midwest had blocked proposals to reduce emissions from power plants and industrial facilities in that region that were contributing to acid rain in the Northeast.<sup>190</sup> New York and other downwind states petitioned the EPA to address the problem, but the EPA delayed and ultimately denied the petitions.<sup>191</sup> These Northeastern states then turned to the courts. Although the courts rejected the claims,<sup>192</sup> the plaintiff-states' multi-pronged efforts eventually prompted Congress to address acid rain in the 1990 CAA Amendments.<sup>193</sup> State lawsuits were able to advance states' interests even though the suits were not, themselves, successful.

The acid rain cases might be described as either national policy or cooperative federalism disputes. For the plaintiff-states, the acid rain cases offered an alternative forum for national policymaking after legislative and executive efforts had failed. The harms addressed extended beyond individual states, just as any judicial relief or legislation would have reached. Yet the cases also sought to enforce the cooperative federalism bargain embodied in the CAA. Namely, the statute had displaced federal common law that otherwise might have allowed downwind states to assert public nuisance claims against neighboring states or facilities in those states. The downwind states instead had to rely on the statute, the EPA, and eventually Congress to address pollution coming from other states.<sup>194</sup> Notwithstanding these cooperative federalism elements, the acid rain cases

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<sup>189</sup> See NOLETTE, *supra* note 64, at 106–08.

<sup>190</sup> See *id.* at 109–10.

<sup>191</sup> See *id.* at 110–12.

<sup>192</sup> See *id.* at 152; see also *Her Majesty the Queen ex rel Ontario v. EPA*, 912 F.2d 1525, 1534–35 (D.C. Cir. 1990) (holding EPA had no duty to initiate the international pollution abatement procedures in CAA § 115 where agency was continuing to develop information necessary to make findings under the statute); *New York v. EPA*, 852 F.2d 574, 579–81 (D.C. Cir. 1988) (largely upholding EPA's denial of petitions filed by states under section 126(b) of CAA alleging pollution attributable to upwind sources); *Thomas v. New York*, 802 F.2d 1443, 1446–47 (D.C. Cir. 1986) (holding that letters issued by EPA administrator did not trigger duty under CAA § 115 to identify states in which pollution responsible for acid deposition originated and to order those states to abate emissions).

<sup>193</sup> See Clean Air Act Amendments of 1990, Pub. L. No. 101-549, § 108, 104 Stat. 2399, 2468 (1990); NOLETTE, *supra* note 64, at 116–17.

<sup>194</sup> See *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 423–25 (2011) (holding that CAA displaces federal common law nuisance actions aimed at GHG emissions from power plants); see also Shannon M. Roesler, *State Standing to Challenge Federal Authority in the Modern Administrative State*, 91 WASH. L. REV. 637, 660 (2016) (discussing how jurisdiction over interstate public nuisance and other interstate disputes was part of “the founding bargain” when states agreed to a federal union).

more closely resemble national policy disputes because they center on the federal government's exercise of its policymaking authority, rather than on the defense of state prerogatives.

Another example of national policy litigation—predating even the acid rain cases—is *Hodel v. Indiana*,<sup>195</sup> where the state of Indiana, along with the coal industry, challenged the constitutionality of Surface Mining Control and Reclamation Act<sup>196</sup> provisions intended to protect prime farmland.<sup>197</sup> Although the state had an economic interest in the operation of the mines affected by the statute, the dispute did not involve federally-owned resources, nor did it concern the implementation of cooperative federalism provisions. At its core, the dispute was a challenge to national policy, and the Court's approval of the statute had an effect well beyond Indiana's boundaries.<sup>198</sup>

### III. STANDING AND RELATED DOCTRINES THAT MAY CONSTRAIN STATE LAWSUITS AGAINST THE FEDERAL GOVERNMENT

As the preceding Parts demonstrate, state suits against the federal government are commonplace in environmental law and have been for some time. The growing volume of state litigation over national policy, however, has prompted worries about whether such litigation is excessive or proper. These worries, in turn, have catalyzed a closer look at doctrines that might constrain such suits, especially standing.

Article III standing doctrine requires plaintiffs in federal court to establish injury-in-fact, causation, and redressability.<sup>199</sup> Courts and commentators have considered three types of interests as a basis for establishing a state's standing to sue: proprietary interests, sovereign interests, and quasi-sovereign interests. This Part explores a state's standing to assert these three types of interests in the context of suits against the federal government. Notably, these three types of interests roughly correspond to the three categories of state-federal disputes described in Part II: disputes over federal resources that largely involve proprietary interests;

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<sup>195</sup> 452 U.S. 314 (1981).

<sup>196</sup> Surface Mining Control and Reclamation Act of 1977, Pub. L. No. 95-87, 91 Stat. 445 (1977).

<sup>197</sup> See *Hodel*, 452 U.S. at 317–18.

<sup>198</sup> See, e.g., Andrea L. Peterson, *The Takings Clause: In Search of Underlying Principles Part I—A Critique of Current Takings Clause Doctrine*, 77 CALIF. L. REV. 1301, 1331 (1989) (noting *Hodel's* role in establishing takings law's "no economically viable use" test).

<sup>199</sup> See *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992).



disputes over state prerogatives, either under cooperative federalism statutes or in the face of federal preemption, that largely involve sovereign interests; and disputes over national policy that largely involve quasi-sovereign interests. To be sure, the question of state standing is distinct from the issue of state suits' normative desirability, a matter addressed in Part IV. Nonetheless, by focusing on plaintiffs' stake in litigation, the injury-in-fact prong of the standing doctrine sheds light on whether states are proper plaintiffs in suits against the federal government. The related doctrines of generalized grievances and abstention involve similar inquiries and are discussed briefly as well.

A. *Standing to Assert Proprietary Interests*

The proposition that states may defend their proprietary interests in court is uncontroversial.<sup>200</sup> States own property, and disputes between states and the federal government over titles, boundaries, or alleged contracts can be analogized to ordinary property or contract disputes between private parties.<sup>201</sup> Private parties who allege harm to proprietary or contractual interests generally can establish the concrete-injury requirement of Article III standing, and states should be equally able to sue the federal government to resolve similar disputes. As the Supreme Court confirmed in litigation over the 2020 census, the reasonable prospect of a state losing federal funding is a sufficiently concrete injury to establish standing.<sup>202</sup> Historical practice readily confirms states' standing to bring suits over proprietary interests,<sup>203</sup> and academic commentary is universally supportive of such standing.<sup>204</sup>

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<sup>200</sup> See F. Andrew Hessick, *Quasi-Sovereign Standing*, 94 NOTRE DAME L. REV. 1927, 1930 (2019); Lemos & Young, *supra* note 56, at 109; Roesler, *supra* note 194, at 640; Katherine Mims Crocker, Note, *Securing Sovereign State Standing*, 97 VA. L. REV. 2051, 2056 (2011).

<sup>201</sup> See Wildermuth, *supra* note 126, at 295–97 (concluding a state's standing to assert injury to proprietary interests should be evaluated in a manner akin to private party standing). Although boundary disputes to some degree are conflicts over sovereignty, they also resemble common law property disputes and are routinely heard by the courts. See Aziz Z. Huq, *State Standing's Uncertain Stakes*, 94 NOTRE DAME L. REV. 2127, 2138 (2019).

<sup>202</sup> See *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2565–66 (2019).

<sup>203</sup> See Ann Woolhandler & Michael G. Collins, *State Standing*, 81 VA. L. REV. 387, 406–07 (1995).

<sup>204</sup> See, e.g., Raymond H. Brescia, *On Objects and Sovereigns: The Emerging Frontiers of State Standing*, 96 OR. L. REV. 363, 366–67 (2018) (contending that states rely primarily on allegations of common law harms to economic interests and property rights to establish standing in their challenges against federal actions); Tara Leigh Grove, *Government Standing and the Fallacy of Institutional Injury*, 167 U. PA. L. REV. 611, 613

*B. Standing to Assert Sovereign Interests: Preemption & Cooperative Federalism*

Preemption and cooperative federalism cases concern a very different sort of interest: a state's sovereign interest in enforcing its laws and defending them against federal encroachment. Yet in these cases, too, states have faced relatively few difficulties in establishing standing. The Supreme Court has stated that "a State clearly has a legitimate interest in the continued enforceability of its own statutes."<sup>205</sup> Federal courts regularly entertain state suits challenging federal limits on state sovereignty.<sup>206</sup> And as a normative matter, various commentators consider a state's capacity to litigate state prerogatives under cooperative federalism statutes or in the face of federal preemption as essential to its ability to exercise self-governance within the nation's federal system.<sup>207</sup>

*1. Preemption Cases*

Although the Supreme Court has not directly held that states have standing to challenge federal preemption of their laws, it has implied as much by deciding state-filed preemption cases on the merits.<sup>208</sup> *Missouri v. Holland*<sup>209</sup> illustrates such an approach. There, the state of Missouri, challenging the Migratory Bird Treaty Act, asserted a proprietary interest in the birds within its borders, but the Supreme Court's brief discussion of standing did not rest on this proprietary interest.<sup>210</sup> Rather, in accepting

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n.4 (2019); Ann Woolhandler & Michael G. Collins, *Reining In State Standing*, 94 NOTRE DAME L. REV. 2015, 2015 (2019).

<sup>205</sup> *Maine v. Taylor*, 477 U.S. 131, 137 (1986).

<sup>206</sup> See Roesler, *supra* note 194, at 657–59.

<sup>207</sup> See Grove, *supra* note 127, at 855, 862–64; Calvin Massey, *State Standing After Massachusetts v. EPA*, 61 FLA. L. REV. 249, 261 (2009) ("When a state asserts a sovereign interest it seeks to vindicate an attribute of its sovereignty . . . . Inherent in violation of law is injury to the polity for which the government is the agent."); Wildermuth, *supra* note 126, at 311–15; but see Alexander M. Bickel, *The Voting Rights Cases*, 1966 SUP. CT. REV. 79, 85–90 (questioning whether state had standing to raise "nothing more than [the state's] interest in the execution of [its] own laws rather than those of Congress"); Robert A. Mikos, *Standing for Nothing*, 94 NOTRE DAME L. REV. 2033, 2035 (2019).

<sup>208</sup> See Jonathan Remy Nash, *Sovereign Preemption State Standing*, 112 NW. U. L. REV. 201, 203–04 (2017); see also Grove, *supra* note 127, at 880–83 (discussing *Gonzales v. Oregon*, 546 U.S. 243 (2006), as an example of a case in which the Court decided merits of state's preemption challenge).

<sup>209</sup> 252 U.S. 416 (1920).

