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THE NEW FRONT IN THE CLEAN AIR WARS: FOSSIL-FUEL INFLUENCE OVER STATE ATTORNEYS GENERAL—AND HOW IT MIGHT BE CHECKED

*Eli Savit**

Struggling for Air: Power Plants and the "War On Coal". By *Richard L. Revesz* and *Jack Lienke*. New York: Oxford University Press. 2016. Pp. viii, 163. $29.95.

Federalism on Trial: State Attorneys General and National Policymaking in Contemporary America. By *Paul Nolette*. Lawrence: University Press of Kansas. 2015. Pp. ix, 219. $39.95.

Introduction

Could the clean air wars, even in the era of Trump, finally be winding down? Or has the battlefield merely shifted? Two new books—Richard Revesz and Jack Lienke's *Struggling for Air: Power Plants and the "War on Coal"*,[1] and Paul Nolette's *Federalism on Trial: State Attorneys General and National Policymaking in Contemporary America*[2]—suggest different answers.

At its core, *Struggling for Air* is about a "tragic flaw" that has hampered the Clean Air Act's effectiveness (Revesz & Lienke, p. 3). It is also a story of how, for decades, the fossil-fuel industry exploited that flaw. The surprise: for all of that, *Struggling for Air* takes a relatively optimistic view of the future of environmental regulation.

First, though, the flaw in question. When the Clean Air Act was enacted, it imposed stringent air-pollution standards on new industrial facilities but largely exempted existing facilities from regulation (Revesz & Lienke, p. 3). That exemption proved environmentally catastrophic, particularly as applied to coal-fired power plants. In 1970, the year the Act was passed, coal-fired plants—probably the most significant industrial source of airborne pollution on the planet—were typically retired after about thirty years in service and replaced by newer, cleaner units. But because the Act exempted from

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1. Richard Revesz is the Director of the American Law Institute and Dean Emeritus of New York University School of Law. Jack Lienke is a Senior Attorney at the Institute for Policy Integrity.

2. Paul Nolette is an Assistant Professor of Political Science, Marquette University.

regulation any facility that existed when the law was enacted, utility companies suddenly had a strong economic incentive to keep old coal plants running for as long as possible. And so they did—keeping dirty coal plants online for decades past their planned obsolescence dates (Revesz & Lienke, pp. 29–33).

The fossil-fuel industry, Revesz and Lienke explain, worked to prevent regulators from closing this loophole, using its formidable war chest and phalanx of lobbyists to evade regulations that could have forced older coal plants to shut down.[3] Indeed, it is hard to come away from *Struggling for Air* without being struck by the fossil-fuel industry's outsized influence over its environmental regulators.

So why is *Struggling for Air* an optimistic book? As Revesz and Lienke see it, theirs is ultimately a tale of the Clean Air Act's "redemption" (Revesz & Lienke, p. 3). Today—even in the aftermath of Donald Trump's election—many of the dirty, old power plants that the Act's "tragic flaw" kept in operation finally look set to shut down (Revesz & Lienke, p. 157). And Revesz and Lienke give much of the credit to Washington regulators. In their telling, policymakers since the 1980s have recognized the "tragic flaw" in the Clean Air Act and have worked to fix it by "slow[ly]" imposing new regulations on fossil-fuel emissions, overcoming dogged industry opposition in the process (Revesz & Lienke, p. 162).

But there is another side to the story. Though Revesz and Lienke understate this point, many of the new regulations restricting coal-fired power plant emissions were imposed only after *litigation*. The Clean Air Act's "redeemers," in other words, were not just the legislators and regulators who acted in the face of industry opposition, but also the litigants who pressured—and sometimes forced—legislators and regulators to act. And those litigants, in the main, were democratically elected state attorneys general (AGs) who sued to curtail environmental harms within their states' borders (Nolette, pp. 163–67).

The growing role that state AGs play in shaping national policy is the subject of Nolette's *Federalism on Trial*. With increasing frequency, Nolette argues, state AGs are banding together with other AGs and sympathetic parties and using litigation to force (or block) federal government action (Nolette, pp. 30–37). That, Nolette contends, is why the Environmental Protection Agency (EPA) was ultimately forced to take meaningful action against coal-fired power plants (Nolette, pp. 142–44). And that is not the only example. In case after recent case, AGs have involved themselves in litigation with national consequences.

But there is a dark side to the raised profiles of state AGs. As they gain national influence, many AGs are jettisoning their duties to defend the specific interests of their state and are instead coordinating with national interest groups to press ideological litigation.[4] Unfortunately, Nolette does not

3. *See* Revesz & Lienke, pp. 74–78.

4. *See* Eric Lipton, *Energy and Regulators on One Team: Lobbyists Help Unite Attorneys General to Fight Rules*, N.Y. Times, Dec. 7, 2014, at A1.

discuss the mechanism by which interest groups gain access to the states' top lawyers. But one mechanism is predictable, and all-too-familiar: campaign contributions and expenditures.

As this Review will show, special-interest groups have, of late, become increasingly involved in AGs' electoral campaigns. In recent election cycles, record amounts of money have flowed from special-interest groups to AG races across the country.[5] The return on investment for those groups is high. Not only have interest groups gained virtually unprecedented access to AGs, they often help direct supposedly "independent" litigation activities of elected AGs—sometimes even ghostwriting legal documents for state lawyers.[6]

And the biggest special-interest player in the AG game? None other than the fossil-fuel industry. After finding itself on the losing end of AG-directed environmental litigation, the fossil-fuel industry seems determined not to let history repeat itself. In recent years, the industry has poured millions of dollars into AG races throughout the country.[7] Sympathetic AGs, in turn, have increasingly allied with fossil-fuel interests in their quest to loosen and avoid environmental regulations.[8]

The clean air wars thus appear far from over. And the new front lines are state AG campaigns across the country.

This Review has three Parts. Part I focuses on *Struggling for Air* and argues that Revesz and Lienke's story of "redemption" understates the significant role litigation played in forcing policymakers to regulate coal-fired power plants. Part II focuses on *Federalism on Trial*. That title highlights how AG-directed litigation helped drive the Clean Air Act's "redemption"—and how a new coalition of AGs is now using litigation to push back *against* regulation. Finally, Part III discusses a potential cause of those recent antiregulatory AG suits: the increased influence of special-interest groups, particularly the fossil-fuel industry, that purchase influence with AGs through campaign contributions and expenditures.

Part III also briefly posits a theory under which interest groups' undue influence over state AGs might ultimately be checked, even in the post–*Citizens United* world. Though the Supreme Court has rejected attempts to enact campaign-finance laws aimed at preventing "influence over or access to elected officials,"[9] AGs are not typical politicians. Unlike most elected officials, AGs are charged not with *creating* laws, but with neutrally enforcing them. In that sense, AGs have more in common with elected judges than with elected legislators. And the Supreme Court recently held that the First Amendment permits stricter campaign-finance restrictions in judicial elections than in elections for political office, reasoning that judges

5. *Id.*

6. *Id.*

7. *Id.*

8. *See id.*

9. Citizens United v. FEC, 558 U.S. 310, 359 (2010).

are expected to be impervious to "influence."[10] That same logic might be applied to elections for AG—allowing legislation that could check the influence of monied special interests over state AGs and, perhaps, ultimately further the "redemption" of the Clean Air Act.

I. Struggling for Air

A. *The Clean Air Act's "Tragic Flaw"*

On December 31, 1970, President Richard Nixon signed into law the Clean Air Act—an ambitious, far-reaching suite of environmental regulations. During his signing remarks, President Nixon expressed hope that the law would be remembered as a "historic piece of legislation that put us far down the road toward . . . a goal of clean air, clean water, and open spaces for the future generations of America."[11]

And so it has. But as Revesz and Lienke explain in *Struggling for Air*, the Act also contained a "tragic flaw" that would "severely . . . undermine the goals of [the] groundbreaking law" (Revesz & Lienke, p. 54). Though the Act required EPA to set stringent emissions standards for six dangerous pollutants, including "sulfur dioxide, nitrogen oxides, and particulate matter" (Revesz & Lienke, pp. 29–30), it empowered EPA to set those standards only for "new" stationary sources of pollution.[12] Sources that were not "new" (that is, those that already existed in 1970) were grandfathered in, and thus were not subject to direct EPA regulation for those pollutants (Revesz & Lienke, p. 3).

Struggling for Air crisply canvasses how, when applied to coal-fired power plants, the Clean Air Act's exemption for existing sources significantly undermined the law's lofty goals. Two factors proved critical. The first is that, "due to wear and tear on various components," the efficiency of coal-fired power plants decreases with age (Revesz & Lienke, pp. 134–35). That, coupled with improving technology, means that operators of coal plants eventually have an economic incentive to replace their aging plants with new units that can "wring more electricity out of a given amount of fuel" (Revesz & Lienke, p. 31; footnote omitted). Invariably, those new, more efficient units are also cleaner—not least *because* they are more efficient, and the best way to reduce air pollution from coal is to burn less of it (Revesz & Lienke, pp. 134–35).

