

Federalism-Facilitated Regulatory Innovation and Regression in a Time of Environmental Legislative Gridlock

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ABSTRACT

Despite a lengthy period of environmental legislative deadlock, the reach of United States environmental law has nonetheless changed. Federalism doctrine, values, and statutes presumptively retaining roles for federal and state governments have been central to such legal changes. Regulatory stakeholders, agencies, litigants, and courts all can and have used federalism strategically. After reviewing the ways federalism can be used to achieve such change, this article turns to several case studies. It first examines efforts to shrink the reach of the Clean Water Act via constitutional federalism arguments, resort to federalism values, and concerns about incursions on state sovereignty and traditional state regulatory domains. Such arguments have been at the heart of battles over what is a jurisdictional “water of the United States.” The article then briefly reviews the role of preemption doctrine in efforts to eliminate (or preserve) room for state regulation or common law regimes.

The U.S. Environmental Protection Agency’s recently finalized Clean Power Plan provides the next case study. Federalism doctrine, logic, and the Clean Air Act’s harnessing of both state and federal roles have collectively been critical to climate regulation progress. The Clean Power Plan builds on litigation facilitated due to constitutional federalism, imposes pollution control obligations based on the track record of state regulatory initiatives, and utilizes the Clean Air Act’s distinctive cooperative federalism architecture. Although the Clean Power Plan is designed to hew closely to statutory and constitutional requirements, a strain in federalism case law is often indeterminate, leaving room for federalism-based arguments advocating judicial rejection of regulatory actions as well as

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unpredictable judicial redrawing of the boundaries of federal and state power chosen by the political branches. The article closes by reviewing a counter-strain in the law. A line of recent Supreme Court cases reveals a less value-laden and more rigorous and respectful judicial attention to statutory structure, statutory functioning, and political branch regulatory judgments about federal and state roles.

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INTRODUCTION

Federal environmental laws have seen little legislative change since the 1990 Clean Air Act Amendments. Efforts to pass climate legislation in 2010 met with failure, as did efforts to pass a clarified Clean Water Act after Supreme Court rulings reduced the Act’s protections.¹ Anti-regulatory interests also suffered legislative defeats, failing to enact bills that would have precluded regulation of power plant pollution for their greenhouse gas (“GHG”) emissions, killed a new federal regulation defining what are “waters of the United States,” or reduced the power of the Endangered Species Act.² The Superfund statute was amended in a few small but important ways since 1990,³ but little else apart from the occasional appropriations rider has surmounted the many hurdles faced in a divided Congress.

Nonetheless, the reach of this nation’s environmental laws has changed, but in unpredictable and sometimes conflicting ways that often link to federalism doctrine, values, and choices. Regulatory stakeholders, agencies, litigants, and

1. See ROBERT L. GLICKSMAN ET AL., ENVIRONMENTAL PROTECTION: LAW AND POLICY 1203–05 (7th ed. 2015) (discussing the content and defeat of several climate bills during 2009–10). The Clean Water Restoration Act was proposed in 2007 and reintroduced in 2009. Jon Devine et al., *The Historical Scope of Clean Water Act Jurisdiction*, 33 NAT’L WETLANDS NEWSLETTER 13, 13 n.10 (2011) (citing the bills).

2. See, e.g., Jean Chemnick & Phil Taylor, *GOP Taking Aim at Key Obama Environmental Priorities with Markups on Tap*, ENV’T & ENERGY DAILY (June 15, 2015) (discussing an array of bills proposing to amend environmental laws or preclude environmental regulatory actions).

3. GLICKSMAN ET AL., *supra* note 1, at 918 (discussing enacted amendments regarding recycling, small businesses, and brownfields reuse).

courts all can and have used federalism strategically to bring about legal change. Federalism doctrine and congressional use of federalism-linked strategies reveal federalism's many facets. And like a cut crystal, those facets of federalism point in different directions, offering diverse and sometimes clashing strategic opportunities. Federalism's facets and multi-valent policies, doctrine, and statutory choices do not move the law in any single predictable direction. They do, however, have one quite certain impact: federalism's facets create room for strategic action, play, and movement under the law. Federalism-related presumptions, canons, doctrine, retained state authority and plenary powers, as well as particular federalism-embracing allocations of roles to federal and state governments, have been central to recent changes in environmental law. This article explores how federalism doctrine and statutory and regulatory choices about federalism have been used in strategic ways to foment change in environmental law despite a period of legislative gridlock.

After introducing the basic ways federalism can be used, the article analyzes three case studies to illuminate these strategic uses of federalism. The first reviews the use of federalism to cut back on federal power in battles over what are federal "waters of the United States."⁴ The article's second case study briefly reviews preemption policy changes late in the George W. Bush Administration that sought to reduce room for states to provide additional legal protections following federal regulatory approvals. The third and most in-depth case study analyzes how the Obama Administration's most far-reaching climate regulation, the Environmental Protection Agency ("EPA") Clean Power Plan ("CPP" or "the Plan"), involves and triggers virtually all federalism moves and facets.⁵ The CPP builds on federalism-facilitated state and regional innovations and uses federalism's structures to incentivize further innovation. It also, however, has provoked heated attacks based on alleged overreach of the permissible bounds of federalism.

To illustrate how federalism, or often congressional retention of federal and state roles, can incentivize innovation and progress, this article explores how the federal CPP is both built on legal developments allowed due to federalism and federalism-linked statutory choices and also designed to hew closely to constitutional and statutory requirements. In so doing, the Plan harnesses state and private incentives to innovate with considerable latitude for difference. It should add to a pool of regulatory and business experience and, over time, contribute to governmental and private sector entrenchment due to aggregate market demand

4. The "waters of the United States" rule was finalized and published in 2015. Clean Water Rule: Definition of "Waters of the United States," Final Rule, 80 Fed. Reg. 37,054 (June 29, 2015) (to be codified at 33 C.F.R. pt. 328 et al.).

5. The final regulation was published under the title Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, but is referred to generally as the Clean Power Plan [hereinafter CPP]. Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,662 (Oct. 23, 2015).

and stability for private investments linked to clean energy efforts. Hence, room for difference, retained due to statutory structures delineating federal and state roles, can provide two seemingly clashing results: innovation and linked experimentation, on the one hand, and, on the other hand, growing entrenchment of political, regulatory, and business commitments to clean energy.⁶ However, federalism-based arguments have also been central to attacks on the CPP. Reviewing courts might show fealty to statutory and regulatory federalism-respecting choices. But courts might also use federalism concerns to adjust the lines of federal and state authority or eliminate deferential reviewing regimes.

