Wild Rivers and the Boundaries of Cooperative Federalism: The Wild and Scenic Rivers Act and the Allagash Wilderness Waterway

Simon B. Burse

Follow this and additional works at: http://lawdigitalcommons.bc.edu/ealr
Part of the Environmental Law Commons, and the Water Law Commons

Recommended Citation
WILD RIVERS AND THE BOUNDARIES OF COOPERATIVE FEDERALISM: THE WILD AND SCENIC RIVERS ACT AND THE ALLAGASH WILDERNESS WATERWAY

Simon B. Burce*

Abstract: The Wild and Scenic Rivers Act (WSRA) is a collaboration between the federal and state governments designed to preserve nationally significant rivers. Section 2(a)(ii) is an innovative provision of the WSRA, which allows states to designate rivers for review by the Secretary of the Interior for inclusion in the National Wild and Scenic Rivers System. When federal and state interests align, section 2(a)(ii) designation is an effective tool for encouraging state participation in river management. When state interests in a river diverge from federal interests, however, the contours of this collaboration raise difficult federalism questions because the federal government has traditionally regulated the management of natural resources, while states have traditionally regulated land use. Maine recently provoked these difficult federalism questions by unilaterally downgrading the status of the Allagash Wilderness Waterway. This Note examines the WSRA and argues that it preempts state laws that violate its federal purpose of preservation.

Introduction

Nestled within the timber forests of northwest Maine, a pristine ninety-two mile sanctuary of streams and lakes flows along the Allagash River.¹ In 1966, the State of Maine established the Allagash Wilderness Waterway (AWW) to “preserve, protect and develop the maximum wilderness character” of this unspoiled area.² Four years later, the Governor of Maine also applied to the U.S. Department of the

---

*Solicitations Editor, BOSTON COLLEGE ENVIRONMENTAL AFFAIRS LAW REVIEW, 2007–08. The author wishes to thank David A. Nicholas for his invaluable guidance during the formation and writing of this Note.

¹ Maine Department of Conservation, Bureau of Parks & Lands, Allagash Wilderness Waterway, http://www.state.me.us/cgi-bin/doc/parks/find_one_name.pl?park_id=2 (last visited Jan. 16, 2008).

Interior to include the AWW within the National Wild and Scenic Rivers System (National System) as the first state-administered “wild” river area under the Wild and Scenic Rivers Act of 1968 (WSRA).³

In approving the Governor’s application, the Secretary of the Interior noted that public access to the AWW would be limited to one road at each of the northern and southern borders of the protected area, allowing the vast area in between to conform to the WSRA’s mandate that a wild river be “generally inaccessible except by trail.”⁴ Although prior to the application several private roads had been built to the river to facilitate logging for the surrounding timber industry, these roads did not affect significantly the “overall wilderness character” of the river and eventually would be removed.⁵

In 2006, the Maine State Legislature passed—and the Governor approved—Legislative Document 2077, “An Act to Make Adjustments to the Allagash Wilderness Waterway.”⁶ The Act established six public roads and permanent bridges over the waterway, dissecting the AWW into several discrete segments and unilaterally downgrading it from a “wild” to a “scenic” river area within the classification structure of the WSRA.⁷ In so doing, the State of Maine reduced the level of state protection afforded to the AWW and, most likely, violated its mandate to administer the area “in such manner as to protect and enhance the values which caused it to be included in” the National System.⁸

The State of Maine’s recent act raises significant federalism questions with regard to its administration of the AWW.⁹ In the scheme of cooperative federalism established for state-nominated rivers under the WSRA, no federal enforcement mechanism exists for ensuring that a

---


⁴ 16 U.S.C. § 1273(b)(1); Notice of Approval, supra note 3, at 11,526.

⁵ Notice of Approval, supra note 3, at 11,526.


⁸ See 16 U.S.C. § 1281(a). In response to the downgrading of the AWW, several plaintiffs filed an action in federal district court arguing, in part, that Legislative Document 2077 is preempted by the WSRA. Fitzgerald v. Harris, No. 07-16-B-W, 2007 WL 2409679, at *1 (D. Me. Aug. 20, 2007). On August 20, 2007, a U.S. Magistrate Judge issued a Recommended Decision to Dismiss the plaintiffs’ complaint. Id. at *13. However, as of the publication of this Note, the district court has yet to accept or reject this recommendation.

⁹ Id. § 1273(a); Act of Aug. 23, 2006, ch. 598, 2006 Me. Acts 1577.
state meets its goals of preserving the river. While the WSRA goes to great lengths to enable state-managed rivers’ inclusion in the system, it does not thereafter provide a federal remedy to protect these rivers when the state government fails to meet its obligations under the statute. Indeed, on the face of the WSRA, it is difficult to identify any power of the federal government to regulate the AWW. Yet, while the power-sharing relationship under the WSRA is unclear at first blush, a Supreme Court decision interpreting an older scheme of cooperative federalism designed to control pre-Prohibition liquor trafficking defines the boundaries of power between the federal and state governments and provides guidance for interpreting this relationship.

Part I of this Note examines the provisions and principles of the Wild and Scenic Rivers Act of 1968. Part II considers the origins and development of cooperative federalism, its current use in the context of environmental regulation, and an early example of cooperative federalism under the Webb-Kenyon Act to control the flow of liquor into “dry” states in the years before Prohibition. Part III examines the applicability of the law articulated by the Supreme Court in examining the Webb-Kenyon Act to the power relationship between the federal government and the State of Maine under the WSRA. Finally, Part IV argues that under any consideration of the statutory scheme established by the WSRA, the State of Maine did not have authority to enact Legislative Document 2077.

I. THE WILD AND SCENIC RIVERS ACT OF 1968

The Wild and Scenic Rivers Act unequivocally pronounced Congress’s intent to protect the natural values of the nation’s untrammeled rivers:

It is hereby declared to be the policy of the United States that certain selected rivers of the Nation which, with their immediate environments, possess outstandingly remarkable . . . values, shall be preserved in free-flowing condition, and that they and their immediate environments shall be protected for

11 See id.
12 See id.
the benefit and enjoyment of present and future generations.\textsuperscript{14}

The WSRA was the culmination of numerous bills introduced throughout the Eighty-Ninth and Ninetieth Congresses.\textsuperscript{15} The policy that the WSRA promoted, however, developed over the course of several decades, beginning in the 1930s, as advocates for the development of flood- and drought-protection plans (particularly in the Western States) negotiated with preservationists to determine the best use of the nation’s rivers.\textsuperscript{16} Born amid the collision between regional interests and national desires for preservation, the WSRA was a product of careful compromise.\textsuperscript{17} The two most significant features that spurred the Act’s progress into law were its three-tier system for classifying rivers in the National System and its two-fold method for designating and protecting them as either state-administered rivers or federally administered rivers.\textsuperscript{18}

\textbf{A. The Three-Part Classification System}

A primary element of the WSRA that ensured the passage of the bill was its three-fold scheme for classifying protected rivers.\textsuperscript{19} The WSRA contains three categories for preservation: wild, scenic, and recreational.\textsuperscript{20} Each category of river under the WSRA is to be admin-


\textsuperscript{16} \textit{Id.} at 708–09; \textit{see also} Roger Tippy, Preservation Values in River Basin Planning, 8 NAT. RESOURCES J. 259, 259 (1968). Ironically, although Senator Church’s first bill proposing to create a “National Wild Rivers System” was designed for river preservation, it conjured images of flood control, since the “literal wildness of a river [was] frequently advanced as a justification for flood control projects.” \textit{Id.} at 273.

\textsuperscript{17} \textit{See} Tarlock & Tippy, supra note 15, at 713 nn.29 & 32.

\textsuperscript{18} Wild and Scenic Rivers Act § 2.

\textsuperscript{19} \textit{Id.} § 2(b); \textit{see} Tarlock & Tippy, supra note 15, at 713 n.29.

\textsuperscript{20} \textit{See} Wild and Scenic Rivers Act, 16 U.S.C. § 1273(b) (2000). The WSRA defines the three categories for inclusion in the National Wild and Scenic Rivers System as follows:

(1) Wild river areas—Those rivers or sections of rivers that are free of impoundments and generally inaccessible except by trail, with watersheds or
istered in such a way as to protect “the values which caused it to be included” in the National System. However, not all rivers in each category should be administered in the same way. The WSRA recognizes that different rivers within each category have different values: “scenic, recreational, geologic, fish and wildlife, historic, cultural, or other similar values.” Accordingly, administrators have devised various schemes for regulating individual rivers within each category.