10. Williams-Yulee v. Fla. Bar, 135 S. Ct. 1656, 1666–67 (2015).

11. President Richard Nixon, Remarks on Signing the Clean Air Amendments of 1970 (Dec. 31, 1970), http://www.presidency.ucsb.edu/ws/?pid=2874 [https://perma.cc/8SNK-C9WR].

12. 42 U.S.C. § 7411 (2012). A "stationary source" is what it sounds like: a "building, structure, facility, or installation," as opposed to, for example, a car, truck, or airplane. *Id.* § 7411(a)(3).

The second factor is that EPA regulation of new coal-fired power plants imposed significant costs on operators. Shortly after the Clean Air Act's enactment, EPA issued a sulfur-dioxide regulation requiring all newly constructed coal plants to "install multimillion dollar pollution 'scrubbers,' which rely on a chemical reaction to remove sulfur from exhaust gases as they pass through a smokestack" (Revesz & Lienke, p. 32). Emissions standards for other pollutants imposed additional costs (Revesz & Lienke, p. 33). And because the Clean Air Act imposes a continuous duty on EPA to set standards that reflect the "best" contemporary emissions-control technology,[13] the standards applicable to new facilities only became more stringent—and compliance, in turn, more costly—over time (Revesz & Lienke, p. 33).

Together, these two factors caused power-plant operators to keep older, dirtier power plants running well past their normal retirement age (Revesz & Lienke, p. 33). Prior to the Act's enactment, the expected lifespan for a coal-fired power plant was approximately thirty years (Revesz & Lienke, p. 3). At that point, it usually became economically sensible for power-plant operators to replace old plants with more efficient (and cleaner) new units.[14] But by "instituting different regulatory regimes for new and existing plants," the Clean Air Act "dramatically altered the math behind plant retirement decisions" (Revesz & Lienke, p. 3). A system in which old plants could "emit with impunity," while new plants had to install ever-more-costly pollution controls, gave power-plant operators an incentive to keep old, dirty plants in operation "much longer than they otherwise would" (Revesz & Lienke, p. 3).

And that, Revesz and Lienke report, is precisely what happened. By 2012, "more than three-quarters of the nation's coal-fired generation capacity" had been in service for longer than thirty years (Revesz & Lienke, p. 33). Nearly 40 percent of America's coal-fired capacity came from power plants more than forty years old; and another 20 percent came from plants more than *fifty* years old (Revesz & Lienke, p. 33).

Why, in the scheme of things, is all of this such a big deal? As Revesz and Lienke explain, coal-fired power plants are not just another industrial facility subject to EPA regulation. Simply put, coal plants can kill. They are among the nation's largest emitters of sulfur dioxide and nitrogen oxides, which can cause fatal respiratory ailments and heart disease, and which also contribute to acid rain and toxic ground-level smog (Revesz & Lienke, pp. 10–11). They are among the nation's largest emitters of mercury, which can cause neurological damage in unborn children (Revesz & Lienke, pp. 10–11). And they are among the nation's largest emitters of carbon dioxide, a greenhouse gas that has been a key driver of global climate change (Revesz & Lienke, pp. 10–12).

Thus, Revesz and Lienke contend, the environmental and health consequences of keeping older coal plants in operation have been devastating. Older plants, they demonstrate, emit deadly pollutants at far higher levels

13. Id. §§ 7411(a)(1), (b)(1)(B).

14. *See* Revesz & Lienke, p. 31.

than newer plants. Take sulfur dioxide. A 2002 study showed that plants that were built before 1971—and accordingly were exempted from federal sulfur dioxide standards—emitted the pollutant at four times the rate of plants that were subject to EPA's "scrubber" regulation (Revesz & Lienke, p. 33). The oldest plants, built prior to 1950, emitted sulfur dioxide at more than *six times* the rate of newer plants (Revesz & Lienke, p. 33).

Ultimately, Revesz and Lienke concede that it is "impossible to tally" the "full costs of grandfathering" old coal plants (Revesz & Lienke, p. 111). But EPA has recently calculated that controlling power-plant emissions will prevent thousands—if not tens of thousands—of premature deaths annually (Revesz & Lienke, p. 111). Extrapolating from that calculation, Revesz and Lienke estimate that "hundreds of thousands more would have been spared if grandfathered plants had been subject to federal regulation" in the first instance (Revesz & Lienke, p. 112).

B. *The "Tragic Flaw" Exploited*

Struggling for Air, however, is not just a story of the Clean Air Act's "tragic flaw." It is also a story of how that and other loopholes in the Act were exploited, over and over again, by a fossil-fuel industry dead set on avoiding meaningful environmental regulation for existing coal-fired power plants.[15]

Indeed, Revesz and Lienke suggest that without industry manipulation, the Act's "tragic flaw" may not have been so tragic at all. To be sure, Congress made "a very big mistake" when it empowered EPA to set certain emissions standards only for "new" sources (Revesz & Lienke, p. 30). But the Act also contained a salve for that self-inflicted wound. It defined a "new source" as "any stationary source, the construction *or modification of which* is commenced after the publication of [an applicable emissions standard]."[16] "In other words," Revesz and Lienke explain, "the Act included a mechanism—'modification'—by which a source's identity might change from 'existing' to 'new' " (Revesz & Lienke, p. 55). And in 1977, Congress doubled down on the "modification" concept, amending the Act to add a "New Source Review" program which required major new *and* "*modified*" facilities to abide by a host of regulations.[17]

The Act itself, moreover, provides a seemingly capacious definition of "modification": "[*A*]*ny* physical change in, or change in the method of operation of, a stationary source which increases the amount of any air pollutant emitted."[18] The Act thus appeared designed to regulate any source that undergoes even a minor change that increases its pollution levels. Taken at face

15. The "fossil-fuel industry," for purposes of this Review, refers to companies engaged in the mining, extracting, or burning of petroleum, coal, or natural gas—or persons with strong financial interests in that enterprise.

16. 42 U.S.C. § 7411(a)(2) (emphasis added).

17. *Id.* § 7479(2); *see id.* §§ 7470–79, 7501–15.

18. *Id.* § 7411(a)(4) (emphasis added).

value, Revesz and Lienke note, something as insignificant as fixing a leaky pipe could count as a "modification" under the Act—if that fix "[e]liminat[ed] the need to periodically shut down the plant and patch the leak" and hence increased the plant's annual emissions (Revesz & Lienke, p. 59).

But with hundreds of millions of dollars in regulatory costs hinging on whether a project was deemed a "modification," industry lobbyists pushed EPA to take a far narrower reading of that term (Revesz & Lienke, pp. 59–60). Those efforts, Revesz and Lienke report, were largely successful. To begin, EPA announced in 1971 that "[r]outine maintenance, repair, and replacement" projects would not qualify as "physical changes" under the statute—and thus, would not qualify as a "modification."[19] Happily for industry (but unhappily for the environment), EPA provided no definition of what qualified as "routine." Nor did EPA require sources to consult with the Agency before determining whether a project qualified as "routine" (Revesz & Lienke, p. 60). Instead, EPA left industrial actors to operate "on the honor system" (Revesz & Lienke, p. 60). Predictably, given the money at stake, those actors often behaved less than honorably. During the 1980s, for example, one major electric-utility trade association expressly counseled its members to avoid regulation by classifying large-scale modifications as routine "maintenance programs" (Revesz & Lienke, pp. 66–67). Though EPA could, in theory, bring an enforcement action against an actor that misclassified a project as "routine," the Reagan EPA habitually looked the other way.[20]

And the routine-maintenance exception was hardly the only regulatory gift EPA gave the fossil-fuel industry. Revesz and Lienke show how, time and again, industry lobbyists convinced EPA to enact extraordinarily industry-friendly standards related to "modification" (Revesz & Lienke, Chapter Four). In 1992, for example, the George H.W. Bush EPA, at the behest of the Edison Electric Institute, adopted a rule that allowed utilities to self-report whether a physical change resulted in an "increase" in pollution (and thus qualified as a "modification") (Revesz & Lienke, p. 71). Almost comically, the regulation allowed utilities to calculate whether emissions had "increased" by comparing (1) their "actual" emissions in *any* two-year period in the previous five years with (2) their "projected" emissions in *any* two-year period within ten years following the change (Revesz & Lienke, pp. 71–72). Plainly, Revesz and Lienke explain, that regulation encouraged utilities to "cherry-pick [their] highest-emitting years from the past half-decade" to minimize the chance of regulation (Revesz & Lienke, p. 72). Worse, the regulation did not require utilities to conform their *actual* future emissions to the "projected" level reported to EPA—giving utilities every incentive to underestimate future emissions (Revesz & Lienke, p. 72).

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19. Standards of Performance for New Stationary Sources, 36 Fed. Reg. 24,876, 24,877 (Dec. 23, 1971) (to be codified at 40 C.F.R. pt. 60).

20. Revesz & Lienke, p. 67. The Reagan EPA was finally forced to take action when a coal-fired plant near Milwaukee attempted to claim that a four-year, $87.5 million overhaul of its facilities qualified as "routine maintenance." Revesz & Lienke, pp. 67–70.