<sup>210</sup> The Court decided the case in 1920, long before the development of modern standing doctrine, and thus did not employ the doctrine's terminology. Instead, the Court merely stated that "it is enough that the bill is a reasonable and proper means to assert the

without question the state's ability to sue, the Court emphasized the statute's alleged interference with sovereign rights reserved for the states under the Tenth Amendment.<sup>211</sup>

A state's standing to challenge federal preemption is supported by its "sovereign interest in the continued enforceability of its law"—the same interest at stake when a state "defends [its laws] against a constitutional challenge brought by a private party."<sup>212</sup> Federal interference with a state's ability to carry out its constitutionally recognized responsibility to protect the health and welfare of its citizens inflicts an injury upon the state.<sup>213</sup> A state's interest in this regard is especially strong when the federal government preempts state regulation without offering any regulation of its own to protect that state's citizens.<sup>214</sup> But even when the federal government has developed its own regulatory scheme, a state's loss of regulatory autonomy remains a sufficiently concrete and particularized injury to establish standing.<sup>215</sup>

If states have standing to defend their sovereign interests in federal court, there is the possibility that states might attempt to manufacture standing by enacting laws specifically designed to conflict with federal law.<sup>216</sup> For example, in *Virginia ex rel. Cuccinelli v. Sebelius*,<sup>217</sup> the

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alleged quasi sovereign rights of a State." *Id.* at 431. The Court's mention of "quasi sovereign" interests was intended to refer to Missouri's sovereign interest in enforcing state law. *See Grove, supra* note 127, at 865.

<sup>211</sup> *See Holland*, 252 U.S. at 431; *see also* *Grove, supra* note 127, at 865–66 (noting Missouri alleged that statute preempted state law). The Court's opinion upholding the statute focused on the extent of the federal government's treaty-making power as compared with the extent of states' reserved powers under the Tenth Amendment. *See Holland*, 252 U.S. at 432–35.

<sup>212</sup> *Grove, supra* note 127, at 882.

<sup>213</sup> *See Nash, supra* note 208, at 231.

<sup>214</sup> *See* Jonathan Remy Nash, *Null Preemption*, 85 NOTRE DAME L. REV. 1015, 1018 (2010) (contending that the infringement on states' sovereignty is especially great when the federal government "depriv[es] states of their ability to regulate and leav[es] a federal regulatory void as well"); *see also* Gillian E. Metzger, *Administrative Law as the New Federalism*, 57 DUKE L.J. 2023, 2038 (2008) (noting that, as result of a CAA provision that prevents states "from adopting or enforcing 'any standard relating to the control of emissions from new motor vehicles or new motor vehicle engines,' . . . states have a sovereign interest in ensuring that the federal government performs its regulatory responsibilities").

<sup>215</sup> Jonathan Nash specifically argues for "sovereign preemption state standing"—i.e., standing for states to sue the federal government when it has preempted state law and is also underenforcing federal law. *See Nash, supra* note 208, at 206–07.

<sup>216</sup> *See* Stephen I. Vladeck, *States' Rights and State Standing*, 46 U. RICH. L. REV. 845, 872–73 (2012).

<sup>217</sup> 656 F.3d 253 (4th Cir. 2011).

Commonwealth of Virginia enacted a law purporting to exempt residents from a federal mandate that required individuals to obtain health insurance.<sup>218</sup> Virginia then sued the federal government in an attempt to invalidate the health insurance mandate and pointed to the conflict between state and federal laws as a basis for standing.<sup>219</sup> The Fourth Circuit rejected the state's alleged standing: "To permit a state to litigate whenever it enacts a statute declaring its opposition to federal law . . . would convert the federal judiciary into a 'forum' for the vindication of a state's 'generalized grievances about the conduct of government.'"<sup>220</sup> Contrasting the case with instances in which a state was held to possess sovereign standing, the court explained that Virginia's law did not regulate behavior or provide for the administration or enforcement of a state program.<sup>221</sup> In other words, what gives rise to state standing in preemption cases are the restrictions on a state's ability to regulate behavior or carry out its own programs, and not the mere existence of a conflict between state and federal law. This distinction suggests a significant limitation on a state's ability to contest any federal policy to which a state might object.

## 2. Cooperative Federalism

Most sovereignty disputes in environmental law—unlike the dispute in *Missouri v. Holland*—involve cooperative federalism schemes rather than outright preemption. Conflicts between states and the federal government are inevitable in implementing these schemes, as states sue to protect their own laws, actions, or autonomy.<sup>222</sup>

As a general matter, federal courts have not hesitated to adjudicate cooperative federalism disputes between states and the federal government.

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<sup>218</sup> *Id.* at 267.

<sup>219</sup> *Id.* at 268.

<sup>220</sup> *Id.* at 271 (quoting *Flast v. Cohen*, 392 U.S. 83, 106 (1968)). Even after *Cuccinelli*, a state might seek to manufacture sovereign standing by enacting a law involving some degree of administration or enforcement, such as a state law promising to indemnify residents for penalties imposed for violating federal law. See Mikos, *supra* note 207, at 2053. Courts still might characterize such a law as "declaratory" and thus an insufficient basis for state standing, rather than as a truly "regulatory" law. See Grove, *supra* note 127, at 877–79 (explaining distinction between regulatory and declaratory state laws).

<sup>221</sup> *Cuccinelli*, 656 F.3d at 269–70; see also Grove, *supra* note 127, at 876–77 (arguing states have standing to sue the federal government in order to protect regulatory, but not declaratory, state laws); Vladeck, *supra* note 216, at 867–70 (asserting Fourth Circuit reached correct result in *Cuccinelli* but should have emphasized that the federal law at issue did not impose a distinct injury on Virginia as a state).

<sup>222</sup> See *supra* Section II.B.

In *West Virginia v. EPA*,<sup>223</sup> the D.C. Circuit explicitly rejected the claim that states lacked standing to challenge an EPA rule directing those states to revise their SIPs under the CAA.<sup>224</sup> The rule's setting of a lower pollution emission budget, the court explained, made "more difficult and onerous . . . the states' task of devising an adequate SIP."<sup>225</sup> This greater difficulty constituted "injury to the states as states . . . [which is] sufficient to confer standing."<sup>226</sup> On numerous other occasions, courts have reviewed the EPA's rejection of SIPs without questioning state standing at all.<sup>227</sup> Furthermore, under environmental cooperative federalism statutes other than the CAA, courts similarly have assumed the presence of state standing in the course of resolving disputes between states and the federal government.<sup>228</sup>

Indeed, there are strong arguments for allowing states to defend their laws and prerogatives within cooperative federalism regimes.<sup>229</sup> When state laws and regulations are applied to individuals, those individuals have a due process right to judicial review; at the same time, states undeniably may defend those laws and regulations.<sup>230</sup> When state and federal laws conflict, states likewise should have a forum for defending their laws.

Admittedly, Congress might be well situated to serve as a forum for resolving sovereignty-based conflicts because it can "assess the relative importance of plurality versus uniformity[] [and] of redundancy versus hierarchical accountability."<sup>231</sup> Many cooperative federalism cases brought by states, however, do not call for basic structural choices between a single federal standard and a multiplicity of state approaches—the kind of

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<sup>223</sup> 362 F.3d 861 (D.C. Cir. 2004).

<sup>224</sup> *Id.* at 868.

<sup>225</sup> *Id.*

<sup>226</sup> *Id.*

<sup>227</sup> *See supra* notes 109, 113.

<sup>228</sup> *See supra* notes 131–136. None of this is to suggest that states *always* have standing to challenge requirements found in cooperative federalism statutes. In *Texas v. EPA*, for example, the D.C. Circuit held that Texas and Wyoming lacked standing to challenge EPA rules designed to implement the requirement in CAA § 165 that new sources obtain a permit incorporating best available control technology for pollutants regulated under the statute, including GHGs. 726 F.3d 180, 198–99 (D.C. Cir. 2013). Because the requirement was self-executing, the court explained, vacatur of EPA's rules would not redress the states' alleged injury to their authority to regulate emissions. *Id.*

<sup>229</sup> *See Roesler, supra* note 194, at 639, 642. *But see Woolhandler & Collins, supra* note 203, at 412 (contending that, as a historical matter, state suits in federal courts tended not to assert sovereignty interests).

<sup>230</sup> *See Grove, supra* note 127, at 877–78.

<sup>231</sup> Schapiro, *supra* note 41, at 2143.

decision Congress might typically make.<sup>232</sup> Rather, these cases often involve challenges to a federal rule or decision rejecting the way in which a state has implemented a cooperative federalism scheme.<sup>233</sup> Congress is unlikely to intervene in disagreements over the details surrounding the implementation of cooperative federalism statutes.<sup>234</sup> Courts are better suited to resolve these types of disputes, which involve interpreting federal statutes and delineating a state's concurrent authority on a case-by-case basis.<sup>235</sup> Indeed, a state's ability to challenge federal power in federal court could serve not only as a corrective mechanism in individual instances, but also as an important structural protection against overly expansive federal authority.<sup>236</sup> If cooperative federalism regimes are understood as "contracts between the national government and the states," state governments presumably possess not only a sovereign interest in defending their laws, but also a "contractual interest in enforcing the terms of the deal as the states understand them."<sup>237</sup>

### C. *Standing to Assert Quasi-Sovereign Interests*

The third set of state-federal disputes—those involving disagreements over national policy—presents more difficult questions regarding the appropriateness of judicial involvement. These cases pose the greatest danger that an individual state, or group of states, might impose its will on others or entangle the federal courts in policymaking.<sup>238</sup> Moreover, the

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<sup>232</sup> See Schapiro, *supra* note 40, at 294–95 (noting Congress's superior capacity to determine what issues are reserved for federal or, alternatively, state regulation, and what issues can be dually regulated),

<sup>233</sup> See *id.* at 295 (asserting that cooperative federalism issues that require courts to interpret constitutional grants of power "currently constitute the bulk of the federalism cases in the courts.").

<sup>234</sup> Cf. Grove, *supra* note 127, at 855 (contending that states should have standing to assert sovereign interest in enforcing or defending state law against the federal government, but not to challenge federal implementation of federal law).

<sup>235</sup> See Schapiro, *supra* note 40, at 295.

<sup>236</sup> See, e.g., Seth Davis, *Implied Public Rights of Action*, 114 COLUM. L. REV. 1, 82–83 (2014) (discussing potential for intergovernmental litigation "to achieve the competitive checks and balances the Framers envisioned would follow from a world of dual sovereignty"); Roesler, *supra* note 194, at 677–78; see also Schapiro, *supra* note 41, at 2143 (arguing that although disputes between states and the federal government "should generally be resolved by well-functioning political bodies," courts nonetheless "retain an important role in enforcing and protecting the policies decided by political bodies and in guarding against malfunctions of the political system").

<sup>237</sup> Lemos & Young, *supra* note 56, at 110.

