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Memo to Environmentalists:
Brace for the Three Ps*

Erin Ryan**

It's a daunting moment for environmentalists. Each day, it appears federal environmental law is being systematically dismantled, [most aggressively by the executive branch](#),¹ but with tacit support from the sitting legislature, and—with record numbers of President Trump's judicial nominees sailing through the appointments process—likely with increasing support from the judiciary soon. Environmental advocates are grieving these losses, but we must also brace for new hurdles—and in particular, the Three Ps: *Preemption, Property Rights, and Political Scale*.

First, we must ensure that the campaign to dismantle federal environmental law does not spill over into displacing state and local efforts to fill the void. Then we must push back against the strategic deployment of property rights to block future efforts to reinvigorate federal environmental law. Finally, we must think creatively about how to accomplish the goals of national-level environmental policy without the benefit of federal authority. This essay, a memo to environmentalists at this pivotal moment in time, reviews each of these challenges in turn.

Preemption. Preemption refers to the ability of a higher level of government to override contrary decisions made by a lower level of government. It matters a lot in environmental law, where important roles are played by federal, state, and local decision-makers. Federal environmental statutes often partner national and local regulators in [distinct but interlocking roles](#) within larger programs of cooperative federalism²—in which the feds usually set standards and oversee compliance, while state and local actors decide how best to implement standards for local circumstances. These laws usually follow the model of “floor preemption,” establishing a federal “floor” of mandatory regulation that states may not fall below, but one that allows them to set more stringent regulations to address local concerns and preferences.³

Federal environmental laws don't usually prevent states from exceeding the federal floor, but there are exceptions—for example, automobile emissions standards. EPA has primary

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¹ Nadja Popovich et al., *76 Environmental Rules on the Way Out Under Trump* N.Y. TIMES, July 6, 2018, <https://www.nytimes.com/interactive/2017/10/05/climate/trump-environment-rules-reversed.html>.

² Erin Ryan, *Environmental Federalism's Tug of War Within*, in THE LAW AND POLICY OF ENVIRONMENTAL FEDERALISM: A COMPARATIVE ANALYSIS (Kalyani Robbins, ed., 2015).

³ See William Buzbee, *Asymmetrical Regulation: Risk, Preemption, and the Floor/Ceiling Distinction*, 82 NYU L. REV. 1547 (2007).

authority to set these standards, and states are generally forbidden from both raising and lowering them. Even so, [Section 209 of the Clean Air Act](#) authorizes California to set more stringent standards in light of its unique regional challenges⁴—and under [Section 177](#), other states may elect California’s stricter standard in lieu of the EPA “ceiling.”⁵ This “[California Waiver](#)”⁶ blunts the force of this example of “ceiling preemption,” which is relatively rare in U.S. environmental law. But with mounting hostility to environmental regulation, that could change.

Which brings us to the first challenge that environmental advocates will likely face: the increasing threat of anti-environmental federal preemption. Proponents of deregulation seem poised to roll back many federal standards, but thanks to our dynamic model of environmental federalism, that is not enough to accomplish their goal. State and local leaders are already hard at work resuscitating environmental governance initiatives abandoned by the federal government. For example, the [United States Climate Alliance](#) is a coalition of seventeen states and territories committed to upholding the objectives of the 2015 Paris climate Agreement within their borders, formed the very day President Trump withdrew the United States from the Accord.⁷ (Indeed, I’ve never been more grateful for federalism than I am right now.)

For deregulation interests to fully succeed, then, they must prevent state and local governments from just taking up the vacated federal seat at the regulatory table. For that reason, Team Deregulation is unlikely to simply withdraw the federal government from the regulatory field entirely, which would swing open the door to state lawmaking. Instead, they are likely to seek weaker regulations partnered with language expressly preempting contrary state or local rules. If they can’t muster the political capital to get express preemption into the text, then they will attempt to persuade a reviewing court to imply it.

To wit, the Trump Administration is already trying to [get rid of the Clean Air Act’s California Waiver](#).⁸ Since the Administration is trying to [roll back the Obama era rule](#) increasing emission standards to 54 mpg by 2025,⁹ this is the next logical step—otherwise, the states could simply ignore EPA’s looser rules and follow California’s more stringent alternative. That’s why the same proposed rule rolling back the 54-mpg standard also eliminates California’s ability to keep it. It’s critical that environmentalists preserve the ability of states to continue moving forward on emissions controls,¹⁰ even as the federal government attempts to take us backward.

With all this in mind, environmental advocates must identify and fortify those realms of federal environmental law most vulnerable to ceiling preemption after federal regulations are

⁴ 42 U.S.C. § 7543 (2013).

⁵ 42 U.S.C. § 7507 (2013).