In another instance, Revesz and Lienke recount how, at the behest of an energy-lobbyist-turned-regulator (Revesz & Lienke, p. 76), the George W. Bush EPA enacted a rule assuring regulated entities that EPA would classify a construction project as "routine" for purposes of the New Source Review program so long as it spent less than twenty percent of its total value on repairs (Revesz & Lienke, p. 77). That meant, Revesz and Lienke point out, that "a plant could, in theory, replace itself entirely in five steps without ever triggering" regulation as a "modified" source (Revesz & Lienke, p. 77). This regulation was ultimately struck down by the D.C. Circuit.[21] Yet the Bush Administration, which had received millions of dollars in campaign and inaugural committee contributions from the fossil-fuel industry, "continued to exercise its enforcement discretion as if [the regulation] were still in effect" (Revesz & Lienke, pp. 74–75, 78).

All of this regulatory manipulation, Revesz and Lienke conclude, meant that the Act's "treatment of modified sources as new failed to act as a meaningful check on the duration of grandfathering" (Revesz & Lienke, p. 78). And the foregoing "[m]isadventures in [m]odification" (Revesz & Lienke, p. 55), they emphasize, were hardly the only shenanigans in which power-plant operators engaged. To evade a Clean Air Act program requiring states to meet ground-level pollution standards, for example, many coal plants built extremely tall smokestacks—sometimes up to 800 feet tall—that dispersed pollutants away from the ground (Revesz & Lienke, pp. 84–85). That "solution" allowed plants more easily to comply with requirements relating to ground-level air pollution. But, of course, the dispersed pollution did not simply disappear. Rather, it was carried by wind into neighboring jurisdictions, where it created other problems, like acid rain (Revesz & Lienke, pp. 85, 101–02).

C. *The Clean Air Act's Redemption and Its Redeemers*

Struggling for Air thus paints a bleak portrait of the past half century of environmental regulation. "Congress," Revesz and Lienke assert, simply "missed the mark" when it exempted old coal-fired power plants from regulation (Revesz & Lienke, p. 54). That blunder opened the door to industry manipulation of the Act, as "lobbyists for old plants . . . work[ed] to preserve and enhance their new advantage" (Revesz & Lienke, p. 78). Ultimately, the one-two punch of legislative error and regulatory manipulation left in operation old, dirty coal plants—with disastrous consequences for public health (Revesz & Lienke, pp. 111–12).

Revesz and Lienke, however, are decidedly more optimistic about the future. Today, they report, most grandfathered plants are "finally set to retire within the next decade," and those that remain will be required to install significant new pollution controls (Revesz & Lienke, p. 163). Part of the reason those old plants are set to retire is that many electric utilities are shifting to cheaper natural gas (Revesz & Lienke, pp. 144–45). But Revesz

21. New York v. EPA, 443 F.3d 880, 883 (D.C. Cir. 2006).

and Lienke also give much of the credit to EPA regulation. In particular, Revesz and Lienke assert, three crucial EPA regulations enacted during the Obama Administration have made (or, if implemented, will make) old coal-fired plants "more expensive to run" (Revesz & Lienke, p. 146):

(1) the Cross-State Air Pollution Rule, which regulates air pollution carried by wind into neighboring states;

(2) the Mercury and Air Toxics Standards (MATS), which regulates emissions of mercury and other statutorily defined "hazardous air pollutants"; and

(3) the Clean Power Plan, which, though not yet in effect, would regulate emissions of greenhouse gases from existing fossil-fuel-fired power plants.[22]

"All three rules," Revesz and Lienke emphasize, were "issued under the authority of the Clean Air Act" (Revesz & Lienke, p. 146)—though pursuant to different statutory provisions than those with which *Struggling for Air* is primarily concerned. "[A]nd all three, by imposing additional pollution-reduction obligations on grandfathered plants, increase the cost of operating such facilities" (Revesz & Lienke, p. 146). Ultimately, then, Revesz and Lienke view *Struggling for Air* as a tale of the Clean Air Act's self-"[r]edemption" (Revesz & Lienke, p. 4). Though the Act failed to directly regulate existing coal plants' emissions of pollutants like sulfur dioxide—and thereby kept old, dirty plants running far longer than they should—the law "held the keys to its own salvation" by authorizing regulation of those plants via separate pollution-control provisions (Revesz & Lienke, pp. 3–4).

At this point, it makes sense to acknowledge the elephant in the room: *Struggling for Air*, with its optimistic gloss, was published months before Donald Trump's surprise electoral victory last November. Revesz and Lienke may well have tempered their title's sanguinity had they known that President Obama would be succeeded by a president who called for EPA to be abolished, derided climate change as a hoax, and promised to reinvigorate the coal industry.[23] That said, *Struggling for Air* does not ignore the possibility that President Obama's successor would be less disposed than he to environmental regulation. In a section entitled "Bumps in the Road Ahead," Revesz and Lienke address the risk that a (generic) Republican president might seek to undo some Obama-era environmental regulations (Revesz & Lienke, pp. 154–57). And though the authors express deep concern that a

22. For an overview of these three regulations, see Revesz & Lienke, pp. 146–52.

23. *See, e.g.*, Kyle Feldscher, *Trump Says He'd Eliminate 'Department of Environmental Protection'*, WASH. EXAMINER (Mar. 3, 2016, 9:41 PM), http://www.washingtonexaminer.com/trump-says-hed-eliminate-department-of-environment-protection/article/2584908 [https://perma.cc/N82C-FB2W]; Ben Wolfgang, *Trump's Promise To Revive Coal Industry Will Be Tough to Keep After Obama Assault*, WASH. TIMES (Dec. 29, 2016), http://www.washingtontimes.com/news/2016/dec/29/donald-trumps-promise-to-revive-coal-industry-will/ [https://perma.cc/3Q8V-V9RK]; Edward Wong, *Trump Has Called Climate Change a Chinese Hoax. Beijing Says It Is Anything But*, N.Y. TIMES (Nov. 18, 2016), https://www.nytimes.com/2016/11/19/world/asia/china-trump-climate-change.html?_r=0 (on file with *Michigan Law Review*).

Republican administration could torpedo the Clean Power Plan (which has not yet taken effect), they also conclude that "the progress the Obama Administration has made toward cleaning up or retiring grandfathered plants" cannot be "undone completely" (Revesz & Lienke, p. 157). Many utilities, after all, have already brought themselves into compliance with the Obama EPA's MATS rule, meaning they have either "retired, converted to gas, or installed the necessary emission controls" in dirty, old plants (Revesz & Lienke, p. 157). It is extraordinarily unlikely, the authors note, that coal-fired power plants which "have already closed up shop" will "come back into service" (Revesz & Lienke, p. 157). Similarly, it is unlikely that "plants that have already invested in scrubbers and other pollution control technologies" will "dismantle their expensive new equipment" (Revesz & Lienke, p. 157). Real progress, in short, has already been made. And, the authors suggest, even the most environmentally hostile administration cannot turn back time.

In any event, Revesz and Lienke do not view clean air as a purely partisan issue. Although the three specific regulatory programs identified by Revesz and Lienke were promulgated by the Obama EPA, the authors are quick to share the credit with previous policymakers from both major political parties. Indeed, they argue, "every administration for the past twenty-five years" has pushed some policies "designed to reduce pollution from our nation's aging coal-fired power plants" (Revesz & Lienke, p. 158). The pre-Obama policies credited by Revesz and Lienke include:

- The George H.W. Bush Administration's support for the 1990 Amendments to the Clean Air Act. Those amendments imposed a cap-and-trade system geared toward preventing acid rain (Revesz & Lienke, pp. 104–06). They also expressly required EPA to determine whether regulation of power plants' emissions of mercury and other "hazardous" pollutants was "appropriate and necessary"—a necessary precursor to the Obama Administration's MATS rule.[24]
- The Clinton Administration's determination "that it *was* 'appropriate and necessary' to regulate mercury emissions from existing coal plants"—another necessary precursor to the MATS rule (Revesz & Lienke, p. 159).
- The George W. Bush Administration's attempted promulgation of a "Clean Air Mercury Rule," which would have implemented a cap-and-trade system for power plants' mercury emissions (Revesz & Lienke, p. 159).

Revesz and Lienke's eagerness to spread credit for the Clean Air Act's "redemption" is consistent with one of their book's central themes. Even while illustrating the influence the fossil-fuel industry has exerted on environmental regulation, the authors take a generally charitable view toward regulators themselves. Policymakers, *Struggling for Air* posits, are not motivated merely by a desire to please donors or constituencies. Instead, they are

24. Revesz & Lienke, pp. 158–59; 42 U.S.C. § 7412(n)(1)(A) (2012).

generally civic-minded people who take seriously their obligation to the public.[25] Consistent with that view, Revesz and Lienke assert that the Act's "redemption" began in "the late 1980s," when "policymakers in Washington . . . realized their [grandfathering] mistake and began an earnest, bipartisan effort to correct it" (Revesz & Lienke, p. 162). Since then, "[p]rogress has been slow but relatively steady"—and now, "an end to the harmful legacy of grandfathering is finally within the nation's grasp" (Revesz & Lienke, p. 162).