<sup>238</sup> See *id.* at 96 (discussing "horizontal conflict" between states that "mostly takes the form of fights for the right to control national policy"); Bickel, *supra* note 207, at 90

expansion of such litigation has led to the worry, suggested by Woolhandler and Collins, that states could serve as “all-purpose advocacy plaintiffs” against the federal government, crippling the federal executive and providing excessive power to the states and courts.<sup>239</sup>

In disagreements over national policy, states sometimes rely on the somewhat opaque concept of *parens patriae* standing.<sup>240</sup> According to the Supreme Court, *parens patriae* interests are “a set of interests that the State has in the well-being of its populace,” and are distinct from “sovereign interests, proprietary interests, or private interests pursued by the State as a nominal party.”<sup>241</sup> Language from a 1923 Supreme Court decision, *Massachusetts v. Mellon*,<sup>242</sup> seemingly rejected *parens patriae* standing as a basis for states to challenge federal laws: “[I]t is the United States, and not the State, which represents [a state’s citizens] as *parens patriae*” with respect to the operation of federal law.<sup>243</sup> While this passage could be read broadly to bar all *parens patriae* suits against the federal government, other portions of *Mellon* suggest a narrower bar on a state’s “institut[ion of] judicial proceedings to protect citizens of the United States from the operation” of federal law.<sup>244</sup>

Sixty years later, in *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*,<sup>245</sup> the Court stated that certain *parens patriae* interests may serve as a basis for state standing.<sup>246</sup> The Court recognized that a state may assert “a quasi-sovereign interest in the health and wellbeing—both physical and economic—of its residents in general” as well as a quasi-sovereign interest in “ensuring that the State and its residents are not excluded from the

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(worrying that broad state authority to sue federal government could threaten to make the Supreme Court into a “council of revision”).

<sup>239</sup> Woolhandler & Collins, *supra* note 204, at 2029; *see also* Grove, *supra* note 127, at 856 (expressing concern that broad state standing might “enabl[e] every dispute between a State and the federal government to wind up in court”).

<sup>240</sup> Although suits based on quasi-sovereign interests are called *parens patriae* suits, they rely on a state’s invocation of its own interests. This stands in contrast to the original notion of *parens patriae*, where a state litigates on behalf of individuals unable to sue on their own. *See* Wildermuth, *supra* note 126, at 298.

<sup>241</sup> *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 602 (1982).

<sup>242</sup> 262 U.S. 447 (1923).

<sup>243</sup> *Id.* at 485–86 (“While the State, under some circumstances, may sue in that capacity for the protection of its citizens, it is no part of its duty or power to enforce their rights in respect of their relations with the Federal Government.” (citation omitted)).

<sup>244</sup> *Id.* at 485; *see also* Wildermuth, *supra* note 126, at 308 (discussing different readings of *Mellon*).

<sup>245</sup> 458 U.S. 592 (1982).

<sup>246</sup> *See id.* at 607–08.

benefits that are to flow from participation in the federal system.”<sup>247</sup> A state may rely on *parens patriae* standing in these contexts if it can both establish injury to “a sufficiently substantial segment of [the state’s] population” and distinguish its interest “from the interests of particular private parties.”<sup>248</sup> *Snapp*’s significance with respect to state-versus-federal litigation was unclear, however, as the case involved litigation against private parties rather than the federal government, and the opinion reaffirmed the federal government’s dominant role in representing a state’s citizens as *parens patriae*.<sup>249</sup>

Indeed, even after *Snapp*, lower court decisions continued to construe *Mellon* as limiting *parens patriae* standing in suits against the federal government.<sup>250</sup> *Massachusetts v. EPA*—in which a dozen states challenged the EPA’s failure to regulate GHGs—called those decisions into question.<sup>251</sup> “Well before the creation of the modern administrative state,” the Court declared, “we recognized that States are not normal litigants for the purposes of invoking federal jurisdiction.”<sup>252</sup> The case the Court had in mind was *Georgia v. Tennessee Copper*,<sup>253</sup> a 1907 public nuisance suit against a private party; there, the Court declared that a state has a quasi-sovereign interest “in all the earth and air within its domain.”<sup>254</sup> Pointing to Massachusetts’ analogous “desire to preserve its sovereign territory,” the

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<sup>247</sup> *Id.* Although the Supreme Court stated in *Snapp* that “[a] State does not have standing as *parens patriae* to bring an action against the Federal Government,” *id.* at 610 n.16, the reasoning in *Snapp*, the Court’s standing analysis in *Massachusetts v. EPA*, 549 U.S. 497, 516–26 (2007), and academic commentary cast serious doubt on the continuing validity of that statement. *See Wildermuth, supra* note 126, at 309–11, 317.

<sup>248</sup> *Snapp*, 458 U.S. at 607. Following this line of reasoning, one can distinguish *parens patriae* suits, in which a “state asserts the interests of another person for that person’s benefit,” from quasi-sovereignty suits, in which a “state asserts its *own* interest in protecting the populace.” Hessick, *supra* note 200, at 1936.

<sup>249</sup> *Snapp*, 458 U.S. at 610 n.16.

<sup>250</sup> *See Wildermuth, supra* note 126, at 309.

<sup>251</sup> *See Massachusetts v. EPA*, 549 U.S. at 505 n.2.

<sup>252</sup> *Id.* at 518.

<sup>253</sup> 206 U.S. 230 (1907).

<sup>254</sup> *Id.* at 237. Chief Justice Roberts’s dissent argued that *Georgia v. Tennessee Copper* merely established “a State’s right, in an original jurisdiction action, to sue in a representative capacity as *parens patriae*,” and “had nothing to do with Article III standing.” *Massachusetts v. EPA*, 549 U.S. at 537–38 (Roberts, C.J., dissenting); *see also* Grove, *supra* note 127, at 887 (criticizing the majority opinion in *Massachusetts v. EPA* for its reliance on *Georgia v. Tennessee Copper* because that opinion “says nothing about state standing to object to a federal agency’s enforcement of federal law”).



Court suggested that this interest could support standing, independent of the state's ownership of any land within that territory.<sup>255</sup>

Unfortunately, the Court's analysis of the precise interests that established Massachusetts's standing was somewhat muddled.<sup>256</sup> The finding of particularized injury relied heavily on the state's ownership of coastal property—i.e., its proprietary interests.<sup>257</sup> At the same time, the Court's discussion of quasi-sovereign interests indicated that state standing did not hinge on proprietary interests alone. By joining the Union, the Court emphasized, Massachusetts had “surrender[ed] certain sovereign prerogatives” to the federal government and was thereby entitled to “special solicitude in [the] standing analysis.”<sup>258</sup> Exactly what that “special solicitude” entails remains open to debate.<sup>259</sup> Under one reading, *Massachusetts v. EPA* recognized the standing of states—but not individuals—to assert claims against the federal government on the basis of generalized injury to public health and well-being.<sup>260</sup> Consistent with this

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<sup>255</sup> *Massachusetts v. EPA*, 549 U.S. at 519.

<sup>256</sup> See Jessica Bulman-Pozen, *Federalism All the Way Up: State Standing and “The New Process Federalism,”* 105 CALIF. L. REV. 1739, 1745 (2017) (observing that “the meaning and durability of [special] solicitude remain unsettled” a decade after *Massachusetts* was decided); Bradford Mank, *Should States Have Greater Standing Rights than Ordinary Citizens?: Massachusetts v. EPA’s New Standing Test for States*, 49 WM. & MARY L. REV. 1701, 1755 (2008) (“The main difficulty with the Court’s standing analysis is that it is never clear to what extent the majority applied reduced standing requirements under footnote seven or a special solicitude for states standard.”); Jonathan Remy Nash, *Standing and the Precautionary Principle*, 108 COLUM. L. REV. 494, 510 n.79 (2008); Note, *An Abdication Approach to State Standing*, 132 HARV. L. REV. 1301, 1307 (2019) (indicating that “the logic undergirding the [special solicitude] rule was ambiguous” and that “the confusion has not abated” since).

<sup>257</sup> See *Massachusetts v. EPA*, 549 U.S. at 522.

<sup>258</sup> *Id.* at 519–20.

<sup>259</sup> For further discussion of the possible implications of *Massachusetts v. EPA* for quasi-sovereign standing, see Wildermuth, *supra* note 126, at 317.

<sup>260</sup> See Massey, *supra* note 207, at 252 (“The most persuasive understanding of [*Massachusetts v. EPA*] is that it permits states, as *parens patriae*, to assert generalized claims of injury suffered in common by all of its citizens that would not be judicially cognizable if asserted by any individual citizen.”); Roesler, *supra* note 194, at 677 (interpreting *Massachusetts v. EPA* as establishing the principle that “[h]aving surrendered lawmaking authority, states have a clear interest—as separately constituted governments—in the implementation of federal law”); see also Margaret H. Lemos, *Aggregate Litigation Goes Public: Representative Suits by State Attorneys General*, 126 HARV. L. REV. 486, 494–95 (2012). Lower courts have understood *Massachusetts v. EPA* to establish states’ standing to sue the federal government in cases involving environmental damage to territory within the state. See, e.g., *NRDC v. Nat’l Highway Traffic Safety Admin.*, 894 F.3d 95, 103–04 (2d Cir. 2018) (“As to the State Petitioners, the Supreme Court has specifically recognized states’ standing to sue in cases involving environmental damage, observing that a state’s

reading, *Massachusetts v. EPA* explained that *Mellon* only prohibits a state from “protect[ing] her citizens from the operation of federal statutes”; it does not prohibit a state from asserting its quasi-sovereign rights that are invaded or threatened by violations of federal law.<sup>261</sup>

It is important to recognize that in national policy disputes, a state’s proprietary and sovereign interests may be sufficient to establish standing, regardless of any quasi-sovereign interests that state might also possess.<sup>262</sup> State-plaintiffs often can demonstrate proprietary injury based on increased state expenditures that a federal action may require.<sup>263</sup> Or states may establish sovereign injury based on harms resulting from changes to state regulations prompted by federal action.<sup>264</sup> Indeed, the relatively minimal barrier that standing poses to state-plaintiffs underscores the fact that the standing doctrine developed in the context of private challenges to governmental action.<sup>265</sup> As Richard Fallon has noted, the standing doctrine was aimed at managing the expanded availability of public-law actions to private parties: “The Supreme Court apparently never intended that the injury in fact, causation, and redressability requirements would apply to the federal and state governments in the same way as to private litigants.”<sup>266</sup>

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‘well-founded desire to preserve its sovereign territory’ supports standing in cases implicating environmental harms.” (quoting *Massachusetts v. EPA*, 549 U.S. 497, 519 (2007))).