As discussed in closing, a problem with the increasingly sprawling body of regulatory federalism law, especially in cooperative federalism settings, is its indeterminacy. Others have noted how this area is “undertheorized,” “opaque,” “lack[s] . . . clarity and reflection,” and perhaps suffers from an absence of framing doctrinal norms.⁷ “Clear statement” norms triggered by federalism values can contribute to untethered and politicized judging.⁸ They also are sometimes wielded along with variants of the *Brown & Williamson* “major questions” canon, which is unrooted in any statute, is substantive and political in nature, and can only have an anti-regulatory impact.⁹

Nonetheless, some bright lines and sound distinctions about federalism, permissible forms of regulation, and sound interpretive presumptions and methods are possible and perhaps emerging in recent Supreme Court cases. These recent cases assess issues of federal and state regulatory power by paying close attention to the relevant legislative texts, engaging in functional analysis of the law and the underlying regulatory challenge, and examining regulatory deliberations and choices that acknowledge state interests and also provide beneficial flexibility and room for regulatory learning. This emergent interpretive method reduces latitude for politicized judging built on federalism preferences or substantive preferences masked through use of federalism-based interpretive scale-tipping.

6. I develop this point in William W. Buzbee, *Climate Federalism, Regulatory Failure and Reversal Risks, and Entrenching Innovation Incentives*, in *THE LAW AND POLICY OF ENVIRONMENTAL FEDERALISM: A COMPARATIVE ANALYSIS* 145, 160–66 (Kalyani Robbins ed., 2015).

7. Abbe R. Gluck, *Intrastatutory Federalism and Statutory Interpretation: State Implementation of Federal Law in Health Reform and Beyond*, 121 *YALE L.J.* 534, 541–43 (2011); Gillian E. Metzger, *Administrative Law as the New Federalism*, 57 *DUKE L.J.* 2023, 2026–29 (2008).

8. See generally William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 *VAND. L. REV.* 593 (1992); John F. Manning, *Clear Statement Rules and the Constitution*, 110 *COLUM. L. REV.* 399 (2010).

9. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000). For critiques of the case, including analysis of its power, anti-regulatory skew, and indeterminacy, see Jacob Loshin & Aaron Nielson, *Hiding Nondelegation in Mouseholes*, 62 *ADMIN. L. REV.* 19, 22, 48, 60–65 (2010); John F. Manning, *The Nondelegation Doctrine as a Canon of Avoidance*, 2000 *SUP. CT. REV.* 223, 227 (2000); Jonathan T. Molot, *Rexamining Marbury in the Administrative State: A Structural and Institutional Defense of Judicial Power Over Statutory Interpretation*, 96 *NW. U. L. REV.* 1239, 1324–28 (2002).

Despite this emergent trend towards a less politicized mode of judicial review in settings implicating federalism-laden choices, the Supreme Court's unprecedented early 2016 stay of the CPP reveals how federalism-wrapped advocacy can unleash arguable lawlessness.¹⁰ Opponents of the CPP in their stay briefing claimed that the Plan constituted gross and unconstitutional federal overreach that violated statutory requirements and transgressed virtually all forms of federalism constraints, yet prior to assembling of any actual regulatory record, parsing of the rule and its impacts, or any lower court decision.¹¹ In an extraordinarily uncommon move, the Supreme Court issued its stay without any accompanying explanatory opinion. Federalism and federalism-respecting regulatory strategies can generate substantial benefits. But federalism-rooted rhetoric and buzzwords—whether wielded to block federal power or state law—still can trigger politicized judging.

I. FEDERALISM'S FACETS AND LATITUDE FOR LEGAL CHANGE

Federalism-facilitated efforts to change environmental law in the United States arise as a result of federal constitutional and statutory law, state law, and often federal and state actions under cooperative federalism regimes. The strategic uses of federalism in the environmental law arena—putting to the side statutory choices during this period of congressional gridlock—can be broken into three basic categories. First, anti-environmental and anti-regulatory interests have used constitutional federalism in efforts to shrink federal regulatory power and the reach of environmental laws. They have mostly advocated Commerce Clause-driven narrowing constructions or argued that courts should limit federal regulatory power by characterizing a challenged action as impinging on an area of traditional state turf.¹² Occasional claims of constitutionally prohibited federal commandeering and excessively coercive monetary inducements arise, but generally can be avoided.¹³ Second, other anti-environmental efforts have arisen in cases involving cooperative federalism schemes, as well as linked preemption claims following federal approvals or other federal actions.¹⁴ These arguments

10. On February 9, 2016, the Supreme Court issued an unprecedented stay of the CPP, prior to creation of a regulatory record for review or a lower court ruling and with no opinion explaining its issuance of a stay. Order in Pending Case, *Chamber of Commerce et al. v. EPA*, 577 U.S. (2016) (No. 15A787).

11. Application by 29 States and State Agencies for Immediate Stay of Final Agency Action During Pendency of Petitions for Review, Directed to the Honorable John G. Roberts, Jr., Chief Justice of the United States and Circuit Justice for the United States Court of Appeals for the District of Columbia Circuit, *State of West Virginia et al. v. EPA* (Jan. 26, 2016) [hereinafter *State Challengers' Stay Brief*].

12. Such arguments in connection with the Clean Water Act's reach are discussed below in Part II.

13. See *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012); *infra* note 37 (discussing the case and its likely limited impacts on environmental regulation).

14. For a book of essays exploring preemption law developments, see generally *PREEMPTION CHOICE: THE THEORY, LAW, AND REALITY OF FEDERALISM'S CORE QUESTION* (William W. Buzbee ed., 2009) [hereinafter *PREEMPTION CHOICE*].

have produced erratic or mixed judicial results. A problematic indeterminacy pervades much of the case law regarding cooperative federalism regimes or areas of federal and state overlap and linked statutory interpretation and standard of review precedents, especially in cases resolving preemption disputes.