Struggling for Air's narrative of an "earnest, bipartisan" group of policymakers working to shutter old coal plants is consistent with another central theme of the book. Revesz and Lienke take umbrage with the talking point, advanced by many in the Republican Party, that Barack Obama engaged in an unprecedented "war on coal" during his presidency (Revesz & Lienke, pp. 1–2). By emphasizing that each of the Obama EPA's major air-pollution regulations had roots in policy choices made by "both Republican and Democratic" administrations (Revesz & Lienke, p. 3), Revesz and Lienke seek to defeat the proposition that President Obama was abnormally hostile to coal.

But *Struggling for Air*'s narrative is ultimately incomplete. In their eagerness to credit "earnest, bipartisan" policymakers with the Act's "redemption" (Revesz & Lienke, p. 162), Revesz and Lienke downplay the degree to which litigation often *forced* unwilling policymakers to take action. That dynamic was particularly pronounced during the George W. Bush Administration. For example: the Clean Power Plan—the greenhouse-gas regulation that Revesz and Lienke call "by far" the most consequential recent regulation (Revesz & Lienke, p. 153)—never could have been promulgated had the Supreme Court not rejected, in *Massachusetts v. EPA*,[26] the Bush Administration's position that greenhouse gases are not a "pollutant" subject to regulation under the Act.[27]

Similarly, EPA's MATS rule regulating mercury emissions would never have been promulgated had the D.C. Circuit not rejected, in *New Jersey v. EPA*,[28] the Bush EPA's attempt to revoke the Clinton EPA's determination that mercury regulation was "appropriate and necessary." The Bush Administration's loss in that case effectively required EPA to directly regulate power plants' mercury emissions.[29] Yet not only do Revesz and Lienke deemphasize that litigation, they somewhat puzzlingly give the Bush EPA credit for trying to enact, as an alternative to the MATS rule's direct regulation of mercury

25. *See, e.g.*, Revesz & Lienke, pp. 25–29 (illustrating the interplay between political and genuinely civic motivations that resulted in the "green stars align[ing]" in 1970).

26. 549 U.S. 497 (2007).

27. *See* Massachusetts v. EPA, 549 U.S. at 528–32.

28. 517 F.3d 574 (D.C. Cir. 2008).

29. The only way EPA could have avoided regulating power plants' mercury emissions after *New Jersey* would have been for the Agency to reach the nearly impossible conclusion that *not a single power plant* nationwide emitted pollutants that threatened "public health" or caused an "adverse environmental effect." *See* New Jersey v. EPA, 517 F.3d at 581–82.

emissions from power plants,[30] a mercury cap-and-trade system (Revesz & Lienke, p. 159). Although such programs can work for globally dispersed pollutants like greenhouse gases—where an emissions reduction in Knoxville is as good as one in Kalamazoo—they do not work well for pollutants like mercury, the effects of which are "highly localized" in areas surrounding the emissions source.[31] Again, it was only because of litigation that the mercury cap-and-trade program was scuttled and the MATS rule placed in its stead.

It is not as though Revesz and Lienke fail to mention litigation at all. They do mention it. But, perhaps intentionally, their crisp, succinct book is not focused on court cases. *Massachusetts v. EPA*—probably the most important environmental case in history—is disposed with in one paragraph (Revesz & Lienke, p. 123). *New Jersey v. EPA*, the mercury case, is referenced only in passing (Revesz & Lienke, pp. 148–49).

Struggling for Air, then, is an important, impressive title that engagingly tells the story of the Clean Air Act's successes and failures over the past fifty years. But in focusing almost exclusively on the actions of policymakers—and understating litigation's role in "redeeming" the Act—*Struggling for Air* ultimately tells only part of the story.

II. Federalism on Trial

The other side of that story (or at least a significant part of it) is fleshed out in Paul Nolette's *Federalism on Trial*. Though *Federalism on Trial* is not, in the main, a book about the Clean Air Act, its chapters dealing with environmental law demonstrate just how big a role litigation—specifically, litigation driven by state AGs—has played in what Revesz and Lienke call its "redemption."[32] Further, its penultimate chapter, which covers AG-directed litigation during the Obama Administration (Nolette, Chapter Nine), gives a valuable perspective on the future of environmental litigation.

A. *Pushing Regulation Forward: The Rise of AG-Directed Environmental Litigation*

Nolette's overarching theme is straightforward. In recent years, he asserts, state AGs have increasingly coordinated with one another and used litigation to shape national policy. A rarity in 1980, coordinated, AG-directed litigation is now routine, with dozens of multistate cases brought and resolved per year (Nolette, pp. 20–21). What is more, the types of cases

30. *See* National Emission Standards for Hazardous Air Pollutants from Coal- and Oil-Fired Electric Utility Steam Generating Units, 77 Fed. Reg. 9,304, 9,367–69 (Feb. 16, 2012) (codified as amended at 40 C.F.R. pts. 60, 63).

31. Ann E. Carlson, *Designing Effective Climate Policy: Cap-and-Trade and Complementary Policies*, 49 Harv. J. on Legis. 207, 221 (2012).

32. This Review, focused on environmental issues, does not purport to offer a comprehensive overview of the chapters in *Federalism on Trial* not focused on environmental litigation.

being litigated by state-AG coalitions have changed over time. Whereas "many of the earliest multistate litigation campaigns involved relatively minor issues," Nolette writes, "recent cases have challenged broader practices of major multinational firms and significant policies of the federal government" (Nolette, p. 22). His book proves the point. *Federalism on Trial* surveys, in depth, several AG-directed litigation campaigns that have profoundly impacted (or sought to impact) national policy in areas ranging from environmental regulation to health care to pharmaceutical marketing.

Such AG-directed litigation campaigns, Nolette suggests, fall within one of three categories. First, in "policy-creating" litigation, AGs sue corporations—such as pharmaceutical companies or banks—with an eye toward reaching settlements "establishing new regulatory responsibilities not otherwise required by law" (Nolette, pp. 13–14). The paradigmatic example is the tobacco litigation of the 1990s, when forty-six AGs forced a settlement with tobacco companies that instituted "a new policy regime regulating the sale and marketing of tobacco products" (Nolette, p. 23). Second, "policy-blocking litigation . . . involves states' legal challenges to regulatory actions by federal policymakers" (Nolette, p. 31). Examples of such litigation include states' mostly unsuccessful challenges to the Affordable Care Act and their mostly successful campaign to block the Obama Administration's deferred-action immigration policy.[33] Third, in "policy-forcing litigation," state AGs attempt "to force the federal government to take a more active regulatory approach" (Nolette, p. 30).

Federalism on Trial demonstrates how all three "categories" of AG-directed lawsuits have shaped federal environmental law. Dovetailing nicely with *Struggling for Air*, the book focuses specifically on two AG-directed litigation campaigns that ratcheted up regulation of fossil-fuel-fired power plants: battles over (1) acid rain and (2) greenhouse gases.

1. Acid Rain Litigation

Nolette's acid-rain chapter tells the story, deemphasized in *Struggling for Air*, of how AG-directed litigation helped mitigate some of the problems created by the Clean Air Act's "tragic flaw" (Nolette, Chapter Six). As noted, many "grandfathered" coal plants—already exempted from direct regulation of nitrogen dioxide and sulfur dioxide—also built extremely tall smokestacks in a bid to evade regulation under a program requiring states to achieve *ground-level* air quality standards for those pollutants.[34] But that "solution" simply created a new problem. Pollutants emitted by the tall smokestacks would "enter the atmosphere and become chemically altered by atmospheric processes," leading to acid rainfall that damaged crops, harmed

33. *See* United States v. Texas, 136 S. Ct. 2271 (2016) (mem.) (per curiam) (affirming preliminary injunction against the implementation of the Deferred Action for Parents of Americans and Lawful Permanent Residents program), *aff'g by an equally divided court*, 809 F.3d 134 (5th Cir. 2015); Nat'l Fed'n of Indep. Bus. v. Sebelius (*NFIB*), 132 S. Ct. 2566 (2012) (upholding the individual mandate of the Affordable Care Act under the taxing power).

34. *See supra* Section I.B.

ecosystems, and corroded manmade structures (Nolette, p. 107). And because the pollutants were carried away from smokestacks via eastbound wind, pollution from the industrial Midwest led to acid rainfall concentrated along the East Coast of the United States (Nolette, p. 107).

The acid-rain problem, Nolette recounts, spurred three separate phases of AG-directed litigation targeting power plants' emissions of nitrogen dioxide and sulfur dioxide. First, during the 1980s, a bipartisan group of "AGs from the Northeast" filed several policy-forcing suits seeking greater EPA regulation of industrial sources in the Midwest (Nolette, p. 160). Those suits largely failed in court (Nolette, pp. 112–13). Still, Nolette asserts, the lawsuits ultimately moved forward the AGs' pro-regulatory agenda. Their decision to litigate, he argues, "place[d] pressure on federal policymakers" and led Congress to enact, as part of the 1990 amendments to the Clean Air Act, a "regulatory structure that specifically dealt with the acid rain issue" (Nolette, p. 165).