As the WSRA progressed through congressional hearings, lawmakers struggled to reach an appropriate balance between national uniformity and local particularity. Standards for preservation needed to be strict enough so that they could be ascertained and enforced, but also loose enough so that they did not place straight jackets on the administrators’ ability to manage each unique river for its own values. By having three separate categories for preservation, the WSRA allowed for individual rivers to be administered to preserve their own outstandingly remarkable values (ORVs), while also establishing clear management standards that could be followed uniformly throughout the National System. Thus, while the categories do not bind administrators

shorelines essentially primitive and waters unpolluted. These represent vestiges of primitive America.

(2) Scenic river areas—Those rivers or sections of rivers that are free of impoundments, with shorelines or watersheds still largely primitive and shorelines largely undeveloped, but accessible in places by roads.

(3) Recreational river areas—Those rivers or sections of rivers that are relatively accessible by road or railroad, that may have some development along their shorelines, and that may have undergone some impoundment or diversion in the past.

Id.

21 Id. § 1281 (a).
26 See id. at 722–23; see also F. Fraser Darling & Noel D. Eichhorn, Man & Nature in the National Parks: Reflections on Policy 27 (1967) (discussing the importance of individualized park management).
to particular plans, they provide adequate guidelines for courts to determine whether the managers of a designated river violate the WSRA by administering it at a lower level than is required to protect the river’s ORVs.\[^{28}\]

B. *Section 5 Rivers Versus Section 2 Rivers*

A second innovation within the WSRA was its two-fold mechanism for designating which rivers to study and subsequently to include in the National System.\[^{29}\] First, under section 5, rivers can be designated by an act of Congress and administered by the federal government.\[^{30}\] Second, rivers can be designated for study under section 2(a)(ii) when a state requests that the Secretary of the Interior study the river.\[^{31}\] If approved under section 2(a)(ii) by the Secretary, the river is included in the National System.\[^{32}\] The proposal for a state-nominated component of the WSRA was introduced by Senator Edmund S. Muskie of Maine, in direct response to conflicts among federal and state proposals for preserving the Allagash River.\[^{33}\] The section 2(a)(ii) method has subsequently proved to be a powerful incentive for encouraging states to include rivers in the National System.\[^{34}\]


\[^{31}\]Id. § 1273. Section 5 rivers are written into the WSRA, but section 2 rivers, which enter the National System by approval of the Secretary of the Interior, are not added to the statute. See id. § 1274(a).

\[^{32}\]Id. § 1273; *River Mileage Classifications for Components of the National Wild and Scenic Rivers System* 1–17 (2007), http://www.rivers.gov (follow “Publications” hyperlink; then follow “Wild & Scenic Rivers Table” hyperlink) [hereinafter *River Mileage Chart*].


\[^{34}\]See *Haas*, *supra* note 24, at 7. The WSRA originally listed eight rivers to be instantly included within the National System and administered by either the Secretary of the Interior or the Secretary of Agriculture (the “Instant” rivers) and designated twenty-seven rivers to be included in the system after study. Wild and Scenic Rivers Act §§ 3, 5. Today, the National System includes at least 187 rivers or sections of rivers, at least twenty of which are state-administered rivers. *River Mileage Chart*, *supra* note 32, at 1–17.
1. Federally Administered Rivers: Section 5

Section 5 of the WSRA requires the Secretaries of the Interior and Agriculture to study expeditiously each of the rivers that it lists, and to make a report to the President and Congress. While the twenty-seven initial study rivers were to be studied, the WSRA protected them from development for five years, effectively granting the Secretaries power to veto any projects by the Federal Power Commission that would affect the characteristics for which the river was to be included in the National System. In addition to the initial study rivers, the WSRA allowed for further study rivers to be included under the WSRA through federal administration by act of Congress, and as of January 2007, at least 137 rivers or sections of rivers had been identified for study through section 5.

The section 5 study process begins with the nomination of a river for inclusion in the National System, which is typically initiated by local citizens, conservation groups, or Members of Congress interested in preserving a river area. As the first step in this process, an interdisciplinary study team (IDT) is convened to work in concert with local stakeholders to make initial findings regarding the river’s eligibility. The study team uses these initial findings to prepare a long-term management plan, paying particular attention to areas of the river susceptible to land use changes that would threaten the river’s designation under the WSRA.

The study process, which can be lengthy, is designed to promote coordination and participation in the management of the river among stakeholders. The period from introduction of a study proposal to passage of the congressional act authorizing the study often takes several years.

35 16 U.S.C. § 1275(a). The Secretary of Agriculture administers rivers or sections of rivers that flow through federal lands. Id.
36 Wild and Scenic Rivers Act § 7(b); Tarlock & Tippy, supra note 15, at 714.
39 Id. at 10.
40 Id. at 11.
41 Id. at 8–9. Local participation is essential for preserving ORVs—even in federally administered components of the National System—because many river-related values such as wildlife habitat, water quality, and scenery can be influenced by land use outside of a river’s boundaries. Thomas, supra note 22, at 6–7. To this extent, preservation requires mutual trust and cooperation among federal, state, and local governments and landowners. Id.
eral years.\textsuperscript{42} During this time, stakeholders are identified, dialogue is fostered among various interest groups, and the amount of local support for designation is assessed.\textsuperscript{43} Through this process, Congress can refer to the various stakeholders in the study and require the administering secretary to consult with the groups to encourage public participation in the study plan.\textsuperscript{44} Frequently, the last step in preparing a study is a municipal vote to evaluate local support.\textsuperscript{45}

Once a study is complete, the IDT makes a recommendation to include a river in the National System through a formal WSR study report.\textsuperscript{46} The report includes a suitability analysis that considers three primary factors: (1) whether a river’s ORVs merit protection; (2) whether these ORVs will be protected through designation; and (3) whether any of the non-federal entities who could be responsible for protecting the river have “demonstrated [a] commitment to protect the river.”\textsuperscript{47} The final report must comply with the requirements under the National Environmental Policy Act (NEPA) and is reviewed for ninety days by all concerned federal agency officials, including the Secretary of the Army and the Chairman of the Federal Energy Regulatory Commission, and the governor of the state in which the river is located.\textsuperscript{48} After the review period, the study is sent to Congress to decide whether to include the river area in the National System.\textsuperscript{49}

2. State-Administered Rivers: Section 2(a)(ii)

Section 2(a)(ii) of the WSRA provides for state-administered rivers to be included in the National System.\textsuperscript{50} Under this section, the Secretary of the Interior can include a river in the National System upon receipt of an application by the governor of a state in which the

\textsuperscript{42} Diedrich & Thomas, \textit{supra} note 38, at 8.
\textsuperscript{43} Id. at 8–9.
\textsuperscript{44} Id. at 9.
\textsuperscript{45} Id. at 11.
\textsuperscript{46} Id. at 19.
\textsuperscript{47} Id. at 17.
\textsuperscript{49} Diedrich & Thomas, \textit{supra} note 38, at 20.
river flows. Unlike federally administered rivers, which require acts of Congress both to authorize a study and to designate the river, state-administered rivers are included in the National System by approval of the Secretary of the Interior. In practical terms, this process grants to states more control over the nomination, study, and inclusion of a river because the ultimate decision does not require the deliberation of Congress.

a. The Process for Inclusion Under Section 2(a)(ii)

The WSRA allows for the study process to begin with a state request for a joint study conducted by federal and state agencies. In fact, the WSRA requires the Secretary of the Interior to approve a study if one is requested. In order for a river to qualify as a state-administered river under section 2(a)(ii), it must meet certain qualifications. First, the river must have been designated as part of a state’s system for river protection by an act of the state’s legislature. Second, the criteria for which it is protected at the state level must meet the criteria established in the preamble to the WSRA: it must be “free-flowing” and possess one or more “outstandingly remarkable values.” Third, the non-federal lands surrounding the river must be administered by a state agency, and resources must be in place to ensure protection of the ORVs for which the river is being protected.

