

3-1-2018

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### Recommended Citation

Elbert Lin, *States Suing the Federal Government: Protecting Liberty or Playing Politics?*, 52 U. Rich. L. Rev. 633 (2018).

Available at: <https://scholarship.richmond.edu/lawreview/vol52/iss3/7>

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## STATES SUING THE FEDERAL GOVERNMENT: PROTECTING LIBERTY OR PLAYING POLITICS?

*Elbert Lin* \*

### INTRODUCTION

It has become increasingly common in recent years to scan the news and find that a state or group of states has sued the federal government. During the eight years of the Obama Administration, states led mostly by Republican attorneys general challenged federal action on matters ranging from health care to immigration to the environment to overtime pay. And during just the first year of the Trump Administration, states led by Democratic attorneys general have brought suits in many of those same areas and others, including federal student loan relief and regulation of the internet.

Many of these state-led lawsuits have put the brakes on federal executive actions. Though some of the cases have challenged alleged congressional overreach in federal statutes—most notably the Affordable Care Act (“ACA”)<sup>1</sup>—the overwhelming majority have challenged actions by federal agencies or the President himself. And many have been successful. In February 2016, West Virginia’s multistate action against the signature climate-change rule of the Obama Administration Environmental Protection Agency (“EPA”) resulted in a United States Supreme Court stay of the rule that, for all practical purposes, made possible the Trump Administration EPA’s current efforts to repeal that rule.<sup>2</sup> Two years later,

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\* Partner, Hunton & Williams L.L.P. Solicitor General of West Virginia, 2013–2017. This article is adapted from a talk given at the *University of Richmond Law Review* Symposium: Defining the Constitution’s President Through Legal & Political Conflict (Oct. 27, 2017) and Elbert Lin, Opinion, *A Duty to Fight for Federalism*, WASH. TIMES (July 16, 2015), [www.washingtontimes.com/news/2015/jul/16/celebrate-liberty-month-a-duty-to-fight-for-federal/](http://www.washingtontimes.com/news/2015/jul/16/celebrate-liberty-month-a-duty-to-fight-for-federal/). This article presents the views of the author, which do not necessarily reflect those of Hunton & Williams L.L.P. or its clients.

1. See, e.g., Nat’l Fed’n of Indep. Bus. v. Sebelius, 567 U.S. 519, 540 (2012) (challenging the constitutionality of the ACA).

2. West Virginia v. EPA, 577 U.S. \_\_, \_\_, 136 S. Ct. 1000, 1000 (2016); see Jennifer A. Dlouhy, *Trump to Argue Obama’s Clean Power Plan Violates U.S. Law*, BLOOMBERG (Oct.

Washington State's lawsuit challenging President Trump's Executive Order 13769 (sometimes called the "Travel Ban") succeeded in blocking the enforcement of significant parts of the Order<sup>3</sup> and caused the Trump Administration to issue a revised Executive Order.<sup>4</sup>

This article explores this trend and suggests that, while states need to push back on federal overreach, there are important questions about how and why states do so. Part I discusses some of the many state-led suits filed against the federal executive branch under both Presidents Obama and Trump.<sup>5</sup> Part II discusses some of the reasons for and criticisms of state-led lawsuits against the federal government. Ultimately, this article concludes that, while state-led litigation against the federal government is important to American democracy, we should be cautious about accepting every state-filed lawsuit as a faithful effort to vindicate federalism.

## I. STATES VERSUS THE PRESIDENT

### A. *Suing President Obama*

During the eight years of the Obama Administration, states led mostly by Republican attorneys general made it a priority, early and often, to challenge President Obama's initiatives. The current Governor of Texas, Greg Abbott, served as the Texas Attorney General during the first six years of the Obama Administration. He once claimed to have sued the Obama Administration twenty-five times, describing his job this way: "I go into the office, I sue the federal government and I go home."<sup>6</sup> "State attorneys general have proven to be the last line of defense," Abbott said, "against a federal government that is growing too large, spending too much, and

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5, 2017, 6:55 PM EDT), <https://www.bloomberg.com/news/articles/2017-10-05/trump-is-said-to-argue-obama-s-clean-power-plan-violates-law> ("Because of legal challenges, [the Clean Power Plan] never actually took effect.").

3. See *Washington v. Trump*, 847 F.3d 1151, 1157–58, 1164, 1169 (9th Cir. 2017) (per curiam).

4. See Exec. Order No. 13,780, 82 Fed. Reg. 13,209, 13,209–10 (Mar. 6, 2017); Supplemental Brief on En Banc Consideration at 4, *Washington v. Trump*, 855 F.3d 984 (9th Cir. 2017) (No. 17-35105) [hereinafter Supplemental Brief on En Banc Consideration].

5. As the Solicitor General of West Virginia from 2013 to 2017, the author was involved in many of the Republican-led suits against the Obama Administration.

6. Sue Owen, *Greg Abbott Says He Has Sued Obama Administration 25 Times*, POLITIFACT (May 10, 2013, 5:14 PM), <http://www.politifact.com/texas/statements/2013/may/10/greg-abbott/greg-abbott-says-he-has-sued-obama-administration/>.

reaching too deeply into our lives.”<sup>7</sup> When E. Scott Pruitt, President Trump’s EPA Administrator, served as the Oklahoma Attorney General from 2011 until 2017, he created an “office of federalism” to fight federal overreach.<sup>8</sup> Similarly, West Virginia Attorney General Patrick Morrisey ran for office in 2012 on a promise to create an “Office of Federalism and Freedom” to “refocus some of the Office’s priorities on challenging federal policies.”<sup>9</sup> Fred Barnes of *The Weekly Standard* wrote several articles about Republican state attorneys general during the Obama years, describing them as “the resistance,”<sup>10</sup> “the last redoubt,”<sup>11</sup> “a scourge of President Obama,”<sup>12</sup> and “the conservative legal army.”<sup>13</sup>

The lawsuits brought by these state attorneys general did not always succeed, but they did stop some of President Obama’s biggest initiatives.<sup>14</sup> And in doing so, they often had not only an immediate impact on the federal executive branch, but also set important precedents for future challenges by states or other parties seeking to rein in the President and his or her agencies.

Perhaps the greatest number of state-led lawsuits filed against the federal government came in the environmental space, and at least three successful suits bear mentioning.<sup>15</sup> In 2012, Michigan

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7. Quin Hillyer, *AGs: States’ Sovereignty Advances Liberty*, CTR. FOR INDIVIDUAL FREEDOM (Sept. 20, 2012), <http://cfif.org/v/index.php/commentary/42-constitution-and-legal/1581>.

8. *Id.*

9. John O’Brien, *AG-Elect Morrisey Ready to Implement 17-Point Plan*, W. VA. RECORD (Nov. 12, 2012, 12:42 PM), <https://wvrecord.com/stories/510603882-ag-elect-morrissey-ready-to-implement-17-point-plan>.

10. Fred Barnes, *The Resistance*, WKLY. STANDARD (Mar. 3, 2014, 12:00 AM), <http://www.weeklystandard.com/the-resistance/article/782747>.