But federalism's presumptions, doctrine, and federalism-linked statutory choices have nonetheless been important in a third way. Federalism-based allocations of power—both statutory federalism-embracing designs and constitutional doctrine—leave room for environmental progress and regulatory regimes designed to both build on and incentivize state and private innovations. Due to the latitude for environmental innovations typically left by the law, one often finds both horizontal (state-to-state) and vertical (federal and state) learning and influence, with roles changing dynamically and arguably in historically contingent and intertwined ways.¹⁵

Federalism in these settings is usually not about prohibited roles or even a tilt in favor of states, but about congressional choice to allocate and preserve areas of regulatory responsibility, often with clear federal primacy.¹⁶ Many such schemes use cooperative federalism structures that engage federal and state actors and harness many of the virtues of federalism, yet without the Constitution providing regulatory constraints outside of anti-commandeering doctrine. This body of law involves what Professor Abbe Gluck has called “intrastatutory federalism,” where Congress creates regulatory regimes that in various forms use federal and state actors.¹⁷ The line between regulatory federalism choices, statutory interpretation disputes, and administrative law is hence often blurred and, in the words of Professor Gillian Metzger, the locus of “new federalism” disputes.¹⁸

To illustrate these uses of federalism, the article turns now to three case studies, focusing in greatest depth on two areas of particularly concerted activity utilizing federalism-based arguments to foment change despite a largely gridlocked Congress. First, the article analyzes efforts to shrink the reach of federal jurisdiction under the Clean Water Act in the context of advocacy surrounding the *Rapanos* case and the new “waters of the United States” (“WOTUS”) rule.¹⁹ After a brief discussion of preemption law's vacillations, the article then turns to the current state of regulation of GHG emissions due to their climate impacts and how federalism has influenced that movement. The article closely analyzes the Clean Power Plan and how it harnesses federalism's benefits, but also how it has triggered federalism-linked opposition.

15. I develop these points in William W. Buzbee, *Asymmetrical Regulation: Risk, Preemption, and the Floor/Ceiling Distinction*, 82 N.Y.U. L. REV. 1547 (2007) and earlier in William W. Buzbee, *Contextual Environmental Federalism*, 14 N.Y.U. ENVTL. L.J. 108 (2005).

16. The centrality of this federalism choice is the focus of PREEMPTION CHOICE, *supra* note 14.

17. Gluck, *supra* note 7.

18. Metzger, *supra* note 7.

19. *Rapanos v. United States*, 547 U.S. 715 (2006). A new WOTUS rule was published in 2015. *See supra* note 4.

II. SHRINKING FEDERAL POWER THROUGH FEDERALISM

Despite long-acknowledged federal power to regulate water pollution and protect America's waters, challengers in 2000 in the *SWANCC* case creatively sought to limit the reach of federal authority.²⁰ Their arguments were built on the Supreme Court's federalism revival, especially the pathbreaking rejection of federal power to regulate handguns near schools in *Lopez*.²¹ They argued first in *SWANCC* and then five years later in *Rapanos*, building on *SWANCC*, that the federal government lacked authority to regulate wetlands and other waters that lacked a direct, strong connection to larger "navigable-in-fact" waters that undoubtedly implicated commerce in all facets of that constitutionally important term. Then and now, Commerce Clause authority can be based on regulation involving channels of commerce, instrumentalities of interstate commerce, and persons or things in interstate commerce. In addition, Congress has the power to regulate "those activities having a substantial relation to interstate commerce, i.e., those activities that substantially affect interstate commerce."²²

In this *SWANCC* to *Rapanos* period of ferment—and continuing in 2016—challengers to federal jurisdiction used three layers of federalism-based argument.²³ First, challengers' apparent goals included both the development of broad doctrinal changes that would limit federal power under the Commerce Clause as well as narrower efforts to shrink the reach of federal environmental jurisdiction. For example, challengers sought to build on language in *Lopez* and the later *Morrison* case to limit the sorts of harms or harming actions that would count as "activities" that could be regulated due to their substantial impacts.²⁴ Despite long-established Commerce Clause doctrine finding numerous ways in which "activities" can have a substantial impact on commerce—sometimes looking at the activity causing harm, other times looking at the commerce-linked values of the protected amenity, and other times looking at how federal regulation could facilitate commerce—litigants challenged federal regulation by asking courts to focus only on the most attenuated commerce linkages.²⁵

Second, advocates challenging federal power also championed a commerce power frame that would look narrowly at particular regulations or regulatory acts,

20. *Solid Waste Agency of Northern Cook Cty. v. U.S. Army Corps of Eng'rs (SWANCC)*, 531 U.S. 159 (2001).

21. *United States v. Lopez*, 514 U.S. 549 (1995).

22. *Id.* at 558–59.

23. For representative arguments in these heavily-briefed cases, *see, e.g.*, Brief for Petitioners at 22–31, *Rapanos*, 547 U.S. 715 (No. 04-1384); Brief of Amici Curiae Washington Legal Found. et al. in Support of Petitioners at 6–7, 16–19, *Rapanos*, 547 U.S. 715 (No. 04-1034); Amicus Curiae Brief on the Merits of Mountain States Legal Found. in Support of Petitioners at 4–9, 15–19, *Rapanos*, 547 U.S. 715 (Nos. 04-1034, 04-1384).

24. These briefs extensively cite to *United States v. Morrison*, 529 U.S. 598 (2000).

25. Robert A. Schapiro & William W. Buzbee, *Unidimensional Federalism: Power and Perspective in Commerce Clause Adjudication*, 88 CORNELL L. REV. 1199 (2003).

rather than aggregate similar acts or the goals of a law or comprehensive body of regulation to assess the adequacy of commerce linkages. In essence, they sought to revisit long-established law under *Wickard v. Filburn* by asking courts to “excise” the smallest sliver of implicated regulatory concerns and hence avoid any “substantial” link to interstate commerce.²⁶ Third, challengers made arguments with echoes of largely discredited “dual federalism” doctrine under which the worlds of federal and state regulation do not and should not overlap. In their modern form, however, such arguments echoing dual federalism doctrine run up against a challenge: the Clean Water and Clean Air Acts and many other laws explicitly involve overlapping and intertwined federal and state roles where federal law nevertheless remains “supreme” under the statute and the Constitution. State roles are explicitly preserved in savings clauses or lauded in policy provisions, but are nonetheless made subordinate to particular federal requirements in operative provisions. Undeterred, opponents of federal power still use federalism values and claims about traditional state functions or turf in support of statutory interpretations that would redraw federal-state lines or narrow federal power.