<sup>261</sup> *Massachusetts v. EPA*, 549 U.S. at 520 n.17 (quoting *Georgia v. Pa. R.R.*, 324 U.S. 439, 447 (1945)). The argument for state standing to challenge federal policy is particularly strong when that policy is developed by federal agencies, which face fewer institutional incentives than Congress to pay heed to state interests. See Massey, *supra* note 207, at 267; Gillian E. Metzger, *Federalism and Federal Agency Reform*, 111 COLUM. L. REV. 1, 73 (2011).

<sup>262</sup> See Woolhandler & Collins, *supra* note 204, at 2022 (“Whether used to bolster a sovereignty or *parens patriae* claim, or as a separate proprietary or individual basis for standing, states have little trouble alleging such concrete injuries.” (footnote omitted)).

<sup>263</sup> See Seth Davis, *The New Public Standing*, 71 STAN. L. REV. 1229, 1273 (2019) (noting ease with which states can identify financial injury as a basis for standing given the interdependence of state governments and the federal government); Huq, *supra* note 201, at 2142–43.

<sup>264</sup> See *supra* text accompanying notes 224–227.

<sup>265</sup> See Woolhandler & Collins, *supra* note 204, at 2024 (“[G]iven the overlap of state and federal regulation, there are few changes in federal administrative policy that cannot plausibly be alleged to have some particularized impact on the states . . .”).

<sup>266</sup> Richard H. Fallon, Jr., *The Fragmentation of Standing*, 93 TEX. L. REV. 1061, 1080 (2015); see also *id.* at 1065 (explaining that “the Supreme Court began to develop doctrines that it expressly denominated as involving standing to govern the eligibility of parties to seek judicial enforcement of constitutional or statutory guarantees” in response to increase in government regulation and expansion of constitutional rights).

Two decisions, *National Ass'n of Clean Air Agencies v. Environmental Protection Agency*<sup>267</sup> and *Natural Resources Defense Council v. Environmental Protection Agency*,<sup>268</sup> illustrate the relative ease with which states can demonstrate standing to challenge national policies without relying on quasi-sovereign interests. At issue in *National Ass'n of Clean Air Agencies* was an EPA rule setting nitrogen oxide (“NOx”) emission standards for aircraft engines, a matter for which state regulation is preempted.<sup>269</sup> The plaintiff, a trade association representing state and local government agencies, contended that the standards were too weak.<sup>270</sup> The plaintiff alleged that higher NOx emissions resulting from the rule would force states to impose stricter controls on other sources of NOx in order to achieve federal ambient air pollution requirements.<sup>271</sup> In doing so, the plaintiff relied primarily on an injury to its sovereign, not quasi-sovereign, interests. The D.C. Circuit had “little difficulty” concluding that this alleged injury—the fact that the EPA’s rule made it “more difficult and onerous” for the states to “devis[e] an adequate SIP”—was sufficient to establish standing.<sup>272</sup>

*Natural Resources Defense Council v. EPA* similarly involved a state challenge to federal environmental policy. New York and Connecticut, along with environmental groups, challenged the EPA’s failure to promulgate national water pollution discharge standards for construction sites.<sup>273</sup> The states alleged that the EPA’s failure caused more pollution to come from upstream, out-of-state sites and required them to expend more resources in developing their own pollution standards.<sup>274</sup> The district court characterized the states’ interests in protecting their natural resources and environment, as well as their additional expenditures, as proprietary interests and found them sufficient to establish standing.<sup>275</sup> Ultimately, as these cases demonstrate, states often claim injury to their proprietary or sovereign interests in order to successfully establish standing in their challenges to national policies.

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<sup>267</sup> 489 F.3d 1221 (D.C. Cir. 2007).

<sup>268</sup> 437 F. Supp. 2d 1137 (C.D. Cal. 2006).

<sup>269</sup> *Nat’l Ass’n of Clean Air Agencies*, 489 F.3d at 1225–26.

<sup>270</sup> *Id.* at 1227.

<sup>271</sup> *Id.*

<sup>272</sup> *Id.* at 1227–28 (quoting *West Virginia v. EPA*, 362 F.3d 861, 868 (D.C. Cir. 2004)).

<sup>273</sup> *Nat. Res. Def. Council*, 437 F. Supp. 2d at 1144.

<sup>274</sup> *Id.* at 1151.

<sup>275</sup> *Id.* at 1152.

#### D. Generalized Grievances

While standing doctrine has received the most attention as a potential means of curbing state lawsuits against the federal government, the related principle that courts may not adjudicate generalized grievances merits discussion as well. The Supreme Court has sometimes characterized this principle as prudential, but its more recent dicta on the subject suggest that the rule is constitutional in nature.<sup>276</sup>

The generalized grievance doctrine bars a plaintiff from “raising only a generally available grievance about government—claiming only harm to his and every citizen’s interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large . . . .”<sup>277</sup> Theoretically, democratic accountability is better maintained by having political branches, not the courts, handle general objections to legal violations. The generalized grievance doctrine, however, does not prevent courts from hearing all cases involving widely shared injuries; rather, it is concerned with harms “of an abstract and indefinite nature—for example, harm to the ‘common concern for obedience to law,’”<sup>278</sup> or those from allegedly illegal government expenditures.<sup>279</sup> These abstract harms, the Supreme Court has said, are “most appropriately addressed in the representative branches,”<sup>280</sup> and their adjudication could lead to the issuance of advisory opinions.<sup>281</sup>

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<sup>276</sup> See *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 127 n.3 (2014) (acknowledging decisions that have grounded the Supreme Court’s “reluctance to entertain generalized grievances” as prudential, while also pointing to subsequent opinions that found “such suits do not present constitutional ‘cases’ or ‘controversies’”); cf. Nash, *supra* note 208, at 245 (“Scholars debate whether the bar against standing for generalized grievances is constitutional or merely prudential.”).

<sup>277</sup> *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 573–74 (1992).

<sup>278</sup> *Fed. Election Comm’n v. Akins*, 524 U.S. 11, 23 (1998) (quoting *L. Singer & Sons v. Union Pac. R.R.*, 311 U.S. 295, 303 (1940)); see also ERWIN CHERMERINSKY, *FEDERAL JURISDICTION* 96 (7th ed. 2016) (explaining that “the number of people affected does not determine the existence of a generalized grievance”).

<sup>279</sup> See *Massachusetts v. Mellon*, 262 U.S. 447, 487–88 (1923); see also CHERMERINSKY, *supra* note 278, at 96 (“[A] generalized grievance is where the plaintiffs sue solely as citizens concerned with having the government follow the law or as taxpayers interested in restraining allegedly illegal government expenditures.”).

<sup>280</sup> *Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, Inc.*, 454 U.S. 464, 475 (1982); see also CHERMERINSKY, *supra* note 278, at 105 (“The generalized grievance standing doctrine can be defended on separation of powers grounds.”).

<sup>281</sup> *Akins*, 524 U.S. at 24.

As an initial matter, the applicability of the generalized grievance doctrine to state suits is questionable because the doctrine, like standing, is aimed at managing litigation filed by private parties.<sup>282</sup> State-filed litigation is different, not only because state officials are democratically elected,<sup>283</sup> but also because of a state's fundamental role in protecting the general well-being of its residents.<sup>284</sup> Even if the doctrine applies to states' claims, it would not bar states from litigating disputes over federal resources within a state, or sovereignty disputes with the federal government. Regarding the first category of cases, states could readily identify concrete and individualized harms to their interests. And when states engage in sovereignty disputes with the federal government, "they are not suing based on a generalized grievance, but are instead seeking to vindicate their concrete interests in governing—either as separate regulatory entities or as cooperative agencies under a federal administrative scheme."<sup>285</sup>

The generalized grievance doctrine may have some bite, however, with respect to some state lawsuits challenging national policy. In certain instances, the doctrine may separate those cases in which states are merely airing out an ideological disagreement with federal policy from those in which states have concrete stakes. The Fourth Circuit in *Cuccinelli*, for example, characterized Virginia's objection to the Affordable Care Act's individual mandate as a generalized grievance because it essentially presented an ideological dispute rather than a conflict over sovereignty.<sup>286</sup> By contrast, state challenges to national environmental policies generally involve more than ideological disputes. In challenges to the Clean Power Plan or to national air pollution standards a state simply can point out the harm to its proprietary or sovereign interests in order to establish a sufficiently concrete, non-generalized injury. Moreover, a state's quasi-sovereign interests in protecting the health of its citizens—which, in most challenges to national environmental policies, states can readily demonstrate—would also suffice to overcome the generalized grievance

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<sup>282</sup> See F. Andrew Hessick & William P. Marshall, *State Standing to Constrain the President*, 21 CHAPMAN L. REV. 83, 97 (2018).

<sup>283</sup> See Hessick, *supra* note 200, at 1950 (contending that a "state's decision to bring suit [to compel the federal government to comply with the law] . . . does not subvert the political process" because it "reflects the views of the people as embodied by their elected officials").

<sup>284</sup> See *Massachusetts v. EPA*, 549 U.S. 497, 518–20 (2007).

<sup>285</sup> Roesler, *supra* note 194, at 685.

<sup>286</sup> *Virginia ex rel. Cuccinelli v. Sebelius*, 656 F.3d 253, 271–72 (4th Cir. 2011).

bar.<sup>287</sup> As the Supreme Court has held, the generalized grievance doctrine does not bar claims where “large numbers of individuals suffer the same common-law injury (say, a widespread mass tort).”<sup>288</sup>

Ultimately, the generalized grievance doctrine may not bar many state-filed cases. Because the critical question is whether a plaintiff has suffered a concrete injury, and not whether the plaintiff’s injury is unique to the plaintiff, states often face minimal obstacles to challenging national environmental policies.<sup>289</sup> “[M]ost environmental harm is not the kind of undifferentiated interest in the vindication of the rule of law forbidden by the ‘generalized grievance’ cases. Even if environmental harm is widely shared, each individual suffers a harm concrete and particularized to herself.”<sup>290</sup>

#### E. Prudential Abstention

Finally, some commentators have suggested that a prudential doctrine of abstention might be a viable means of addressing the concerns motivating the standing and generalized grievance inquiries.<sup>291</sup> Under this approach, courts would not focus on whether a plaintiff has alleged a concrete injury or whether an injury is widely shared. Rather, courts might

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<sup>287</sup> In a dissenting opinion, Justice Scalia once argued that the generalized grievance doctrine should bar consideration of injuries that are “undifferentiated and common to all members of the public.” *Fed. Election Comm’n v. Akins*, 524 U.S. 11, 35 (1998) (Scalia, J., dissenting) (quoting *United States v. Richardson*, 418 U.S. 166, 177 (1974)) (reasoning that, compared to particularized injuries, undifferentiated injuries are more likely to be addressed by the political process). Such a rule might bar consideration of some national environmental policy disputes. In many instances, however, a state would still be able to identify impacts unique to it. For example, coastal states challenging federal deregulation of GHG emissions might allege that they would be disproportionately harmed by a rise in sea level due to climate change. *See Nash, supra* note 208, at 246 (suggesting that the greater burden that border states may bear in providing support for illegal immigrants as a result of underenforcement of federal immigration laws could serve as a basis for challenging such underenforcement). Indeed, the harms from climate change illustrate the indeterminate nature of the generalized grievance concept; climate change involves both generalized harm for the global population as well as particularized harms—rising sea levels, drought, or crop failure—for different people. *See Richard Murphy, Abandoning Standing: Trading a Rule of Access for a Rule of Deference*, 60 ADMIN. L. REV. 943, 975 (2008); *see also Massachusetts v. EPA*, 549 U.S. at 541 (Roberts, C.J., dissenting) (“The very concept of global warming seems inconsistent with this particularization requirement . . . and the redress petitioners seek is focused no more on them than on the public generally—it is literally to change the atmosphere around the world.”).