11. Fred Barnes, *The Last Redoubt*, WKLY. STANDARD (July 22, 2013, 12:00 AM), <http://www.weeklystandard.com/the-last-redoubt/article/739263>.

12. *Id.*

13. Fred Barnes, *Another Attorney General for the Conservative Legal Army*, WALL STREET J. (July 15, 2016, 7:05 PM ET), <https://www.wsj.com/articles/another-attorney-general-for-the-conservative-legal-army-1468623912>; see George F. Will, *State Attorneys General Are Revitalizing Federalism*, PITTSBURGH POST-GAZETTE (Dec. 22, 2014, 12:00 AM), <http://www.post-gazette.com/opinion/Op-Ed/2014/12/22/George-F-Will-State-attorneys-general-are-revitalizing-federalism/stories/201412220058>.

14. See, e.g., Elbert Lin, *States Get Wins Against Federal Overreach*, FEDERALIST SOC’Y: BLOG POSTS (Oct. 11, 2015), <https://fedsoc.org/commentary/blog-posts/states-get-wins-against-federal-overreach> (discussing judicial injunctions on two “major” federal rules); Adam Liptak & Coral Davenport, *Supreme Court Deals Blow to Obama’s Efforts to Regulate Coal Emissions*, N.Y. TIMES (Feb. 9, 2016), <https://www.nytimes.com/2016/02/10/us/politics/supreme-court-blocks-obama-epa-coal-emissions-regulations.html>.

15. *West Virginia v. EPA*, 577 U.S. \_\_\_, \_\_\_, 136 S. Ct. 1000, 1000 (2016); *Michigan v. EPA*, 576 U.S. \_\_\_, \_\_\_, 135 S. Ct. 2699, 2712 (2015); *In re EPA*, 803 F.3d 804, 808–09 (6th

led more than twenty States, together with numerous industry and labor entities, in challenging an EPA rule regulating the emission of certain “hazardous air pollutants” from coal- and oil-fired power plants.<sup>16</sup> The issue in the case was the EPA’s finding under the Clean Air Act that such regulation was “appropriate and necessary.”<sup>17</sup> The EPA had concluded that it need not consider costs when making that finding.<sup>18</sup> The challengers disagreed.<sup>19</sup>

Three years later, the Supreme Court found for the challengers in *Michigan v. EPA* in an opinion by Justice Scalia that will undoubtedly be quoted at length in many future challenges to federal agency action.<sup>20</sup> The Court stressed that the question was whether *regulation* was “appropriate and necessary.”<sup>21</sup> Such a determination, the Court explained, plainly requires a consideration of cost.<sup>22</sup> Indeed, “[a]gencies have long treated cost as a centrally relevant factor when deciding whether to regulate.”<sup>23</sup> That is because “reasonable regulation ordinarily requires paying attention to the advantages *and* the disadvantages of agency decisions.”<sup>24</sup> Put simply, “[n]o regulation is ‘appropriate’ if it does significantly more harm than good.”<sup>25</sup>

The greater impact of *Michigan v. EPA*, however, may have come the day after the Supreme Court handed down its decision. That next day, the EPA responded to the decision in a blog post, characterizing the Court’s ruling as “very narrow” and noting that “the majority of power plants are already in compliance or well on their way to compliance.”<sup>26</sup> The EPA’s message was clear: even though the Court had found that the EPA had acted unlawfully, the ruling

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Cir. 2015).

16. See *White Stallion Energy Ctr., LLC v. EPA*, 748 F.3d 1222, 1229 (D.C. Cir. 2014) (per curiam), *rev’d sub nom. Michigan v. EPA*, 576 U.S. at \_\_\_, 135 S. Ct. at 2699; National Emission Standards for Hazardous Air Pollutants, 77 Fed. Reg. 9304, 9363–64 (Feb. 16, 2012) (to be codified at 40 C.F.R. pts. 60 & 63).

17. *White Stallion Energy*, 748 F.3d at 1233; see 42 U.S.C. § 7412(n)(1)(A) (2012).

18. *White Stallion Energy*, 748 F.3d at 1236–37; see National Emission Standards for Hazardous Air Pollutants, 77 Fed. Reg. at 9327.

19. *White Stallion Energy*, 748 F.3d at 1236.

20. *Michigan v. EPA*, 576 U.S. at \_\_\_, 135 S. Ct. at 2712.

21. *Id.* at \_\_\_, 135 S. Ct. at 2709.

22. *Id.* at \_\_\_, 135 S. Ct. at 2707.

23. *Id.* at \_\_\_, 135 S. Ct. at 2707.

24. *Id.* at \_\_\_, 135 S. Ct. at 2707.

25. *Id.* at \_\_\_, 135 S. Ct. at 2707.

26. Janet McCabe, *In Perspective: The Supreme Court’s Mercury and Air Toxics Rule Decision*, EPA: EPA BLOG (June 30, 2015), <https://blog.epa.gov/blog/2015/06/in-perspective-the-supreme-courts-mercury-and-air-toxics-rule-decision/>.

had come too late to stop the EPA from achieving its desired result. That boast may have contributed to another state-led success, to which this article next turns.

Soon after the decision in *Michigan v. EPA*, West Virginia led a group of more than two dozen States in a challenge to the Obama Administration EPA's signature climate-change rule, which the EPA called the Clean Power Plan.<sup>27</sup> Promulgated under the Clean Air Act, the Clean Power Plan sought to reduce carbon dioxide emissions from existing fossil-fuel-fired power plants by thirty-two percent of 2005 levels by 2030.<sup>28</sup> The Clean Power Plan based its targeted emission reductions not on an improvement in technology or operations at the existing power plants, but rather on the theory that those power plants could simply produce less electricity and shift their power generation to new low- or zero-carbon-emission competitors.<sup>29</sup> Over two dozen States and many other interested parties sued the EPA.<sup>30</sup> The challengers accused the EPA of picking winners and losers in the energy marketplace, and alleged that the EPA had exceeded its statutory authority under the Clean Air Act, had failed to comply with certain rulemaking requirements in the Administrative Procedure Act ("APA"), and had violated the United States Constitution.<sup>31</sup>

In February 2016, the challengers won an unprecedented stay from the Supreme Court by a vote of 5-4.<sup>32</sup> It was the first time the Court had ever stayed an agency rule while the merits of the rule

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27. See LINDA TSANG & ALEXANDRA M. WYATT, CONG. RESEARCH SERV., R44480, CLEAN POWER PLAN: LEGAL BACKGROUND AND PENDING LITIGATION IN *WEST VIRGINIA V. EPA* 1 (2017); Carbon Pollution Emission Guidelines for Existing Stationary Sources, 80 Fed. Reg. 64,662, 64,665 (Oct. 23, 2015) (to be codified at 40 C.F.R. pt. 60); Petition for Review at 2, *West Virginia v. EPA* (D.C. Cir. Oct. 23, 2015) (No. 15-1363) [hereinafter Petition for Review].

28. See Carbon Pollution Emission Guidelines for Existing Stationary Sources, 80 Fed. Reg. at 64,665; see also EPA, OVERVIEW OF THE CLEAN POWER PLAN, <https://19january2017snapshot.epa.gov/sites/production/files/2015-08/documents/fs-cpp-overview.pdf> [hereinafter EPA, OVERVIEW].