To those unfamiliar with the reach of federal jurisdiction prior to *SWANCC*, the Court’s ruling may have seemed modest and only about a few statutory words. But in rejecting federal authority to protect what were characterized as “isolated” waters regulated due to their use by migratory birds, the Court made a massive change in the law. The Court rejected the overt constitutional attack, but then used constitutional concerns about the breadth of federal power to drive a “clear statement” reading of the Clean Water Act that substantially cut back on the reach of federal power under the Act.²⁷ The Court did not explain how operating a municipal landfill operation did not implicate commerce, or how such operations and isolated waters in the aggregate did not involve a substantial impact on commerce, or why migratory bird use was not relevant. Instead, the Court simply asserted that the federal government was acting at the outer bounds of its authority and in an area of traditional state regulatory turf, namely, land use regulation.²⁸ It therefore rejected the Army Corps’ claim of jurisdiction and, in somewhat indeterminate language, revived the defined term “navigability” as partly shaping what waters could be protected.²⁹ In passing, the Court stated that it had upheld earlier broad Army Corps regulatory protections of waters due to the “significant nexus” between those adjacent wetland waters, larger waters, and commerce.³⁰

26. *Wickard v. Filburn*, 317 U.S. 11, 128–29 (1942).

27. *Solid Waste Agency of Northern Cook Cty. v. U.S. Army Corps of Eng’rs*, 531 U.S. 159, 172–74 (2001).

28. *Id.*

29. *Id.* at 172.

30. *Id.* at 167.

SWANCC's rejection of federal authority over isolated waters due to their use by migratory birds had the effect of cutting back on what were considered federally protected waters by a substantial percentage, with a twenty percent figure frequently mentioned.³¹ Further regulatory forbearance, likely attributable to a desire to avoid constant litigation, meant that regulators protected even fewer waters than required by the actual *SWANCC* opinion.³²

The challengers in *Rapanos* built on *SWANCC* and *Lopez* by constructing additional arguments rooted in federalism values.³³ They sought to convert the constitutional toehold left by *SWANCC*'s conclusory language about regulation at the edges of federal authority and the "clear statement" narrowing of the Act into a major opportunity to expand on *Lopez* and limit federal Commerce Clause authority. They also sought to limit what sorts of waters could be federally protected. Again, this involved the same three-pronged anti-regulatory federalism move seen in *SWANCC*: (1) limit the focus or perspective on what count as relevant "activities" under the Commerce Clause; (2) shift perspectives so as to minimize any aggregation of impacts or framing of relevant law; and (3) make claims about federal intrusion on a traditional area of state regulatory turf, namely, land use regulation. This time, they met with even less success, with *Rapanos* resulting in no majority opinion, no majority finding federal overreach, and two different majorities articulating what waters are federally protected.³⁴ The Supreme Court did, however, inject reviewing courts into a more expansive oversight role to ensure that disputed waters do in fact have a "significant nexus" to larger navigable-in-fact or traditional navigable waters.³⁵

The Supreme Court's decision in *Gonzales v. Raich* quite clearly and resoundingly adhered to longstanding doctrine and rejected efforts to minimize relevant frames and aggregation of impacts.³⁶ This second prong of federalism-based anti-regulatory attack is hence now weakened, but due to ongoing questions about what can be aggregated and how broadly one should define a relevant body of law, it remains a strain in regulatory challenges.

Newer and sharper developments in federalism emerged in *NFIB v. Sebelius*. Although the Court upheld the Affordable Care Act's "individual mandate" under

31. Bradford C. Mank, *The Murky Future of the Clean Water Act After SWANCC: Using a Hydrological Connection Approach to Saving the Clean Water Act*, 30 *ECOLOGY L.Q.* 811, 816 (2003) (reporting environmentalists' concerns that a guidance document interpreting *SWANCC* would result in a loss of protection for twenty percent of America's wetlands).

32. U.S. GOV'T ACCOUNTABILITY OFF., *WATERS AND WETLANDS: CORPS OF ENGINEERS NEEDS TO BETTER SUPPORT ITS DECISIONS FOR NOT ASSERTING JURISDICTION* 5 (Sept. 2005) (cited in Devine et al., *supra* note 1, n.51).

33. See, e.g., briefs cited *supra* note 23.

34. *Rapanos v. United States*, 547 U.S. 715 (2006).

35. *Id.* Justice Kennedy's concurring opinion developed this framework which, due to Supreme Court law concerning splintered cases resulting in no majority, is viewed as providing the governing test for determining what waters are protected. *Id.* at 759.

36. *Gonzales v. Raich*, 545 U.S. 1 (2006).

federal taxing authority, a majority of the justices also joined language rejecting federal power to force people into markets. A clearer majority also held that the law's conditional federal spending was unconstitutionally coercive due to how it threatened massive, longstanding funding under earlier (but still linked) legislation. These holdings and federalism discussion appear generally inapplicable to the permissible bounds of federal environmental regulation.³⁷ Nonetheless, *NFIB v. Sebelius* contains language about federalism values and limited federal power that is already being used to buttress more directly applicable grounds for attack.³⁸

Although the regulatory and legislative politics that followed *Rapanos* have been convoluted, claims of federal overreach and use of federalism rhetoric have remained prominent. Claims of federal overreach were central to efforts to preclude any restoration of federal authority via new legislation.³⁹ Federal overreach claims have also been prominent arguments both during the 2014-2015 WOTUS rulemaking and in subsequent challenges that resulted in a stay. In reality, six Supreme Court justices in *Rapanos* supported EPA and Army Corps authority to clean up jurisdictional uncertainties via a new regulation. Despite that majority view, opponents of the WOTUS rulemaking continue to speak of illegal overreach, often couching their language in federalism terms.⁴⁰

Despite the quite limited success of this three-pronged federalism-driven effort to limit federal environmental power, it has now become a ubiquitous element in subsequent challenges to federal environmental authority. These efforts to extend *Lopez*, *SWANCC*, and *Rapanos* have thus far failed in the Supreme Court, although they found success in one court ruling on the constitutional reach of the Endangered Species Act.⁴¹ That opinion, however, clashed with the analysis and conclusion of most other courts confronted with similar questions.⁴² Claims of federal overreach have also been rejected in other cases involving cross-jurisdictional pollution and federal oversight of state permitting under federal law

37. *NFIB* broke new ground in finding a conditional federal spending inducement unconstitutionally coercive, but no current environmental laws utilize a comparatively huge monetary cudgel. Such a finding with respect to environmental laws is highly unlikely. Nor do federal environmental laws force individuals into markets. See Erin Ryan, *The Spending Power and Environmental Law After Sebelius*, 85 U. COLO. L. REV. 1003, 1034-59 (2014).