<sup>288</sup> *Akins*, 524 U.S. at 24.

<sup>289</sup> *See supra* text accompanying notes 264–275.

<sup>290</sup> Heather Elliott, *The Functions of Standing*, 61 STAN. L. REV. 459, 485 (2008).

<sup>291</sup> *See, e.g., id.* at 510–14.

assess whether a dispute features a “concrete, factual context[] in which to apply the law, and . . . [an] adversarial presentation of argument.”<sup>292</sup> Courts also might ask whether a matter is better left to the political branches, how likely a political response may be, and whether other parties more directly affected by the challenged conduct are likely to sue.<sup>293</sup> Such factors, these commentators suggest, would better ensure that federal courts adjudicate “cases” and “controversies,” as prescribed by the Constitution.<sup>294</sup>

Still, this approach may do little to limit state-versus-federal litigation. Suits to invalidate an EPA rule or decision often involve concrete, factual contexts. As suits brought in recent years demonstrate, states frequently pursue the relevant issues in vigorous and adversarial ways.<sup>295</sup>

Moreover, states often turn to the courts because they were unable to secure satisfying responses from the political branches. Short of significant changes to existing doctrines, standing, generalized grievance, and abstention are all unlikely to serve as significant restraints on state lawsuits against the federal government.

#### IV. THE DESIRABILITY OF STATE LAWSUITS CHALLENGING FEDERAL POLICY

A number of scholars have criticized current standing doctrine as overly generous to states. Ann Woolhandler and Michael Collins have declared, “The problem is not that states lack real injuries,” but rather “that states can easily satisfy the current standing tests” by pointing to their sovereign, quasi-sovereign, or proprietary interests.<sup>296</sup> Tara Leigh Grove has contended that “[s]tates have special standing to protect their interest in state law but lack any special role in overseeing the federal administrative state.”<sup>297</sup> And Stephen Vladeck has worried that “[a]llowing states to sue in virtually any instance of conflict with federal law would . . . short-circuit

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<sup>292</sup> *Id.* at 510; *see also* Jonathan R. Siegel, *A Theory of Justiciability*, 86 TEX. L. REV. 73, 134 (2007) (generally attacking justiciability requirements while also contending that “[t]he basic requirement of adversity should be retained”).

<sup>293</sup> *See* Elliott, *supra* note 290, at 512; Mark V. Tushnet, *The New Law of Standing: A Plea for Abandonment*, 62 CORNELL L. REV. 663, 700 (1977). *But cf.* Siegel, *supra* note 292, at 136 (suggesting that “any appropriate plaintiff” that can “vigorously litigate the issue presented” should be able to sue).

<sup>294</sup> *See, e.g.*, Elliot, *supra* note 290, at 490–92, 514; Tushnet, *supra* note 293, at 700.

<sup>295</sup> *See, e.g.*, Crocker, *supra* note 200, at 2054.

<sup>296</sup> Woolhandler & Collins, *supra* note 204, at 2024; *see also* Roesler, *supra* note 194, at 700–01 (contending that “[t]here would be no meaningful limit” to state standing if a state only needs to show that it must incur costs or change its laws as a result of federal policy).

<sup>297</sup> Grove, *supra* note 127, at 895.

the principal means through which majorities have traditionally exercised control over the scope of federal power—at the ballot box.”<sup>298</sup> The result, he opined, would be “at the indirect but potentially unavoidable expense of those constituencies who historically have been left to the courts to vindicate their rights.”<sup>299</sup> This Part considers these arguments as part of a broader normative discussion on state public-law litigation. Such litigation expands on states’ traditional roles within the nation’s federal system; other plaintiffs, though, might bring similar suits even if states did not. In the end, state suits against the federal government may serve as important mechanisms for articulating states’ concerns, promoting accountability, and maintaining checks and balances against excessive federal power.

A. *The Case Against State Lawsuits Challenging National Policy*

The fundamental criticisms of state lawsuits challenging federal policies are as follows: first, such lawsuits invite courts to engage in policymaking, which violates the separation of powers; second, such suits contribute to policy gridlock and overburden the courts; and third, such suits overstep the boundaries of our federal system, both by policing the federal executive and by promoting partisan or parochial interests over national interests.

There is general agreement that democratically accountable legislatures or expert agencies should make policy, not courts.<sup>300</sup> The separation of powers critique asserts that state public-law litigation can “dilute claims of individual rights” and circumvent democratic lawmaking processes.<sup>301</sup> Under this view, the federal courts should, consistent with common law practice, focus on deciding disputes over private rights and their modern analogues.<sup>302</sup> Courts’ adjudication of public-law cases can raise concerns regarding adequate participation and representation because the resulting remedies often affect those outside the courtroom.<sup>303</sup>

Worries about an overly expansive judicial role seem particularly apt when courts decide matters with policy implications in the absence of statute or regulation. For example, state-driven litigation against tobacco

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<sup>298</sup> Vladeck, *supra* note 216, at 874.

<sup>299</sup> *Id.*

<sup>300</sup> Cf. Lemos & Young, *supra* note 56, at 105.

<sup>301</sup> Woolhandler & Collins, *supra* note 203, at 482–83; *see also* Lemos & Young, *supra* note 56, at 105–06; Vladeck, *supra* note 216, at 874.

<sup>302</sup> *See* Woolhandler & Collins, *supra* note 204, at 2028–29; Woolhandler & Collins, *supra* note 203, at 439–42.

<sup>303</sup> *See* Lemos & Young, *supra* note 56, at 107.



companies in the 1990s relied heavily on common law claims.<sup>304</sup> The settlement of these cases effectively “established nationwide rules . . . that bound basically the entire industry” without the typical process of lawmaking through the political branches.<sup>305</sup> In contrast, concerns of democratic legitimacy are muted—though not eliminated—when courts interpret legislative enactments or review agencies’ regulatory actions.<sup>306</sup> Statutes often leave wide discretion for judicial interpretation, which may constitute a form of policymaking.<sup>307</sup> Even judicial review of agency rules may come across as a form of policymaking when entire regulatory regimes—such as the Clean Power Plan—turn on a court’s order.<sup>308</sup>

In terms of practical effects, state-versus-federal lawsuits can render federal policymaking “inefficient, complex, costly, punitive, and unpredictable.”<sup>309</sup> In the past, resource and political constraints may have limited the frequency with which states challenged national policies.<sup>310</sup> The proliferation of these challenges in recent years suggests a loosening of these constraints and, at the same time, poses greater obstacles to federal policymaking.<sup>311</sup> Lawsuits—or even their mere possibility—can foster uncertainty among regulated parties, contribute to policy gridlock, and undermine federal authority.<sup>312</sup> These effects can be troubling, regardless of one’s political affiliation. Under deregulatory federal administrations, liberal states sue to compel federal action; under more activist federal administrations, conservative states sue to block federal action.<sup>313</sup> The legal wrangling over the federal government’s response to climate change nicely illustrates this dynamic. After nearly two decades of state-driven litigation,

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<sup>304</sup> See DONALD G. GIFFORD, *SUING THE TOBACCO AND LEAD PIGMENT INDUSTRIES: GOVERNMENT LITIGATION AS PUBLIC HEALTH PRESCRIPTION* 128–31 (2010).

<sup>305</sup> Lemos & Young, *supra* note 56, at 106.

<sup>306</sup> See Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1314 (1976).

<sup>307</sup> See *id.*

<sup>308</sup> The Supreme Court’s issuance of a stay of the rule while litigation over the rule was pending before the D.C. Circuit—and the outcry that followed—suggests the outsized role of courts in determining federal climate policy. See Emily Holden & Rod Kuckro, *What Does Supreme Court Stay Mean for Climate Rule?*, E&E NEWS (Feb. 10, 2016), [https://www.eenews.net/interactive/clean\\_power\\_plan/column\\_posts/1060032172](https://www.eenews.net/interactive/clean_power_plan/column_posts/1060032172).

<sup>309</sup> Lemos & Young, *supra* note 56, at 107 (quoting ROBERT A. KAGAN, *ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW* 4 (2001)).

<sup>310</sup> See Massey, *supra* note 207, at 274 (“State attorneys general have limited resources and are politically constrained”).

<sup>311</sup> See Lemos & Young, *supra* note 56, at 107–08.

<sup>312</sup> See NOLETTE, *supra* note 64, at 166–67, 202–03.

<sup>313</sup> See *id.* at 202–03.

first to compel regulation and then to invalidate it, federal policy has lurched back and forth with no resolution in sight.<sup>314</sup>

Whereas the preceding concerns apply to public-law litigation generally, there are additional criticisms that specifically target public-law litigation initiated by states. From an institutional perspective, state attorneys general (“AGs”) are “well-suited to represent state interests, including the interest in protecting state law against federal interference.”<sup>315</sup> While state AGs are, for the most part, democratically elected,<sup>316</sup> they are accountable only to the citizens of their respective states.<sup>317</sup> “States do *not* have a special interest in the manner in which the federal executive enforces *federal* law,” and state AGs have no obligation—and little incentive—to represent national interests when they sue the federal government.<sup>318</sup> In fact, states may promote their parochial interests at the expense of the federal executive.<sup>319</sup>

State-federal litigation indeed reflects an expanded role for state AGs beyond their traditional functions in representing the states.<sup>320</sup> Rather than protecting state sovereignty or otherwise “vindicat[ing] the long-term, institutional interests of states *qua* states,” a decision to litigate may be based on partisan opposition or an attorney general’s personal aspirations.<sup>321</sup> State suits are sometimes coordinated with—and, on occasion, instigated by—industry groups or nongovernmental organizations.<sup>322</sup> And as state AGs have challenged more national policies, state AG races have attracted more out-of-state funding, attention, and

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<sup>314</sup> See *supra* Part II.