If all requirements are met, the Secretary of the Interior is required to foster state participation by determining how state and local governments can participate in a preservation plan, and by providing

---

51 16 U.S.C. § 1273(a). The Governor of Maine’s letter accompanying the AWW application requested that the entire AWW be included in the National System—rather than a portion of the AWW as had been proposed earlier—because “all concerned feel this is as it should be considering the character of the area and our understanding of the intent of the National Act.” Letter from Kenneth M. Curtis, Governor, State of Me., to Walter J. Hickel, U.S. Sec’y of the Interior (May 4, 1970) (on file with Boston College Environmental Affairs Law Review).
52 16 U.S.C. § 1273(a); see Notice of Approval, supra note 3, at 11,525.
53 Haas, supra note 24, at 2.
54 16 U.S.C. § 1276(c).
55 Id. (“The study of any of said rivers shall be pursued in as close cooperation with appropriate agencies . . . as possible . . . if request for such joint study is made by the State.”) (emphasis added).
56 Haas, supra note 24, at 8.
57 Id.
58 16 U.S.C. § 1271; Haas, supra note 24, at 8; see 16 U.S.C. § 1286(b) (defining “[f]ree-flowing” as “existing or flowing in natural condition without impoundment, diversion, straightening, rip-rapping, or other modification of the waterway”).
59 Haas, supra note 24, at 8.
technical assistance to state and local governments and local private interests.\textsuperscript{60} During this time, an environmental impact statement is prepared and circulated to the appropriate reviewing agencies in order to comply with NEPA requirements, and public comments are reviewed.\textsuperscript{61} Finally, if the Secretary designates a river, it is assigned one of the three classifications in the Act—wild, scenic, or recreational—in order to guide state and local decisions as to which future land uses might be appropriate along the river.\textsuperscript{62}

b. Encouraging State Participation

One of the most significant aspects of the section 2(a)(ii) designation process is the limited role played by the federal government.\textsuperscript{63} The WSRA notes that all state-administered lands are to be administered “without expense to the United States.”\textsuperscript{64} This language has been interpreted to mean that the WSRA prohibits the federal government from spending money on state-administered rivers.\textsuperscript{65} As a result, state participation is imperative for rivers admitted into the National System under section 2(a)(ii).\textsuperscript{66}

In the early history of the WSRA, a lack of state participation was a significant stumbling block for including state rivers in the WSRA.\textsuperscript{67} Between 1968 and 1978, only five state-administered rivers were nominated for inclusion under the Act, despite the fact that Congress had “envisioned a prominent State role” in river designation.\textsuperscript{68} A report by the General Accounting Office—the investigative arm of Congress—identified two reasons for the lack of enthusiasm among the states.\textsuperscript{69} First,
some states felt that inclusion in the WSRA would be “too costly” because the state would bear the burden of administration and land-acquisition costs.\textsuperscript{70} Second, the Department of the Interior had adopted a narrow interpretation of the “without expense to the United States” provision of the WSRA.\textsuperscript{71} As a result, even if the federal government were to spend money on federal lands within a state-administered system, the river could not be admitted under the WSRA.\textsuperscript{72}

An amendment passed in 1978 remedied many of these problems by providing that state-administered rivers would be administered without expense to the federal government “other than for administration and management of federally owned lands.”\textsuperscript{73} Since the 1978 amendment, at least fifteen rivers or segments of rivers have been added as state-administered rivers under the WSRA.\textsuperscript{74}

\section*{C. Corridor Management After a River is Included in the National System}

Once a river is included in the National System under either section 5 or section 2(a) (ii), it is immune from any new federal resource development project such as dams, water conduits, reservoirs, powerhouses, or transmission lines.\textsuperscript{75} Nonetheless, since protected river areas often include private or state-owned land, this prohibition leaves room for local discretion in land use decisions that could affect the river’s ORVs.\textsuperscript{76} The federal government has “little or no control” over such decisions.\textsuperscript{77} For federally administered rivers, the WSRA grants to Congress some authority to acquire land within a congressionally designated river’s boundaries.\textsuperscript{78} However, owing to the limitations on federal funding and the slowness of the purchase process, these remedies often

\begin{thebibliography}{9}
\bibitem{70} Comptroller General of the U.S., supra note 68, at 17.
\bibitem{71} See id. at 18–19.
\bibitem{72} See id. at 19.
\bibitem{73} National Parks and Recreation Act of 1978, Pub. L. No. 95-625, § 761, 92 Stat. 3467; see Haas, supra note 24, at 7.
\bibitem{74} River Mileage Chart, supra note 32, at 1–18.
\bibitem{76} Thomas, supra note 22, at 6.
\bibitem{77} Id.
\end{thebibliography}
leave a large hole in protection.\textsuperscript{79} Likewise, for state-administered rivers, the federal government has virtually no recourse for mismanagement because the river area is administered “without expense to the United States.”\textsuperscript{80}

In order to mitigate this protection gap, the WSRA relies heavily on cooperation among state and local governments, landowners, and private organizations.\textsuperscript{81} This strategy allows a great deal of creativity in developing river management plans, but also demands careful maintenance of relationships among the various entities.\textsuperscript{82} For section 5 rivers, federal agencies must tread lightly, balancing their desire to establish uniformity among rivers in the system against the deference required to avoid micromanaging state and local agencies and undermining the trust required for a successful strategy.\textsuperscript{83}

Notwithstanding the disparity of federal power between federal and state-administered rivers, the WSRA makes no distinction between the level of rigorousness used to administer each type of river.\textsuperscript{84} To that end, the three-tiered category system is used as administration guidelines for all rivers in the system.\textsuperscript{85} Within these guidelines, the Secretaries have great discretion in carrying out the purposes of the WSRA.\textsuperscript{86} Nonetheless, protection standards still should ensure that a river segment’s classification does not change from one category to another.\textsuperscript{87} Thus, while each category should be administered equally to ensure the preservation of ORVs in that category, as a practical matter, wild rivers require more stringent levels of protection than scenic or recreational rivers.\textsuperscript{88} Ultimately, although the federal government has virtually no power over state rivers, the WSRA demands that state-administered rivers are not run as “second class” rivers.\textsuperscript{89}

\begin{itemize}
\item 79 \textit{Thomas, supra note 22}, at 6–7.
\item 80 16 U.S.C. § 1273(a).
\item 81 \textit{Thomas, supra note 22}, at 6–7.
\item 82 \textit{Id}.
\item 83 See \textit{Id}.
\item 85 \textit{Thomas, supra note 22}, at 8.
\item 86 See McMichael v. United States, 355 F.2d 283, 286 (9th Cir. 1965) (noting that “[t]he choice of what shall be preserved is an administrative choice in which geographical and topographical considerations are certainly germane but hardly are subject to judicial review”).
\item 87 \textit{Thomas, supra note 22}, at 8; Tarlock & Tippy, \textit{supra} note 15, at 719–20.
\item 89 \textit{Marsh, supra note 65}, at 23.
\end{itemize}
D. Incentive and Accountability for State Governments Under Section 2(a)(ii)

The regulatory scheme established by the WSRA includes an ambiguous balance of power between the federal and state governments, particularly with regard to section 2(a)(ii) rivers.\(^\text{90}\) The language of the statute does not indicate why the state governments would have any incentive to participate in the WSRA.\(^\text{91}\) Equally unclear is the incentive provided for states to administer their rivers in conformance with the categories established by the Act is equally unclear.\(^\text{92}\) Although the WSRA explicitly announces a federal interest in preserving the nation's rivers in their free-flowing condition, it does not issue a mandate to the states to protect this interest.\(^\text{93}\) Especially considering that the federal government is prohibited from spending money on state-administered rivers, states are neither persuaded nor explicitly required under the WSRA to adhere to federal standards.\(^\text{94}\)

Notwithstanding the lack of explicit incentives in the statute, there are several advantages available to states participating in the WSRA under section 2(a)(ii).\(^\text{95}\) The incentive most clearly implicated in the statute is the protection that the WSRA affords against federally sponsored dam projects.\(^\text{96}\) This grant of power allowing the states to circumvent congressional designation is most significant when Congress would otherwise reject a designation under section 5 in favor of developing a hydroelectric project.\(^\text{97}\) A second advantage of participation in the WSRA is that states may prevent federal control over the rivers within their boundaries.\(^\text{98}\) A third, and often noted, purpose for including a river in the system is the publicity value of having it included in the National System.\(^\text{99}\)


\(^{91}\) 16 U.S.C. § 1281.

\(^{92}\) See id.

\(^{93}\) See id. § 1271.

\(^{94}\) See id. § 1273(a).

\(^{95}\) Hannon & Cassidy, supra note 69, at 151–52; Tarlock & Tippy, supra note 15, at 715.


\(^{97}\) See Hannon & Cassidy, supra note 69, at 151–52 (citing an instance where state designation was used as a political maneuver to prevent dam construction in order to protect the New River in North Carolina).

\(^{98}\) See id. at 152 (noting that the designation of the AWW “came about as a result of a desire within the state to prevent federal control of the river”).