29. See EPA, OVERVIEW, *supra* note 28.

30. Petition for Review, *supra* note 27, at 2. Other interested parties challenging the EPA's Clean Power Plan included "three labor unions, a number of rural electric cooperatives and an association representing them, more than two dozen industry and trade groups, several nonprofit public policy organizations, and more than two dozen fossil-fuel-related companies and local electric utilities." TSANG & WYATT, *supra* note 27, at 10. The author served as counsel for the States.

31. See Petition for Review, *supra* note 27, at 2.

32. See *West Virginia v. EPA*, 577 U.S. \_\_\_, \_\_\_, 136 S. Ct. 1000, 1000 (2016).

remained under review in the lower courts.<sup>33</sup> In the State petitioners' stay motion to the Court, the petitioners led with the argument that the *Michigan v. EPA* decision "starkly illustrate[d] the need for a stay" because it showed very clearly the consequences of the courts allowing a rule to remain in effect while it was reviewed.<sup>34</sup> Whether that argument made the difference is anyone's guess, but the EPA certainly did itself no favors with its finger-in-the-eye blog post after the *Michigan v. EPA* decision, which provided a clear illustration of the stakes that courts face when they refuse to stay agency rules during the review process.

The third major success in the environmental space was the challenge to the Obama Administration Waters of the United States Rule ("WOTUS Rule"). The WOTUS Rule sought to define the phrase "waters of the United States," which is the scope of federal jurisdiction under the Clean Water Act.<sup>35</sup> The acceptable meaning of that phrase has fractured the Supreme Court once before in a 2005 case called *Rapanos v. United States* that was resolved in a 4-1-4 split.<sup>36</sup> Around thirty States and other parties challenged the rule.<sup>37</sup> Among other arguments, the challengers asserted that the United States Army Corps of Engineers and the EPA exceeded their statutory authority under the Clean Water Act, failed to comply with the APA, and violated the United States Constitution.<sup>38</sup>

After some complicated procedural adventures worthy of a federal courts textbook, eighteen States and other interested-party movants won a nationwide stay from the United States Court of

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33. Liptak & Davenport, *supra* note 14. During briefing on the stay request, one law professor said it was "unthinkably unlikely" that the Supreme Court would grant the stay. See Ellen M. Gilmer, *States Sidestep Convention in Bid for Supreme Court Action*, E&E NEWS (Jan. 27, 2016), <https://www.eenews.net/stories/1060031211>.

34. Application by 29 States and State Agencies for Immediate Stay of Final Agency Action During Pendency of Petitions for Review at 1, *West Virginia v. EPA*, 577 U.S. \_\_\_, 136 S. Ct. 1000 (No. 15A773).

35. Clean Water Rule: Definition of "Waters of the United States," 80 Fed. Reg. 37,054 (June 29, 2015).

36. 547 U.S. 715, 718 (2006).

37. See *In re U.S. Dep't of Def. Clean Water Rule*, 817 F.3d 261, 263 (6th Cir. 2016), *rev'd sub nom.* Nat'l Ass'n of Mfrs. v. Dep't of Def., No. 16-299 (U.S. Jan. 22, 2018); Sonal Patel, *SCOTUS Sends Controversial WOTUS Rule into More Legal Limbo*, POWER (Jan. 23, 2018), <http://www.powermag.com/scotus-sends-controversial-wotus-rule-into-more-legal-limbo>; John Siciliano, *GOP Lawmakers Join 31-State Lawsuit Opposing EPA Water Rule*, WASH. EXAMINER (Nov. 8, 2016, 4:48 PM), <http://www.washingtonexaminer.com/gop-lawmakers-join-31-state-lawsuit-opposing-epa-water-rule/article/2606808>.

38. *In re U.S. Dep't of Def. Clean Water Rule*, 817 F.3d at 264-65.

Appeals for the Sixth Circuit in October 2015.<sup>39</sup> Perhaps most notable was the Sixth Circuit's grant of the stay despite its conclusion that none of the movants was in any danger of irreparable harm—whether “in the form of interference with state sovereignty, or in unrecoverable expenditure of resources as they endeavor to comply with the new regime.”<sup>40</sup> The Sixth Circuit simply determined that the challengers had demonstrated a “substantial possibility of success on the merits of their claims,” and that “the sheer breadth of the ripple effects caused by the Rule's definitional changes counsels strongly in favor of maintaining the status quo for the time being.”<sup>41</sup> The court granted the nationwide stay to “temporarily silence[] the whirlwind of confusion that springs from uncertainty about the requirements of the new Rule and whether they will survive legal testing.”<sup>42</sup>

Outside the environmental context, one notable case was the Texas-led challenge to President Obama's program of Deferred Action for Parents of Americans and Lawful Permanent Residents (“DAPA”), which sought to assist certain undocumented immigrants with children who are American citizens or lawful permanent residents.<sup>43</sup> Texas and its coalition of more than twenty States argued that DAPA violated federal immigration statutes, the APA, and the United States Constitution.<sup>44</sup> A federal district court in Texas entered a nationwide injunction in February 2015.<sup>45</sup> The United States Court of Appeals for the Fifth Circuit affirmed, agreeing with Texas's contention that DAPA would unlawfully “confer ‘lawful presence’ and associated benefits on a class of unlawfully present aliens.”<sup>46</sup> The Supreme Court granted certiorari in January 2016 and, after Justice Scalia's death, affirmed by an equally divided Court.<sup>47</sup>

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39. *In re* EPA, 803 F.3d 804, 808 (6th Cir. 2015).

40. *Id.*

41. *Id.* at 807–08.

42. *Id.* at 808.

43. *Texas v. United States*, 86 F. Supp. 3d 591, 604 (S.D. Tex. 2015); Memorandum from Jeh Johnson, Sec'y, Dep't of Homeland Sec., to Leon Rodriguez, Dir., USCIS, et al. 3–4 (Nov. 20, 2014), [http://www.dhs.gov/sites/default/files/publications/14\\_1120\\_memo\\_prosecutorial\\_discretion.pdf](http://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf).

44. *See Texas v. United States*, 86 F. Supp. 3d at 607–08.

45. *Id.* at 677–78.

46. *Texas v. United States*, 809 F.3d 134, 166 (5th Cir. 2015).

47. *United States v. Texas*, 579 U.S. \_\_\_, \_\_\_, 136 S. Ct. 2271, 2272 (2016) (per curiam); *United States v. Texas*, 577 U.S. \_\_\_, \_\_\_, 136 S. Ct. 906, 906 (2016) (mem.). Justice Scalia died on February 16, 2016, after the Court granted certiorari but several months before the



Two aspects of the DAPA case bear particular mention. The first is the question of standing. The Fifth Circuit's ruling, though purportedly "limited" by that court to the "facts" before it, may have far-reaching implications for state-led challenges by Republican *and* Democratic state attorneys general.<sup>48</sup> In holding that Texas had standing to sue, the Fifth Circuit relied on the "special solicitude" that the Supreme Court afforded to states in the climate-change-related Clean Air Act challenge in *Massachusetts v. EPA*.<sup>49</sup> Describing that "special solicitude" as a "presumption" in favor of standing, the Fifth Circuit expressly extended the reasoning of *Massachusetts v. EPA* to certain lawsuits brought under the APA against federal executive action.<sup>50</sup> That holding will undoubtedly be cited by states in future legal actions against the federal government.