The second phase of AG-directed litigation against utilities took place during the 1990s. With the 1990 amendments to the Clean Air Act on the books and the relatively environmentalist Clinton EPA in power, AGs concerned with acid rain shifted their focus from policy-forcing litigation (against EPA) to policy-creating litigation (against industry).[35] Specifically, AGs sued industry actors under a "citizen suit" provision in the Clean Air Act, alleging that those actors were violating the Act by reporting their major construction projects as routine maintenance—thus avoiding regulation as "modified" sources and allowing old, dirty power plants to remain in operation.[36] The AGs' strategy worked. Not only did AGs reach a settlement that forced utilities to shut down some old coal-fired boilers, the settlement also required plants to install pollution controls on existing plants—and pay millions to the plaintiff states to boot (Nolette, p. 121).

In the third phase, AGs pressed litigation that invalidated the George W. Bush EPA's industry-friendly New Source Review "modification" standard (Nolette, pp. 126–27). That standard, discussed above, would have allowed plants to avoid regulation as a "modified" source so long as a construction project totaled less than twenty percent of the source's total value.[37]

This third phase of litigation is also discussed in *Struggling for Air*.[38] But the *manner* in which each work discusses the lawsuits betrays the relative importance its authors place on AG-directed lawsuits. Revesz and Lienke downplay the litigation, instead focusing on the actions of regulators. Despite the D.C. Circuit's invalidation of EPA's "modification" regulation, they emphasize, the Bush Administration "continued to exercise its enforcement discretion as if the [regulation] were still in effect" (Revesz & Lienke, p. 78). Nolette sees the litigation as more important. He calls the AGs' successful

35. *See* Nolette, pp. 116–18.

36. *See* Nolette, p. 119; *supra* Section I.B.

37. *See supra* Section I.B.

38. *See supra* Section I.B.

invalidation of the regulation part of a "significant setback to the Bush Administration's administrative approach" (Nolette, p. 127).

The ultimate impact of the AGs' "modification" suits is probably somewhere between these two extremes. But Nolette does convincingly demonstrate that, through their various campaigns, the anti-acid-rain AGs played a significant role in mitigating the harmful impacts of grandfathered coal plants.

2. Climate Change Litigation

And there can be no realistic dispute about the importance of the other environmental campaign surveyed in *Federalism on Trial*: the one to rein in emissions of greenhouse gases. By the early 2000s, it was beyond scientific reproach that human emissions of greenhouse gases were causing global climate change and that the consequences could prove devastating.[39] Yet Congress was unwilling to pass legislation to combat greenhouse-gas emissions.[40] The George W. Bush Administration, moreover, refused to regulate greenhouse gases under the Clean Air Act.[41]

Into that policy void, Nolette recounts, stepped state AGs and their environmental allies. In 2003, the Bush EPA formally rejected a petition by a group of environmental organizations seeking regulation of greenhouse gases under the Clean Air Act (Nolette, p. 138). Greenhouse gases, EPA determined, did not qualify as "air pollutants" under the Act, because they cause harms different in kind from the types of pollutants with which the Act is primarily concerned.[42] Almost immediately, a group of AGs announced that they would "file a lawsuit in the DC Circuit challenging the EPA's denial of the environmental groups' petition" (Nolette, p. 139). Those AGs, joined by a coalition of cities and environmental advocacy groups, argued that the "'plain language' of the [Act] authorized the EPA to regulate emissions" of greenhouse gases (Nolette, p. 139). The case was captioned *Massachusetts v. EPA*.[43]

Though the AGs and their environmental allies lost in the D.C. Circuit, that court "did not have the final word" (Nolette, p. 142). The Supreme Court granted certiorari in the case and ruled by a 5–4 vote that (1) greenhouse gases qualify as a "pollutant" under the Clean Air Act; and (2) accordingly, EPA was required to promulgate regulations if it determined that greenhouse gases endangered human health or welfare.[44]

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39. *See generally* Q.K. Ahmad et al., Intergovernmental Panel on Climate Change, Climate Change 2001: Impacts, Adaptation, and Vulnerability (2001), https://www.ipcc.ch/ipccreports/tar/wg2/pdf/wg2TARspm.pdf [https://perma.cc/B2R2-A2FB].

40. *See* Nolette, p. 136.

41. *See* Nolette, p. 138.

42. *See* Massachusetts v. EPA, 549 U.S. 497, 512–13 (2007).

43. *Id.* at 497.

44. *Id.* at 528–35.

The AGs' participation in *Massachusetts*, Nolette emphasizes, proved critical. A key issue in the case was whether any party had standing to challenge EPA's refusal to regulate greenhouse gases.[45] Ultimately, however, the Court "confined its [standing] analysis only to the lead petitioner, the Commonwealth of Massachusetts" (Nolette, p. 142). The Court first held a state is entitled to "special solicitude" where its "quasi-sovereign" interests in the "earth and air within its domain" are at stake.[46] And "[w]ith that in mind," the Court concluded that Massachusetts—which had submitted evidence that rising sea levels caused by global warming could swallow its coastline—had established an injury traceable to EPA's refusal to regulate greenhouse gases.[47] Only then, with Massachusetts' standing established, did the Court turn to the merits of the case and conclude that greenhouse gases indeed qualify as "pollutants" under the Clean Air Act.[48]

It is difficult to overstate the seismic change effected by *Massachusetts*. Initially, the Supreme Court's holding that greenhouse gases qualify as a "pollutant" triggered a cascading series of major regulations imposing greenhouse-gas emission standards on motor vehicles and on new and "modified" "stationary sources."[49] Further, by clarifying that greenhouse gases fall under the Clean Air Act's regulatory ambit, *Massachusetts* paved the way for other greenhouse-gas regulations under the Act. The most notable of these is Clean Power Plan—which, if it goes into effect notwithstanding Donald Trump's election, will regulate greenhouse-gas emissions of existing fossil-fuel-fired plants.[50] Not only do such regulations cut greenhouse-gas emissions, they also dramatically reduce the emissions of "conventional" pollutants like sulfur dioxide, nitrogen oxides, and particulate matter.[51] Without the involvement of state AGs, it is quite possible that none of that would have happened.

* * *

Nolette's focus on AGs' role in shaping contemporary environmental policy is thus a welcome and important one. And, when considered alongside *Struggling for Air*, *Federalism on Trial* provides an important additional perspective on the Clean Air Act's "redemption." Whereas Revesz and Lienke play up the role of policymakers in fixing the Act's "tragic flaw," Nolette emphasizes that AGs' "courtroom victories" were in fact a catalyst that "help[ed] reshape the entire American environmental policy regime" (Nolette, p. 150). Indeed, Nolette notes, AGs' greenhouse-gas and acid rain

45. *See id.* at 516–26.

46. *Id.* at 520 & n.17 (quoting Nebraska v. Wyoming, 515 U.S. 1, 20 (1995)).

47. *Id.* at 521–22.

48. *Id.* at 532.

49. *See* Coal. for Responsible Regulation, Inc. v. EPA, 684 F.3d 102, 114–16 (D.C. Cir. 2012) (per curiam), *aff'd in part, rev'd in part sub nom.* Util. Air Regulatory Grp. v. EPA, 134 S. Ct. 2427 (2014).

50. Carbon Pollution Emission Guidelines for Existing Stationary Electric Utility Generating Units, 80 Fed. Reg. 64,662, 64,662 (Oct. 23, 2015) (to be codified at 40 C.F.R. pt. 60).

51. *Id.* at 64,670.

litigation campaigns—each of which mitigated the environmental damage caused by dirty, old power plants—were undertaken precisely because "other political branches seemed unwilling or unable to enact stronger pollution controls" (Nolette, p. 150).

Correspondingly (though Nolette himself does not make this point) *Federalism on Trial* shows how state AGs helped check the fossil-fuel industry's influence over environmental regulation. As noted above, regulators with ties to the fossil-fuel industry for decades refused to alleviate the environmental harms caused by old power plants. To the contrary, lobbyists repeatedly convinced regulators to enact "modification" rules that *exacerbated* those problems.[52] It was only once AGs took the battle for clean air to the courthouse—where the fossil-fuel industry held less sway—that those industry-friendly rules were reined in, regulation was expanded, and the Clean Air Act's full potential was unleashed.

B. *Pushing Back: The Anti-Regulatory AG Movement*

Although much of *Federalism on Trial* is devoted to how state AGs helped strengthen environmental regulations, its penultimate chapter suggests that some AGs are now pushing in the opposite direction. That chapter, titled "The Rise of Conservative State Litigation and the Changing Shape of AG Activism," details a dramatic increase in policy-blocking suits filed by Republican AGs during the Obama Administration (Nolette, Chapter Nine). Those suits challenged federal policies on a host of issues, ranging from consumer protection to immigration to voting rights (Nolette, p. 168). Perhaps the biggest and most frequent battles, however, concerned environmental regulation. Throughout President Obama's term in office, a group of Republican AGs embarked on vigorous litigation campaigns seeking to block every major new environmental regulation (Nolette, p. 180). Three of those cases reached the Supreme Court;[53] a fourth, a multistate challenge to the Clean Power Plan, also seems likely to make its way there in the event the Clean Power Plan is not otherwise undone by the Trump Administration.[54]

Of course, policy-blocking litigation against the federal government is hardly new. As Nolette points out, "AGs initiated policy-blocking challenges throughout the twentieth century" (Nolette, p. 169). Yet, Nolette emphasizes, policy-blocking litigation during the Obama Administration differed from previous AG-directed campaigns in at least three important respects. First, the major litigation campaigns were "broader" than those in previous eras (that is, more AGs participated) (Nolette, p. 188). Second, the Obama-era campaigns were "more partisan" than previous campaigns (Nolette, p. 188). In other words, policy-blocking litigation campaigns during the

52. *See supra* Section I.B.