\(^{99}\) See id. (explaining that the designation of the Lumber River in North Carolina under section 2(a)(ii) “appears to have been motivated at least in part by a desire to promote
Moreover, once a river is included in the WSRA, the National System does not encumber the state government with much accountability.\textsuperscript{100} Of course, during the application process, states must comply with federal designation requirements, including the preparation of reports to satisfy NEPA requirements.\textsuperscript{101} Once a river is in the system, however, the state does not report to the federal government, nor does the federal government have any immediate recourse to ensure that the state administers its rivers for the reasons that the rivers were included in the WSRA.\textsuperscript{102} As such, while the federal government must strive to maintain a balance between uniform preservation of national rivers and formation of individual management plans to protect each river’s specific ORVs, the state and local governments owe no such regard to the National System.\textsuperscript{103} This distinction places states in a position of power, and reveals at least one unilateral advantage for the states in this particular form of cooperative federalism.\textsuperscript{104}

\textsuperscript{100} See 16 U.S.C. § 1284(d) (“The jurisdiction of the States over waters of any stream included in a national wild, scenic or recreational river area shall be unaffected by this chapter to the extent that such jurisdiction may be exercised without impairing the purposes of this chapter or its administration.”).

\textsuperscript{101} See Haas, supra note 24, at 9.

\textsuperscript{102} 16 U.S.C. §§ 1271–1287; see H.R. Rep. No. 90-1623, at 3 (1968), as reprinted in 1968 U.S.C.C.A.N. 3801, 3803. As noted above, the WSRA is designed in part to allow rivers to be administered on an individualized basis, since each river is unique. See Haas, supra note 24, at 10–19. Once admitted into the National System under one of the three protective categories, a river can be administered in any number of ways to preserve the values for which it was included. See id.

\textsuperscript{103} See National Wild and Scenic Rivers System; Final Revised Guidelines for Eligibility, Classification and Management of River Areas, 47 Fed. Reg. 39,454 (Sept. 7, 1982); Thomas, supra note 22, at 6–7.

II. THE DEVELOPMENT OF COOPERATIVE FEDERALISM:
A “FIELD OF EXPERIMENT”

The tradition of dividing power between the federal and state governments in environmental regulation traces its roots to the founding of the Nation. The Supremacy Clause of Article VI of the Constitution states that the “Constitution, and the Laws of the United States which shall be made in Pursuance there of . . . shall be the supreme Law of the Land.” Also, the Tenth Amendment declares that “[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” Throughout the history of the United States, the ongoing effort to interpret this balance of power between the federal and state governments has inspired both creativity and conflict.

While the phrase “cooperative federalism” has its jurisprudential roots in a 1950 decision of the U.S. Court of Appeals for the Ninth Circuit, a symposium published by the Iowa Law Review in 1938 traced the mechanics of cooperative federalism to the middle of the nineteenth century. The symposium identified “an entirely new field of experiment characterized by the participation of several governments in cooperative legislative or administrative action.” In subsequent case law, courts have characterized cooperative federalism in different ways, but have not significantly deviated from this initial description. Yet for as long as this form of cooperation has been an operative principle in government, scholars and statespersons have struggled to identify the allocations of power specific to the federal and state governments in this “field of experiment.” Indeed, some

---

105 Erwin Chemerinsky, Constitutional Law 100 (2d ed. 2005).
106 U.S. Const. art. VI.
107 U.S. Const. amend. X.
109 Alaska Steamship Co. v. Mullaney, 180 F.2d 805, 816 n.14 (9th Cir. 1950); Glicksman, supra note 108, at 725; Frank R. Strong, Cooperative Federalism, 23 Iowa L. Rev. 459, 459 (1938).
110 Foreword, Symposium on Cooperative Federalism, 23 Iowa L. Rev. 455, 455 (1938).
111 See New York v. United States, 505 U.S. 144, 167 (1992) (stating that cooperative federalism includes statutory programs that “anticipate[] a partnership between the States and the Federal Government, animated by a shared objective”); see also Hodel v. Va. Surface Mining & Reclamation Ass’n, 452 U.S. 264, 289 (1981) (describing “cooperative federalism” as a model “that allows the States, within limits established by federal minimum standards, to enact and administer their own regulatory programs, structured to meet their own particular needs”).
112 Foreword, supra note 110, at 456.
commentators have argued that the ambiguity over these power assignments is an advantage deliberately built into the Republic by the Framers themselves.\footnote{See id. at 455 (“This interminable disagreement, with its occasional bitterness, is itself testimony to the wisdom of the constitutional generalization. Had the controls been locked, had the framers precluded the continual experiment and adjustment of state-federal relationships to changing circumstances, the union could not possibly have endured.”).}

A. Cooperative Federalism in Environmental Regulation

1. Federal Regulation in Pollution Control and Resource Management

The history of a significant federal government presence in the arena of pollution control began in 1970.\footnote{Robert V. Percival, Environmental Federalism: Historical Roots and Contemporary Models, 54 Md. L. Rev. 1141, 1147 (1995).} Until then, the regulation of the environment was an area left largely to the states.\footnote{Id. Professor Percival notes several instances of early federal government responses to “pollution,” including the Refuse Act of 1899, an act that prohibited refuse barriers in navigable waterways, and the Esch-Hughes Act of 1912, an act that restricted the use of white phosphorous in match manufacturing to prevent phosphorous necrosis or “phossy jaw.” Id. at 1149–50; see also Esch-Hughes Act of 1912, Pub. L. No. 62-112, 37 Stat. 81 (1912); Refuse Act of Mar. 3, 1899, ch. 425, 30 Stat. 1151 (repealed 1972).} Acting through their residuary Tenth Amendment police powers to protect the health, safety, and welfare of their citizens, the states took primary responsibility for regulating pollution through local land use laws, elementary pollution control statutes, and common law litigation.\footnote{Glicksman, supra note 108, at 729–30.} The federal government intervened only after it became clear that pollution did not conform neatly within state boundaries, and that states could not regulate pollution effectively on their own.\footnote{See Percival, supra note 114, at 1157.}

In 1970, the federal government embarked on an initiative to take control of pollution regulation.\footnote{Id. at 1159.} That year, Congress enacted the Clean Air Act (CAA), and President Nixon issued an executive order creating the Environmental Protection Agency.\footnote{Clean Air Act, Pub. L. No. 91-604, 84 Stat. 1705 (1970) (codified as amended at 42 U.S.C. §§ 7401–7642 (2000)); Reorganization Plan No. 3 of 1970, 3 C.F.R. 199 (1970), reprinted in 5 U.S.C. app. at 184–89 (2000); see Percival, supra note 114, at 1160.} In the following decade, Congress enacted more than twenty federal environmental laws, exercising its authority under the Commerce Clause to absorb the responsibilities of the states in the arena of national pollu-
tion control.\textsuperscript{120} The development of strong federal legislation during this period was due to a public recognition that the states could not by themselves address the problem of pollution.\textsuperscript{121} Not only was the federal government better equipped to provide resources to confront national pollution problems, but it also was immune to interstate competition for pollution control restrictions that devolved into a “race to the bottom” among states vying to attract business.\textsuperscript{122} As a result, when states challenged Congress’s authority to regulate under the Commerce Clause, they often lost.\textsuperscript{123}

In comparison to the field of pollution control, the federal presence in the arena of resource management is significantly older.\textsuperscript{124} Dating from 1849, when Congress created the Department of the Interior to regulate the transfer of public lands to private parties, the federal environmental policy in the mid-nineteenth century focused on the development of natural resources.\textsuperscript{125} This period saw a flurry of congressional activity designed to encourage private development of the federal government’s massive land holdings.\textsuperscript{126} However, as the century drew to a close, scientific studies challenged the wisdom of unchecked exploitation of natural resources.\textsuperscript{127} Federal policy shifted from resource development to resource conservation, resulting in a conflict between federal and state interests that had previously been aligned under development policies.\textsuperscript{128} While the conservation movement was not without initial controversy, the Supreme Court ultimately validated the power of the federal government as preempting state laws that conflicted with federal policy.\textsuperscript{129}

2. Recent Supreme Court Jurisprudence

The expansive power granted to the federal government in the field of environmental regulation corresponded with a broad interpre-

\textsuperscript{120} U.S. Const. art. I, § 8; Glicksman, \textit{supra} note 108, at 728; Percival, \textit{supra} note 114, at 1160.

\textsuperscript{121} Glicksman, \textit{supra} note 108, at 731–32.

\textsuperscript{122} \textit{Id.} at 730–31, 736.