38. See *infra* Part IV (discussing the CPP and challengers' arguments).

39. See Devine et al., *supra* note 1, at 13 n.10 (citing to bills, such as the Clean Water Restoration Act, that were proposed to "restore the protections" afforded prior to *SWANCC* and *Rapanos* but were not brought up for a floor vote in Congress).

40. See, e.g., Geof Koss, *Senate Not Done with WOTUS Fight*, GREENWIRE (Jan. 21, 2016) (reporting on efforts to legislatively override the WOTUS rule and quoting Senator McConnell as calling the rule a "federal power grab" that would impinge on property rights).

41. *People for the Ethical Treatment of Property Owners v. U.S. Fish & Wildlife Serv.*, 57 F. Supp. 3d 1337 (D. Utah 2014). An appeal is pending in the Tenth Circuit. *People for the Ethical Treatment of Property Owners v. U.S. Fish & Wildlife Serv.*, Nos. 14-4151, 14-4165, 2015 WL 3830600 (10th Cir. June 18, 2015).

42. See, e.g., *Gibbs v. Babbitt*, 214 F.3d 483 (4th Cir. 2000) (rejecting such a challenge and citing aligned cases), *cert. denied*, 531 U.S. 1145 (2001).

and regulation of energy markets—especially in the *EME Homer*,⁴³ *Alaska DEC*,⁴⁴ and *FERC v. EPSA*⁴⁵ decisions—where there was little question about federal authority or retained or delegated state roles. But even in those cases, those federalism-rooted arguments—which really were statutory interpretation and administrative law issues in a cooperative federalism setting—sometimes garnered substantial support.

III. REGULATORY APPROVALS' UNCERTAIN IMPACTS AND PREEMPTION

A middle ground of federalism conflict is worth brief mention before turning to the climate regulation and CPP case study. Arguments over preemption at times involve environmental issues. For example, the *Bates* case involved pesticide regulation, upholding state common law claims despite federal product approvals.⁴⁶ Preemption disputes more often involve risk regulation, especially disputes over the potential preemptive impacts of federal approvals or regulation of pharmaceutical products and several other areas of consumer protection regulation.⁴⁷ Here, too, despite rare changes in underlying statutes, federalism has been used to change the reach of the law.

In the preemption arena, federalism argumentation has been used in ways that clash with battle lines over the WOTUS rule. During the “waters” wars, anti-regulatory interests have argued against federal regulatory authority and for preservation of state turf. In contrast, in the preemption field, anti-regulatory interests embrace federal regulation and seek to preempt state authority.⁴⁸ And those favoring regulation advocate retention of state law, although here they typically favor retaining both state and federal law. I and others have addressed these issues in what has now become a vast body of scholarship, so this article only lightly addresses this body of law. Preemption disputes following federal regulatory reviews illustrate how federalism’s many facets can lead to regulatory battlegrounds where both sides claim the federalism mantle, but to opposing ends.

The basic issue here is whether federal regulatory reviews or approvals should preempt and hence prohibit state common law claims for injuries or state regulation of such environmental harms, risks, or products. Most relevant federal laws contain savings clauses or are silent regarding the impact of federal

43. *EPA v. EME Homer City Generation, L.P.*, 134 S. Ct. 1584 (2014).

44. *Alaska Dep’t of Env’tl. Conservation v. EPA*, 540 U.S. 461 (2004).

45. *FERC v. Elec. Power Supply Ass’n*, 136 S. Ct. 760 (2016).

46. *Bates v. Dow Agrosciences, L.L.C.*, 544 U.S. 431 (2005).

47. See generally PREEMPTION CHOICE, *supra* note 14 (edited book of essays exploring battles over preemption, mostly in areas of risk regulation).

48. See THOMAS O. MCGARITY, THE PREEMPTION WAR: WHEN FEDERAL BUREAUCRACIES TRUMP LOCAL JURIES ix–x, 3–5, 152–78 (2008) (recounting and analyzing changes in federal agency policy and litigation positions around 2006 leading to more aggressive claims of preemptive impact of federal regulatory approvals and requirements).

approvals on state laws and common law. Only rarely do federal regulatory approval regimes explicitly claim preemptive impact or supply their own compensatory regime. For many decades, the assumption and prevailing regulatory policy was that federal regulatory oversight and product reviews or approvals might, at most, provide evidence about the safety of a product, but did not preempt state regulation unless in direct conflict. Arguments or court rulings that federal approvals preempted state common law regimes were even rarer.

This changed when tort reform proponents and the George W. Bush Administration began to champion a more broadly preemptive impact of federal regulatory reviews and approvals.⁴⁹ Industry and anti-regulatory advocates made similar arguments in courts and to agencies, pointing to dysfunctions that they attributed to state law, especially concerns with disparate state law treatments of a risk and jury variability in rulings on common law claims. Supreme Court rulings, especially in *Geier*, established that even in disputes involving laws with savings clauses preserving state law or state common law, particular state actions could raise conflicts and be preempted.⁵⁰ This variant on “conflict” preemption, known as “obstacle” or “purposes and effects” preemption, has been central to such pro-preemption argumentation.⁵¹ Common law liabilities found despite federal approvals are often claimed to present an “obstacle” to some federal choice. Such pro-preemption arguments and occasional court rulings are often laden with particular and oft-repeated pro-preemption buzzwords: federal law should have preemptive impact due to how state law can create a legal “patchwork” or “crazy quilt” or upset the “balance” struck by federal law.⁵² Under this view, federal preemption arguably brings valuable efficiency to the law and avoids regulatory balkanization.

Champions of ongoing state authority, in contrast, point to shortcomings in federal regulation and limited federal resources. They also point to the need for compensation for injuries that federal law rarely provides, make economic internalization arguments, and identify benefits of ongoing incentives to improve products and address risks.⁵³ Opponents of broad preemptive impact of federal regulatory approvals also highlight how common law and regulatory investigations often create a feedback loop that generates information about risks and

49. *Id.*

50. *Geier v. Am. Honda Motor Co.*, 529 U.S. 861 (2000); see Sandi Zellmer, *When Congress Goes Unheard: Savings Clauses' Rocky Judicial Reception*, in PREEMPTION CHOICE, *supra* note 14, at 144–66 (reviewing cases finding preemption despite the presence of savings clauses).

