Community
Rights
Counsel

Contact: Doug Kendall, Executive Director
Jason Rylander, Litigation & Policy Counsel
(202) 296-6889

William H. Pryor: A Remarkable Record of Hostility Toward Federal Environmental Protections

In speeches, law review articles, and legal briefs, Alabama Attorney General William H. Pryor—nominated by President George W. Bush for a lifetime position on the U.S. Court of Appeals for the Eleventh Circuit—has enthusiastically argued that many of our most cherished federal environmental safeguards are unconstitutional.

- Mr. Pryor has been alone among the 50 state attorneys general in challenging the constitutionality of significant portions of the Clean Water Act and the Endangered Species Act. He has asserted that land use and wildlife protection are "traditional areas of state environmental primacy" in which the federal government generally cannot regulate, despite the fact that it was the failure of state protections that led to the need for and enactment of federal safeguards.

- Mr. Pryor has testified to Congress that it is an assault on states' rights for the EPA to enforce the Clean Air Act to prevent uncontrolled pollution increases at dirty coal-burning power plants and oil refineries (even though the pollution harms downwind States), and he has fought vigorously to make states less accountable for failing to enforce federal minimum environmental standards. At the same time, a new EPA report suggests that Alabama, during Mr. Pryor's tenure as AG, has been quite lax in prosecuting corporate polluters.

- Mr. Pryor has demonstrated hostility to claims of environmental injustice, calling a ruling that vindicated a powerful claim of environmental racism from South Camden, N.J. "ridiculous," and stating the unequivocal position that "environmental racism claims should fail generally."

While many of President Bush's nominees to the federal bench have had very troubling environmental records, none has waged as comprehensive an assault on national environmental safeguards as Bill Pryor.

1. Federal Power to Protect Clean Water and Endangered Species

a. Commerce Clause

Congress has rooted most of our nation's federal environmental protections in its authority under the Commerce Clause of the Constitution, which grants Congress the right to "regulate commerce among the several states." The reason is simple. Pollution and environmental degradation are external costs of many land uses and manufacturing processes. These external costs are frequently borne by residents outside of the state in which the pollution or degradation originates. Even wholly intrastate pollution can have significant impacts on interstate commerce, for example, where the despoliation of a lake or river reduces tourism dollars spent by out-of-state vacationers. For these reasons, the Supreme Court and lower federal courts have consistently recognized that the Commerce Clause gives Congress broad authority to protect the environment.[1]

Mr. Pryor would change all that. Mr. Pryor has sought out opportunities to promote the view that the federal government has remarkably little power to protect the environment under the Constitution's Commerce Clause. In particular, Mr. Pryor has advocated "in favor of limiting the reach of the federal government through the Commerce Clause into traditional areas of state environmental primacy."[2] Areas he considers within state environmental primacy include land use and wildlife protection. As a result, he has asked the Supreme Court to strike down as unconstitutional major portions of the Clean Water Act and the Endangered Species Act.

For example, in *Gibbs v. Babbitt,* Mr. Pryor asked the Supreme Court to review and reverse a scholarly and detailed opinion written by Chief Judge J. Harvie Wilkinson III of the Fourth Circuit that upheld the federal government's authority under the Endangered Species Act to prevent the killing of red wolves on private land.[3] Pryor argued that the Supreme Court should "proceed to address the constitutional issue raised in this case," and he asked the Court to rule that "[a]pplication of the red wolf rule to

---

[1] *See* Hodel v. Virginia Surface Mining Control & Reclamation Ass'n, 452 U.S. 264 (1981) (upholding Commerce Clause authority to regulate strip mining on privately-owned lands); United States v. Riverside Bayview Homes, Inc., 474 U.S. 121 (1985) (upholding Commerce Clause authority to regulate filling of privately-owned wetland areas adjacent to navigable waters); Rancho Viejo, LLC v. Norton, 323 F.3d 1062 (D.C. Cir. 2003) (upholding Commerce Clause authority to protect endangered species on private lands); Gibbs v. Babbitt, 214 F.3d 483 (4th Cir. 2000); *cert. denied*, 531 U.S. 1145 (2001).

[2] William H. Pryor, Competitive Federalism in Environmental Enforcement, Speech to the Alabama State Bar Environmental Section, June 8, 2001, at 17 [hereinafter "*Competitive Federalism"*]; *see also* William H. Pryor, *Madison's Double Security: In Defense of Federalism, the Separation of Powers, and the Rehnquist Court,* 53 ALA. L. REV. 1167, 1175 (2002) [hereinafter "*Double Security*"] ("The limitation on the federal government's power left states free to make law (or not) with respect to the remainder of what was historically understood as the 'police power' of every sovereign government, and that indeed is a broad range of action.").