<sup>315</sup> Grove, *supra* note 127, at 856.

<sup>316</sup> William P. Marshall, *Break Up the Presidency? Governors, State Attorneys General, and Lessons from the Divided Executive*, 115 YALE L.J. 2446, 2448 n.3 (2006) (noting that state AGs are chosen by popular vote in 43 states).

<sup>317</sup> NOLETTE, *supra* note 64, at 211–12.

<sup>318</sup> Grove, *supra* note 127, at 855, 896–97.

<sup>319</sup> See NOLETTE, *supra* note 64, at 2; cf. Woolhandler & Collins, *supra* note 204, at 2026.

<sup>320</sup> See NOLETTE, *supra* note 64, at 200–01.

<sup>321</sup> Lemos & Young, *supra* note 56, at 48; see also Bulman-Pozen, *supra* note 187, at 1097–100; Grove, *supra* note 127, at 896–97; Metzger, *supra* note 261, at 71–72.

<sup>322</sup> See NOLETTE, *supra* note 64, at 170, 182–83, 192–93; see also Huq, *supra* note 201, at 2151–52 (expressing skepticism as to whether state AGs better represent their respective states’ interests than private attorneys).

partisan involvement.<sup>323</sup> Ultimately, critics fear, partisan state litigation could undermine the credibility of state AGs and aggravate partisan divides.<sup>324</sup>

*B. The Case in Favor of State Lawsuits Challenging National Policy*

Admittedly, policymaking through litigation is less than ideal. Federal judges are unelected, and litigation contributes to policy gridlock, piecemeal results, and uncertainty. State-versus-federal suits, however, can advance federalism interests and promote the separation of powers. Moreover, defenders of state public-law litigation contend that these suits should be considered not in isolation, but in comparison to alternative, and perhaps more problematic, lawsuits that private plaintiffs would otherwise bring.

Consistent with the notion of uncooperative federalism, litigation against the federal government asserts state autonomy while potentially advancing federalism values of divided authority, accountability, and local control.<sup>325</sup> This is most obvious when states defend their policymaking authority under cooperative federalism schemes or in the face of federal preemption.<sup>326</sup> Yet many disputes that are primarily over national policy have a federalism component as well. For example, in *Hodel v. Indiana*, the state, in challenging federal restrictions of surface coal mining on prime farmland, contested both the overall national policy and the policy's impact on states' traditional authority over local land use.<sup>327</sup>

Successful state lawsuits can check abuses of power by the federal government and serve as deliberately chosen mechanisms for making policy.<sup>328</sup> Even if state challenges to federal policy ultimately fail, the

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<sup>323</sup> See Lemos & Young, *supra* note 56, at 86–95; Bulman-Pozen, *supra* note 187, at 1135–36 (discussing growing political involvement in out-of-state elections as an example of partisan federalism); *cf.* Huq, *supra* note 201, at 2151–52.

<sup>324</sup> See Lemos & Young, *supra* note 56, at 86, 105 (noting danger that state lawsuits might “exacerbate the ill effects of polarization[] by bringing explicitly partisan warfare to the courts”).

<sup>325</sup> See generally RYAN, *supra* note 151, at 38–67 (discussing values promoted by federalism).

<sup>326</sup> See Lemos & Young, *supra* note 56, at 95–98 (discussing vertical conflicts between the federal government and states).

<sup>327</sup> *Hodel v. Indiana*, 452 U.S. 314, 330 (1981); see *supra* text accompanying notes 195–198.

<sup>328</sup> See RYAN, *supra* note 151, at 39–44 (explaining dual federalism's function in limiting unchecked discretionary action by the federal government); David Landau et al., *Federalism for the Worst Case*, 105 IOWA L. REV. 1187, 1204–25 (2020) (contending that federalism can protect against authoritarianism because it disperses power across a large

litigation process itself can still promote deliberation and democratic values. State public-law litigation can provide a forum for direct public opposition between states and the federal government, offer a channel for states to express independent views, and force states and the federal government to provide a public accounting of their policies and underlying policy justifications.<sup>329</sup> Consistent with dynamic federalism's appreciation of the virtues of interactive state and federal involvement, state lawsuits against the federal government can enrich the dialogue on national policy.

State public-law litigation on environmental matters often involves challenges to agency actions rather than federal statutes. For this important category of challenges, a separation of powers rationale further supports state suits. In theory, policymaking through federal agencies is less likely to be responsive to state concerns than policymaking in Congress, where states exercise influence through their elected representatives.<sup>330</sup> To be sure, states can, and often do, participate in federal rulemaking,<sup>331</sup> and federal legislators may look beyond concerns of the state or district they represent. The lack of direct voting power in administrative processes, however, arguably restricts states' influence. State-driven challenges to agency policymaking can promote greater consideration of state interests and serve as checks on a federal executive branch that has become increasingly reliant on unilateral action to overcome congressional gridlock.<sup>332</sup> These suits can also force the federal government to bargain with the states and can moderate the effects of polarization.<sup>333</sup>

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number of states with varying interests); Sarah L. Swan, *Plaintiff Cities*, 71 VAND. L. REV. 1227, 1270 (2018) (noting that legislators sometimes choose litigation as a means of establishing policy).

<sup>329</sup> See Bulman-Pozen, *supra* note 187, at 1090 (noting that in a political system where partisan control at the national level does not translate into equivalent control of the governments of all fifty states, "federalism furnishes a consistent forum for party conflict"); Daniel Francis, *Litigation as a Political Safeguard of Federalism*, 49 ARIZ. ST. L.J. 1023, 1041 (2017).

<sup>330</sup> See Massey, *supra* note 207, at 267 ("Agencies operate under broad delegations of authority, and are never directly answerable to state politics."); Nina A. Mendelson, *Chevron and Preemption*, 102 MICH. L. REV. 737, 760–63 (2004).

<sup>331</sup> For example, EPA engaged in extensive consultation with state governors, legislators, and environmental officials in the course of developing the Clean Power Plan, which was created to regulate GHG emissions from existing fossil fuel-fired power plants. See Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,662, 64,704–05 (Oct. 23, 2015) (to be codified at 40 C.F.R. pt. 60).

<sup>332</sup> See Lemos & Young, *supra* note 56, at 63–64; Metzger, *supra* note 261, at 73. With respect to climate change, congressional deadlock has led the federal government to turn to

Perhaps most importantly, the desirability of state public-law litigation should not be considered in a vacuum.<sup>334</sup> Lemos and Young have pointed out that industry, nongovernmental organizations, and other private actors often will sue to challenge a federal action, regardless of whether states sue.<sup>335</sup> Litigation is almost inevitable for environmental policy initiatives. A 2016 Congressional Research Service report observed that “[v]irtually all major EPA regulatory actions are subjected to court challenge.”<sup>336</sup> Even during the 1980s, when state suits challenging national policies were rare, former EPA Administrator William Ruckelshaus estimated that eighty percent of the EPA’s rules resulted in litigation.<sup>337</sup> It thus seems unlikely that eliminating state-filed lawsuits would significantly impact the volume of environmental suits against the federal government.<sup>338</sup> Often, states are simply adding their voices to an already crowded courtroom. In contrast to industry or other nongovernmental plaintiffs, though, a state-plaintiff represents the public interest, albeit a state-centered notion of the public interest.<sup>339</sup> Compared to private mechanisms for aggregating diffuse interests, state governments may be preferable plaintiffs because of their greater “democratic accountability” and “unique institutional perspectives.”<sup>340</sup>

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EPA, whose actions (and inaction) have been challenged in the courts. *See Metzger, supra* note 261, at 40.

<sup>333</sup> *See* Bulman-Pozen, *supra* note 256, at 1749; Hessick, *supra* note 200, at 1938.

<sup>334</sup> *See* Lemos & Young, *supra* note 56, at 105 (“Any normative assessment of state public-law litigation must contend with a comparative question: state litigation *as compared to what?*”).

<sup>335</sup> *Id.* at 49 (contending that “private analogs [of state AGs] would remain” even if courts curbed state suits); *see* Huq, *supra* note 201, at 2149 (“[T]he sheer range of procedural pathways to challenge the policies of either the federal government or a coordinate state implies that the elimination of state standing would not materially alter the domain of legal questions cognizable in federal court for the simple reason that few legal questions fall outside those alternative pathways.”).

<sup>336</sup> JAMES E. MCCARTHY & CLAUDIA COPELAND, CONG. RESEARCH SERV., R41561, EPA REGULATIONS: TOO MUCH, TOO LITTLE, OR ON TRACK? 4 (2016).

<sup>337</sup> William D. Ruckelshaus, *Environmental Protection: A Brief History of the Environmental Movement in America and the Implications Abroad*, 15 ENVTL. L. 455, 463 (1985).

<sup>338</sup> *See* MCCARTHY & COPELAND, *supra* note 336, at 7 (noting many rules promulgated by EPA under the Obama Administration were “challenged in court by a variety of groups—some seeking more stringent rules, others less stringent”).

<sup>339</sup> *See* Davis, *supra* note 263, at 1289 (explaining that inter-branch political processes, internal administrative processes, and accountability to voters may lead states, rather than private organizations, to better represent the public interest).

<sup>340</sup> Lemos & Young, *supra* note 56, at 49; *see also id.* at 113–19.

Finally, many state challenges to national environmental policies—including various lawsuits surrounding federal climate policy—assert APA and similar statutory claims that a federal agency has acted arbitrarily, ignored procedural requirements, or failed to perform nondiscretionary duties.<sup>341</sup> A reasonable argument can be made that APA claims—as well as most claims invoking other statutory or regulatory standards—require little policymaking by the courts. In most instances, courts simply enforce the law or ensure that an agency is acting within the discretion granted to it by Congress. Requiring an agency to adhere to legal constraints is not the same as engaging in policymaking. Thus, when the Supreme Court “h[eld] the EPA to standards of public rationality and evidence-based argument” in *Massachusetts v. EPA*, it determined that the EPA could not evade the problem of climate change by claiming a lack of statutory authority, and thereby left the policymaking to the EPA.<sup>342</sup>

### C. *Social and Political Context of Federal-State Litigation*

Ultimately, a normative assessment of state-versus-federal environmental litigation should account for the social and political context in which such litigation is occurring. Political polarization has reached new heights, and congressional gridlock has prompted heavy reliance on executive branch policymaking.<sup>343</sup> At the same time, state authority has become closely intertwined with federal authority, creating greater overlap between disputes over national environmental policy and disputes over state and federal governments’ respective roles in the making and implementation of environmental policy. In today’s politically polarized environment, federalism has become “a consistent forum for party conflict.”<sup>344</sup>

Growing political polarization is a widely recognized and important phenomenon. Both across American society and within its institutions, political scientists continue to report heightened polarization, whether measured in terms of issue differences or partisan animosity.<sup>345</sup> Within the

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<sup>341</sup> See Lemos & Young, *supra* note 56, at 79–80; Hannah J. Wiseman, *Dysfunctional Delegation*, 35 YALE J. REG. 233, 249–50 (2018); *supra* Section II.C.1.

