

COOPERATIVE FEDERALISM: ITS INFLUENCE ON ENVIRONMENTAL REGULATION & POTENTIAL IMPACTS UNDER THE TRUMP ADMINISTRATION POST-PARIS CLIMATE AGREEMENT

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How is cooperative federalism changing as states act on climate change in the Trump-era and post-Paris Climate Agreement? This paper explains how cooperative federalism has influenced environmental regulation and assesses recent potential changes to the model under the Trump Administration. First, this paper will introduce the traditional concept of cooperative federalism and its roots in the Clean Water Act. Second, it will give two examples of successful traditional cooperative federalism schemes in environmental law. Third, this paper will suggest that there is a shift in the cooperative federalism paradigm under the Trump Administration. Finally, the paper will discuss how states are maintaining the traditional cooperative federalism scheme in their reaction to President Trump's decision to withdraw from the Paris Climate Agreement. Ultimately, it offers an understanding of how cooperative federalism became associated with environmental regulation and how its impact continues to shape federal and state legislation.

I. INTRODUCTION TO COOPERATIVE FEDERALISM

Cooperative federalism is the working relationship between the federal government and the states in which the Federal government sets a national standard or rule, and the states have the liberty to “implement those standards within their borders.”¹ The traditional form of

¹ *Cooperative Federalism*, The Environmental Council of the States, <https://www.ecos.org/cooperative-federalism/> (last visited Jan. 7, 2019).

cooperative federalism allows the states to exceed the standards, so long as the state is following the minimum requirements established at the federal level.²

Cooperative federalism in the realm of environmental regulation was firmly introduced under the Clean Water Act of 1977 (“CWA”).³ Under the CWA, the federal standards on pollution were intended to create a regulatory base, not a limit; and states were permitted to set stricter standards for restricting pollution than the federal government or neighboring states did.⁴ The intention was to allow states “to impose higher standards on their own sources [of pollution].”⁵ As the traditional cooperative federalism model expanded to other environmental statutes, it was seen that the federal government often later adopted standards that the states have pioneered on their own.⁶ As such, traditional cooperative federalism allows states to make choices regarding environmental regulation and provides regulatory frameworks for the federal government to follow.⁷

The concept that “the ‘cooperative federalism’ structure of the Clean Water Act serve[s] as a regulatory floor, not a ceiling”⁸ provides a legal framework to assess how far the liberty of setting ‘ceiling’ actually extends to the states, or whether states have become limited by the ‘regulatory floor’.

² *See id.*

³ 33 U.S.C. § 1251.

⁴ *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 499 (1987).

⁵ *Id.*

⁶ Colin Sullivan, *Northeast ‘off to a running start’ in advance of Obama emissions plan*, E&E NEWS (June 3, 2014), <https://www.eenews.net/energywire/stories/1060000600/search?keyword=collin+sullivan>.

⁷ *See id.*

⁸ *Bell v. Cheswick Generating Station*, 734 F.3d 188, 197-98 (6th Cir. 2013).

II. HOW TRADITIONAL COOPERATIVE FEDERALISM WORKS

Two examples of how cooperative federalism was meant to work come from the Northeast. In 2005, Vermont faced a court battle to determine the efficacy of cooperative federalism and to define the scope of the role of federal and state governments in implementing regulations.⁹ Earlier that year, Vermont put forth an amendment that adopted California's most recent auto emissions standards.¹⁰ These regulations were implemented to limit greenhouse gas emissions from vehicles "as part of a comprehensive strategy to reduce GHG emissions in the state, recognizing that these emissions contribute to global warming."¹¹ Automakers who did not agree with Vermont's implementation of the policy sued, claiming that the Environmental Protection Agency ("EPA") had not yet waived federal preemption for California.¹² The United States District Court for the District of Vermont ruled in favor of Vermont because "unless [the] EPA finds that California's determination is arbitrary and capricious, the state doesn't need the standards to meet compelling and extraordinary conditions."¹³

This case is an illustration of how cooperative federalism was used to ensure states had power to enact environmental regulation. The Act specifically explains the role states and the federal government have in writing and enforcing environmental regulations:

The CWA carefully defines the role of both the source and affected States, and specifically provides for a process whereby their interests will be considered and balanced by the source State and the EPA. This delineation of authority represents Congress' considered judgment as to the best method of serving the public interest and reconciling the often competing concerns of those affected by the pollution. It would be extraordinary for Congress,

⁹ Green Mt. Chrysler Plymouth Dodge Jeep v. Crombie, 508 F. Supp. 2d 295, 338 (D. Ver. 2007).

¹⁰ *Id.* at 338.

¹¹ *Id.* at 339.

¹² *Id.* at 344.