[3] Alabama is in the Eleventh Circuit, not the Fourth Circuit, so the *Gibbs* ruling had only the most tangential impact on the law in Alabama. Mr. Pryor's decision that his office's scarce, taxpayer-funded resources were appropriately directed towards asking the Supreme Court to review the *Gibbs* case is alone indicative of his philosophical commitment to directing constitutional law in a way that undercuts environmental protections.

private lands cannot be sustained as an exercise of Congress's powers under the Commerce Clause."[4] Supreme Court review was necessary, in Pryor's view because otherwise, "it is inevitable that some other endangered species will find its way onto private property and cause a criminal prosecution, the derailing of a hospital project, or other injury to State and local interest."[5]

Chief Judge Wilkinson's stinging rebuke to identical arguments made in dissent by Judge Michael Luttig illustrates the far-reaching and dire implications of Mr. Pryor's views on the Commerce Clause. The *Gibbs* case, according to Chief Judge Wilkinson, was about "whether the national government can act to conserve scarce natural resources of value to our entire country."[6] Pryor's views would "place in peril the entire federal regulatory scheme for wildlife and natural resource conservation." "To invalidate this regulation," Chief Judge Wilkinson explains, "would require courts to move abruptly from preserving traditional state roles to dismantling historic federal ones."[7]

Coming as it does from Chief Judge Wilkinson, one of the federal bench's leading conservatives, this pointed criticism illustrates how far Mr. Pryor's views stray from the mainstream even of conservative legal thinking. Mr. Pryor's argument, according to Chief Judge Wilkinson, "would turn federalism on its head," transforming the Supreme Court's Commerce Clause precedent "from a shield protecting state activities to a sword dismembering a long recognized federal one."[8] Chief Judge Wilkinson warns against the activist role Pryor envisions for federal courts, stating that: "[a]n indiscriminate willingness to constitutionalize recurrent political controversies will weaken democratic authority and spell no end of trouble for the courts."[9]

On several occasions Mr. Pryor has been the *only* Attorney General in America to argue against federal constitutional authority, a fact Mr. Pryor regularly touts in his speeches.[10] In one case, thirty-six states advocated in favor of a federal role, to Mr. Pryor's lone dissent.[11] In *Solid Waste Agency of Northern Cook County (SWANCC) v. U.S. Army Corps of Engineers,*[12] a Clean Water Act case challenging the federal

---

[4] Brief for Amicus Curiae the State of Alabama, Gibbs v. Babbitt, No. 00-844 (Jan. 26, 2001) [hereinafter "*Gibbs* Brief"] at 2.
[5] *Gibbs* Brief at 4
[6] *Gibbs,* 214 F.3d at 486.
[7] *Id.* at 504.
[8] *Id*. at 505.
[9] *Id*.
[10] Bill Pryor, The Future of Federalism (remarks to the Federalist Society's Federalism and Separation of Powers Practice Group, Nov. 18, 2000), *available at* http://www.ago.state.al.us/speeches.cfm?Item=Single&Case=57 ("In both [*SWANCC*] and *Morrison*, I have been the only state attorney general to file a friend of the court brief in support of federalism."); Bill Pryor, Fighting for Federalism (Remarks to Alabama Lawyer's Chapter of the Federalist Society, March 28, 2001), *available at* http://www.ago.state.al.us/speeches.cfm?Item=Single&Case=63 (same).
[11] United States v. Morrison, 529 U.S. 598 (2000). *See also* Brief of the State of Alabama, United States v. Morrison, 529 U.S. 598 (2000), *available at* 1999 WL 1191432. In a 5-4 ruling the Supreme Court agreed with one important aspect of Mr. Pryor's position.
[12] 531 U.S. 159 (2001). The Court in *SWANCC* ultimately interpreted the Clean Water Act narrowly to avoid the Commerce Clause question discussed in Mr. Pryor's brief. *See SWANCC*, 531 U.S. at 173.

government's authority to prevent destruction of waters and wetlands that serve as critical habitat for migratory birds, eight states filed a brief supporting federal regulation, even though a local government was challenging the rule.[13] Only Mr. Pryor opined that the Constitution's Commerce Clause does not grant the federal government authority to protect the environment.[14] As in *Gibbs*, Mr. Pryor characterized environmental concerns as "uniquely a matter of local oversight."[15]

Mr. Pryor's Commerce Clause analysis in *Gibbs* and *SWANCC* mirrors the reasoning applied by District Judge Brevard Hand in his decision in *United States v. Olin Corp.,*[16] which struck down key provisions of the federal Superfund toxic-waste cleanup law. In *Olin*, Judge Hand ruled that because the site was no longer active, the cleanup of the site was essentially a local real estate matter, not "economic activity."[17] Because "the law regulating real property has been traditionally a local matter," Judge Hand declared that Congress under the Commerce Clause could not regulate such activities.[18] Judge Hand's view was rejected by other courts[19] and was quickly reversed on appeal.[20] It indicates, however, the breadth of the threat that Mr. Pryor's views pose to federal environmental safeguards. If regulation of waste disposal operations (at issue in both *Olin* and *SWANCC*) does not fall within the scope of the Commerce Clause, then a wide array of environmental protections would also fall outside Congress's constitutional authority under the Clause.