The second aspect of DAPA that bears mention is the Fifth Circuit's affirmance of the nationwide scope of the district court's injunction.<sup>51</sup> The Fifth Circuit rejected the federal government's request to confine the injunction to Texas or the plaintiff States, reasoning that any order affecting immigration policy must apply uniformly and also that the judicial power includes the power to issue a nationwide injunction "in appropriate circumstances."<sup>52</sup> The Fifth Circuit's holding in *Texas v. United States* has already been cited by courts imposing nationwide injunctions against the Trump Administration at the request of Democratic attorneys general,<sup>53</sup> and has triggered a vigorous debate among legal practitioners and academics, as well as in the public sphere.<sup>54</sup>

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Court issued its decision in *Texas v. United States*. Amy Brittain & Sari Horwitz, *Texas Sheriff's Report Reveals More Details on Supreme Court Justice Scalia's Death*, WASH. POST (Feb. 23, 2016), [https://www.washingtonpost.com/world/national-security/texas-sheriff-releases-report-on-supreme-court-justice-scalias-death/2016/02/23/8c0bdb0c-da82-11e5-891a-4ed04f4213e8\\_story.html?utm\\_term=.875c6ec5166b](https://www.washingtonpost.com/world/national-security/texas-sheriff-releases-report-on-supreme-court-justice-scalias-death/2016/02/23/8c0bdb0c-da82-11e5-891a-4ed04f4213e8_story.html?utm_term=.875c6ec5166b).

48. See *Texas v. United States*, 809 F.3d at 154.

49. *Id.* at 151–53.

50. See *id.* at 154–55.

51. *Id.*

52. *Id.* at 187–88.

53. See *Hawaii v. Trump*, 859 F.3d 741, 787 (9th Cir.), *vacated as moot and appeal dismissed*, 874 F.3d 1112 (9th Cir. 2017) (mem.); *Int'l Refugee Assistance Project v. Trump*, 857 F.3d 554, 605 (4th Cir.) (en banc), *vacated as moot*, 583 U.S. \_\_\_, 138 S. Ct. 353 (2017); *Washington v. Trump*, 847 F.3d 1151, 1166–67 (9th Cir. 2017) (per curiam); *City of Chicago v. Sessions*, No. 17 C 5720, 2017 U.S. Dist. LEXIS 169518, at \*9 (N.D. Ill. Oct. 13, 2017).

54. See, e.g., Spencer E. Amdur & David Hausman, *Nationwide Injunctions and Nationwide Harm*, 131 HARV. L. REV. F. 49, 49–50 (2017); Samuel L. Bray, *Multiple Chancel-*

A few final examples of success in lawsuits led by Republican attorneys general—all resulting in nationwide injunctions against the Obama Administration—include challenges to two United States Department of Labor rules and a purported guidance document from the United States Department of Education and other federal agencies. In June 2016, a federal district court judge in Texas enjoined the Department of Labor’s “Persuader Rule” on a nationwide basis at the urging of several business groups and ten States.<sup>55</sup> Then in August 2016, in a lawsuit brought by more than a dozen States, a different federal district court judge in Texas issued a nationwide injunction of federal “Guidelines” that required all federally funded schools to allow access to bathrooms, locker rooms, and similar facilities on the basis of gender identity.<sup>56</sup> And in November 2016, at the request of twenty-one States and a number of business groups, a third federal district court judge in Texas enjoined nationwide the Department of Labor’s new “Overtime Rule,” which would have doubled the salary threshold for exemption from overtime pay.<sup>57</sup>

### B. *Suing President Trump*

In the past year and a half, it has become clear that Democratic state attorneys general will continue what their Republican counterparts were doing under the Obama Administration. Even before then-President-elect Trump’s inauguration, Democratic state attorneys general were preparing to follow the Republican tactic of

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*lors: Reforming the National Injunction*, 131 HARV. L. REV. 417, 418–19 (2017); Kate Huddleston, *Nationwide Injunctions: Venue Considerations*, 127 YALE L.J.F. 242, 242–43 (2017); Getzel Berger, *Nationwide Injunctions Are Wrong—Even When They Stop Trump*, L.A. TIMES, (May 12, 2017, 4:00 AM), <http://www.latimes.com/opinion/op-ed/la-oe-berger-injunctions-lower-federal-courts-judges-20170512-story.html>; Max Bloom, *American District Courts Wield Too Much Power*, NAT’L REV. (July 7, 2017, 2:45 PM), <http://www.nationalreview.com/article/449306/us-district-courts-too-powerful-nationwide-injunctions-hurt-legal-system>; Amanda Frost, *Academic Highlight: The Debate Over Nationwide Injunctions*, SCOTUSBLOG (Feb. 1, 2018, 10:21 AM), <http://www.scotusblog.com/2018/02/academic-high-light-debate-nationwide-injunctions/>.

55. Nat’l Fed’n of Indep. Bus. v. Perez, No. 5:16-cv-00066-C, 2016 U.S. Dist. LEXIS 89694, at \*4–5, \*130–31 (N.D. Tex. June 27, 2016).

56. Texas v. United States, 201 F. Supp. 3d 810, 815–16, 836 (N.D. Tex. 2016).

57. Nevada v. U.S. Dep’t of Labor, 218 F. Supp. 3d 520, 523–25, 533–34 (E.D. Tex. 2016).

filing lawsuits against federal executive actions.<sup>58</sup> After the inauguration, they put that plan into action.<sup>59</sup> As one news article said, “Since Donald Trump was elected president, Democratic state attorneys general have been forming a coordinated wall of legal resistance over immigration, environmental protections, health care and other major issues.”<sup>60</sup> In late November, just ten months after the inauguration, it was reported that the California Attorney General’s Office had “put its name on 21 lawsuits against the Trump administration.”<sup>61</sup>

Indeed, resources are specifically being raised for and directed toward these efforts. The Democratic Attorneys General Association has stepped up fundraising and outreach, and does not shy away from saying it has “played a crucial role bringing about [the] shift” in coordinated resistance by Democratic state attorneys general.<sup>62</sup> An *American Prospect* article reported that Democratic state attorneys general offices “have been beefing up”; in March, the New York Attorney General was looking to hire “two new senior attorneys to focus on issues related to Trump’s presidency.”<sup>63</sup> And in August 2017, New York University School of Law launched its State Energy & Environmental Impact Center (“Center”) with nearly six million dollars of support from Bloomberg Philanthropies.<sup>64</sup> The Center “is dedicated to helping state attorneys general fight against regulatory rollbacks and advocate for clean energy, climate change, and environmental values and protections.”<sup>65</sup> So

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58. See, e.g., Vivian Yee, *To Combat Trump, Democrats Ready a G.O.P. Tactic: Lawsuits*, N.Y. TIMES (Dec. 14, 2016), <https://www.nytimes.com/2016/12/14/nyregion/donald-trump-democrats-lawsuits.html>.