¹³ *Id.*

after devising an elaborate permit system that sets clear standards, to tolerate common-law suits that have the potential to undermine this regulatory structure.¹⁴

The court in Vermont's case recognized the ability of automakers to develop new technologies, thereby creating more fuel-efficient cars, and acknowledged that the EPA had flexibility in determining when waivers would be granted, giving automakers time to implement new regulations.¹⁵ The court dictated that the Supreme Court's acknowledgment of climate change came with an affirmation of the EPA's role in limiting greenhouse gas emissions.¹⁶ Not only does the EPA have "the authority to monitor and regulate such emissions," it is responsible for "the public health and welfare, a responsibility it shares with each of the states."¹⁷ Vermont, through limiting greenhouse gas emissions from vehicles, acted in accordance with the Act's intentions.

Similarly, in 2013, a federal judge determined the EPA had worked carefully with the six states in the Chesapeake Bay ("Bay") watershed in the model of 'cooperative federalism' envisioned under the CWA.¹⁸ The EPA led this effort to stem pollution into the Bay, but it was directly managed by states.¹⁹ Based on the Bay's total maximum daily load ("TMDL") pollution goals were set and divided among sectors such as stormwater and agriculture.²⁰ States could determine which sectors needed to be regulated the most, thereby maintaining a balance of control with the federal government.

¹⁴ *Int'l Paper Co.*, 479 U.S. at 497.

¹⁵ *Green Mt. Chrysler Plymouth Dodge Jeep*, 508 F. Supp. 2d at 397.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ Annie Snider, *In victory for EPA, judge upholds pollution reduction plan*, E&E NEWS (September 16, 2013), <https://lawlibproxy2.unc.edu:2130/greenwire/stories/1059987304/search?keyword=cooperative+federalism>.

¹⁹ *Id.*

²⁰ *Id.*

III. A SHIFT IN THE COOPERATIVE FEDERALISM PARADIGM – COOPERATIVE FEDERALISM UNDER THE TRUMP ADMINISTRATION

The EPA’s current official stance on cooperative federalism is positive—it presents a belief in cooperation between states and the federal government to address environmental concerns.²¹ As recently as July 2018, acting EPA Administrator Andrew Wheeler maintained a belief in this premise. He “promised a federal-state partnership.”²²

However, just ten days after that announcement, Wheeler proposed to revoke California’s authority to regulate greenhouse gas emissions for vehicles.²³ During the first half of 2018, the Trump Administration sought to rework the Obama-era car emission standards.²⁴ The goal of the Obama Administration’s rules was to set the minimum efficiency requirements to 50 miles per gallon by 2025²⁵ and the Trump Administration’s preference was to keep the minimum fuel efficiency at 2020 standards through 2026.²⁶ Additionally, the Trump administration sought to rescind California’s Clean Air Act waiver which let the state set tailpipe pollution rules that were

²¹ *Cooperative Federalism at EPA*, ENVTL. PROT. AGENCY, <https://www.epa.gov/home/cooperative-federalism-epa> (stating “EPA is embracing cooperative federalism and working collaboratively with states . . . to implement laws that protect human health and the environment, rather than dictating one-size-fits-all mandates from Washington.”).

²² Maxine Joselow, *Calif. Waiver Creates ‘Cooperative Federalism’ Test for EPA*, E&E NEWS (July 24, 2018) <https://lawlibproxy2.unc.edu:2130/greenwire/stories/1060090193/search?keyword=cooperative+federalism>.

²³ *Id.*

²⁴ Maxine Joselow, *Trump’s rollback gets chilly reception in Detroit suburb*, E&E NEWS REPORTER (September 25, 2018), <https://lawlibproxy2.unc.edu:2130/greenwire/stories/1060099673/search?keyword=united+states+climate+alliance>.

²⁵ Chris Mooney, *California, 17 other states sue Trump administration to defend Obama-era climate rules for vehicles*, THE WASHINGTON POST (May 1, 2018), https://www.washingtonpost.com/news/energy-environment/wp/2018/05/01/california-17-other-states-sue-trump-administration-to-defend-obama-era-vehicle-efficiency-rules/?noredirect=on&utm_term=.63c187b58445.

²⁶ Maxine Joselow, *Agency promotes states’ rights – sometimes*, E&E NEWS (August 21, 2018), <https://lawlibproxy2.unc.edu:2130/climatewire/stories/1060094807/search?keyword=cooperative+federalism>.

stricter than the limits set by the federal government.²⁷ After it was granted to California, twelve more states and D.C. implemented the stricter standards.²⁸

Additionally, in terms of the CWA, in July 2018, Senator Barrasso introduced the “Water Quality Certification Improvement Act of 2018”²⁹ (“WQCIA”) that would effectively limit the state’s authority to set their own water quality standards and consequently limit their ability to approve permit applications.