⁶ *Vehicle Emissions California Waivers and Authorizations*, <https://www.epa.gov/state-and-local-transportation/vehicle-emissions-california-waivers-and-authorizations> (June 23, 2017).

⁷ U.S. CLIMATE ALL. <https://www.usclimatealliance.org> (last visited Sept. 28, 2018).

⁸ Robinson Meyer, *The Coming Clean-Air War Between Trump and California*, ATLANTIC (Mar. 6, 2017), <https://www.theatlantic.com/science/archive/2017/03/trump-california-clean-air-act-waiver-climate-change/518649/>.

⁹ Timothy Cama & Amanda Green, *Trump Moves to Roll Back Obama Emission Standards*, HILL (Sept. 2, 2018), <https://thehill.com/policy/energy-environment/400036-trump-submits-rule-to-weaken-iconic-obama-car-efficiency-standards>.

¹⁰ Ann Carlson, *Iterative Federalism and Climate Change*, 103 NW. U. L. REV. 1097 (2009).

weakened. We must ensure that neither Congress nor EPA partners federal deregulatory efforts with statutory or regulatory language field-preempting subnational interference. And we'll need to think carefully about other ways to safeguard the environment—which brings us to the next P.

Property Rights. Even as we respond to the current assault on federal environmental law, we also need to think ahead. Deregulation interests know that even if they succeed in dismantling those laws today, that won't be enough, since a shift in national leadership could always bring them back in the future. So here's a riddle: what's the best way to prevent that from happening? Public law norms generally prevent governmental decision-makers from binding their future counterparts, so legal rules enacted today can ordinarily be revisited in the future. But that's not always the end of the issue, thanks to another of Team Deregulation's favorite strategies. The answer to the riddle: fortify the non-regulatory status quo with private property rights.

Here in the U.S., few legal concerns command more focused constitutional attention than private property rights. Threats to property receive the full force and attention of the Fifth and Fourteenth Amendments' [Takings Clauses](#),¹¹ which require compensation when the government "takes" property. The definition of "take" continues to evolve, however, and these clauses are sometimes interpreted to require compensation for any regulatory activity that interferes with private economic use of property, [even when it harms the public](#).¹² This "Takingsification" of American property law has gathered force over time, raising eyebrows among property scholars around the world. Today, nothing can take down an environmental regulation more efficiently than the claim that it constitutes a taking of property.

Which is why, from the perspective of Team Deregulation, it's such a winning strategy. Rather than just dismantling environmental regulations that prevent extraction from public lands, much better to [issue as many oil and gas leases](#) on these newly opened public lands as possible.¹³ Those leases don't just yield an extractive win for industry in the present, they will complicate any future efforts to dial extraction back, because now these extractive rights have a wholly new layer of constitutional protection. Professor Christopher Serkin has persuasively shown how government actors have learned to consolidate their power in the present, protecting it from changed policy preferences in the future, by [making pre-commitments into the future through the private law tools of property and contract](#).¹⁴

Environmentalists must push back, hard, against the strategic use of property rights to fortify the deregulatory agenda. They must scrutinize efforts to create or reify property-based entitlements that would entrench environmental deregulation by preventing more stringent scrutiny in the future. They must also better educate lawmakers and judges about the complex

¹¹ LEGAL INFO. INST., *Takings*, <https://www.law.cornell.edu/wex/takings> (last visited Sept. 28, 2018).

¹² Bill Funk, *CPR Perspective: The Takings Clause of the 5th Amendment*, CTR. FOR PROGRESSIVE REFORM, <http://www.progressivereform.org/perspTakings.cfm> (last visited Sept. 28, 2018).

¹³ Darryl Fears, *Trump Administration Tears Down Regulations to Speed Drilling on Public Lands*, WASH. POST (Feb. 1, 2018), https://www.washingtonpost.com/news/energy-environment/wp/2018/02/01/trump-administration-tears-down-regulations-to-speed-drilling-on-public-land/?noredirect=on&utm_term=.121bef57a30c.

¹⁴ Christopher Serkin, *Public Entrenchment through Private Law: Binding Local Governments*, 78 U. CHI. L. REV. 879, 894–95 (2011).

relationship between property rights and environmental law, to refute the misguided Takingsification that occurs when we fail to account for the overlapping public and private interests in natural resources. As federal law often borrows from state law concepts of property, we can never ignore the importance of continuing to develop the common law of property through litigation in state courts. Which brings us, incidentally, to the third and final challenge.

Political Scale. With federal environmental law under sustained attack, it becomes incumbent on us to think more seriously about how to continue pursuing solutions to national-level environmental problems by means other than federal authority. More than ever, we are facing [interjurisdictional challenges](#) that cannot be managed effectively in a piecemeal manner.¹⁵ Some fifty years ago, we conceded that problems like air and water pollution, species loss, and climate change went beyond any single state's boundaries, or capacity. After the failure of the patchwork-of-states approach, iconic federal laws like the Clean Air and Water Acts recognized the importance of centralized national authority to cope with these problems.¹⁶

But what if national authority ends? Disheartening as it may be, we need to think about new strategies for large-scale environmental governance that don't rely on federal law. We should keep fighting to get federal law back—but in the meanwhile, the environment can't wait.