\textsuperscript{123} \textit{Id.} at 747; \textit{see}, e.g., Pennsylvania v. EPA, 500 F.2d 246, 259 (3d Cir. 1974) (noting that “it has seldom if ever been doubted that Congress has power in order to attain a legitimate end” (citing McCulloch v. Maryland, 17 U.S. 316, 420 (1819))).

\textsuperscript{124} Percival, \textit{supra} note 114, at 1147.

\textsuperscript{125} \textit{Id.}

\textsuperscript{126} \textit{Id.; see}, e.g., General Mining Act of 1872, 30 U.S.C. § 22 (2000).

\textsuperscript{127} A. Dan Tarlock, \textit{Biodiversity Federalism}, 54 Md. L. Rev. 1315, 1342 (1995).

\textsuperscript{128} Percival, \textit{supra} note 114, at 1147–48.

\textsuperscript{129} Tarlock, \textit{supra} note 127, at 1342.
tation of the Commerce Clause by the Supreme Court. During the period from 1937 until 1995, the Supreme Court did not strike down a single federal law for exceeding Congress’s power under the Commerce Clause. However, in 1995 in *United States v. Lopez*, and in 2000 in *United States v. Morrison*, the Court invalidated two federal statutes as exceeding the scope of Congress’s commerce power. These statutes were invalidated on the grounds that the activities that they regulated did not substantially affect interstate commerce. Since 2000, the Court has not invalidated any further laws as exceeding congressional commerce power. Yet the specter of *Lopez* and *Morrison* overshadows all contemporary considerations of Congress’s power to regulate the activities of state and local governments.

Another significant development in constitutional law affecting contemporary conceptions of cooperative federalism is the Supreme

---

130 See Chemerinsky, supra note 105, at 129–38. The Supreme Court affirmed an expansive interpretation of the federal government’s power over interstate commerce in the early twentieth century. See Wickard v. Filburn, 317 U.S. 111, 127–28 (1942) (affirming Congress’s power to regulate intrastate wheat production of local farmers because, although the individual effects of each farmer were trivial, their contributions “taken together with that of many others similarly situated, is far from trivial”); United States v. Darby, 312 U.S. 100, 113 (1941) (holding that Congress had power to regulate manufacturing because “[w]hile manufacture is not of itself interstate commerce the shipment of manufactured goods interstate is such commerce”); Nat’l Labor Relations Bd. v. Jones & Laughlin Steel Corp., 301 U.S. 1, 31 (1937) (finding congressional power to regulate a labor dispute because it affected commerce in so far as it “burden[ed] or obstruct[ed] commerce or the free flow of commerce”).

131 Chemerinsky, supra note 105, at 131.


133 *Morrison*, 529 U.S. at 613; *Lopez*, 514 U.S. at 561.

134 See generally Gonzales v. Raich, 545 U.S. 1 (2005) (holding that the federal Controlled Substances Act, which criminalized the manufacture and possession of marijuana, did not exceed Congress’s authority, notwithstanding the provisions of California’s Compassionate Use Act of 1996 that authorized the cultivation and use of marijuana for medical purposes).

135 See *Morrison*, 529 U.S. at 613; *Lopez*, 514 U.S. at 561; see also *Rapanos v. United States*, 126 S. Ct. 2208, 2223 (2006) (interpreting narrowly the definition of “waters” in the Clean Water Act, as applied to wetlands within a state to exclude areas that the federal government sought to regulate); Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng’rs, 531 U.S. 159, 174 (2001) (holding that federal jurisdiction over a waste disposal site exceeded the authority granted under the Clean Water Act, despite the fact that migratory birds used the waters).
Court’s recent jurisprudence on federal preemption of state laws.\textsuperscript{136} In addition to express preemption, in which Congress explicitly preempts state law on the face of a statute, the Court has found three types of implied preemption: field preemption, conflict preemption, and a state law impeding a federal objective.\textsuperscript{137} In determining if a federal statute preempts state law, courts must ascertain the statute’s congressional purpose.\textsuperscript{138} While the Supreme Court has found preemption in many recent cases, the Court has also emphasized the importance of determining the “clear and manifest purpose of Congress” when the federal government regulates an area of traditional state concern, such as land use.\textsuperscript{139} Since every regulatory arrangement is unique, there is no bright-line test for determining when the federal government purposefully preempts state law.\textsuperscript{140} Rather, the statutes at issue must be considered on a case-by-case basis to determine how the federal government intended its regulatory framework to function.\textsuperscript{141}

\textsuperscript{136} Chemerinsky, supra note 105, at 366–81.

\textsuperscript{137} Gade v. Nat’l Solid Wastes Mgmt. Ass’n, 505 U.S. 88, 98 (1992). In Gade, the Court articulated its preemption analysis as follows:

Pre-emption may be either expressed or implied, and “is compelled whether Congress’ command is explicitly stated in the statute’s language or implicitly contained in its structure and purpose.” Absent explicit pre-emptive language, we have recognized at least two types of implied pre-emption: field pre-emption, where the scheme of federal regulation is “so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it,” and conflict pre-emption, where “compliance with both federal and state regulations is a physical impossibility,” or where state law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”

\textit{Id.} (citation omitted).

\textsuperscript{138} Medtronic, Inc. v. Lohr, 518 U.S. 470, 485–86 (1996) (noting that “any understanding of the scope of a pre-emption statute must rest primarily on a ‘fair understanding of congressional purpose’”) (citation omitted).


\textsuperscript{140} \textit{See Medtronic}, 518 U.S. at 486. The Court noted that:

Congress’ intent, of course, primarily is discerned from the language of the pre-emption statute . . . and the ‘structure and purpose of the statute as a whole,’ as revealed not only in the text, but through the reviewing court’s reasoned understanding of the way in which Congress intended the statute . . . to affect . . . the law.

\textit{Id.} (citation omitted).

\textsuperscript{141} \textit{Id.}
B. Federal and State Power Is Unclear from Statutory Language That Explicitly Provides for State Participation

While many federal environmental statutes explicitly delineate the cooperative relationship that they seek to establish among the levels of government, the enforcement of these statutes often reveals different relationships in practice.\textsuperscript{142} In the pollution control context, most statutes reflect congressional mindfulness of the traditional role assumed by states for protecting public health, safety, and welfare.\textsuperscript{143} The Clean Water Act, for example, states that “[i]t is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution . . . ."\textsuperscript{144} Many environmental statutes buttress this policy by allowing states to regulate at stricter levels than the federal government if they choose to do so.\textsuperscript{145} However, notwithstanding this deferential language to state regulation, the federal government retains significant, and often primary, enforcement power under these statutes.\textsuperscript{146}

In the context of resource management, many statutes emphasize the principal role of the federal government.\textsuperscript{147} Rather than recognizing the primary authority of state governments, as pollution control statutes do, these resource management statutes conceive of the federal government sharing its own power with the states.\textsuperscript{148} However, many of these statutes simultaneously carve out specific provisions for

\textsuperscript{142} See, e.g., Resource Conservation and Recovery Act, 42 U.S.C. § 6901(a)(4) (2000) (noting that “the collection and disposal of solid wastes should continue to be primarily the function of State, regional, and local agencies”); Clean Air Act, 42 U.S.C. § 7401(a)(3) (2000) (stating that “air pollution control at its source is the primary responsibility of States and local governments”).

\textsuperscript{143} See, e.g., Clean Water Act, 33 U.S.C. § 1251(b) (2000); see Glicksman, supra note 108, at 738.

\textsuperscript{144} 33 U.S.C. § 1251(b).


\textsuperscript{146} See Glicksman, supra note 108, at 740 (“The terminology of state primacy and of federal-state partnerships is misleading, however. The federal pollution control statutes unquestionably put the federal government . . . in the driver’s seat.”).

\textsuperscript{147} See Fischman, supra note 104, at 200–03.

state power in federal management processes. In statutes that contain language identifying concurrent federal and state power, the assignment of power can be ambiguous on the face of the statute.

The language of power arrangements in these statutes does not ring hollow, and courts often use this language to inform their interpretations of the substantive provisions of these statutes. Yet the language of the statutes themselves offer little insight into the sources of power from which they draw their authority because courts use traditional conceptions of federal and state power to inform their statutory interpretation. Therefore, rather than examining statutory language, a more useful method for analyzing the balance of power in cooperative federalism is to consider how courts have articulated the interaction of the sources of federal and state power when confronted with questions of statutory interpretation.