B. Spending Clause

The principal alternative available to Congress, if Commerce Clause authority to protect the environment is limited by the courts, is the carrot and stick approach of the Constitution's Spending Clause. Under the Spending Clause, Congress may "further broad policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with federal statutory and administrative directives."[21] The Supreme Court

---

[13] Brief of the States of California, Iowa, Maine, New Jersey, Oklahoma, Oregon, Vermont, and Washington as Amici Curiae in Support of Respondents, *SWANCC*, 531 U.S. 159 (2001), *available at* 2000 WL 1369438.
[14] *See* Brief of the State of Alabama, *SWANCC*, 531 U.S. 159 (2001), *available at*, 2000 WL 1052159 [hereinafter *SWANCC* Brief].
[15] *SWANCC* Brief, 2000 WL 1052159 at *12. *See also* Brief of the States of Alabama, et al, as Amici Curiae in Support of Petitioners in Borden Ranch Partnership v. U.S. Army Corps of Engineers, No. 01-1243, *available at* 2002 WL 1989813 (arguing against federal authority under the Clean Water Act to regulate "deep ripping," a technique that transforms wetlands into usable farmland, arguing that under the Act states have exclusive jurisdiction over "nonpoint source pollution and farming activities." The Supreme Court ultimately affirmed EPA authority to regulate deep ripping on a tie 4-4 vote (Justice Kennedy recused). *See* Borden Ranch Partnership v. U.S. Army Corps of Engineers, 537 U.S. 99 (2002).
[16] 927 F. Supp. 1502 (S.D. Ala. 1996).
[17] *Id*. at 1532-1533.
[18] *Id.* at 1533.
[19] *See* Nova Chemicals, Inc. v. GAF Corp., 945 F. Supp. 1098 (E.D. Tenn. 1996); U.S. v. NL Indus., Inc., 936 F. Supp. 545 (S.D. Ill. 1996).
[20] United States v. Olin Corp., 107 F.3d 1506 (11th Cir. 1997).
[21] Fullilove v. Klutznick, 448 U.S. 448, 474 (1980).

has repeatedly ruled that, under the Spending Clause, Congress's authority "is not limited by the direct grants of legislative power found in the Constitution."[22]

Many conservatives view legislation pursuant to the Spending Clause to be less heavy handed, and therefore preferable, to direct federal regulation under the Commerce Clause. As Chief Justice Rehnquist noted in *South Dakota v. Dole*, when the federal government acts pursuant to the Spending Clause, "enactment of [state laws furthering the federal objective] remains the prerogative of the States."[23] Indeed, Congress has already achieved voluntary state compliance with federal environmental programs to protect coastal zones and reduce transportation-related pollution using its Spending Clause authority.[24]

In contrast, Mr. Pryor views an attack on Congress's Spending Clause authority to be the "next phase" of his attack on federal legislative authority.[25] He takes credit for laying the "groundwork" for this attack and yearns to "participate in this next phase of the operation."[26]

Mr. Pryor's views on the Spending Clause are best encapsulated by his enthusiastic praise for a remarkably activist and very disturbing recent decision by a federal district court in *Westside Mothers v. Haveman*. Pryor has described this ruling as "sublime." In his words:

> This brilliant opinion of the district court concludes that Spending Clause contracts are not proper subjects of Ex parte Young actions, and section 1983 does not create a private right to enforce spending contracts. This scholarly opinion should be read by every serious Federalist.[27]

Mr. Pryor's glowing praise for the district court's *Westside Mothers* opinion is troubling on several levels. First, the central conclusion of what he called the district court's "brilliant opinion"—the conclusion that Spending Clause statutes establish merely federal/state contracts which are not the "supreme law of the land"—was flatly contrary

---

[22] South Dakota v. Dole, 483 U.S. 203, 207 (1987) (quoting United States v. Butler, 297 U.S. 1, 66 (1936)).
[23] *See* South Dakota v. Dole, 483 U.S. at 211 ("Here Congress has offered a relatively mild encouragement to the States to enact higher minimum drinking ages than they would otherwise choose. But the enactment of such laws remains the prerogative of the States not merely in theory but in fact.").
[24] Examples include the Coastal Zone Management Act, which provides federal funding and guidelines for states to develop coastal management plans; the Coastal Barriers Resources Act, which offers financial incentives and disincentives by denying federal funds for roads, sewers, water systems and flood insurance to developments in sensitive coastal areas; and the Intermodal Surface Transportation Act (ISTEA), which linked federal highway funds to the development of greenways, bike trails and transportation improvements.
[25] Bill Pryor, The Future of Federalism (remarks to the Federalist Society's Federalism and Separation of Powers Practice Group, Nov. 18, 2000), *available at* http://www.ago.state.al.us/speeches.cfm?Item=Single&Case=57 ("[T]he next opportunities for promoting federalism will come on three fronts. The first is spending clause litigation ….").
[26] William H. Pryor, Jr., *The Demand for Clarity: Federalism, Statutory Construction, and the 2000 Term*, 32 CUMB. L. REV. 361, 371 (2001).
[27] *Id*. at 372.

to binding precedent. A 1985 Supreme Court ruling in *Bennett v. Kentucky Department of Education* states plainly that Spending Clause legislation is "[u]nlike normal contractual undertakings" because it "originate[s] in and remain[s] governed by statutory provisions expressing the judgment of Congress concerning desirable public policy."[28] As a result, the district court's ruling was pointedly reversed by a unanimous Sixth Circuit (in a panel that included Judge Danny Boggs, the court's most prominent conservative), which concluded that "[b]inding precedent has put the issue to rest."[29] Mr. Pryor's ringing endorsement of this activism by the district court suggests that, if confirmed, Mr. Pryor is unlikely to feel confined by precedent that does not comport with his ideological viewpoint.