The clearest alternative is regional governance. The patchwork approach was ineffective and challenging for industry, but what if many states used the same law? Perhaps we should consider the development of uniform state laws or model codes that would enable states to coordinate on a broader regulatory scale. Successful examples like the [Uniform Commercial Code](#),¹⁷ the [Model Rules of Professional Conduct](#),¹⁸ and other widely adopted laws provide a deliberated, tested model for states seeking sound, consensus-based policies in complex realms of law. States could adopt them in the wake of withdrawn federal law or wholly new areas, addressing climate change, water pollution, and waste management. For example, universities nationwide are collaborating on the multidisciplinary development of a [Sustainable Development Code](#) to provide best sustainability practices for adoption by local governments.¹⁹

Uniform laws provide an obvious model for coordinated but nonfederal national response, but we might even consider less conventional means. [Legal pluralism](#) heralds the possibility of multiple sources of simultaneous normative policymaking, including sources beyond sovereign-based law.²⁰ Could private or non-governmental rules contribute to large-scale environmental action? Perhaps meaningful guidance or rulemaking by commercial associations like the American Arbitration Association, professional associations like the American Law Institute, non-governmental legal institutions like the Council of Mayors, religious organizations, trade organizations, universities, and others?

¹⁵ See Erin Ryan, *Federalism and the Tug of War Within: Seeking Checks and Balances in the Interjurisdictional Grey Area*, 66 MD. L. REV. 503 (2007).

¹⁶ John P. Dwyer, *The Practice of Federalism Under the Clean Air Act*, 54 MD. L. REV. 1183, 1191 (1995).

¹⁷ See generally U.C.C. (AM. LAW INST. & UNIF. LAW COMM'N 1977).

¹⁸ MODEL RULES OF PROF'L CONDUCT (AM. BAR ASS'N 1983).

¹⁹ *Drake Law School Forms Partnership to Update Sustainable Community Development Code*, DRAKE U. NEWSROOM (Feb. 1, 2017), <https://news.drake.edu/2017/02/01/drake-law-school-forms-partnership-to-update-sustainable-community-development-code/>.

²⁰ Paul Schiff Berman, *Global Legal Pluralism*, 80 S. CAL. L. REV. 1155 (2007).

In fact, here's a concrete example that puts some of these ideas together. We all know that climate is the largest-scale environmental problem of them all, ideally calling not only for national but international policymaking. Yet a substantial volume of climate-relevant decision-making occurs within individual homes and neighborhoods. And in the U.S., a large volume amount of that decision-making takes place through private homeowner associations. [One in five Americans live in property subject to HOA governance](#),²¹ but many are operating without sufficient legal expertise or guidance. Recognizing that problem, many states enact [statutes](#),²² municipalities provide [guidance](#),²³ and private organizations sponsor [training materials](#)²⁴ for HOA board members, to help them make better decisions that strengthen their communities.

So... what if we could impact climate policy by harnessing the private law influence of HOA decision-making on climate-relevant matters? Borrowing, perhaps, from [parts of the Sustainable Development Code](#) already in progress,²⁵ legal architects could draft a model code of HOA best practices on water conservation, renewable energy use, transportation considerations, and other issues that impact the nation's climate footprint. A model code could also discourage HOAs from preventing solar panels, clothes lines, rain barrels, or other sustainable practices, and they could encourage landscaping practices that limit pesticide and nutrient loading of waterways.

In the end, overcoming the Three Ps will require novel ideas—but we'll need some ambitious thinking to move forward in the difficult days to come. After all, necessity is the mother of creativity—and has there ever been greater need than right now?

²¹ Ernie Smith, *Study: Homeowners Associations Hit New Population Peaks*, ASSOC. NOW (May 15, 2015), <https://associationsnow.com/2015/05/study-homeowners-associations-hit-new-population-peaks/>.

²² FLA. STAT. § 720 (2018).

²³ *Homeowners Associations*, HENRICO COUNTY, VIRGINIA, <https://henrico.us/revit/hoas/> (last visited Sept. 29, 2018).

²⁴ HOMEOWNER ASSOCIATIONS USA, A GUIDE FOR HOMEOWNER ASSOCIATION BOARD MEMBERS (2010).

²⁵ *Draft Climate Chapter, Sustainable Community Development Code*, DRAKE U., https://drive.google.com/file/d/1TolghETH_nuaOCZmz9ck9PFYCJOS-lrb/view (last visited Sept. 29, 2018).