<sup>342</sup> Francis, *supra* note 329, at 1047.

<sup>343</sup> See Lemos & Young, *supra* note 56, at 46, 53.

<sup>344</sup> Bulman-Pozen, *supra* note 187, at 1090; see also Davis, *supra* note 263, at 1252 (discussing state standing as “an important vehicle” for “bring[ing] partisan battles over the national public interest”).

<sup>345</sup> See Nolette, *supra* note 56, at 464–66; James A. Thurber & Antoine Yoshinaka, *Introduction*, in AMERICAN GRIDLOCK: THE SOURCES, CHARACTER, AND IMPACT OF POLITICAL POLARIZATION 1, 1 (James A. Thurber & Antoine Yoshinaka eds. 2015); see

general public, Republicans and Democrats have become more ideologically divided.<sup>346</sup> Within the Supreme Court, the ideological center has shrunk as Republican- and Democrat-nominated justices increasingly vote in politically predictable patterns.<sup>347</sup> In Congress, members tend to vote along party lines rather than in bipartisan coalitions.<sup>348</sup> This polarization in Congress, in turn, contributes to legislative gridlock. The poor prospects for bipartisan support complicate the already arduous task of legislating in the face of divided government and supermajority requirements.<sup>349</sup>

Legislative gridlock has contributed to another trend important to state public law litigation: unilateral policymaking by the executive branch.<sup>350</sup> Although neither was the first to do so, both President Obama and President Trump have relied heavily on preexisting statutory grants of authority, rather than on new legislation, to make policy.<sup>351</sup> Congressional gridlock not only creates an incentive for unilateral executive action, but also makes legislated restraints on such action less likely.<sup>352</sup> Thus, although one might expect polarization in the federal government to shift power to the states, its main effect has actually been the empowerment of the federal executive.<sup>353</sup>

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generally PEW RESEARCH CTR., POLITICAL POLARIZATION IN THE AMERICAN PUBLIC (2014). Political scientists generally define polarization in terms of “political parties becoming coherent ideologically.” Ernest A. Young, *Federalism as a Check on Executive Authority: State Public Litigation, Executive Authority, and Political Polarization*, 22 TEX. REV. L. & POL. 305, 308 (2017–2018).

<sup>346</sup> PEW RESEARCH CENTER, *supra* note 345, at 6.

<sup>347</sup> See Brandon L. Bartels, *The Sources and Consequences of Polarization in the U.S. Supreme Court*, in AMERICAN GRIDLOCK, *supra* note 345, at 171, 171–72.

<sup>348</sup> See Michael Barber & Nolan McCarty, *Causes and Consequences of Polarization*, in NEGOTIATING AGREEMENT IN POLITICS 19, 19 (Jane Mansbridge & Cathie Jo Martin eds. 2013); Cynthia R. Farina, *Congressional Polarization: Terminal Constitutional Dysfunction?*, 115 COLUM. L. REV. 1689, 1701 (2015).

<sup>349</sup> See Gillian E. Metzger, *Agencies, Polarization and the States*, 115 COLUM. L. REV. 1739, 1748, 1752–53 (2015); Young, *supra* note 345, at 310.

<sup>350</sup> See Metzger, *supra* note 349, at 1748, 1752–53.

<sup>351</sup> See Edward G. Carmines & Matthew Fowler, *The Temptation of Executive Authority: How Increased Polarization and the Decline in Legislative Capacity Have Contributed to the Expansion of Presidential Power*, 24 IND. J. GLOBAL LEGAL STUD. 369, 369–76 (2017); Jerry L. Mashaw & David Berke, *Presidential Administration in a Regime of Separated Powers: An Analysis of Recent American Experience*, 35 YALE J. REG. 549, 550–51 (2018); Metzger, *supra* note 349, at 1752–57.

<sup>352</sup> See Metzger, *supra* note 349, at 1753.

<sup>353</sup> Young, *supra* note 345, at 310. Polarization has also empowered the judiciary in that courts perceive a greater need to check the executive branch and a diminished risk that

State governments have not escaped the trend toward greater polarization.<sup>354</sup> Many state legislatures have become as polarized as Congress,<sup>355</sup> and lawsuits filed by state AGs increasingly reflect partisan patterns.<sup>356</sup> Often acting in concert with political advocacy groups, state AGs have been able to tap into outside resources by offering publicity and legitimacy to litigation filed in coordination with such groups.<sup>357</sup> States' environmental suits against the federal government exemplify the growing partisan divide. The Northeastern states' suits to compel federal action on acid rain in the 1980s were bipartisan efforts driven by regional interests; in contrast, recent state litigation to spur—or block—federal action on climate change and other air pollution issues has been an almost exclusively partisan affair.<sup>358</sup>

This partisan trend mirrors the establishment of partisan AG associations. The National Association of Attorneys General (“NAAG”), founded in 1907, long served as a collaborative forum for state AGs, regardless of their political affiliations.<sup>359</sup> In response to the NAAG's involvement in coordinating investigations and litigation against tobacco companies and other industries in the 1990s, however, disenchanted Republican AGs formed the Republican Attorneys General Association, and Democratic AGs soon established their own counterpart organization.<sup>360</sup> Both organizations seek to elect members of their respective parties into state AG positions, but a significant part of their work also involves coordinating and supporting litigation against—or in favor of—the federal government.<sup>361</sup>

At the same time that the federal and state governments have witnessed increased polarization, state and federal actors have become more closely integrated in the modern administrative state.<sup>362</sup> The term

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Congress will override their decisions to do so. *See* Barber & McCarty, *supra* note 348, at 44; Metzger, *supra* note 349, at 1759.

<sup>354</sup> *See* Bulman-Pozen, *supra* note 187, at 1117; Metzger, *supra* note 349, at 1768–69; Nolette, *supra* note 56, at 463–64.

<sup>355</sup> *See* Boris Shor, *Polarization in American State Legislatures*, in *AMERICAN GRIDLOCK*, *supra* note 345, at 203, 204.

<sup>356</sup> *See* Lemos & Young, *supra* note 56, at 91–95.

<sup>357</sup> Nolette, *supra* note 56, at 465–66.

<sup>358</sup> *See* NOLETTE, *supra* note 64, at 160–61, 184 tbl. 9.1.

<sup>359</sup> *Id.* at 33–34.

<sup>360</sup> *Id.* at 34, 191–92.

<sup>361</sup> *See id.* at 34.

<sup>362</sup> *See* Bulman-Pozen, *supra* note 256, at 1744; Garrick B. Pursley, *Federalism Compatibilists*, 89 TEX. L. REV. 1365, 1371 (reviewing ROBERT A. SCHAPIRO, *POLYPHONIC*



cooperative federalism may be misleading, but it nicely captures the “deeply integrated, highly interactive relationship” between states and the federal government in making and implementing environmental law.<sup>363</sup> While the cooperative federalism statutes of environmental law were enacted decades ago, the federal government—increasingly, the federal executive—more than ever relies on the states to carry out federal environmental policies while also constraining state policies.

The EPA’s efforts to address climate change and interstate pollution through state-adopted measures exemplify the extreme federal-state interdependence. Within this dynamic, it is unsurprising for heightened polarization to be manifested in litigation between federal agencies and the states that disagree with a chosen federal approach. As Bulman-Pozen asserts, “contests about the federal separation of powers are at the same time cases about state power” because “administrative and partisan integration has largely undermined the distinctive authorities and interests of state and federal governments.”<sup>364</sup> In other words, state public-law litigation is not just about protecting state authority from federal encroachment; frequently, it also contests national policy itself as well as the making of that policy by the federal executive.<sup>365</sup>

Many of today’s most prominent state-federal environmental disputes reflect the overlap between partisan disagreements over national policy and federalism-based disagreements over states’ roles. Climate change litigation is the most obvious example. Established under a Democratic president, the Clean Power Plan contemplated that states would meet state-specific carbon intensity goals by regulating power plant emissions, encouraging the substitution of natural gas-fired plants for coal-fired plants, increasing renewable energy production, or adopting a combination of these approaches.<sup>366</sup> State lawsuits—brought by Republican AGs—contested the national policy of reducing GHG emissions from coal-fired plants as well as the EPA’s parameters governing how states might implement that policy. In doing so, these states set forth both a separation

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FEDERALISM (2009)) (explaining that, in practice, modern federalism involves overlapping authority and constant interaction between federal and state governments).

<sup>363</sup> Gerken, *supra* note 126, at 1706.

<sup>364</sup> Bulman-Pozen, *supra* note 256, at 1744.

<sup>365</sup> Gerken, *supra* note 126, at 1721 (“The fact that states are embedded in a federal regime . . . allows them to play a crucial role in defending congressional prerogatives, checking executive overreach, and safeguarding the separation of powers.”).

<sup>366</sup> See Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,662, 64,667 (Oct. 23, 2015) (to be codified at 40 C.F.R. pt. 60).

of powers argument that the plan exceeded the EPA's statutory authority and a federalism argument that the parameters infringed on states' authority to regulate electricity generation.<sup>367</sup> Today, California's challenge to the Trump Administration's freeze on vehicle fuel-economy standards likewise reflects a partisan disagreement with national policy, a separation of powers argument regarding lack of statutory authority, and a federalism-based assertion of the state's autonomy to set its own standards.<sup>368</sup>

Other state-versus-federal environmental suits similarly involve partisan conflicts over both national policy and state prerogatives. Aimed at persistent transboundary air pollution, the EPA's Cross-State Air Pollution Rule established an emissions budget for upwind states and allocated each state's budget to individual facilities.<sup>369</sup> Republican AGs challenged the rule, and Democratic AGs defended it.<sup>370</sup> States' arguments against the rule included both a separation of powers argument that the EPA's methodology for allocating emission reductions lay beyond its statutory authority,<sup>371</sup> and a federalism argument that the EPA had infringed on states' prerogatives by allocating the reductions without first allowing states the opportunity to do so.<sup>372</sup>

Litigation over the geographic scope of the CWA has also raised separation of powers and federalism issues. The state-plaintiffs—predominantly Republican-controlled states—challenging the Obama EPA's definition of “Waters of the United States” have argued both that the rule exceeds the agency's statutory authority and that it violates the Tenth Amendment's reservation of state sovereignty over intrastate land use and water resources.<sup>373</sup> As these cases illustrate, partisan disagreements over national policy and federalism disagreements over states' roles are often inseparable.