On a substantive level, Mr. Pryor's endorsement of the view that Spending Clause legislation creates nothing more than a state/federal contract would dramatically limit the efficacy of federal statutes enacted pursuant to the Clause. For example, if, as the district court concluded in *Westside Mothers,* Spending Clause legislation is not the "supreme law of the land," then normal rules of preemption of conflicting state statutes under the Constitution's Supremacy Clause would presumably not apply, leaving a jumble of inconsistent federal and state mandates. Similarly, contracts are rarely enforceable by injunction, or "specific performance," to use contract law lingo. This could make it very difficult for even the federal government to demand that states comply with Spending Clause mandates.

To summarize, as Alabama's Attorney General, Mr. Pryor has led an attack on federal constitutional authority to protect the environment. In his view, there is a "wide range of action" where the federal government is powerless to act, including matters relating to land use and species protection.[30]

2. Replacing Cooperative Federalism with Competitive Federalism

Even under the most restrictive reading of the Commerce and Spending Clauses, core federal protections against industrial pollution—which traverses state boundaries and clogs the channels of interstate commerce—will survive Mr. Pryor's attack on federal power.

The unassailable need for federal action to address problems such as air, water, and land pollution, however, has not prevented Mr. Pryor from challenging and seeking to eviscerate statutes such as the Clean Air Act, the Safe Drinking Water Act, and the Surface Mining Control and Reclamation Act, which address these national problems. Indeed, Mr. Pryor would like to replace the cooperative federalism that is at the core of almost every federal environmental statute with a new "competitive federalism," where states fight, rather than join, federal efforts to control pollution.

---

[28] *Westside Mothers,* 289 F.3d at 858 (quoting *Bennett*, 470 U.S. 565, 669 (1985)).
[29] *Id.*
[30] *See* Pryor, *Double Security, supra* note 2 at 1173-74 ("This limitation on the federal government's power left states free to make law (or not) with respect to the remainder of what was historically understood as the 'police power' of every sovereign government, and that indeed is a broad range of action.").

Almost every major environmental law authorizes state agencies to implement federal environmental programs in their state. These programs limit the intrusiveness of federal programs by putting state officials at the front lines of most environmental enforcement. For these programs to work, states must agree to implement federal protections and agree to be accountable for ensuring the minimum environmental standards mandated by federal law. To ensure this accountability, all these statutes retain an important, backup role for the federal EPA, and most of the statutes have citizen suit provisions that permit citizens to sue states in federal court when state agencies fail to implement federal mandates.

Mr. Pryor rejects this form of cooperative federalism in favor of what he calls "competitive federalism."[31] Mr. Pryor favors a world where uniform federal minimum environmental standards are eliminated and states can race to the environmental bottom, competing for businesses and tax revenue by offering more and more lax environmental protections. Such a race to the bottom, in Mr. Pryor's view, would promote "individual liberty."[32]

Mr. Pryor's most aggressive actions in promoting this race to the bottom have come through his enthusiastic efforts to establish the Constitution's Eleventh Amendment as a "potent defense for state governments" against suits seeking compliance with federal law.[33] Mr. Pryor has filed or joined briefs supporting state immunity from suit in *Alden v. Maine*,[34] *College Savings Bank*,[35] *Kimel v. Florida Bd. of Regents*,[36] *University of Alabama v. Garrett*,[37] and, very recently, *Department of Human Resources v. Hibbs,*[38] a claim of immunity rejected even by Chief Justice Rehnquist, the Supreme Court's leading immunity proponent.[39]

In promoting expansion of Alabama's immunity to suits brought by Alabama residents, Mr. Pryor is unquestionably promoting judicial activism.[40] The Eleventh

---

[31] *See* Pryor, *Competitive Federalism*, *supra* note 2 at 6-7; *see also* Pryor, *Double Security, supra* note 2 at 1173-74.

[32] Pryor, *Competitive Federalism, supra* note 2 at 7; *see also* Pryor, *Fighting for Federalism*, *supra* note 10 ("'If I dislike the laws of my home state enough and feel tyrannized by them, I always can preserve my freedom by moving to a different state with less tyrannous laws.'" (quoting Stephen Calabresi, *A Government of Limited and Enumerated Powers: In Defense of* United States v. Lopez*,* 94 MICH. L. REV. 752, 776 (1995))).

[33] Bill Pryor, *The Future of Federalism* (remarks to the Federalist Society's Federalism and Separation of Powers Practice Group, Nov. 18, 2000), *available at* http://www.ago.state.al.us/speeches.cfm?Item=Single&Case=57.

[34] 527 U.S. 706 (1999).

[35] College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666 (1999); Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank, 527 U.S. 627 (1999).

[36] 528 U.S. 62 (2000).

[37] 531 U.S. 356 (2001).

[38] Brief of Alabama, et al., Dep't of Human Resources v. Hibbs, No. 01-1368, *available at* 2002 WL 1974391).

[39] *Dep't of Human Resources v. Hibbs*, 2003 WL 21210426 (May 27, 2003).