This WQCIA would change the Federal Water Pollution Control Act’s water quality certification process.³⁰ The intention behind this amendment, as Senator Barrasso explained, was to limit the ability of states to regulate “discharges” into water sources.³¹ This means, as Senator Van Hollen pointed out, states could be prevented from “looking at things like water flow, sedimentation and turbidity, which can also impact water quality” and be *required* to grant certifications if pollution standards are met.³²

Supporters of the bill argue rejections of projects like Washington’s Millennium Bulk Terminals, a 44-million-ton coal export project, would continue under the unamended language of Section 401 of the CWA.³³ Senator Barrasso argues the proposed changes are necessary

²⁷ *Id.*

²⁸ *Id.*

²⁹ Water Quality Certification Improvement Act of 2018, S.3303, 115th Cong., 1 (2018).

³⁰ *Id.*

³¹ Nick Snow, *Democrats see changes in S.3303 as threat to cooperative federalism*, OJG (August 20, 2018), <https://www.ogj.com/articles/2018/08/democrats-see-changes-in-s-3303-as-threat-to-cooperative-federalism.html>.

³² Ariel Wittenberg, *Republicans Slam Wash., N.Y. in Fight Over Permitting*, E&E NEWS (August 17, 2018), <https://lawlibproxy2.unc.edu:2130/eedaily/stories/1060094579/search?keyword=cooperative+federalism>.

³³ *Id.* Section 401 of the Act concerns application requirements—under Section (a)(1), the Act required industry to receive a license or permit to operate within a state if the activity may “result in any discharge into navigable waters.” See *Section 404 of the Clean Water Act*, ENVTL PROT. AGENCY, <https://www.epa.gov/cwa-404/clean-water-act-section-401-certification> (last visited Jan. 7, 2019).

because states have overreached their authority (and made the permit application process political) by denying applications for interstate gas pipelines (NY) and coal exports (WA).³⁴

Based on this proposed bill and rescission of California’s Clean Air Act waiver, there is now indeed a “ceiling” in the Act—or, rather, some members of the Senate believe one should exist. This concerns Congresspeople, like Senator Gillibrand, who worries states would be unable to enforce water quality standards if the certification process was altered.³⁵ The changes put forth by WQCIA would create a “one-size-fits all” approach – an approach the EPA purports to be against³⁶ – by limiting the discharges states would be able to monitor.³⁷ Similar arguments can be made for the rescission of California’s waiver as the administration seeks a national standard without any exceptions.

These recent actions show that cooperative federalism appears to be applauded, but is only used when convenient. This is significant because changing fundamental aspects of the CWA could undermine the overall role cooperative federalism has with regard to environmental regulation.

IV. COOPERATIVE FEDERALISM AND THE TRUMP ADMINISTRATION

The EPA under the Trump Administration, and some members of Congress, see a ceiling that is necessarily attached to cooperative federalism. It appears that in their minds, it can only go so far and then must be stopped. This is most clearly seen through the withdrawal from the

³⁴ Snow, *supra* note 31.

³⁵ *Id.*

³⁶ *Cooperative Federalism at EPA*, *supra* note 21.

³⁷ Snow, *supra* note 31.

Paris Climate Agreement³⁸ which aimed to cut greenhouse gas emissions 26-28% by 2025.³⁹

Additionally, the EPA has been actively undermining any action to mitigate climate change:

On one hand, the agency is proposing to weaken federal clean car standards and pre-empt states from setting their own, tougher tailpipe pollution rules. On the other, the agency is proposing to replace President Obama's signature climate rule and let states set their own guidelines for cutting carbon emissions from power plants.⁴⁰

Essentially, the EPA is embracing Senator Barrasso's approach to cooperative federalism—marked with an asterisk meaning to be used when advantageous to industry.

As cooperative federalism is culled, the resulting consequences will not only affect states' abilities to pass environmental regulations but will also result in the US continuing to contribute to increasing CO₂ emissions. The US's CO₂ emissions in 2017 saw a slowdown in declining emissions, from an average of 1.3% between 2005 and 2016 to less than 1% in 2017.⁴¹ Most of this decline in emissions came from the power sector, “but emissions from . . . transport, buildings and industrial sectors all grew, offsetting half the decline in the power sector.”⁴² The goal of the Paris Agreement was to cut emissions by 26-28% by 2025, and if the current rate of emissions continues, the US will only reduce emissions by 17%.⁴³

The withdrawal of waivers and the rollback of regulations to address CO₂ emissions signals a weakening of the cooperative federalism model. As Bob Holycross, global director of sustainability and vehicle environmental matters for Ford Motor Co said, “[a] patchwork of

³⁸ Wittenberg, *supra* note 32.