59. See, e.g., Rachel M. Cohen, *The Hour of the Attorneys General*, AM. PROSPECT (Mar. 22, 2017), <http://prospect.org/article/hour-attorneys-general> (“State Democratic AGs have assumed new importance in the effort to contain the Trump presidency.”); Alan Neuhauser, *State Attorneys General Lead the Charge Against President Donald Trump*, U.S. NEWS & WORLD REP. (Oct. 27, 2017), <https://www.usnews.com/news/best-states/articles/2017-10-27/state-attorneys-general-lead-the-charge-against-president-donald-trump>.

60. Christopher Aluka Berry, *Democratic State Attorneys General Begin Trump Pushback*, CNBC (Jan. 31, 2017, 2:45 AM), <https://www.cnbc.com/2017/01/31/democratic-state-attorneys-general-begin-trump-pushback.html>.

61. Ben Christopher, *For California Attorney General, Suing Trump Again and Again Is a Team Sport*, L.A. DAILY NEWS (Nov. 30, 2017, 6:18 PM), <https://www.dailynews.com/2017/11/30/for-california-attorney-general-suing-trump-again-and-again-is-a-team-sport/>.

62. Neuhauser, *supra* note 59.

63. Cohen, *supra* note 59.

64. Caitlin MacNeal, *Bloomberg Charity Funds Center to Aid State AGs in Climate Change Fight*, TPM LIVEWIRE (Aug. 17, 2017, 11:59 AM), <http://talkingpointsmemo.com/livewire/bloomberg-nyu-law-school-state-ags-climate-change>.

65. *7 Attorney General Offices Selected to Participate in New State Impact Center’s NYU Law Fellowship Program*, N.Y.U. (Oct. 17, 2017), <http://www.law.nyu.edu/centers/state-im>

far, the Center has announced that fourteen fellows will be placed in ten Democratic state attorney general offices to serve as “special assistant attorneys general dedicated to working on clean energy, climate change and environmental matters of national and regional importance.”<sup>66</sup>

Some of these Democrat-led challenges already have succeeded in halting or altering federal executive action. Likely the most well-known success is the Washington State lawsuit taking on the original Travel Ban. On January 27, 2017, President Trump issued the Travel Ban, which, among other things, suspended for ninety days the entry of aliens from Iraq, Iran, Libya, Somalia, Sudan, Syria, and Yemen.<sup>67</sup> Three days later, Washington State filed suit, challenging parts of the Travel Ban as violative of several federal statutes and the United States Constitution.<sup>68</sup> The federal district court entered a nationwide temporary restraining order, which the United States Court of Appeals for the Ninth Circuit upheld on appeal.<sup>69</sup> In response, the United States declined to seek en banc review, instead informing the Ninth Circuit that “the President intend[ed] in the near future to rescind the [Travel Ban] order and replace it with a new, substantially revised Executive Order to eliminate what the panel erroneously thought were constitutional concerns.”<sup>70</sup>

State-led challenges to later iterations of the Travel Ban have seen success in lower courts but have met some resistance at the United States Supreme Court. In March 2017, Hawaii won a nationwide injunction of parts of President Trump’s Executive Order 13780 (“Travel Ban 2.0”), which the Ninth Circuit affirmed.<sup>71</sup> But in late June 2017, the Supreme Court granted certiorari and issued

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pact/news/7-AG-offices-selected-NYUlaw-fellowship-program.

66. *Id.*; *3 More Attorneys General Selected to Boost Legal Work on Energy, Environment & Climate*, N.Y.U. (Dec. 13, 2017), <http://www.law.nyu.edu/centers/state-impact/news/3-More-AttorneysGeneral-Selected-to-Boost-Legal-Work-on-Energy-Environment-Climate>.

67. Exec. Order No. 13,769, 82 Fed. Reg. 8977, 8978 (Jan. 27, 2017); *Trump’s Executive Order: Who Does Travel Ban Affect?*, BBC NEWS (Feb. 10, 2017), [www.bbc.com/news/world-us-canada-38781302](http://www.bbc.com/news/world-us-canada-38781302).

68. Complaint for Declaratory and Injunctive Relief, *Washington v. Trump*, No. C17-0141JLR, 2017 U.S. Dist. LEXIS 16012 (W.D. Wash. Feb. 3, 2017).

69. *Washington v. Trump*, 847 F.3d 1151, 1156, 1169 (9th Cir. 2017) (per curiam); *Washington v. Trump*, 2017 U.S. Dist. LEXIS 16012, at \*7–8.

70. Supplemental Brief on En Banc Consideration, *supra* note 4, at 4.

71. *Hawaii v. Trump*, 859 F.3d 741, 789 (9th Cir.), *vacated as moot and appeal dismissed*, 874 F.3d 1112 (9th Cir. 2017) (mem.); *Hawaii v. Trump*, 245 F. Supp. 3d 1227, 1237–39 (D. Haw. 2017); Exec. Order No. 13,780, 82 Fed. Reg. 13209 (Mar. 6, 2017).

an order lifting the injunctions “with respect to foreign nationals who lack any bona fide relationship with a person or entity in the United States,” explaining that the government’s interest is “undoubtedly at [its] peak when there is no tie between the foreign national and the United States.”<sup>72</sup> Then in July 2017, Hawaii won—and the Ninth Circuit affirmed—another injunction narrowing Travel Ban 2.0.<sup>73</sup> The United States returned to the Supreme Court, and the Court agreed to lift part of that injunction.<sup>74</sup> A few weeks later, the Trump Administration issued Proclamation No. 9645 (“Travel Ban 3.0”), replacing Travel Ban 2.0 and causing the Court to dismiss its pending cases as moot.<sup>75</sup> Hawaii sought and obtained a nationwide preliminary injunction of Travel Ban 3.0,<sup>76</sup> but the Court granted a stay in early December 2017, allowing Travel Ban 3.0 to go into effect.<sup>77</sup>

Perhaps most notable about the reasoning in these cases is the weight given to tweets and similar statements made by President Trump and others in his orbit. In one opinion, the Ninth Circuit cited tweets by the President as evidence of his reasons for signing Travel Ban 2.0.<sup>78</sup> In a related case (not brought by a state), the Court of Appeals for the Fourth Circuit relied on statements made not only by *President* Trump, but also pre-inauguration statements by *then-candidate* Trump.<sup>79</sup> This sort of reasoning, which has been criticized by some, could have extraordinarily far-reaching implications for the relationship between the executive and the judiciary.<sup>80</sup>

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72. *Trump v. Int’l Refugee Assistance Project*, 582 U.S. \_\_\_, \_\_\_, 137 S. Ct. 2080, 2087–88 (2017) (per curiam).

73. *Hawaii v. Trump*, 871 F.3d 646, 664 (9th Cir. 2017) (per curiam); *Hawaii v. Trump*, 263 F. Supp. 3d 1049, 1063 (D. Haw. 2017).