[40] For example, Judge John Noonan, a conservative appointed by President Reagan to the Ninth Circuit, declared in a recent book entitled *Narrowing the Nation's Power* that the expansive view of the Eleventh

Amendment's plain language prevents a federal court only from hearing a suit brought against a state by a citizen of *another* state or another country.[41] Mr. Pryor supports extracting the word "another" from the amendment.[42]

Effective, enforceable, cooperative federalism in environmental laws remains viable in spite of recent Supreme Court Eleventh Amendment rulings[43] only because of the Supreme Court's 1908 ruling in *Ex parte Young,* which permits suits to enjoin state officials from violating federal law even where the Eleventh Amendment would bar a suit against the state seeking money damages.[44] *Ex parte Young* thus constitutes an essential linchpin of our nation's federal environmental laws; without it, almost every environmental statute would have to be re-written, or retained in a much less effective form.

This fact has not escaped Mr. Pryor's notice, and he has supported aggressive arguments to chip away at *Ex parte Young*. As discussed above, Mr. Pryor has called "sublime" the *Westside Mothers* decision that held that federal laws enacted under the Spending Power can never be the subject of an *Ex parte Young* action. In another case, Mr. Pryor advanced an argument that, according to the Eleventh Circuit (the court to which Mr. Pryor has been nominated), "would essentially render *Ex parte Young* a nullity."[45]

Most importantly, Mr. Pryor has touted a very disturbing ruling by the Fourth Circuit in *Bragg v. West Virginia Coal Association*, which held that West Virginia could not be sued under *Ex parte Young* for non-compliance with the essential mandates of the

---

Amendment promoted by Mr. Pryor is "without justification of any kind" and is doing "intolerable injury to the enforcement of federal standards." JOHN NOONAN JR., NARROWING THE NATION'S POWER 154-55 (2001). Noonan has compared the activism of the Rehnquist Court's Eleventh Amendment doctrine to "other moments in the history of the United States produced by positions taken by the Supreme Court – with *Dred Scott v. Sandford,* holding that Congress could not constitutionally prevent property, including slaves, from being brought into federal territory; with *Lochner v. New York,* holding that a state could not constitutionally regulate the hours of work of employees of business; and with *Carter v. Carter Coal Company,* holding that Congress could not constitutionally regulate the labor relations of a corporation whose business was coal mining. * * * Each decision is recognized today as unjustified by the Constitution."

[41] U.S. CONST. amend. XI. The Amendment states simply: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

[42] Mr. Pryor has called for the impeachment of judges that "repeatedly and recklessly disregard the law." Bill Pryor, *When Federal Judges Should be Impeached*, HUNTSVILLE TIMES, July 25, 1997. His standard itself disregards the plain text of our framing document, which allows impeachment only for "high crimes and misdemeanors," and we wholeheartedly disagree with Mr. Pryor's call for impeachment of judges on this inherently subjective ground. We note, however, that with conservatives (like Judge Noonan) and liberals united in the conclusion that Mr. Pryor's views on the Eleventh Amendment are "without justification of any kind," by applying Mr. Pryor's standard, Senators could call for the impeachment of judges that adopt Mr. Pryor's interpretation of the constitution.

[43] In 1996, in a 5-4 ruling in *Seminole Tribe of Florida v. Florida,* 517 U.S. 44 (1996), the Supreme Court overruled a case called *Pennsylvania v. Union Gas*, 490 U.S. 1 (1989), and held that the Commerce Clause – the basis for most environmental legislation – cannot be used to abrogate state immunity.

[44] 209 U.S. 123 (1908).

[45] Summit Medical Associates v. Pryor*,* 180 F.3d 1326, 1338 (11th Cir. 1999).

federal Surface Mining Control and Reclamation Act (SMCRA).[46] *Bragg* involved one of the most environmentally-destructive practices imaginable: mountain-top removal coal mining that buries and destroys valleys, rivers, and streams. The district court in *Bragg* found that West Virginia surface mining officials had plainly violated SMCRA by permitting mountain-top removals.[47] The Fourth Circuit reversed the district court and bypassed *Ex parte Young*, finding that federal minimum standards "drop out" once a state program is approved and a claimant's only cause of action is under state law, which cannot be enforced under *Ex parte Young*.[48]

To so rule, the Fourth Circuit had to ignore both the plain language of SMCRA, which makes clear that federal minimum standards never "drop out,"[49] and binding Fourth Circuit precedent that held that state permits and rules are "issued pursuant to SMCRA."[50] In doing so, the court not only freed West Virginia officials to continue permitting removal of mountain tops and the destruction of hundreds of miles of streams, but also broke Congress's core promise to the American people in passing SMCRA: the assurance that compliance with minimum federal environmental protections would not be left up to state officials.[51] Mr. Pryor cheers the result in *Bragg* as part of "the restoration of competitive federalism."[52]

3. Weakening Environmental Enforcement at All Levels

In his speeches, Mr. Pryor talks about promoting "a robust form of federalism" in the environmental enforcement area that redefines the "division of authority between the federal government and the states."[53] The record, however, shows that Mr. Pryor would strip the federal government of its enforcement powers while failing to increase state actions against polluters.