C. An Early Example of Cooperative Federalism: Liquor Control

One early example of the use of cooperative federalism emerged in the pre-Prohibition control of liquor traffic. In the period between 1843, when Oregon enacted the first territory-wide prohibition law, and the passage of the Eighteenth Amendment in 1919, the federal and state governments experimented with various forms of liquor regulation. During this time, the number of prohibition states ebbed and flowed, falling as low as three in 1904 and rising as high as thirty-two in 1918. States attempting to enforce their prohibition requirements faced significant challenges from outside exporters because state statutes could not interfere with interstate commerce, an area of power explicitly granted to the federal government in the Constitution.

---

149 See, e.g., Wild and Scenic Rivers Act § 5, 16 U.S.C. § 1276(c) (2000) (requiring the Secretary of the Interior to pursue “[t]he study of any of said rivers . . . if request for such joint study is made by the State”).


152 Id. at 2223 n.7, 2224 (noting that such an expansive interpretation of “waters of the United States” implicated the “outer limits of Congress’s commerce power”).

153 Id.

154 Notes, Symposium on Cooperative Federalism, 23 IOWA L. REV. 635, 637 (1938).

155 Id. at 637–43.

156 Id. at 637.

Without supplemental federal regulation, states were powerless to enforce their prohibition laws.  


To facilitate the states in regulating liquor traffic, Congress passed the Wilson Act, which allowed the states to regulate liquor as soon as it “arrived” within their boundaries. Under the Wilson Act, intoxicating liquors shipped in interstate commerce could be regulated by state law upon arrival “to the same extent and in the same manner as though such liquids or liquors had been produced in such State or Territory.” While the Supreme Court upheld this creative solution as a valid exercise of Congressional authority, the Court almost immediately undercut its effectiveness by holding in several cases that “arrival” into a state meant receipt by an in-state recipient, rather than entrance into state territory. In response to the Wilson Act, out-of-state shippers simply shipped alcohol directly to customers through mail-order businesses. Thus, despite Congress’s effort to grant states more regulatory power, neither government retained any control over the liquor industry. Congress lacked the wherewithal to enact a uniform regulation over interstate commerce that would place the interests of “dry states” over “wet states,” and states could not manage this traffic without interfering with interstate commerce.

In response, Congress supplemented the Wilson Act with the Webb-Kenyon Act, which explicitly “divest[ed] intoxicating liquors of their interstate character in certain cases.” Under the Webb-Kenyon Act, Congress deemed it illegal to ship or transport liquor into any

---

158 Notes, supra note 154, at 638.
161 Wilkinson v. Rahrer, 140 U.S. 545, 562 (1891) (“No reason is perceived why, if congress chooses to provide that certain designated subjects of interstate commerce shall be governed by a rule which divests them of that character at an earlier period of time than would otherwise be the case, it is not within its competency to do so.”); see also Heyman v. S. Ry. Co., 203 U.S. 270, 274 (1906); Rhodes v. Iowa, 170 U.S. 412, 426 (1898); Vance v. Vandercook, 170 U.S. 438, 452–53 (1898).
162 Jane Perry Clark, Interdependent Federal and State Law as a Form of Federal-State Cooperation, 23 IOWA L. REV. 539, 550 (1938); Notes, supra note 154, at 640.
164 Id.
state where the liquor was intended to be used in violation of that state’s laws. As a result, state law provided the substance of the federal law, and liquor was subject to state law as soon as it entered into the state, rather than when it reached its destination. The Webb-Kenyon Act provided no penalties and could have no practical effect unless the states acted. Yet this piece of “permissive legislation” allowed the federal government to regulate liquor effectively. As a result, even after the federal government assumed complete dominion over the field of liquor control through the passage of the Eighteenth Amendment in 1919, the Supreme Court held that the Webb-Kenyon Act was consistent with federal law.

2. Initial Reactions to the Webb-Kenyon Act

Some early commentators reacting to the Webb-Kenyon Act questioned its constitutional validity. These responses echoed the sentiments of President Taft, who vetoed the bill on the grounds that it illegally delegated federal authority to the states. A central purpose for the formation of the United States, Taft argued, “was to relieve the commerce between the States of the burdens which local State jealousies and purposes had in the past imposed upon it . . . .” By granting states the power to regulate a subject of interstate commerce, states could not only control shipments of liquor within their borders, but also incidentally could control the formation of contracts in other states to which this liquor would be shipped. Moreover, if this novel legislation could withhold federal regulation over a subject so important as liquor control, “it is difficult to see how [Congress] may not suspend interstate commerce in respect to every subject of commerce whenever the police power of the State can be exercised to hinder or obstruct that commerce.”

167 Id.; Notes, supra note 154, at 641.
168 Notes, supra note 154, at 641.
169 Id. at 650.
170 McCormick Co. v. Brown, 286 U.S. 131, 141 (1932); Notes, supra note 154, at 644.
172 49 Cong. Rec. 4291, 4291–92 (1913) (veto message of President Taft). Congress subsequently overrode President Taft’s veto. Clark, supra note 162, at 552.
173 49 Cong. Rec. 4291, 4292 (1913) (veto message of President Taft); Denison, supra note 163, at 322.
174 Kerr, supra note 171, at 580.
175 49 Cong. Rec. 4291, 4292 (1913) (veto message of President Taft).
3. The Supreme Court Rules: *James Clark Distilling Co. v. Western Maryland Railway Co.*

Four years after the passage of the Webb-Kenyon Act, the Supreme Court affirmed its validity in *James Clark Distilling Co. v. Western Maryland Railway Co.*\(^{176}\) In upholding the Act, Chief Justice Edward Douglass White analyzed in surgical detail the argument that Congress had impermissibly delegated its authority to the states, and concluded that it “rest[ed] on a mere misconception.”\(^{177}\) Chief Justice White noted that the federal power to regulate interstate commerce is plenary.\(^{178}\) Congress could use the states in its regulatory scheme if it wanted to do so, and to hold otherwise would be to “announce the contradiction in terms that because Congress had exerted a regulation lesser in power than it was authorized to exert, therefore its action was void for excess of power.”\(^{179}\) Delegation was not abdication simply because Congress chose to lessen its own power to accomplish a purpose entrusted to it by the Constitution.\(^{180}\) On the contrary, “the will which causes the prohibitions to be applicable is that of Congress, since the application of state prohibitions would cease the instant the act of Congress ceased to apply.”\(^{181}\)

### III. Comparing the Webb-Kenyon Act to the WSRA

#### A. Similarities Between the Webb-Kenyon Act and the WSRA

Although the Webb-Kenyon Act and the WSRA address fundamentally different subject matters, the relationships that they establish between the federal and state governments are strikingly similar.\(^{182}\) First, under the WSRA’s section 2(a)(ii), the federal and state governments have entered into a regulatory relationship to accomplish a goal that neither level of government could reach on its own: a uniform system for preserving certain of the nation’s rivers that allows each river to be regulated for its own particular values.\(^{183}\) Without the

---

\(^{176}\) 242 U.S. 311, 327 (1917).

\(^{177}\) Id. at 326.

\(^{178}\) Id. at 328.

\(^{179}\) Id. at 331.

\(^{180}\) Id. at 326.

\(^{181}\) Id.


protection of the Federal Act, the states would not be able to preserve their rivers against federal agencies seeking to develop dams and other hydroelectric projects.184 Much like state laws under the Webb-Kenyon Act, without federal support the states’ regulatory purposes would be rendered completely powerless due to the federal government’s plenary grant of power under the Commerce Clause to regulate the nation’s rivers.185 Likewise, under the WSRA the federal government cannot unilaterally enforce the provisions of the Act among the states, just as it could not under the pre-Prohibition Webb-Kenyon Act.186 Rather, preservation of a river requires the coordination of the river’s various stakeholders, just as the regulation of liquor required the cooperation of a multitude of state and local officials.187 Thus, without either level of government, both laws would fail to accomplish their purposes.188

Second, under both the WSRA and the Webb-Kenyon Act, in order for the federal government to accomplish its purposes, its regulatory regime provides a place for the states to exercise police powers.189 In the context of liquor control, states that chose to prohibit liquor within their borders exercised their police power to protect the health, safety, and welfare of their citizens.190 Likewise, in the context of river preservation, the states exercise their traditional powers over land use.191 These valid exercises of police power occur through a self-imposed limitation of the federal government’s plenary authority over interstate commerce.192 These limitations provide states with the power to regulate an otherwise impermissible area of interstate commerce in conformance with its local preferences.193 Yet in each case, “the will which causes [these preferences] to be applicable is that of Congress.”194