51. Christopher H. Schroeder, *Supreme Court Preemption Doctrine*, in PREEMPTION CHOICE, *supra* note 14, at 119, 131–35 (reviewing forms of conflict preemption).

52. MCGARITY, *supra* note 48, ch. 4 (reviewing preemption arguments and key decisions in the courts).

53. David C. Vladeck, *Preemption and Regulatory Failure Risks*, in PREEMPTION CHOICE, *supra* note 14, at 54–58.

leaves room for beneficial state level experimentation.⁵⁴

Although the federalism rhetoric and battle lines in preemption law disputes are predictable, the results have been erratic. Cases seem to turn primarily on close analyses of particular statutes and regulatory regimes. Clear doctrinal development is further hindered due to the Supreme Court's occasional failure to reconcile seemingly related but clashing cases. For example, in two cases involving the term "requirements," the Court in the latter case only glancingly cited the earlier decision's denial of preemptive impact in a case involving the same exact term.⁵⁵ The Supreme Court erratically applies and sometimes altogether ignores the anti-preemption presumption.⁵⁶ As Justice Thomas has now argued at length in separate opinions, the indeterminacy inherent in "obstacle" preemption law makes outcomes difficult to predict and injects judges into a value-laden role.⁵⁷ Little is certain in the realm of regulatory preemption law other than a need for close statutory analysis and predictable use of federalism rhetoric by both pro- and anti-preemption interests. In this area, however, anti-regulatory interests have sought to expand the reach of often unchanged federal statutes via preemption argument and, concomitantly, reduce the protections afforded by state law.

IV. CLIMATE CHANGE INNOVATION, FEDERALISM, AND THE CLEAN POWER PLAN

Federalism-facilitated innovation as well as federalism-linked anti-regulatory rhetoric have both been at the heart of climate change regulatory developments. Regulatory structures and strategies deployed in EPA's most significant climate regulation, the CPP, build on state innovations and progress and are shaped by federalism-linked doctrine and cooperative federalism statutory provisions. The CPP is also, however, imperiled by challengers who rely heavily on claimed federalism transgressions, as well as more indeterminate federalism values and claims of federal overreach. These claims are often linked to a few other substantive anti-regulatory canons of interpretation, especially variants of the *Brown & Williamson* "major questions" canon.

The CPP's fate will likely hinge on how reviewing courts balance congressional and agency regulatory judgments about effective regulation and allocations of

54. Thomas O. McGarity, *The Regulation-Common Law Feedback Loop in Nonpreemptive Regimes*, in *PREEMPTION CHOICE*, *supra* note 14, at 235–45, 252–56.

55. Compare *Bates v. Dow Agrosciences, L.L.C.*, 544 U.S. 431 (2005) (describing common law as "motivating an optional decision," not a preempted "requirement"), with *Riegel v. Medtronic*, 552 U.S. 312 (2008) (stating that "[a]bsent other indication, reference to a state's 'requirements' includes its common law duties").

56. Compare *Riegel*, 552 U.S. at 312 (in finding preemption, not even using any presumption against preemption language), with *Wyeth v. Levine*, 129 S. Ct. 1187, 1194–95, n.3 (2009) (declining to find preemption and stating the usual presumption against preemption).

57. See, e.g., *Wyeth*, 129 S. Ct. at 1204–17 (2009) (Thomas, J., concurring) (expansively articulating why he rejects "purposes and effects" preemption, calling it "free-wheeling," "extratextual," and driven by "judicially manufactured policies").

authority. Outcomes of challenges will hinge in particular on whether reviewing courts believe there is room for additional judicial scale-tipping due to alleged federalism constraints even within an overtly cooperative federalist structure. (Other interpretation and power disputes—such as over the effect of Section 111(d)’s cross reference to Section 112 and several more standard administrative law challenges—are beyond the scope of this article.) As suggested below, the real strategy of challengers may be to raise individually weak but, in the aggregate, seemingly stronger allegations of federalism transgressions. They then use those federalism concerns to argue that EPA lacks its claimed CPP authority because—as they have argued in regulatory submissions and now in briefs to the D.C. Circuit and the Supreme Court—EPA cannot point to a clear legislative statement justifying its particular regulatory choices.⁵⁸ Challengers claim illegal impingement on traditional state regulatory turf, namely state energy and police power regulation. And, relatedly, challengers also argue that these federalism concerns preclude judicial application of deferential reviewing frames.

Close examination reveals that the CPP carefully hews to federalism lines laid down by federalism precedents and authority allocated by the Clean Air Act (“CAA”). Under existing law, the federalism-linked elements of the CPP should be upheld by a D.C. Circuit that has to work with existing precedents. However, due to the indeterminacy and heavily political nature of federalism-linked interpretive canons, as well as the importance of deferential review, any ultimate Supreme Court outcome is hard to predict. If the law matters, the CPP is sound and should survive. If politics rules or the Court decides to break new federalism doctrinal ground or further jettison *Chevron* deference, then the fate of the CPP is anyone’s guess.

A. STATE CLIMATE INNOVATIONS DURING A TIME OF FEDERAL INACTION

As documented and analyzed in a now vast body of scholarship, many states over recent decades have taken a leadership role in embracing cleaner energy, regulating GHG emissions, and devising market-based regulatory schemes to incentivize and reward a cost-effective shift to cleaner energy.⁵⁹ Such state

58. Particular briefs and arguments are cited and discussed *infra*, principally at notes 69 and 89–103 and accompanying text.