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<sup>367</sup> See, e.g., Petitioners' Nonbinding Statement of the Issues To Be Raised, *West Virginia v. EPA*, No. 15-1363 (D.C. Cir. Dec. 18, 2015).

<sup>368</sup> See Xavier Becerra et al., Comment Letter on the Proposed Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule for Model Years 2021–2026 Passenger Cars and Light Trucks, (Oct. 26, 2018), <https://www.regulations.gov/document?D=EPA-HQ-OAR-2018-0283-5481>.

<sup>369</sup> See *EPA v. EME Homer City Generation, L.P.*, 572 U.S. 489, 500–03 (2014).

<sup>370</sup> See *id.* at 493–94 (listing Texas, Alabama, and Indiana among states challenging the rule, and New York, Illinois, and Massachusetts among states supporting it).

<sup>371</sup> *Id.* at 504–05.

<sup>372</sup> *Id.*

<sup>373</sup> First Amended Complaint at 10–13, *North Dakota v. EPA*, No. 3:15-cv-00059-RRE-ARS (D.N.D. Aug. 7, 2015).

#### D. *Synthesis*

Pure federalism disputes—i.e., lawsuits “in which states present a united front in opposition to the federal government” regardless of party affiliation—“constitute a small and shrinking percentage of [state-federal] conflict[s].”<sup>374</sup> More commonly, state AGs from one party challenge a national policy issued under a President from the opposing party, with state AGs from the same party as the President intervening in the federal government’s defense.<sup>375</sup> Political polarization, congressional gridlock, invigorated executive policymaking, and intertwined state and federal authority collectively explain the increase in state-versus-federal lawsuits over national policy.

Under an approach to standing that focuses on the archetype of common law litigation, states would be able to pursue only those claims that are analogous to proprietary claims brought by private litigants. Other disputes, meanwhile, would be resolved by the political branches.<sup>376</sup> A somewhat less restrictive approach would recognize a state’s ability to defend its sovereign prerogatives within cooperative federalism schemes or against federal preemption. Disputes over national policy would thereby remain outside the courts.<sup>377</sup> As discussed above, however, neither of these approaches is consistent with courts’ actual approach to state standing,<sup>378</sup> nor does either fully account for the context in which contemporary state-federal litigation is occurring. The ultimate question remains: Should courts—or society at large—welcome these suits?

A helpful starting point in normatively analyzing state challenges to national environmental policy is the fundamental question posed by Lemos and Young: “[C]ompared to what?”<sup>379</sup> If these cases are going to be litigated anyway—which appears true for most environmental initiatives<sup>380</sup>—several of the rationales for limiting state lawsuits become weak or simply irrelevant. The addition of state plaintiffs—or their substitution for private plaintiffs—may impose little incremental burden on the courts, aside from the need to consider additional arguments and read additional briefs. Similarly, state participation in litigation may not

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<sup>374</sup> Nolette, *supra* note 56, at 459.

<sup>375</sup> See *id.* at 461–62; Bulman-Pozen, *supra* note 187, at 1080.

<sup>376</sup> See Woolhandler & Collins, *supra* note 204, at 2015; *supra* Section III.A.

<sup>377</sup> See Grove, *supra* note 127, at 899; *supra* Section III.B.

<sup>378</sup> See *supra* Part III.

<sup>379</sup> Lemos & Young, *supra* note 56, at 49.

<sup>380</sup> See *supra* text accompanying notes 335–338.

significantly exacerbate preexisting policy gridlock or courts' involvement in policymaking.

In some circumstances, a state's participation as a plaintiff may make it more likely that courts will find standing. When industry challenges an agency action as too stringent, it typically can point to an economic injury as a basis for standing;<sup>381</sup> state participation adds little to the standing analysis. In contrast, private plaintiffs arguing that an agency is acting too leniently, or not acting at all, may face more difficulty in demonstrating concrete injury.<sup>382</sup> In these circumstances, where private plaintiffs' asserted injury is more diffuse, a state's participation as a plaintiff may strengthen the case for standing.<sup>383</sup>

State involvement also may change the tenor of lawsuits by raising their profile, bolstering their credibility, or providing a public interest rationale for suing.<sup>384</sup> These effects may be positive if state involvement improves the quality of representation, promotes adversarial argumentation, or otherwise enhances the adjudicative process. State efforts to litigate national policy also have the potential to transform states' roles within our federal system. Cooperative federalism theory describes a relationship between states and the federal government, but it largely assumes that the relationship will play out between the governments' respective political branches.<sup>385</sup> State-versus-federal suits highlight the potential roles of litigation and the courts in advancing federalism's values of accountability, plurality, and checks and balances, particularly in an era of heightened presidential power.<sup>386</sup> These suits involve not only an assertion of autonomy by states, but also a demand that the federal government be held accountable and ordered to act in accordance with public interest and the rule of law.<sup>387</sup>

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<sup>381</sup> See Daniel A. Farber, *A Place-Based Theory of Standing*, 55 UCLA L. REV. 1505, 1541–42 (2008).

<sup>382</sup> See *id.* at 1540.

<sup>383</sup> See *id.* at 1542 (suggesting that environmental groups “may not be able to recruit the appropriate plaintiff,” or that they may have greater difficulty than business groups in establishing standing); Shi-Ling Hsu, *The Identifiability Bias in Environmental Law*, 35 FLA. ST. U. L. REV. 433, 466 (2008) (noting standing doctrine systematically tends to filter out suits by environmental plaintiffs because the injuries asserted often are diffuse and have multiple causes).

<sup>384</sup> See NOLETTE, *supra* note 64, at 215–16.

<sup>385</sup> See SCHAPIRO, *supra* note 33, at 90–91.

<sup>386</sup> See Davis, *supra* note 263, at 1290–91.

<sup>387</sup> See Lemos & Young, *supra* note 56, at 101; *supra* Section IV.B.

One might also argue that state-driven national policy cases can facilitate better policymaking and political compromise. Yet when states file suits, they do not necessarily do so to promote national interests or objectively superior policies. Rather, states may sue in order to advance “one particular vision of proper regulation at the expense of the other.”<sup>388</sup> State lawsuits challenging the Clean Power Plan sought to invalidate it in its entirety, not to offer a compromise approach.<sup>389</sup> State challenges to the Plan’s successor, the Affordable Clean Energy Rule, are likewise seeking complete invalidation of the new federal action.<sup>390</sup> Engaged policy discussions and compromise solutions sometimes emerge from settlement talks. Indeed, states and the federal government negotiate policies and the allocation of authority in a wide range of contexts and forums.<sup>391</sup> Nonetheless, the substitution of legalistic processes for political processes—or the addition of legalistic processes on top of political processes—does pose the danger of undermining deliberative debate and effective problem solving.<sup>392</sup>

Increased state litigation against the federal government has sometimes been blamed on *Massachusetts v. EPA*’s discussion of “special solicitude” for states.<sup>393</sup> Although the opinion coincided with an increase in such litigation, it is hardly responsible for that increase.<sup>394</sup> *Massachusetts v. EPA* is significant to state-federal litigation less because of any refinement to standing doctrine that it made in terms of “special solicitude,” and more

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<sup>388</sup> NOLETTE, *supra* note 61, at 205. *New York v. United States*, a successful Tenth Amendment challenge to federal legislation addressing the problem of low-level radioactive waste, illustrates this danger. The legislation, based on a report submitted by the National Governors’ Association, represented a compromise reached by the states after extensive negotiations “to achieve a state-based set of remedies to the waste problem.” *New York v. United States*, 505 U.S. 144, 189–94 (White, J., concurring in part and dissenting in part).

<sup>389</sup> See Ellen M. Gilmer, *Challengers Question EPA’s Authority, Rulemaking Process in Briefs*, E&E NEWS (Feb. 22, 2016), <https://www.eenews.net/stories/1060032725>.

<sup>390</sup> See King, *supra* note 165.

<sup>391</sup> See Ryan, *supra* note 84, at 24–28.

<sup>392</sup> See NOLETTE, *supra* note 64, at 206–07.

<sup>393</sup> See, e.g., *id.* at 154 (“Federal courts have opened the door to state-driven challenges to environmental regulation, most strikingly through the development of the special solicitude standard announced in *Massachusetts v. EPA*.”); Emma Platoff, *America’s Weaponized Attorneys General*, ATLANTIC (Oct. 28, 2018), <https://www.theatlantic.com/politics/archive/2018/10/both-republicans-and-democrats-have-weaponized-their-ags/574093/>.

<sup>394</sup> Note, *supra* note 256, at 1306–08 (noting states frequently relied on *Massachusetts*’ “new rule of special solicitude,” while also further reporting that many courts “have adopted restrictive interpretations of special solicitude”).

because it reminds us of a state's fundamental obligation to represent its citizens and to protect their health and welfare.

When a state sues to challenge national policy, it is speaking up on behalf of its citizens to express a belief that the policy is contrary to its citizens' interests, the nation's interests, or governing law. Moreover, the state is not simply expressing the views of its citizens, but also is holding the federal government to basic standards of accountability and rationality.<sup>395</sup> At a time when national policies are increasingly crafted by the federal executive branch, and when the President is, with growing frequency, elected without the support of the majority of the electorate,<sup>396</sup> the ability to voice these objections and have them publicly evaluated is of growing importance.

#### CONCLUSION

State-versus-federal lawsuits can serve as important mechanisms for articulating states' respective concerns and for having those concerns subjected to "adversarial testing" in a public forum.<sup>397</sup> State litigation over national policy is consistent with a dynamic federalism model, with such litigation representing one locus—among several—where the federal and state governments interact and contest policy.<sup>398</sup> These lawsuits are best understood as a symptom of the political polarization occurring in society, rather than as a root cause of partisan divides.

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<sup>395</sup> See Francis, *supra* note 329, at 1051–52.

<sup>396</sup> See Tara Law, *These Presidents Won the Electoral College—But Not the Popular Vote*, TIME (May 15, 2019), <https://time.com/5579161/presidents-elected-electoral-college/> (noting that "[t]wo of the last three U.S. presidents"—President George W. Bush and President Donald Trump—did not win their respective popular votes); cf. Katherine Florey, *Losing Bargain: Why Winner-Take-All Vote Assignment is the Electoral College's Least Defensible Feature*, 68 CASE WESTERN RES. L. REV. 317, 322 n.22 (2017) (discussing presidential elections in which the winner of popular vote did not become president).

<sup>397</sup> Lemos & Young, *supra* note 56, at 117–19.

<sup>398</sup> See Engel, *supra* note 16, at 166; cf. Pursley, *supra* note 362, at 1371 (discussing the descriptive claim of proponents of dynamic federalism that modern federalism involves overlapping authority and constant interaction between federal and state governments).