184 Tarlock & Tippy, supra note 15, at 715.
187 See Thomas, supra note 22, at 6–7; Notes, supra note 154, at 641.
188 See Thomas, supra note 22, at 6; Tarlock & Tippy, supra note 15, at 715. Moreover, each of these laws required a preceding period of development before reaching an effective balance between federal and state power. Hannon & Cassidy, supra note 69, at 151–52; Notes, supra note 154, at 641–42. These adaptations are consistent with the characterization of cooperative federalism as a “field of experiment.” Foreword, supra note 110, at 456.
190 Denison, supra note 163, at 326.
192 U.S. Const. art. I, § 8; U.S. Const. art. VI.
Finally, under both the WSRA and the Webb-Kenyon Act, if the federal government had elected to exercise its plenary authority under the Commerce Clause, its activity would substantially resemble an exercise of power traditionally reserved to the states.\footnote{195}{Rapanos, 126 S. Ct. at 2223; James Clark Distilling Co., 242 U.S. at 326.} In the context of liquor control, the federal government had plenary power to regulate the flow of interstate trafficking.\footnote{196}{See Bowman v. Chi. & Nw. Ry., 125 U.S. 465, 491–92 (1888).} Notwithstanding the provisions of the Webb-Kenyon Act, the federal government could exercise this control within a state’s boundaries until the liquor reached its final destination.\footnote{197}{See Clark, supra note 162, at 550.} From the time that the liquor crossed state lines until the time that it reached its final destination, the federal government could regulate the flow of liquor entirely within a state.\footnote{198}{See id.} This regulation would closely resemble a state’s police power to regulate liquor, but would in fact be a separate exercise of power, drawn from a direct grant of constitutional authority over interstate commerce.\footnote{199}{U.S. Const. art. I, § 8;} Clark, supra note 162, at 550.

Similarly, notwithstanding the section 2(a)(ii) provision of the WSRA, the federal government could exercise complete control over “certain selected rivers of the Nation . . . possess[ing] outstandingly remarkable . . . values.”\footnote{200}{Wild and Scenic Rivers Act § 1, 16 U.S.C. § 1271 (2000); Tarlock & Tippy, supra note 15, at 715.} If Congress had chosen to regulate these rivers, in spite of the practical challenges of doing so, its regulation would closely resemble an exercise of a state’s traditional police power to regulate land use.\footnote{201}{See Rapanos v. United States, 126 S. Ct. 2208, 2223 (2006); Thomas, supra note 22, at 6–7.} Yet, again the federal power would be drawn from a higher authority.\footnote{202}{See U.S. Const. art. I, § 8.}

B. Differences Between the Webb-Kenyon Act and the WSRA

No two schemes of cooperative federalism are exactly alike; each is the product of a unique set of circumstances confronting the federal and state governments.\footnote{203}{See Foreword, supra note 110, at 456 (describing judicial determinations of federal and state power as a “kaleidoscopic federalism”).} While the regulatory structure of the WSRA bears substantial similarities to the Webb-Kenyon Act, the two are not identical.\footnote{204}{See 16 U.S.C. §§ 1271–1287; Webb-Kenyon Act, 27 U.S.C. § 122 (2000).} The most significant difference is the manner in which the
Acts allow for state regulation. 205 Under the Webb-Kenyon Act, the federal government literally completely divested itself of authority over liquor shipped in interstate commerce when use of that liquor would conflict with state laws. 206 In contrast, under the WSRA the federal government simply provides an independent method for states to participate in regulation, but does not cut short its own power. 207

Moreover, under the WSRA, a state’s regulatory authority is conditioned upon its fulfillment of its obligation to administer rivers in a manner that protects the values for which the rivers are included in the system. 208 In *James Clark Distilling Co. v. Western Maryland Railway Co.*, Chief Justice White noted that even when the federal government divests itself of regulatory control, it retains power over the subjects entrusted to it by the Constitution. 209 Thus, the relationship established by the WSRA lends even stronger force to Chief Justice White’s argument that the federal government does not delegate power to the states simply when it includes them as part of a regulatory system. 210

**IV. The Boundary Between Federal and State Power in the WSRA**

A basic premise of constitutional law is that the federal government can only act to the extent of its constitutionally allotted power. 211 Yet when the federal government does act, its laws are supreme. 212 In schemes of cooperative federalism, the boundary between this plenary federal power and the residual police power belonging to the states is difficult to distinguish, and the WSRA is no exception. 213 However, the Supreme Court clearly determined this boundary under the regulatory regime established by the Webb-Kenyon Act. 214 Because of the similari-

---

208 16 U.S.C. § 1284(d). (“The jurisdiction of the States over waters of any stream included in a national wild, scenic or recreational river area shall be unaffected by this [Act] to the extent that such jurisdiction may be exercised without impairing the purposes of [the Act] or its administration.” (emphasis added)).
209 242 U.S. 311, 326 (1917).
210 See 16 U.S.C. § 1273(a); *James Clark Distilling Co.*, 242 U.S. at 326.
ties between the WSRA and the Webb-Kenyon Act, much of the Court’s analysis of the Webb-Kenyon Act is applicable to the WSRA.215

A. The State of Maine’s Exercise of its Police Power

In passing Legislative Document 2077, the Maine legislature used its police power to downgrade the AWW from a “wild” river area to a “scenic” river area by adding six roads and permanent bridges to the river area.216 In doing so, the legislature shattered the compromise that Senator Muskie had carefully brokered between federal and state interests under section 2(a)(ii) of the WSRA.217 Congress made careful provisions in the WSRA to protect the states’ police power to regulate national wild and scenic rivers.218 It noted in the WSRA that as long as the states fulfilled the declared federal purpose, the jurisdiction of the states over waters within their boundaries would not be affected by the Act.219 In exchange for this grant of power, the federal government filled a critical gap in its preservation scheme.220 When the federal government restricts itself, the states can exercise their police powers free of the federal government, and this freedom translates into a more powerful cooperation among state and local stakeholders in protecting rivers in the National System.221

Neither the Webb-Kenyon Act nor the WSRA can function effectively without state participation.222 Moreover, neither statute provides the federal government with a remedy when the states do not adhere to the federal regulatory scheme.223 But neither of these characteristics alone determines the boundaries of power between the federal and state governments.224 Because statutes are specific exercises of underlying constitutional authority, many schemes of cooperative federalism include statutory language that does not adequately reflect

217 See Muskie Proposal Letter, supra note 33.
219 Id. § 1284(d).
221 See Thomas, supra note 22, at 6–7.
222 See id. at 6; Notes, supra note 154, at 641.
224 See U.S. Const. art. VI.; U.S. Const. amend. X.
the balance of power among levels of government. It is only when courts examine the constitutionality of these statutes that the sources of power from which they derive are identified.

In *James Clark Distilling Co. v. Western Maryland Railway Co.*, the Supreme Court held that when a state exercises its police power as part of a federal regulatory scheme, its power is subject to the will of Congress. Under both the Webb-Kenyon Act and the WSRA, the federal regulatory scheme grants nearly unbridled authority to the state governments to regulate within the federal system. Also, in both cases the state’s regulation closely resembles an activity traditionally regulated under the state’s police power; states have traditionally regulated both alcohol and land use to protect health, safety, and welfare. Yet the fact that both regulations are part of a larger federal scheme implicates the Supremacy Clause. The broad power to regulate that the states enjoy derives not from their traditional authority, but from a grant of power from the federal government to fulfill a federal purpose. When Maine downgraded the AWW from a “wild” to a “scenic” river, it ceased to fulfill the purpose of the federal act that granted its own power to regulate. Therefore, Maine’s legislature exceeded its authority to regulate the river within the three categories established by the WSRA.