---

[46] Bragg v. West Virginia Coal Ass'n, 248 F.3d 275 (4th Cir. 2001), *cert. denied*, 122 S. Ct. 920 (2002).
[47] Bragg v. Robertson*,* 72 F. Supp. 2d 642, 661-62 (1999) ("When valley fills are permitted in intermittent and perennial streams, they destroy those stream segments. The normal flow and gradient of the stream is now buried under millions of cubic yards of excess spoil waste material, an extremely adverse effect. If there are fish, they cannot migrate. If there is any life form that cannot acclimate to life deep in a rubble pile, it is eliminated. No effect on related environmental values is more adverse than obliteration. Under a valley fill, the water quantity of the stream becomes zero. Because there is no stream there is no water quality. The Director lawfully cannot make required findings . . . for buffer zone variances for valley fills.").
[48] *See* Pennhurst State School & Hosp. v. Halderman, 451 U.S. 1 (1981).
[49] *See, e.g.*, 30 U.S.C. § 1260(b)(1) (requiring that permits issued under a state-approved program meet "all the requirements of this chapter and the State or Federal program"). *See also* 30 U.S.C. §§ 1257 & 1271 (allowing federal enforcement of state laws passed under SMCRA).
[50] Molinary v. Powell Mountain Coal Co. Inc., 125 F.3d 231 (4th Cir. 1997).
[51] *Bragg* does not prevent the Office of Surface Mining from stepping in to ensure that West Virginia complies with the minimum mandates of federal law. *See* 30 U.S.C § 1257 & 1271. However such federal "overfiling" is controversial and rare even when the president in office believes in strong federal environmental protections. It seems unlikely indeed in an administration committed to devolving responsibility for environmental protections down to the state.
[52] Pryor, *Competitive Federalism, supra* note 2, at 7 & 25-27.
[53] Bill Pryor, Division of Responsibility Between the State and Federal Governments: Competitive Federalism and Environmental Enforcement, Speech to the Alabama State Bar Environmental Section, June 8, 2001.

Mr. Pryor's disturbing critique of federal power is perhaps best illustrated by his recent Congressional testimony in opposition to EPA enforcement of the Clean Air Act. To avoid the pollution reductions required for new sources of pollution, the owners of coal burning power plants—our nation's single greatest source of pollution-related health effects—have for decades essentially rebuilt these plants under the mislabel of "routine maintenance," which is permitted for "grandfathered" sources of pollution. State and federal regulators turned a blind eye to this charade until late in the Clinton Administration when EPA finally started to enforce the Act's mandates and bring these polluting dinosaurs into compliance. Testifying in 2002 in favor of the Bush Administration's plan to back away from this initiative, Mr. Pryor expressed disdain for the federal enforcement policy: "EPA invaded the province of the States and threw their respective air pollution control programs into upheaval by reversing—with the blunt tool of enforcement instead of a collaborative rulemaking process—interpretations that are central to the day-to-day activities of state regulators."[54]

Mr. Pryor's adamant opposition to EPA enforcement of federal environmental laws might be justified if, as Alabama's Attorney General, Pryor was aggressive about bringing polluters into compliance with federal standards. But the available evidence is to the contrary. Indeed, a recently leaked EPA report concludes that 38 percent of all Alabama "major" dischargers of water pollutants were in significant noncompliance ("SNC") with federal Clean Water Act permit requirements.[55] Alabama had 73 major dischargers in significant noncompliance and came up short in eight of the eleven indicators used by EPA to measure state enforcement efforts.[56] Only two states, Ohio and Tennessee, failed in more categories.

Mr. Pryor, who has been remarkably unforgiving in prosecuting other types of lawbreakers, has apparently been quite lax in prosecuting corporate polluters. Alabama is one of 10 states where facilities had a "recidivism" rate that is above the national average each year between 1999 and 2001.[57] At the end of 2001, Alabama also had six facilities (6% of the nation's total) that were deemed to be "perpetual" SNCs—facilities that had not complied with their permit requirements for eight consecutive quarters.[58] Alabama had taken formal action against only 2 of these 6 facilities over this two year period.[59]

---

[54] Statement of Alabama Attorney General Bill Pryor before the Senate Environment and Public Works Committee, July 16, 2002, *available at* http://www.ago.state.al.us/speeches.cfm?Item=Single&Case=82.
[55] Environmental Protection Agency, *A Pilot for Performance Analysis of Selected Components of the National Enforcement and Compliance Assurance Program* 13, 19 (Feb. 2003).
[56] *Id*.
[57] *Id*. at A-1, A-8 (93 total perpetual SNCs).
[58] *Id.* at B-13 (Alabama has 6).
[59] *Id*.

4. Bill Pryor: "Environmental Racism Claims Should Fail Generally."

Mr. Pryor's hostility to federal environmental protections is perhaps best encapsulated by his intemperate remarks opposing the availability of a forum to bring claims of environmental racism.

In what Mr. Pryor called "his favorite victory of the 2000 Term,"[60] Mr. Pryor's office successfully convinced the Supreme Court in *Alexander v. Sandoval*[61] to find that there is no private cause of action to enforce disparate impact regulations promulgated under Title VI of the Civil Rights Act—regulations that form the primary source of rights to ensure environmental justice.[62] By a 5-to-4 vote, the Court, through Justice Scalia, ruled that the well-established private cause of action to enforce § 601 of the Civil Rights Act[63] did not extend to disparate impact regulations promulgated under § 602 of Title VI.[64]

The *Sandoval* decision left open the question of whether victims of disparate impact discrimination could enforce § 602 regulations under 28 U.S.C. § 1983.[65] In dissent, Justice Stevens thus raised the question of whether *Sandoval* was simply "something of a sport" and suggested that "litigants who in the future wish to enforce the Title VI regulations against state actors in all likelihood must only reference § 1983 to