59. See generally David Adelman & Kirsten Engel, *Adaptive Environmental Federalism*, in PREEMPTION CHOICE, *supra* note 14; William Andreen, *Federal Climate Change Legislation and Preemption*, 3 ENVTL. & ENERGY L. & POL’Y J. 261 (2008); Eric Biber, *Cultivating a Green Political Landscape: Lessons for Climate Change Policy from the Defeat of California’s Proposition 23*, 66 VAND. L. REV. 399 (2013); Rachel Brewster, *Stepping Stone or Stumbling Block: Incrementalism and National Climate Change Legislation*, 28 YALE L. & POL’Y REV. 245 (2010); Buzbee, *Asymmetrical Regulation*, *supra* note 15; William W. Buzbee, *State Greenhouse Gas Regulation, Federal Climate Change Legislation, and the Preemption Sword*, 1 SAN DIEGO J. CLIMATE & ENERGY L. 23 (2009); Ann Carlson, *Designing Effective Climate Policy: Cap-and-Trade and Complementary Policies*, 49 HARV. J. ON LEG. 207 (2012); Ann Carlson, *Federalism, Preemption, and Greenhouse Gas Emissions*, 37 U.C. DAVIS L. REV. 281 (2003); Ann Carlson, *Iterative Federalism and Climate Change*, 103 NW. U. L. REV. 1097 (2009) [hereinafter, Carlson, *Iterative Federalism*]; Kirsten Engel, *State and Local Climate*

innovation and leadership in addressing a global challenge may be contrary to prevailing assumptions about states' political economic incentives and proclivities, but such is the reality.⁶⁰ State and regional policy shifts and new regulatory regimes have also, in an "iterative" way, worked out many regulatory design challenges and built up regulatory expertise.⁶¹ Furthermore, these state and regional efforts, combined with federal monetary inducements and abundant, low-cost natural gas due to the rise of fracking, have led to a large shift away from coal totally apart from the CPP's proposal.

These state innovations to control air pollution, here GHGs, as well as related efforts to build a larger renewable energy sector, were allowed due to the Clean Air Act's strong savings clause and due to states' broad, presumptively retained plenary police powers.⁶² Federalism-based arguments against the legality of such state innovations have been rare, although some alleged in-state preferences have been challenged in the courts and questioned by scholars.⁶³ General authority of state legislatures and public utility commissions to shift a state's energy profile and reduce pollution, however, is usually beyond challenge.

When 2009 and 2010 congressional efforts to pass a federal cap-and-trade climate law began, a big question was whether state power to regulate GHG emissions should be preserved. Despite industry calls for preemption of state

Change Initiatives: What Is Motivating State and Local Governments to Address a Global Problem and What Does This Say about Federalism and Environmental Law?, 38 URB. LAW. 1015 (2006); Robert Glicksman, *Nothing Is Real: Protecting the Regulatory Void through Federal Preemption by Inaction*, 26 VA. ENVTL. L.J. 5 (2008); Robert Glicksman & Richard Levy, *A Collective Action Perspective on Ceiling Preemption by Federal Environmental Regulation: The Case of Global Climate Change*, 102 NW. U. L. REV. 579 (2008); Alice Kaswan, *A Cooperative Federalism Proposal for Climate Change Legislation: The Value of State Autonomy in a Federal System*, 85 DENV. U. L. REV. 791 (2008); Douglas Kysar & Bernadette Meyler, *Like a Nation State*, 55 UCLA L. REV. 1621 (2008); Richard B. Stewart, *States and Cities as Actors in Global Climate Regulation: Unitary vs. Plural Architecture*, 50 ARIZ. L. REV. 681 (2008); Vivian E. Thomsen & Vicki Arroyo, *Upside Down Cooperative Federalism: Climate Change Policymaking and the States*, 29 VA. ENVTL. L. J. 1 (2011); Elizabeth Trisolini, *All Hands on Deck: Local Governments and the Potential for Bidirectional Climate Change Regulation*, 62 STAN. L. REV. 669 (2009-2010); Michael P. Vandenbergh and Mark A. Cohen, *Climate Change Governance: Boundaries and Leakage*, 18 N.Y.U. ENVTL. L.J. 221 (2010).

60. Kirsten Engel & Scott Saleska, *Subglobal Regulation of the Global Commons: The Case of Climate Change*, 32 ECOLOGY L.Q. 183, 190 (2005) (analyzing the logic of state climate regulation despite contrary predictions); Robert Stavins, *State Eyes on the Climate Policy Prize*, 27 ENVTL. F. 16 (2010) (questioning the logic of state climate regulation); Robert Stavins, *A Meaningful U.S. Cap-and-Trade System to Address Climate Change*, 32 HARV. ENVTL. L. REV. 293, 298-299 (2008) (same); Jonathan Wiener, *Think Globally, Act Globally: The Limits of Local Climate Policies*, 155 U. PA. L. REV. 1961 (2007) (same).

61. Carlson, *Iterative Federalism*, *supra* note 59.

62. 42 U.S.C. § 7416 (2015).

63. In *Rocky Mountain Farmers Union v. Corey*, 730 F.3d 1080 (9th Cir. 2013), *cert. denied*, 134 S. Ct. 2875 (2014), the court rejected a dormant Commerce Clause attack and upheld a California law regulating ethanol through a tax or credit system based on the carbon intensity of a fuel that took into account distance transported. For discussion of state climate measures' constitutionality, see Steven Ferry, *Solving the Multimillion Dollar Constitutional Puzzle Surrounding State "Sustainable" Energy Policy*, 49 WAKE FOREST L. REV. 121 (2014) (surveying claims and cases challenging constitutionality of state clean energy and climate measures and recommending strategies to ensure legality); Kysar & Meyler, *supra* note 59 (discussing the dormant Commerce Clause and vulnerabilities of state GHG emissions-trading strategies).

authority and broad initial sympathy for that view, the final, most viable bill contained only a limited carve-out preempting state authority.⁶⁴ States could regulate such pollution in all ways other than via a cap-and-trade scheme.⁶⁵ Furthermore, that limitation would only have lasted for six years.⁶⁶

Although the federal legislative effort failed, state and regional climate regulation and renewable energy efforts continued, but with state-to-state variety in the measures embraced.⁶⁷ In fact, state, regional, and federal energy law and climate regulation now together create a realm of natural policy experimentation: the interactions among multiple integrated energy grids, Independent System Operators, regulated and deregulated energy markets, monopolistic and competitive states, and diverse state and utility energy mixes have collectively generated substantial variation in regulatory regimes and energy innovation.⁶⁸

B. THE CLEAN POWER PLAN'S FEDERALISM ROOTS

The path to the CPP is rooted in Supreme Court edicts, federalism structures, and benefits of state and regional environmental and energy experimentation.⁶⁹ Statutory law may be frozen, but climate-related changes and innovations have nonetheless occurred. First, faced with federal refusal to regulate GHGs, Massachusetts and other states petitioned for federal regulation of motor vehicle GHG emissions and then challenged the denial of that petition.⁷⁰ That ability to differ with federal leadership and even sue is distinctively associated with federalism; mere decentralized structures would have provided no similar option.⁷¹ In *Massachusetts v. EPA*, Massachusetts was found to satisfy standing and statutory

64. GLICKSMAN ET AL., *supra* note 1, at 1203–04.

65. *Id.* at 1211, Problem 12-1 (providing federalism language and linked language proposing to amend the Clean Air Act).