74. *See Trump v. Hawaii*, 582 U.S. \_\_\_, \_\_\_, 138 S. Ct. 49, 49 (2017) (mem.).

75. *Trump v. Hawaii*, 583 U.S. \_\_\_, \_\_\_, 138 S. Ct. 377, 377 (2017) (mem.); *see* Proclamation No. 9645, 82 Fed. Reg. 45,161 (Sept. 24, 2017).

76. *See Hawaii v. Trump*, No. 17-17168, 2017 U.S. App. LEXIS 22725, at \*4–5 (9th Cir. Nov. 13, 2017).

77. *See Trump v. Hawaii*, 583 U.S. \_\_\_, \_\_\_, 138 S. Ct. 542, 542 (2017) (mem.).

78. *Hawaii v. Trump*, 859 F.3d 741, 773 n.14 (9th Cir.), *vacated as moot and appeal dismissed*, 874 F.3d 1112 (9th Cir. 2017) (mem.).

79. *Int’l Refugee Assistance Project v. Trump*, 857 F.3d 554, 575–76, 594–601 (4th Cir.) (en banc), *vacated as moot*, 583 U.S. \_\_\_, 138 S. Ct. 353 (2017).

80. *See, e.g.*, Josh Blackman, *Analysis of IRAP v. Trump Part I: The Fourth Circuit’s Reliance on Pre- and Post-Inauguration Statements*, LAWFARE (May 27, 2017, 4:45 PM), <https://www.lawfareblog.com/analysis-irap-v-trump-part-i-fourth-circuits-reliance-pre-and-post-inauguration-statements>.

On a different immigration-related issue, fifteen States and the District of Columbia were granted a nationwide preliminary injunction in February 2018 by the District Court for the Eastern District of New York in their lawsuit to stop the Trump Administration from ending the Deferred Action for Childhood Arrivals program (“DACA”).<sup>81</sup> The court acknowledged that the Trump Administration “indisputably can end the DACA program,” but concluded that the government had failed to “offer[] legally adequate reasons for doing so,” rendering the DACA rescission “arbitrary and capricious.”<sup>82</sup> Among other things, the court rejected as “legally erroneous,” and therefore “arbitrary and capricious,” the United States Attorney General’s stated reasons for concluding that the DACA program is unconstitutional.<sup>83</sup> The court also recognized that “several academic commentators have insightfully observed various problems with the practice of granting nationwide injunctions against the Government,” but concluded for several reasons that such an injunction was warranted.<sup>84</sup> Beyond the immigration space, Democratic state attorneys general have also won a nationwide injunction of a Trump Administration rule that would change requirements on employers to provide health insurance that covers birth control.<sup>85</sup> In December 2017, a federal district court judge in Pennsylvania granted the request by Pennsylvania Attorney General Josh Shapiro, holding that the Trump Administration had violated the APA and the United States Constitution.<sup>86</sup> Nineteen Democratic state attorneys general supported Pennsylvania’s suit as amici curiae.<sup>87</sup>

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81. See Complaint for Declaratory and Injunctive Relief at 1–3, *New York v. Trump*, No. 17-CV-5228, 2018 U.S. Dist. LEXIS 23547 (E.D.N.Y. Feb. 13, 2018).

82. *Vidal v. Nielsen*, No. 16-CV-4756 (NGG) (JO), 2018 U.S. Dist. LEXIS 23547, at \*13–15 (E.D.N.Y. Feb. 13, 2018).

83. *Id.* at \*47–51.

84. *Id.* at \*88–89.

85. See *Pennsylvania v. Trump*, No. 17-4540, 2017 U.S. Dist. LEXIS 206380, \*3–5 (E.D. Pa. Dec. 15, 2017); Religious Exemptions and Accommodations Under the Affordable Care Act, 82 Fed. Reg. 47,792 (Oct. 13, 2017) (to be codified at 45 C.F.R. pt. 147); Moral Exemptions and Accommodations Under the Affordable Care Act, 82 Fed. Reg. 47,838 (Oct. 13, 2017) (to be codified at 45 C.F.R. pt. 147).

86. *Pennsylvania v. Trump*, 2017 U.S. Dist. LEXIS 206380, at \*12–13, \*63.

87. See Amici Curiae Brief of Massachusetts et al. in Support of Plaintiff’s Motion for a Preliminary Injunction, *Pennsylvania v. Trump*, 2017 U.S. Dist. LEXIS 206380 (No. 17-4540).

Many other suits have been filed but, as of this writing, have not yet been resolved or were unsuccessful. New York Attorney General Eric Schneiderman and nearly two dozen States have filed a suit challenging the decision of the Federal Communications Commission (“FCC”) to undo regulation of the internet (i.e., net neutrality) under Title II of the Communications Act of 1934.<sup>88</sup> Schneiderman is also leading a challenge by ten States and the District of Columbia to a new rule by the EPA and the Army Corps of Engineers that delays the applicability of the WOTUS Rule.<sup>89</sup>

Eighteen States and the District of Columbia sued to force the Trump Administration to continue subsidy payments to health insurers under the ACA, but lost their bid for an emergency injunction.<sup>90</sup>

## II. SHOULD STATES SUE THE PRESIDENT?

### A. *Why States Should Sue the President*

Whether one agrees with the states or not, there is a strong argument that American democracy benefits from lawsuits brought by states against the federal government. Schoolchildren throughout the United States are taught the importance of separation of powers, and how the three branches of the federal government check and balance each other. Perhaps less often discussed is the vertical separation of powers between the federal government and the states.

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88. See Protective Petition for Review, *New York v. FCC*, No. 18-1013 (D.C. Cir. Jan. 16, 2018); see also Press Release, Attorney General Eric T. Schneiderman, N.Y. State Office of the Attorney General, *I Will Sue to Stop Illegal Rollback of Net Neutrality* (Dec. 14, 2017), <https://ag.ny.gov/press-release/ag-schneiderman-i-will-sue-stop-illegal-rollback-net-neutrality>; see John Patrick Pullen, *What's Next for Net Neutrality? Lawsuits Against the FCC*, FORTUNE (Dec. 14, 2017), <http://fortune.com/2017/12/14/net-neutrality-fcc-lawsuit-ajit-pai/>.

89. See Press Release, Attorney General Eric T. Schneiderman, N.Y. State Office of the Attorney Gen., *A.G. Schneiderman Leads Coalition of 11 AGs in Suing Trump EPA for Illegal Rollback of Clean Water Protections* (Feb. 6, 2018), <https://ag.ny.gov/press-release/ag-schneiderman-leads-coalition-11-ags-suing-trump-epa-illegal-rollback-clean-water>; Don Jenkins, *Oregon, Washington, California Sue to Save WOTUS*, CAP. PRESS (Feb. 7, 2018, 9:09 AM), <http://www.capitalpress.com/Water/20180207/oregon-washington-california-sue-to-save-wotus>.