53. *See* Michigan v. EPA, 135 S. Ct. 2699 (2015); Util. Air Regulatory Grp. v. EPA, 134 S. Ct. 2427 (2014); EPA v. EME Homer City Generation, L.P., 134 S. Ct. 1584 (2014).

54. West Virginia v. EPA, No. 15-1363 (D.C. Cir. Oct. 23, 2015).

Obama Administration were pursued by coalitions of almost entirely Republican AGs; coalitions of Democratic AGs tended to intervene on the side of the Obama Administration (Nolette, p. 188). Third, Nolette notes, Obama-era campaigns increasingly featured AGs working closely with "outside interests" (Nolette, p. 187). During challenges to the Affordable Care Act and to the Obama EPA's climate-change regulations, for example, Republican AGs worked hand-in-hand with "private industry and conservative advocacy groups."[55]

The implications of all of this are troubling. AGs, after all, are generally charged with representing the particular interests of their state and its citizens.[56] And historically, that is precisely what they have done. During "the acid rain litigation of the 1980s," Nolette writes, "the split between the AGs was largely regional" (Nolette, p. 31). The acid rain battles featured Democratic *and* Republican AGs from the East Coast fighting for stricter environmental regulation. And logically so. After all, states in that region, whether their AGs were Democratic or Republican, were together bearing the brunt of acid rain–related harms (Nolette, pp. 31, 160). By contrast, AGs now seem focused less on the needs of their particular states and more on working with national interest groups to advance their party's policy agenda.

Take, for example, litigation over climate change. Like acid rain, climate change disproportionately affects certain states. As a result of climate change, coastal states will likely suffer through "more intense" hurricanes,[57] and will also be forced to endure rising sea levels caused by melting polar ice caps.[58] Southern states, too, will bear high costs associated with rising temperatures, which will lead to "significant drops in agricultural yield and labor productivity, along with increased sea level rise, higher energy demand, and rising mortality rates."[59] Yet despite these potentially catastrophic consequences, Republican AGs from coastal and southern states have toed their

55. Nolette, p. 192. This last trend, it must be emphasized, did not start during the Obama Administration. To the contrary, it had its genesis in previous campaigns undertaken by Democratic AGs, in which those AGs "allied with liberal advocacy groups and private class-action attorneys in litigation aimed at influencing national policy." Nolette, p. 193.

56. *See, e.g.*, HAW. REV. STAT. § 28-1 (2015) (stating that the AG "shall appear" in all cases "in which the State may be a party, or be interested . . . ."); MICH. COMP. LAWS SERV. § 14.28 (LexisNexis 2013) (charging Michigan's AG with "appear[ing] for the people of this state" where "the interests of the state require it"); MINN. STAT. ANN. § 8.01 (West 2016) (stating the AG shall appear where "the interests of the state require it").

57. *Global Warming and Hurricanes*, GEOPHYSICAL FLUID DYNAMICS LABORATORY (Oct. 12, 2016), http://www.gfdl.noaa.gov/global-warming-and-hurricanes [https://perma.cc/6MNE-DKVB].

58. *See generally* John A. Church et al., *Sea Level Change*, *in* CLIMATE CHANGE 2013: THE PHYSICAL SCIENCE BASIS 1137 (Thomas F. Stocker et al. eds., 2013).

59. FIONA KINNIBURGH ET AL., RISKY BUS. PROJECT, COME HEAT AND HIGH WATER: CLIMATE RISK IN THE SOUTHEASTERN U.S. AND TEXAS 2 (Kate Gordon ed., 2015), http://riskybusiness.org/site/assets/uploads/2015/09/Climate-Risk-in-Southeast-and-Texas.pdf [https://perma.cc/AZL8-FNLQ].

party's line on climate change and, almost without exception, joined lawsuits *opposing* efforts to alleviate climate change.[60]

What accounts for the increased partisan polarization among AGs? Nolette offers a couple of theories. For one, he argues that political polarization among AGs mirrors "a considerable surge in polarization throughout the political system since 2000" (Nolette, p. 190). Indeed, polling indicates that it is increasingly difficult to find "moderate" Democrats or Republicans who might be willing to cross party lines on national, hot-button issues like climate change.[61] In addition, Nolette suggests, new institutions have encouraged cross-state partisan collaboration among AGs (Nolette, pp. 191–92). In 1999, Republicans formed the Republican Attorneys General Association (RAGA) "to elect more party members and as a forum to discuss partisan policy priorities"; in 2002, Democrats responded by forming the similar Democratic Attorneys General Association (DAGA) (Nolette, pp. 191–92).

Though these theories may well have some purchase, Nolette fails to mention another homogenizing factor: the increased flow of money from national special-interest groups into electoral campaigns for state AGs and the corresponding influence national interest groups enjoy over a diverse set of state AGs. That trend—and its distorting effect on environmental litigation—is the subject of Part III of this Review.

III. The New Front in the Clean Air Wars: The Battle for State AGs

A. *Dark Money, Darker Skies? Polluters' Regulatory Capture of State AGs*

Money in politics is nothing new. But national special-interest money is a relatively new arrival in state campaigns for AG. In recent years—as AGs' national footprints have grown—national interest groups, corporations, and lobbyists have taken in an intense interest in the office and have begun pouring "record amounts of money" into AG campaigns.[62] That money flows to campaigns in two ways. First, groups, companies, and lobbyists make direct contributions to an AG's campaign.[63] Second, groups, companies, and lobbyists donate millions of dollars to RAGA and DAGA (the partisan AG groups discussed in *Federalism on Trial*).[64] RAGA and DAGA, in turn, spend that money on AG races across the country.[65]

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60. Nolette, p. 184; *see, e.g.*, Opening Brief of Petitioners on Core Legal Issues, West Virginia v. EPA, No. 15-1363 (D.C. Cir. Feb. 19, 2016).

61. *See* Pew Research Ctr., Partisan Polarization Surges in Bush, Obama Years 1–15 (2012), http://www.people-press.org/files/legacy-pdf/06-04-12%20Values%20Release.pdf [https://perma.cc/XND7-MFZB].

62. Lipton, *supra* note 4.

63. *See id.*

64. *See id.*

65. *See id.*

There is considerable evidence that special-interest money influences AGs' decisions. A 2014 *New York Times* exposé detailed how corporate representatives and lobbyists regularly purchase an audience with Democratic and Republican AGs through campaign contributions and "sponsorship" of lavish, invitation-only RAGA and DAGA affairs.[66] That access apparently pays dividends. According to the *Times* exposé, one Democratic AG dropped a deceptive-advertising investigation against 5-Hour Energy—a major campaign contributor—just minutes after being urged to do so by a lobbyist at a DAGA event.[67] Similarly, following an intensive campaign by a lobbying firm that poured money into her campaign coffers, a Republican AG dropped a suit against a client of that firm.[68]

And the fossil-fuel industry is by far the biggest special-interest player in this new AG game. Not only do fossil-fuel-aligned donors give massive amounts of money directly to Republican AGs' campaigns,[69] the industry's donations to RAGA appear to dwarf those of any other industry.[70] Some contributions come directly from corporations or energy-focused lobbying groups.[71] Still more come in the form of "dark money," from groups that are not required to disclose their donors. Though it is by definition impossible to precisely track the source of "dark money," what evidence there is indicates that fossil-fuel interests are behind many of these groups.[72]

This unprecedented flow of fossil-fuel money, the *Times* exposé showed, has created an unprecedentedly cozy relationship between the industry and Republican AGs. Energy companies ghostwrite legal letters "from" state AGs to federal agencies—which are then signed by AGs and passed along with

66. Eric Lipton, *Lobbyists, Bearing Gifts, Pursue Attorneys General*, N.Y. Times, Oct. 29, 2014, at A1.

67. *Id.*

68. *Id.* at A18; *Pam Bondi and Dickstein: A Mutually Beneficial Relationship*, N.Y. Times, at 55 (Oct. 28, 2014), http://www.nytimes.com/interactive/2014/10/28/us/politics/3-Pam-Bondi-and-Dickstein-A-Mutually-Beneficial-Relationship.html (on file with *Michigan Law Review*).

69. Lipton, *supra* note 4.

70. *See generally infra* notes 71–72.

71. *Republican Attorneys General Assn: Top Contributors 2016*, OpenSecrets.org, https://www.opensecrets.org/527s/527cmtedetail_contribs.php?cycle=2016&ein=464501717 [https://perma.cc/K6JL-3X3E] [hereinafter *RAGA Contributors*] (listing, among RAGA's biggest donors, Murray Energy and the American Coalition for Clean Coal Electricity).