³⁹ Benjamin Storrow, *States, Vowing to Resist Trump, Find Pitfalls on Climate*, E&E NEWS (May 29, 2018), <https://lawlibproxy2.unc.edu:2130/climatewire/stories/1060082805/search?keyword=united+states+climate+allianc>.

⁴⁰ See Joselow, *supra* note 26.

⁴¹ Trevor Houser and Peter Marsters, *Final US Emissions Numbers for 2017*, RHODIUM GROUP (March 29, 2018), <https://rhg.com/research/final-us-emissions-numbers-for-2017/>.

⁴² *Id.*

⁴³ Storrow, *supra* note 39.

regulations doesn't work, and we need regulatory certainty, not protracted litigation.”⁴⁴

Cooperative federalism was designed to balance the interests of states as individual entities and the federal government's responsibility to its citizens; without a clear regulatory framework, climate change will not be addressed with any urgency.

Though the Trump Administration withdrew from the Paris Climate Agreement and threatened to limit states' power in regulating CO₂ emissions, states such as California, Colorado, and even North Carolina have pledged to meet the standards set forth in the Paris Agreement. In addition, these states are doing so in a way that involves them in the global community. The U.S. Climate Alliance (“Alliance”) is a group of 16 states and Puerto Rico seeking to meet the United States' previous proposed greenhouse gas emissions cuts under the Paris accord.⁴⁵ According to the Alliance, its key principles are: “continuing to lead on climate change...state-level climate action [that benefits] our economies and strengthen[s] our communities[and]...showing the nation and the world that ambitious climate action is achievable.”⁴⁶ Essentially, the states who have committed to the Alliance are ensuring that cooperative federalism remains a key part of environmental regulation and that it continues to be an influence as more action is taken to address climate change.

Additionally, members of the Alliance commit to three goals: (1) to implement policies that reduce greenhouse gas emissions 26-28 percent below 2005 levels, (2) monitor progress and collaborate with the global community, and (3) propose and implement policies to combat climate change at the state and federal level.⁴⁷ These commitments will likely lead to more

⁴⁴ *Joselow*, *supra* note 24.

⁴⁵ *Storrow*, *supra* note 39.

⁴⁶ *About: Alliance Principles*, UNITED STATES CLIMATE ALLIANCE, <https://www.usclimatealliance.org/alliance-principles/> (last visited Jan. 7, 2019).

⁴⁷ *Id.*

regulatory battles with the federal government and there is likely to be an influx of litigation related to these issues as the tension between federal and state power continues to rise.

In a lawsuit brought earlier this year, eighteen “states contend that the EPA acted ‘arbitrarily and capriciously’ in changing course on the greenhouse gas regulations” after the EPA announced they would reassess auto emission rules set forth by the Obama Administration.⁴⁸ This is just one example of the types of litigation that could be brought in the next two to six years. Additionally, there might be an influx of litigation challenging a state’s ability to regulate emissions and pollutants that arises out of corporate and individual entities within the state, particularly where the support for federal environmental regulation is weaker.

The Trump Administration made a choice when it pulled out of the Paris Climate Agreement—it chose to ignore the increasing consensus that unchecked climate change will fundamentally alter this planet.⁴⁹ State leaders have also made choices, however. On October 29, 2018, Governor Roy Cooper of North Carolina signed an executive order pledging to reduce emissions 40% by 2025.⁵⁰ North Carolina has felt the effects of climate change directly,⁵¹ and hopefully its actions now will mitigate more damaging effects in the future.

⁴⁸ Chris Mooney, *California, 17 Other States Sue Trump Administration to Defend Obama-Era Climate Rules for Vehicles*, THE WASHINGTON POST (May 1, 2018), https://www.washingtonpost.com/news/energy-environment/wp/2018/05/01/california-17-other-states-sue-trump-administration-to-defend-obama-era-vehicle-efficiency-rules/?noredirect=on&utm_term=.63c187b58445.

⁴⁹ Jonathan Watts, *We have 12 years to limit climate change catastrophe, warn UN*, THE GUARDIAN (October 8, 2018), <https://www.theguardian.com/environment/2018/oct/08/global-warming-must-not-exceed-15c-warns-landmark-un-report>.

⁵⁰ Office of Governor Roy Cooper, Executive Order No. 80 North Carolina’s Commitment to Address Climate Change and Transition to a Clean Energy Economy (Oct. 29, 2018), <https://files.nc.gov/governor/documents/files/EO80%20NC%27s%20Commitment%20to%20Address%20Climate%20Change%20%26%20Transition%20to%20a%20Clean%20Energy%20Economy.pdf>

⁵¹ *Id.* at 1.