90. Complaint for Declaratory and Injunctive Relief at 5–7, *California v. Trump*, 267 F. Supp. 3d 1119 (N.D. Cal. Oct. 25, 2017) (No. 3:17-cv-05895-VC); Dan Levine & Lawrence Hurley, *Judge Rejects Bid by 18 States to Revive Obamacare Subsidies*, REUTERS (Oct. 25, 2017, 4:39 PM), <https://www.reuters.com/article/us-usa-healthcare-ruling/judge-rejects-bid-by-18-states-to-revive-obamacare-subsidies-idUSKBN1CU2ZZ>.

The United States Constitution establishes a system where the people give power to two independent governments.<sup>91</sup> Each of us is subject to both the federal government and a state government.<sup>92</sup> Indeed, the framers specifically considered a system in which “Congress . . . employ[ed] state governments as regulatory agencies.”<sup>93</sup> And they “rejected [that] concept of a central government that would act upon and through the States, and instead designed a system in which the State and Federal Governments would exercise concurrent authority over the people.”<sup>94</sup> Thus, “our Constitution establishes a system of dual sovereignty between the States and the Federal Government.”<sup>95</sup>

In some areas, federal law is supreme.<sup>96</sup> If the federal government acts properly within its limited and defined powers, the Supremacy Clause prevents the states from interfering.<sup>97</sup> That is the deal states agreed to when they joined the Union.

But the federal government must stay in its own lane. Powers not specifically granted to the central government were retained by the states—a concept reaffirmed in the Tenth Amendment.<sup>98</sup> Moreover, the federal government has to do its own work; it cannot force the states, or state legislatures or officers, to do its bidding.<sup>99</sup> That is the anti-commandeering principle described in cases like *New York v. United States* and *Printz v. United States*.<sup>100</sup> The framers designed “a legal system unprecedented in form and design, establishing two orders of government, each with its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it.”<sup>101</sup>

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91. See *Gregory v. Ashcroft*, 501 U.S. 452, 457–58 (1991).

92. *E.g.*, *Printz v. United States*, 521 U.S. 898, 919–20 (1997).

93. *New York v. United States*, 505 U.S. 144, 163 (1992).

94. *Printz*, 521 U.S. at 899.

95. *Gregory*, 501 U.S. at 457.

96. See *New York v. United States*, 505 U.S. at 159.

97. See *id.*

98. U.S. CONST. amend. X; see, e.g., *Printz*, 521 U.S. at 919.

99. *Printz*, 521 U.S. at 935.

100. See, e.g., *Printz*, 521 U.S. at 925 (“[L]ater opinions of ours have made clear that the Federal Government may not compel the States to implement, by legislation or executive action, federal regulatory programs.”); *New York v. United States*, 505 U.S. at 149 (“We conclude that while Congress has substantial power under the Constitution to encourage the States to provide for the disposal of the radioactive waste generated within their borders, the Constitution does not confer upon Congress the ability simply to compel the States to do so.”).

101. *Printz*, 521 U.S. at 920 (quoting *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779,



In this “tension between federal and state power,” the Supreme Court has said, “lies the promise of liberty.”<sup>102</sup> “The ‘constitutionally-mandated balance of power’ between the States and the Federal Government was adopted by the Framers to ensure the protection of ‘our fundamental liberties.’”<sup>103</sup> James Madison described it as “a double security” for “the rights of the people.”<sup>104</sup> The “great innovation” was that “our citizens would have two political capacities, one state and one federal, each protected from incursion by the other.”<sup>105</sup> Just as the horizontal separation of powers among the three branches of the federal government “serve[s] to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front.”<sup>106</sup> The “allocation of powers between the National Government and the States [thus] enhances freedom . . . .”<sup>107</sup>

As such, there is a strong argument that when the federal government gets out of its lane, whether it is the legislative branch or the executive branch, it is the constitutional duty of the states to push back. To fulfill the framers’ vision of a “double security” for individual liberty, the federal government must believe that the states will fight federal overreach, and the states must sometimes actually do so.<sup>108</sup> As the Supreme Court has said, “These twin powers will act as mutual restraints only if both are credible.”<sup>109</sup> The discharge of that responsibility does not always require states to sue the federal government, and it does not always require them to win if they do sue. And it may not be the state attorney general who should be speaking for the state; that is a question of state law for each state and its citizens to determine on their own. What is important is that the states do their part in maintaining the necessary tension between themselves and the federal government.

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838 (1995) (Kennedy, J., concurring)).

102. *Gregory v. Ashcroft*, 501 U.S. 452, 459 (1991).

103. *Id.* at 458 (quoting *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242 (1985)).

104. THE FEDERALIST NO. 51, at 172 (James Madison) (Bob Blaisdell ed., 2016).

105. *Printz*, 521 U.S. at 920 (quoting *Thornton*, 514 U.S. at 838 (Kennedy, J., concurring)).

106. *Gregory*, 501 U.S. at 458.

107. *Bond v. United States*, 564 U.S. 211, 221 (2011).

108. See THE FEDERALIST NO. 51, *supra* note 104, at 172.

109. *Gregory*, 501 U.S. at 459.

This is not to say that individuals cannot seek to vindicate the vertical separation of powers. As the Supreme Court explained recently in *Bond v. United States*, “[f]idelity to principles of federalism is not for the States alone to vindicate.”<sup>110</sup> That is because “[s]tates are not the sole intended beneficiaries of federalism.”<sup>111</sup> When an individual has been injured by a violation of the vertical separation of powers, he or she has a right to object to and challenge that constitutional infirmity. “[I]ndividuals, too, are protected by the operations of separation of powers and checks and balances; and they are not disabled from relying on those principles in otherwise justiciable cases and controversies.”<sup>112</sup>

This article only suggests that states may have their own role to play in creating the necessary “tension between federal and state power” to maintain “the promise of liberty.”<sup>113</sup> If exercised properly, serious state-led litigation against the federal government (and the “credible” threat of such litigation) could go a long way toward persuading the federal government to respect states as the counterweight the framers envisioned and to exercise appropriate “restraint[.]”<sup>114</sup>

### B. *Why States Should Not Sue the President*

What this article has not focused on so far, however, is the difference between state-led lawsuits that seek to force federal policy and those that seek to stop it. Perhaps the best known example of a policy-forcing lawsuit is *Massachusetts v. EPA*, the successful effort by a dozen States and several cities in 2007 to force the EPA to regulate carbon dioxide and other greenhouse gases as pollutants.<sup>115</sup> That decision has spawned a whole series of climate-change-related regulations, including the Obama Administration’s Clean Power Plan.<sup>116</sup> Another example is *Pennsylvania v. Trump*,

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110. 564 U.S. at 222.

111. *Id.*

112. *Id.* at 223.

113. *Gregory*, 501 U.S. at 459.

114. *See id.*

115. *Massachusetts v. EPA*, 549 U.S. 497, 505 (2007).