72. As of May 2, 2016, the biggest contributor to RAGA in the 2016 election cycle was a group called "Judicial Crisis Network." *Id.* That shadowy group "has increasingly relied on funding" from sources aligned with a network "led by billionaire [fossil-fuel magnates] Charles and David Koch." Viveca Novak & Peter Stone, *The JCN Story: How to Build a Secretive, Right-Wing Judicial Machine*, Daily Beast (Mar. 23, 2015, 10:15 PM), http://www.thedailybeast.com/articles/2015/03/23/the-jcn-story-how-to-build-a-secretive-right-wing-judicial-machine.html [https://perma.cc/QMB7-2FQX]; *see also* Josh Israel, *Why the Koch Brothers Are So Interested in Who Becomes the Next Attorney General of Colorado*, ThinkProgress (July 31, 2014), http://thinkprogress.org/climate/2014/07/31/3466357/colorado-ag-energy-koch/ [https://perma.cc/MSW4-8VL5] (explaining the fossil-fuel industry's ties to major RAGA funders, including the U.S. Chamber of Commerce).

the state's imprimatur.[73] Fossil-fuel conglomerates draft legislation and lean on Republican AGs to shepherd that legislation through state legislatures.[74] And fossil-fuel interests play an outsized role in directing AG litigation campaigns against federal environmental regulations. In 2014, at a summit alliteratively entitled "Federalism and the Future of Fossil Fuels," energy companies, lobbyists, and lawyers met with Republican AGs to strategize about challenges to EPA regulations.[75] One week after that summit, nineteen Republican AGs, working closely with industry actors, launched a coordinated effort "to derail major environmental action, like efforts to curb fish kills, reduce ozone pollution, slow climate change and tighten regulation of coal ash."[76] Interviewed about the fossil-fuel industry's influence over AGs, David Frohnmayer, a former Republican AG from Oregon, was blunt: "The puppeteer behind the stage," he said, "is pulling strings."[77]

Those puppet strings, in the environmental context, are valuable ones indeed. AGs are prized allies for virtually any litigant because they "add legitimacy and publicity to the political concerns underlying [the] litigation" (Nolette, p. 193). Post–*Massachusetts v. EPA*, moreover, states are entitled to "special [standing] solicitude," at least in environmental cases.[78] That means there may be cases that fossil-fuel interests could not bring on their own, but that can be brought by their AG allies. Indeed, since *Massachusetts*, this "special solicitude" theory has already been pressed in at least one major greenhouse gas case, where the State of Texas argued even if industry lacked standing, its identity as a state lessened its "burden of establishing a concrete and particularized injury in fact."[79] And even though, as Revesz and Lienke emphasize, old coal plants are finally shutting down, that does not mean that environmental litigation is grinding to a halt. Even if current trends continue and the oldest, dirtiest power plants are retired, new major battles in environmental regulation—such as battles over the "fracking" of natural gas—loom. Moreover, the Clean Air Act *requires* certain standards to be revisited periodically,[80] ensuring a steady flow of environmental litigation in which AGs are prized allies. Finally, of course, the Trump EPA may try to reverse or revise Obama-era regulations. Any such attempt will undoubtedly be challenged in court and the parties to that litigation will undoubtedly welcome AG support.

In short, deep-pocketed national fossil-fuel interests, recognizing the value of AG allies, are now exerting influence over Republican AGs similar to

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73. Lipton, *supra* note 4, at A1.

74. *Id.* at A33.

75. *Id.* at A32.

76. *Id.* at A33.

77. *Id.* at A32.

78. 549 U.S. 497, 520 (2007).

79. *See* Coal. for Responsible Regulation, Inc. v. EPA, 684 F.3d 102, 148 (D.C. Cir. 2012) (per curiam), *aff'd in part, rev'd in part sub nom.* Util. Air Regulatory Grp. v. EPA, 134 S. Ct. 2427 (2014).

80. *See, e.g.*, 42 U.S.C. § 7411(b)(1) (2012).

the influence they exerted over regulators during the Reagan and both Bush Administrations. That influence, largely purchased through campaign expenditures, incentivizes AGs to march in lockstep against regulations that affect fossil-fuel interests—and is thus a key driver of the partisan "polarization" among AGs Nolette identifies in his book.

To be sure, it can sometimes be difficult to disentangle an AG's motives in taking a particular action. The fossil-fuel industry, for example, has spent millions of dollars supporting Republican AG candidates in Texas.[81] The Texas AG's office, in turn, has led or participated in numerous campaigns against federal environmental regulations.[82] But it is difficult to delineate precisely *why* the Texas AG undertook such campaigns. Was it because of Texas's status as an oil-rich state? Was it because of donations from the fossil-fuel industry? Or, perhaps, was it some combination of the two?

In other cases, the national fossil-fuel industry's influence is more difficult to explain away. Michigan's AG, for example, led the multi-state challenge to EPA's MATS rule and joined the challenge to the Clean Power Plan—even though the local electrical utilities being regulated indicated they were prepared to comply with both regulations.[83] On its face, one observer noted, the Michigan AG's decision to fight regulations that even Michigan utilities welcomed "didn't make sense."[84] Perhaps Michigan's AG was guided by his own personal ideology. But it is difficult to ignore the fact that national fossil-fuel groups have poured large amounts of money into Michigan AG elections,[85] and that Michigan's AG served as chairman of fossil-fuel funded RAGA from 2015 to 2016.[86]

A couple of caveats are in order. First, Republican AGs (as noted above) are not the only ones susceptible to the influence of monied special interests.[87] But they do appear uniquely susceptible to fossil-fuel-aligned interest groups. Those groups have a tremendous interest in, and a disproportionate

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81. Lipton, *supra* note 4.

82. *See e.g.*, Brief for the State Petitioners at 29, Util. Air Regulatory Grp. v. EPA, 134 S. Ct. 2427 (2014) (No. 12-1146); *see also* Brief for Petitioners State of Michigan et al. at 55, Michigan v. EPA, 135 S. Ct. 2699 (2015) (No. 14-46).

83. Jay Greene, *Schuette Presses On Without Snyder Support in Opposition to EPA's Mercury Rule*, Crain's Detroit Bus. (June 25, 2016, 12:54 PM), http://www.crainsdetroit.com/article/20160625/BLOG010/160629791/schuette-presses-on-without-snyder-support-in-opposition-to-epas [https://perma.cc/A7JS-SLN7]; Emily Lawler, *Michigan Can Comply with Federal Clean Power Plan for a Decade with No Changes*, MLive (Dec. 23, 2015, 8:00 AM), http://www.mlive.com/lansing-news/index.ssf/2015/12/michigan_can_comply_with_feder.html [https://perma.cc/Y8GN-KFMF].

84. Jay Greene, *What Will Michigan Attorney General Bill Schuette Do About Mercury Rule Setback?*, Crain's Detroit Bus. (Mar. 4, 2016, 4:09 PM), http://www.crainsdetroit.com/article/20160304/BLOG010/160309914/what-will-michigan-attorney-general-bill-schuette-do-about-mercury [https://perma.cc/7PTQ-DZRY].

85. Lipton, *supra* note 4.

86. Jonathan Oosting, *Bill Schuette Named Future Chair of Republican Attorneys General Association*, MLive (Nov. 17, 2014, 9:43 AM), http://www.mlive.com/lansing-news/index.ssf/2014/11/bill_schuette_named_future_cha.html [https://perma.cc/7JVA-NF2H].

87. *See* Lipton, *supra* note 66.

impact on, the environmental policies that are primary the subject of this Review.[88]

Second, even within the environmental context, Republicans are hardly the only ones who work closely with national interest groups. Indeed, Nolette notes, "Massachusetts's lead brief in *Massachusetts v. EPA*" was the product of close collaboration between states and environmental advocacy groups (Nolette, p. 193). But while one might criticize AGs from both parties for coordinating with outside groups, environmental advocacy groups are not heavily regulated entities. Nor do environmental advocacy groups shovel money into Democratic AGs' campaigns at anywhere close to the rate fossil-fuel interests funnel money into Republican AGs' campaigns.[89] The regulatory capture of state AGs by fossil-fuel interests thus appears truly unprecedented.

B. *A Ray of Light:* Williams-Yulee *and the Prospects for AG-Specific Campaign-Finance Reform*

All of this suggests a bleak future for environmental regulation. *Struggling for Air* tells the story of how the Clean Air Act's "tragic flaw" was manipulated for decades by monied fossil-fuel lobbyists who exerted influence over regulators. *Federalism on Trial* demonstrates how those lobbyists' influence was counteracted, in part, through litigation directed by state AGs. But with the fossil-fuel industry now exerting its substantial influence on AGs (largely through campaign contributions), AGs are increasingly serving as a barrier to, not a catalyst of, effective environmental regulation.

Could stricter campaign-finance rules reduce the influence special-interest groups, like the fossil-fuel industry, have over AGs? At first blush, the prospects for reform seem dim. The Supreme Court has emphasized that to pass First Amendment muster, a campaign-finance restriction must (1) further "a compelling interest" and (2) be "narrowly tailored to achieve that interest."[90] Crucially, the Court has held that preventing donors' "ingratiation and access" to political officials does not qualify as a "compelling interest."[91] Instead, the Court has suggested, campaign-finance restrictions must target what one commentator calls a "subset of bribery"[92]: the "*direct* exchange of an official act for money," or the appearance thereof.[93] Over the

88. *See* Lipton, *supra* note 4.