---

[60] Pryor, 32 CUMB. L. REV. at 370.
[61] 532 U.S. 275 (2001).
[62] See discussion of the *South Camden* case below.
[63] This cause of action under Title VI was originally implied by the Court but has subsequently been recognized and expanded by Congress.
[64] § 602 authorizes federal agencies "to effectuate the provisions of [§ 601] * * * by issuing rules, regulations, or orders of general applicability" 42 U.S.C. 2000d-1 (1964). DOJ promulgated a regulation forbidding funding recipients to "utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color or national origin…" 28 C.F.R. § 42.104(b)(2) (1999). *See Sandoval*, 532 U.S. at 278. The *Sandoval* decision effectively overruled a line of earlier Supreme Court rulings that had, at the very least, presumed that § 602 regulations could be privately enforced. Interpreting these Supreme Court rulings, ten federal circuit courts had addressed the question of whether there was a private cause of action to enforce regulations validly promulgated under Title VI and every one of these courts had concluded that such a right existed. As Justice Stevens notes in dissent: "This Court has already considered the question presented today and concluded that a private right of action exists." 532 U.S. at 295 (Stevens, J., dissenting). Stare decisis alone demanded that the *Sandoval* plaintiffs prevail. Justice Stevens ends his *Sandoval* dissent with a stinging critique of the majority's activism in denying the *Sandoval* class a day in court:

> The question the Court answers today was only an open question in the most technical sense. Given the prevailing consensus in the Courts of Appeals, the Court should have declined to take this case. Having granted certiorari, the Court should have answered the question differently by simply according respect to our prior decisions. But most importantly, even if it were to ignore all of our post-1964 writing, the Court should have answered the question differently on the merits.

532 U.S. at 317 (Stevens, J., dissenting).
[65] Section 1983 provides a cause of action against "every person who, under color of any statute * * * causes * * * the deprivation of any rights, privileges or immunities secured by the Constitution and laws."

obtain this relief."[66] The *Sandoval* majority never responded to this assertion by the dissent.

After *Sandoval,* a district court hearing an important environmental justice case called *South Camden Citizens in Action v. New Jersey Department of Environmental Protection*[67] ruled that, indeed, § 602 regulations could be enforced under 28 U.S.C. § 1983. Mr. Pryor responded almost immediately, calling the district court's ruling "ridiculous" and "wrong on many levels."[68] He even went so far as to argue that disparate impact regulations themselves are invalid.[69] His conclusion could not be starker (or less sensitive to the victims of environmental injustice): "Environmental racism cases should fail generally."[70]

5. Bill Pryor's Judicial Temperament

Some of this nation's most distinguished jurists have joined the federal bench after careers in politics, or after devoting considerable portions of their career towards advancing one side in a divisive legal debate. Critical in a confirmation debate over a judicial nominee is the evidence supporting, or undermining, the claim, made by virtually every judicial nominee, that he or she will put aside personal political views and be a fair and neutral arbiter of cases that come before the nominee's court.

Mr. Pryor's public comments indicate that he would consider his appointment a failure if, in fact, he put his political and ideological commitments aside when he became a judge. Mr. Pryor has stated that "the key" to the revival of his version of competitive federalism "will be the Supreme Court," and he has noted that "most of the important federalism decisions of the last decade were reached by a 5-4 vote" and thus "a single appointment to the Court by the next administration could decide the fate of federalism."[71]

Most remarkably, Pryor was the only state attorney general to weigh in against states' rights in the *Bush v. Gore* case in the service of electing a president who shared his political ideology. The day after the Supreme Court's split ruling in Governor Bush's favor, Pryor told a reporter: "I'm probably the only one who wanted it 5-4. I wanted Governor Bush to have a full appreciation of the judiciary and judicial selection so we can have no more appointments like Justice Souter."[72] It is clear from this statement that

---

[66] *Sandoval,* 532 U.S. at 300 (Stevens, J., dissenting).
[67] 145 F. Supp. 2d 505 (D. NJ 2001), *rev'd* 274 F.3d 771 (3d Cir. 2001), *cert. denied,* 536 U.S. 939 (2002). While a divided panel of the Third Circuit reversed the district court's ruling, even the majority recognized the split of authorities on this issue.
[68] Pryor, 32 CUMB. L. REV. at 372.
[69] Pryor, *Competitive Federalism, supra* note 2, at 31.
[70] *Id*. at 32.
[71] Bill Pryor, The Future of Federalism (remarks to the Federalist Society's Federalism and Separation of Powers Practice Group, Nov. 18, 2000), *available at* http://www.ago.state.al.us/speeches.cfm?Item=Single&Case=57.
[72] Phillip Rawls, AP, *Bush's Co-Chairmen Say No Interest in Federal Jobs,* Dec. 13, 2000. He has closed one speech with the prayer of "Please God, no more Souters." Bill Pryor, The Supreme Court as Guardian of Federalism, Speech to Federalist Society and Heritage Foundation at conference on "Federalism: The

Pryor defines success in judicial nominations in terms of nominees' adherence to, rather than independence from, their pre-nomination legal and ideological leanings.