116. For a discussion of the Obama Administration’s Clean Power Plan, see *supra* text accompanying notes 27–34. See, e.g., JACQUELINE PEEL & HARI M. OSOFSKY, CLIMATE CHANGE LITIGATION 3 (2015); Ben Levitan, *The Tenth Anniversary of Massachusetts v. EPA*, ENVTL. DEF. FUND: CLIMATE 411 (Apr. 2, 2017), <http://blogs.edf.org/climate411/2017/04/02/the-tenth-anniversary-of-massachusetts-v-epa/>.

the successful effort to obtain a nationwide injunction of a Trump Administration regulation that would relax requirements on employers to provide health insurance that covers birth control.<sup>117</sup> That lawsuit technically seeks to stop a federal executive action, but its goal is to force the federal government to maintain a particular policy.<sup>118</sup>

Paul Nolette has written extensively and critically about policy-forcing lawsuits by state attorneys general, tracing their roots to the well-known \$206 billion tobacco settlement in 1998 and similar efforts by state attorneys general to create more regulation by suing companies.<sup>119</sup> Nolette, who has argued that state attorneys general are “ruining” federalism, explains persuasively that these sort of policy-forcing lawsuits are inconsistent with the idea of states “serv[ing] as a counterbalance to federal power by providing a check on centralization.”<sup>120</sup> Rather, policy-forcing lawsuits “amount to calls by some state [attorneys general] to ‘come and please regulate us.’”<sup>121</sup> These state attorneys general “would place every state of the union, not just their own, onto a higher floor of regulation through the mechanism of federal mandates.”<sup>122</sup>

But Nolette also criticizes the so-called “[p]olicy-blocking litigation” on which much of this article focuses.<sup>123</sup> Though these lawsuits “have delivered effective checks to administration policy,” Nolette contends that state attorneys general cannot be relied upon to take a consistent and committed approach to checking federal power.<sup>124</sup> The incentives of state attorneys general, Nolette argues, “are to follow the goals of their broader partisan coalition and not to vindicate any abstract principle of competitive federalism.”<sup>125</sup> As

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117. See *Pennsylvania v. Trump*, No. 17-4540, 2017 U.S. Dist. LEXIS 206380, at \*3–4 (E.D. Pa. Dec. 15, 2017); see also *supra* text accompanying notes 85–87.

118. See *Pennsylvania v. Trump*, 2017 U.S. Dist. LEXIS 206380, at \*3; Margot Cleveland, *6 Things to Know About the Lawsuits Against Trump’s New Birth Control Exemption*, FEDERALIST (Oct. 11, 2017), <http://thefederalist.com/2017/10/11/6-things-know-lawsuits-trumps-new-birth-control-exemption/>.

119. See, e.g., PAUL NOLETTE, FEDERALISM ON TRIAL 1–2 (2015); Paul Nolette, *Commandeering Federalism: The Rise of the Activist State Attorneys General*, LAW & LIBERTY (Sept. 5, 2016), <http://www.libertylawsite.org/liberty-forum/commandeering-federalism-the-rise-of-the-activist-state-attorneys-general/> [hereinafter Nolette, *Commandeering Federalism*].

120. Nolette, *Commandeering Federalism*, *supra* note 119.

121. *Id.*

122. *Id.*

123. See *id.*

124. *Id.*

125. *Id.*

evidence, he points to cases where Republican state attorneys general have taken litigation positions inconsistent with the “states’ rights” position, such as their intervention in *United States v. Windsor* to support the federal Defense of Marriage Act.<sup>126</sup> This makes them “unsteady allies for any sustained commitment to a vision of federalism that promotes limited government.”<sup>127</sup>

Another concern about the recent increase in state-led litigation against the federal government is dilution of credibility. Conventional wisdom has long held that a state’s decision to file or intervene in a lawsuit in its own name, or to submit an amicus brief, makes a certain statement with the judiciary and in the court of public opinion that private parties do not.<sup>128</sup> But as states file more and more lawsuits, do they risk cheapening the brand? James Tierrey, Maine’s Attorney General from 1980 to 1990, thinks so: “My long-term concern is that the [attorneys general] become seen as one more lawyer, one more politician on the make, and that undercuts the credibility of the office itself.”<sup>129</sup> Nolette, for one, plainly sees state attorneys general in that way already.<sup>130</sup> In his view, “[t]he [attorneys general], far from ‘protecting the interest of their states,’ as they frequently claim, are doing the bidding of partisan and interest coalitions on the Left and Right alike.”<sup>131</sup> Will courts begin to take the same view? If the legislative and the executive branches also do so, will that undermine the states’ ability to elicit “restraint” on the part of the federal government?<sup>132</sup>

## CONCLUSION

There is no question that states have been suing the federal government (and the executive in particular) more often in recent years, and they will continue to do so under the Trump Administration. By Nolette’s count, state attorneys general brought fifty-nine multistate lawsuits against the federal government between

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126. *Id.*; see *United States v. Windsor*, 570 U.S. \_\_\_, \_\_\_, 133 S. Ct. 2675, 2682, 2684 (2013).

127. Nolette, *Commandeering Federalism*, *supra* note 119.

128. See Brandon D. Harper, Comment, *The Effectiveness of State-Filed Amicus Briefs at the United States Supreme Court*, 16 U. PA. J. CONST. L. 1503, 1524, 1526–27 (2014) (evaluating the effectiveness of state-filed amicus briefs).

129. Neuhauser, *supra* note 59.

130. Nolette, *Commandeering Federalism*, *supra* note 119.

131. *Id.*

132. *Gregory v. Ashcroft*, 501 U.S. 452, 459 (1991).

2009 and 2016.<sup>133</sup> And according to one estimate, President Trump had been sued in federal court by state attorneys general no fewer than twenty-five times by May 2017.<sup>134</sup>

At a very high level, I believe state-led litigation against the federal government is valuable. Our system of dual sovereignty is critical to the preservation of individual freedom. As the United States Supreme Court has said, “freedom is enhanced by the creation of two governments, not one.”<sup>135</sup> “By denying any one government complete jurisdiction over all the concerns of public life, federalism protects the liberty of the individual from arbitrary power.”<sup>136</sup> But that system depends on states being willing to push back on federal overreach and on the federal government respecting the states as separate sovereigns.<sup>137</sup> The Court’s admonition in *Gregory v. Ashcroft* is worth repeating one more time: “These twin powers will act as mutual restraints *only if both are credible*.”<sup>138</sup>

As with many things, though, the devil is in the details. There are very real concerns—many that Nolette has set forth quite persuasively—about the way in which state attorneys general are taking on the federal government and the incentives driving those attorneys general. I do not think those concerns call into question whether state pushback on federal overreach is needed at all, but rather whether state attorneys general are serving as faithful agents of that task. That seems to be Nolette’s overarching (and fair) concern: that state attorneys general are taking federalism’s name in vain in support of the rise in state-led litigation against the federal government.<sup>139</sup> I am not sure what can be done about that, but I am sure we should not let that concern lead us to forget the importance of state resistance to federal overreach, or to overlook the benefits obtained from states checking federal power.

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133. Neuhauser, *supra* note 59.

134. *Id.*

135. *Alden v. Maine*, 527 U.S. 706, 758 (1999).

136. *Bond v. United States*, 564 U.S. 211, 222 (2012).

137. *Id.* at 221.

138. 501 U.S. 452, 459 (1991) (emphasis added).

139. See Nolette, *Commandeering Federalism*, *supra* note 119.