89. *Compare Democratic Attorneys General Assn: Top Contributors 2016*, OpenSecrets.org, http://www.opensecrets.org/527s/527cmtedetail_contribs.php?cycle=2016&ein=134220019 [https://perma.cc/EN6X-ZRHU], *with RAGA Contributors*, *supra* note 71.

90. Citizens United v. FEC, 558 U.S. 310, 340 (2010) (quoting FEC v. Wis. Right to Life, Inc., 551 U.S. 449, 464 (2007)).

91. McCutcheon v. FEC, 134 S. Ct. 1434, 1441–44 (2014) (quoting *Citizens United*, 558 U.S. at 360).

92. Anthony Johnstone, *A Madisonian Case for Disclosure*, 19 Geo. Mason L. Rev. 413, 453 (2012).

93. *McCutcheon*, 134 S. Ct. at 1441 (emphasis added).

past several years, this narrow conception of "compelling interest" has repeatedly stymied state and federal attempts to rein in the influence of money in politics. Most prominently, in *Citizens United*, the Court struck down federal restrictions on campaign spending by outside groups, emphasizing that—though such spending might ingratiate groups to politicians—preventing "influence over or access to elected officials" does not qualify as compelling.[94]

That line of reasoning would seem to undercut any attempt to fashion a campaign-finance law targeting interest groups' influence over AGs. Although it seems quite clear that special-interest groups use campaign contributions and expenditures to "access" state AGs and "ingratiate[e]" themselves, it seems less likely that AGs and their supporters are engaging in literal bribery. Distasteful as it might seem, an AG who drops or joins a lawsuit following a chat with a lobbyist at a DAGA or RAGA event may, under Supreme Court precedent, be characterized as simply being "responsive" to that lobbyist's concerns.[95] And preventing politicians from being "responsive"—even when that "responsiveness" accrues primarily to monied donors—is not a compelling interest under recent Supreme Court precedent.[96] To the contrary, the Court has emphasized, "responsiveness is key to the very concept of self-governance through elected officials."[97]

But for those who wish to check the influence special-interest groups exert on state AGs, a recent Supreme Court decision offers a glimmer of hope. In *Williams-Yulee v. Florida Bar*, the Court upheld, against First Amendment challenge, a Florida regulation which barred judicial candidates "from personally soliciting funds for their campaigns."[98] Along the way, the Court held that the First Amendment permits states to impose stricter campaign-finance regulations for judicial elections than for "political elections, because the role of judges differs from the role of politicians."[99] Unlike politicians, the Court stressed, judges are not expected to be "responsive" to their supporters.[100] Instead, a judge must strive to be "perfectly and completely independent," without providing "special consideration to his campaign donors."[101] Accordingly, the Court held, Florida's restriction was justified by a compelling interest "in preserving public confidence in the integrity of its judiciary"—an interest distinct from the interest in preventing corruption or the appearance thereof in "political elections."[102]

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94. *Citizens United*, 558 U.S. at 359.

95. *See McCutcheon*, 134 S. Ct. at 1441.

96. *Id.* at 1460–61.

97. *Id.* at 1462.

98. 135 S. Ct. 1656, 1662 (2015).

99. *Williams-Yulee*, 135 S. Ct. at 1667.

100. *Id.*

101. *Id.* (quoting John Marshall, *Address (Dec. 11, 1829)*, *in* Proceedings and Debates of the Virginia State Convention of 1829–30 608, 616 (Richmond, Samuel Shepherd & Co. 1830)).

102. *Id.*

Williams-Yulee, by its terms, is cabined to judicial elections. But its logic suggests that a state might also constitutionally enact stricter campaign-finance laws for AG elections than for political elections. Like judges, AGs play a role that is quite distinct from that of elected policymakers. Though AGs' responsibilities vary by state, their duties generally include "providing legal advice to state agencies and officials," as well as litigating on behalf of citizens in such areas as consumer protection.[103] Many AGs also "function as the principal prosecutor in their state," and all "are responsible for representing the state in criminal appeals."[104] As with judges, none of these duties lend themselves to providing "special consideration to . . . campaign donors."[105] There is no legitimate reason a donor who has ingratiated himself to an AG should, for example, receive "special consideration" with respect to criminal prosecutions. Nor is there any conceivable reason companies that have raised money for an AG should get the benefit of "ingratiation" when an AG decides whether to bring a consumer protection suit.

Further, unlike lawmakers, AGs are not expected to engage in the "horse trading" on behalf of various constituencies that is a feature of legislative activity.[106] Instead, like judges, an AG's role is to apply the law neutrally and "administer justice without fear or favor."[107] Thus, even if one accepts—as the Court did in *Citizens United*—that "[f]avoritism and influence are not . . . avoidable in *representative* politics,"[108] a state might still endeavor to remove the specter of favoritism from the office of its top legal officer. Accordingly, campaign-finance regulations specifically targeting AG elections might be justified by something resembling the "compelling interest" articulated in *Williams-Yulee*.[109] Specifically, a state might argue that AG-focused campaign-finance restrictions are necessary to preserve public confidence not just in the *judiciary*, but in the integrity of a state's *justice system* as a whole.

It is beyond the scope of this Review to fully theorize how campaign-finance restrictions should apply in AG elections. Suffice it to say, however, the argument that *Williams-Yulee* should be extended to AG elections is far from a slam-dunk. For one, the Court in *Williams-Yulee* does not seem to have contemplated that its logic could be extended beyond the judicial realm. Indeed, *Williams-Yulee* expressly distinguishes judicial elections from "legislative *and executive* elections."[110] And an AG is typically a part of the

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103. Brief of Amici, Wyoming et al. in Support of Respondent's Brief on the Merits at 2, Burns v. Reed, 500 U.S. 478 (1991) (No. 89-1715).

104. *Id.* at 3.

105. *Williams-Yulee*, 135 S. Ct. at 1667.

106. Ala. Legislative Black Caucus v. Alabama, 988 F. Supp. 2d 1285, 1327 (M.D. Ala. 2013).

107. *Williams-Yulee*, 135 S. Ct. at 1659.

108. Citizens United v. FEC, 558 U.S. 310, 359 (2010) (emphasis added) (quoting McConnell v. FEC, 540 U.S. 93, 297 (2003)).

109. *See* 135 S. Ct. at 1666.

110. *Id.* at 1667 (emphasis added).

executive branch (albeit an executive actor, unlike a governor, who has minimal legislative responsibilities).[111]

In any event, even if courts were to hold that the First Amendment permits stricter campaign-finance regulations in AG elections than in other political elections, it remains unclear how strict those regulations could be. The restriction at issue in *Williams-Yulee*, after all, was relatively mild: it simply prohibited judicial candidates from soliciting contributions personally, while permitting such solicitations by surrogates.[112] If a court accepted that AG elections are like judicial elections, a parallel in-person-solicitation ban for AGs might be upheld.[113] But more expansive regulations targeting outside-group spending would presumably be needed to check the influence special-interest groups obtain through contributions to groups like RAGA and DAGA. And it is far from clear that, even in the judicial-elections context, such restrictions on outside spending would survive First Amendment scrutiny.

Still, *Williams-Yulee* offers at least some possibility that willing states might be able to rein in special-interest groups' outsized influence over AGs. That possibility suggests that national fossil-fuel interests' influence over state AGs could potentially be checked in some states—thus helping to preserve, and even expand upon, environmental victories in the clean air wars.

Conclusion

Read together, *Struggling for Air* and *Federalism on Trial* offer a thorough history of the Clean Air Act and show how that law has been made more effective, in part, through the efforts of state AGs. The fossil-fuel industry, however, has begun pouring unprecedented sums of money into AG races throughout the country. That spending has apparently paid off. AGs across the country have, in recent years, allied with fossil-fuel interests in an attempt to fight environmental regulations. This regulatory capture of many AGs seems likely to impede environmental regulation for years to come.

The Supreme Court's recent decision in *Williams-Yulee*, however, offers at least a theoretical possibility that targeted campaign-finance laws geared toward AGs could pass constitutional muster. Such laws, if enacted, could help check the significant influence fossil-fuel interests now enjoy over AGs—and ultimately allow for the continued "redemption" of the Clean Air Act.

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111. Neal Devins & Saikrishna Bangalore Prakash, *Fifty States, Fifty Attorneys General, and Fifty Approaches to the Duty to Defend*, 124 Yale L.J. 2100, 2123 (2014).

112. 135 S. Ct. at 1668.

113. Such a restriction may be good policy. A state could well conclude that personal solicitation by the state's top prosecutor, like "personal solicitation by a judicial candidate . . . 'places the solicited individuals in a position to fear retaliation if they fail to financially support that candidate.'" *Id.* (quoting Simes v. Ark. Judicial Discipline & Disability Comm'n, 247 S.W.3d 876, 882 (Ark. 2007)).