In his Senate Judiciary Committee questionnaire, Pryor has stated that "[j]udicial activism violates the Constitution itself" and that "it is a betrayal of their oath of office for judges to exceed their authority, under Article III of the Constitution, by ruling based on a personal or political agenda rather than the texts of the Constitution and laws, decisions of the Supreme Court, and relevant appellate precedents." These statements are very difficult to square, however, with Mr. Pryor's unqualified praise of rulings like that of Judge Cleland in *Westside Mothers*. As the Sixth Circuit's reversal made clear, the only thing that made *Westside Mothers* "sublime," "brilliant," and "must reading for all federalists" was Judge Cleland's willingness to ignore binding court of appeals and Supreme Court decisions in order to reach the result that Mr. Pryor favored.

In at least one case, Mr. Pryor has been strongly criticized by the Alabama Supreme Court for participating in what amounts to an abuse of the judicial process. Mr. Pryor has been an adamant defender of Alabama Supreme Court Judge Roy Moore's display of the Ten Commandments in his courtroom.[73] In 1995, as Deputy Attorney General, Mr. Pryor became the "lead lawyer" in a suit filed by Alabama using taxpayer resources to seek a declaratory judgment on the constitutionality of Moore's actions.[74] In a stinging rebuke, the Alabama Supreme Court chastised Pryor's office for filing the suit. "As between the state and Judge Moore, there exists no controversy whatever—not even a contrived one," the court ruled. "This is not what lawsuits are about."[75]

6. It's About Politics, Not Federalism

While Pryor has described himself as an ardent supporter of federalism and states' rights, he has been far from consistent in supporting federalism when the results run counter to his political objectives. One example discussed above, is the brief he filed in support of Governor George Bush and against states' rights in the *Bush v. Gore* case. Another is Pryor's crusade against the ability of states to hold the tobacco industry liable for smoking related health costs.[76] Finally, Pryor has supported aggressive preemption of

---

Quiet Revolution." July 11, 2000, *available at* http://www.ago.state.al.us/speeches.cfm?Item=Single&Case=8.

[73] AP, *Tulane Law Grad Gets Alabama's Top Legal Post*, NEW ORLEANS TIMES-PICAYUNE, Dec. 24, 1996, at A4 (quoting Pryor as advocating the display of the Ten Commandments in "every courtroom.").

[74] *Id.* ("Pryor has been the lead counsel for many of the state's major civil cases, including support for Etowah County Circuit Judge Roy Moore's legal fight over the judge's display of the Ten Commandments and courtroom prayers").

[75] State v. ACLU of Alabama, 711 So. 2d 952 (Ala. 1998).

[76] Bill Pryor, *Litigator's Smoke Screen,* WALL ST. J., April 7, 1997. Pryor's position on the tobacco litigation has been strongly criticized by other Republican attorneys general. In the words of Arizona Attorney General Grant Woods: "He's been attorney general for about five minutes, and already he's acted more poorly than any other attorney general." Kelly Greene, *Bill Pryor Hopes to Ride Court Crusade to the Top,* WALL ST. J., May 21, 1997. NY Attorney General Dennis Vacco has also criticized Pryor's stance. In a debate with Pryor, he said: "What we've brought to the table is a plan. The critics have only brought rhetoric." Jerry Zremski, *Negotiators Say Tobacco Deal Will Be Ratified By Congress,* BUFFALO NEWS, Aug. 6, 1997.

state regulation of corporations when it interferes with his vision of an unfettered free market.[77]

7. Conclusion

In several of the cases discussed in this report, Mr. Pryor retained Jeffrey Sutton, who was recently confirmed by the Senate to a lifetime seat on the Sixth Circuit Court of Appeals, to represent his office. During Mr. Sutton's contentious confirmation process, the administration and other defenders of his nomination dismissed the extreme environmental and other views expressed in Mr. Sutton's legal briefs as simply the product of a "lawyer representing a client." Having now nominated Mr. Sutton's client, Mr. Pryor, to the Eleventh Circuit, what explanation can the Bush Administration offer now?

The honest explanation appears to be that this administration, famous for announcing environmental rollbacks at 5:30 p.m. on Fridays, is using judicial nominations as a backdoor strategy for undermining federal environmental protections. You will not hear that from the Bush Administration, but Mr. Pryor has not been reticent in claiming that his views advance the President's agenda. Mr. Pryor credits the President for seeking a "significant change in environmental policy" which relies less on "edicts from Washington."[78] He argues that "President Bush's plans for a new, decentralized environmentalism fit nicely" with the extreme constitutional theories he advocates.[79]

Mr. Pryor's record suggests that he is willing to aid and abet judicial activism when it supports his ideological and political objectives. There is considerable reason to believe that he will continue to "participate" in the "next phase" of the "operation" to undermine the federal power to protect the environment if confirmed to the Eleventh Circuit.

[77] In Pryor's view, "the first function" of the federal government is "to promote commerce by overriding state protectionism and providing uniform rules for the marketplace." He asks Congress to "make free trade its main domestic concern." He supports aggressive action by Congress to "prevent undue burdens from abuses of civil lawsuits in state courts." Bill Pryor, Federalism Versus Economic Efficiency, Remarks at the 2001 American Legislative Exchange Council Annual Meeting, Aug. 1, 2001.
[78] Pryor, *Competitive Federalism, supra* note 2, at 2.
[79] *Id.*