While Maine could argue that passing Legislative Document 2077 was a valid act of its traditional police power over land use, this argument would implicate the absurdity identified by Chief Justice White in *Clark Distilling Co.* Maine would either argue that it was the will of Congress for Maine to violate the purpose of its own Federal Act, or, if downgrading the AWW was not Congress’s purpose, then Congress delegated its authority to Maine under the WSRA. Such an argument would result in one of two possible absurdities: if Congress did not delegate its power to Maine, then Congress intentionally violated

---

225 See supra Part II.B.
227 242 U.S. at 326.
234 See 242 U.S. 311, 331 (1917).
235 See id.
its own Act; but if Congress unconstitutionally delegated its own power to Maine, then Congress exceeded its authority by exerting less power than it was required to assert.\(^{236}\)

**B. Analyzing the WSRA Under Contemporary Environmental Law**

Like other federal resource management statutes, the WSRA draws its power from the Commerce Clause.\(^{237}\) Congress could have developed a hydroelectric project on the AWW, but decided instead to preserve the AWW for its natural beauty as a wilderness canoe area.\(^{238}\) Having decided that preservation is in the best interests of the nation, the federal government must rely on the State of Maine for assistance to maintain the river perpetually so as to preserve those values for which it was included in the National System.\(^{239}\)

In maintaining the AWW, the State of Maine acts under its traditional police power to regulate land use.\(^{240}\) Yet, while Maine is charged with administering the AWW, it does not have a concurrent obligation to ensure that the AWW is regulated consistently with other rivers in the National System with similar values.\(^{241}\) Indeed, one of the principle strengths of the WSRA is that Maine need not concern itself with other rivers, but only must manage the AWW to preserve its particular values as a canoe area.\(^{242}\) Under the WSRA, the interest in uniformity of preservation is a federal concern, one that the federal government addresses by admitting state-administered rivers under one of the three protective categories.\(^{243}\)

By admitting the AWW as a “wild” river area, the federal government established it as a “nationally significant waterway[].”\(^{244}\) Even under a narrow interpretation of the congressional Commerce Clause power, a court would most likely find that the WSRA is a valid exercise of federal power.\(^{245}\) The AWW attracts visitors from Maine, Massachusetts, Connecticut, New Hampshire and Vermont, all of whom must

\(^{236}\) See id.

\(^{237}\) U.S. Const. art. I, § 8; see Glicksman, supra note 108, at 748–49.

\(^{238}\) 16 U.S.C. § 1273(a); Notice of Approval, supra note 3, at 11,525; Maine State Park and Recreation Comm’n, supra note 23, at 13.

\(^{239}\) 16 U.S.C. § 1271; Thomas, supra note 22, at 6–7.


\(^{241}\) See Notice of Approval, supra note 3, at 11,525; Fischman, supra note 104, at 200.

\(^{242}\) See 16 U.S.C. § 1284(d) (“The jurisdiction of the States over waters of any stream . . . shall be unaffected by this Act . . . .” (emphasis added)).

\(^{243}\) 16 U.S.C. §§ 1271, 1273; Thomas, supra note 22, at 8.

\(^{244}\) Notice of Approval, supra note 3, at 11,525; Muskie Proposal Letter, supra note 33.

\(^{245}\) 16 U.S.C. § 1273(a); see discussion supra Part II.A.
pay for the privilege of enjoying its outstanding wilderness experience.246 Thus, the regulation of the AWW almost certainly implicates activities that “substantially affect” interstate commerce.247

While the federal government has authority under the Commerce Clause to regulate the AWW under the WSRA, the issue of preemption presents a more interesting question, particularly given Maine’s role under section 2(a)(ii).248 When a state fulfills its obligations under the WSRA to protect the values for which a river was included in the National System, that state acts within its grant of statutorily permitted power from the federal government.249 However, when the state fails to preserve such values, or takes affirmative steps in contradiction to federal regulatory objectives, it is not immediately clear which type of preemption applies.250 Under the WSRA, the federal government did not expressly preempt state regulation, nor did it intend to occupy the field; the statutory language is clear that the federal government intended at least some participation from state governments.251

Although the Federal Government intended participation from state governments, it granted power to the states to regulate only “to the extent that such jurisdiction may be exercised without impairing the purposes of [the WSRA] or its administration.”252 Therefore, when a state administers a river in such a way as to downgrade it within the National System, it infringes on federal regulatory authority.253 Interestingly, the WSRA does not specifically declare that downgrading a river constitutes an infringement of its federal purposes.254 However, when the WSRA states that “certain selected rivers . . . possess[ing] outstandingly remarkable . . . values, shall be preserved in free-flowing condition,” it implicitly provides that these ORVs are pre-
served when a river is administered in its free-flowing condition within its designated category in the National System. 255 When a state passes legislation to downgrade a river, it fails to preserve these ORVs, and violates the explicit mandate to protect the designated rivers “for the benefit and enjoyment of present and future generations.” 256 Under the WSRA, any such action is preempted as either directly conflicting with the federal statute or impeding its purpose. 257

Federal law requires a “clear and manifest purpose” for Congress to preempt an area of law such as land use that is traditionally regulated under a state’s police power. 258 Although Maine regulates the AWW using its state police power, it exercises this power on behalf of the federal government, which could exercise its own power over the AWW if it chose to do so. 259 Thus, the regulation of the AWW is not an area of law traditionally regulated under the state’s police power because Congress has declared that preservation of the AWW is “the policy of the United States.” 260 Congress has a history of managing the nation’s resources that dates to the mid-nineteenth century, and it applied its traditional federal power over rivers to the AWW by admitting it to the National System as a wild river. 261 Because this area of law is not regulated traditionally under the state’s police power, Congress does not require a clear and manifest purpose to preempt state law in order to regulate the AWW. 262

Nevertheless, although Congress’s clear and manifest purpose is not required to preempt the Maine law, such purpose is evident from the terms of the WSRA. 263 The WSRA states that “[t]he jurisdiction of the States over waters of any stream included in a national wild . . . river area shall be unaffected by this [Act] to the extent that such jurisdiction may be exercised without impairing the purposes of this [Act] or its administration.” 264 However, the WSRA also states that its purpose is to implement the federal policy that the AWW “shall be

255 See id. §§ 1271, 1273(b).
256 See id. § 1271.
261 H.R. Rep. No. 90-1623, at 3; Percival, supra note 114, at 1147.
262 Contra Rapanos, 126 S. Ct. at 2223.
264 Id. § 1284(d).
preserved in free-flowing condition.” Therefore, to the extent that the State of Maine violates its obligation to preserve the AWW as a “wild” river, the State’s legislation is clearly and manifestly preempted by this federal purpose.

C. Federal Supremacy Under James Clark Distilling Co. v. Western Maryland Railway Co.

The example of the Webb-Kenyon Act brings into relief the power relationship between the federal and state governments under the WSRA. Under both Acts, the federal government granted power to the states to regulate a subject of interstate commerce uninhibited by federal government intervention. In the Webb-Kenyon Act, Congress enabled the states to regulate liquor that would be imported into their boundaries through interstate commerce. Likewise, under the WSRA, the federal government granted the State of Maine power to perpetually administer the AWW as a wild river.

Under the Supremacy Clause, the WSRA governs the administration of the AWW as the supreme law of the land. In the WSRA, the federal government carves out a certain amount of its own power to allow Maine to regulate the AWW. While the WSRA establishes a relationship of mutual dependence between the federal and state governments, any power that Maine exerts under the WSRA is exercised by the will of Congress. The presumption that Maine’s regulation is better suited to preserving the federal purpose is why the federal government grants such broad authority to Maine in the regulatory scheme. Thus, while the WSRA distinguishes between a uniform federal classification scheme and a process of individualized local administration, this regulation falls entirely under the auspices of Congress. Once Maine failed to preserve the AWW in order to

---

265 Id. § 1271.
266 See id. § 1273(b); Act of Aug. 23, 2006, ch. 598, 2006 Me. Acts 1577.
269 27 U.S.C. § 122; Notes, supra note 154, at 641.
270 16 U.S.C. § 1273(a); Notice of Approval, supra note 3, at 11,526.
271 U.S. Const. art. VI.
275 See 16 U.S.C. §§ 1273(a), 1281(a); James Clark Distilling Co., 242 U.S. at 327.
protect its ORVs, it threatened the federal interests in the river, and exceeded the boundaries of power allocated to it by the federal government. 276

CONCLUSION

The AWW is one of the nation’s most treasured canoe areas, and under the protective auspices of Congress and the State of Maine, it has enjoyed the protection of the “wild” river designation since 1970. That year represented a landmark in the federal government’s foray into the field of environmental protection, and it is fitting that the AWW is a memorial to the strong federal presence in environmental law. Nevertheless, the federal power over resource management dates to the middle of the nineteenth century. In this traditional area of federal concern, the power of the federal government stands as an obstacle to any state or local authorities that seek to deteriorate the values for which the AWW was included in the National System.

The WSRA is an example of cooperative federalism in the “field of experiment” between the federal and state governments. Under this form of regulation, the states can exercise their police powers over land use, while the federal government can harness the power of the states to fulfill its federal objectives. When the states fulfill their obligations under the WSRA, it represents a unique and inventive answer to a preservation challenge facing both levels of government. However, if the states use their authority in contravention of the federal purpose, their acts are preempted by the Supremacy Clause. Only when Maine’s legislation is deemed preempted by federal law can the WSRA continue to protect the AWW as a vestige of primitive America for the benefit of present and future generations.