66. *Id.*

67. *See supra* notes 59 and 63 and accompanying text (citing extensive scholarship discussing state climate initiatives, including work by Ferry, Kysar, and Meyler discussing state climate and clean energy initiatives and their legality).

68. William L. Rubin & Ann E. Carlson, *Accidents of Federalism: Ratemaking and Policy Innovation in Public Utility Law*, 63 UCLA L. REV. (forthcoming 2016).

69. The CPP emphasizes the importance of state policies repeatedly. *See, e.g.*, CPP, *supra* note 5, at 64,663, 64,667, 64,725; EPA, SURVEY OF EXISTING STATE POLICIES AND PROGRAMS THAT REDUCE POWER SECTOR CO₂ EMISSIONS 9–22 (2014), <https://www.epa.gov/cleanpowerplanttoolbox/survey-existing-state-policies-and-programs-reduce-power-sector-co2-emissions> (reviewing state policies and programs reducing GHG emissions in technical document accompanying CPP proposal) [hereinafter EPA SURVEY]; *see* Respondent EPA's Initial Brief at 2, 29–34, *West Virginia v. EPA* (D.C. Cir. 2016) (No. 15-1363) (discussing the interconnected nature of the grid and how it is like a “complex machine”) [hereinafter “EPA's Initial CPP Brief”].

70. Lisa Heinzerling, *Climate Change in the Supreme Court*, 38 ENVTL. L. 1 (2008) (article by professor and co-counsel for the Commonwealth of Massachusetts discussing the history and strategies leading to the *Massachusetts* decision).

71. Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. REV. 903, 924 (1994) (distinguishing between mere decentralization and federalist structures which leave room for direct policy differences and ability to “choose different goals”).

hurdles in a Supreme Court opinion that rejected federal declination to regulate GHG emissions.⁷² The Court stated that Massachusetts and other states deserved “special solicitude” in standing analysis,⁷³ although they were also found to have satisfied the “most demanding standards of the adversarial process.”⁷⁴ Hence, federalism specially protected the right of Massachusetts and other states to sue.

The *Massachusetts* ruling, in turn, led to several climate-directed EPA regulatory actions as well as the Supreme Court’s *American Electric Power* decision that found federal public nuisance claims preempted by the Clean Air Act.⁷⁵ But, in so ruling, the Court also reaffirmed the heart of the *Massachusetts* decision. The Court explained its decision as rooted in EPA’s power under the CAA to regulate the existing power plants targeted by the common law plaintiffs; the Court explicitly referenced Section 111’s grant of authority.⁷⁶ EPA subsequently started down the Section 111 path, regulating new power plants under CAA Section 111(b) and then, as seemingly mandated by Section 111(d), issuing follow-on regulation of existing power plants through the proposal now known as the CPP.⁷⁷

Federalism-linked developments have been central to the CPP. First, state-level efforts to increase energy efficiency, reduce GHG emissions and other power plant-linked pollution, and devise cost-effective means to achieve those goals have influenced the stringency and design of the CPP.⁷⁸ Power plants are part of the highly interconnected and integrated energy sector; how power plants meet energy demands and juggle usual state level goals of cost-effectiveness, reliability, consumer interests, and pollution control (among other goals) links unavoidably to state efforts to shift energy fuels, expand renewables, and reduce energy demand.⁷⁹ Indeed, the interconnectedness of the grid, power sector, and energy markets was central to the Supreme Court’s ruling in *FERC v. EPSA* upholding the order of the Federal Energy Regulatory Commission (“FERC”) that sought to facilitate wholesale markets in demand reduction commitments.⁸⁰

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

73. *Id.* at 520.

74. *Id.* at 521.

75. *Am. Elec. Power Co. v. Conn.*, 131 S. Ct. 2527 (2011).

76. *Id.* at 2537.

77. *See* CPP, *supra* note 5.

78. *See* EPA SURVEY, *supra* note 69; CPP, *supra* note 5, at 64,723–26, 64,758 (discussing state measures influencing the CPP); Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 79 Fed. Reg. 34,830, 34,848–50 (proposed June 18, 2014) (to be codified at 40 C.F.R. pt. 60) (CPP proposed rule discussing state measures influencing the CPP).

79. The CPP substantially relies on this interconnectedness to justify both its stringency and latitude for varied and flexible state plans. CPP, *supra* note 5, at 64,665, 64,690–92, 64,723–26, 64,758.

80. *FERC v. Elec. Power Supply Ass’n*, 136 S. Ct. 760, 768, 778–81 (2016) (discussing the “interconnected” grid, how retail and wholesale energy markets are not “hermetically sealed from each other,” and how FERC’s actions were a legitimate use of cooperative federalism).

Energy utilities, states, and public utility commissions have long recognized these several related and interdependent ways in which power plants, along with other players in energy markets, can achieve these linked goals.⁸¹ The CPP built on those precedents and regulatory experience and adopted a similarly broad, system-based approach. The CPP assessed what counts as Section 111's "best system of emission reduction" ("BSER") for this source category with reference not only to what may be achievable on-site at particular types of power plants, but best ways (or "systems") states and power plants and other energy players have devised to reduce pollution emissions while meeting energy needs.⁸²

Due to this system-based perspective rooted in state innovations and the text of Section 111, the levels of permissible emissions under the CPP are substantially lower than what would be derived if each plant were viewed solely as presenting a technology-based and fuel-specific regulatory target. This difference led to debates over whether EPA has authority to set emissions levels based on variables outside the "fenceline."

Importantly to this article's analysis of the uses of federalism in a time of federal legislative gridlock, the track record of state level innovations intended to reduce pollution and energy use and yet retain a reliable energy supply were central to the CPP's stringency. "Best" regulatory "systems" under Section 111(d) must be "adequately demonstrated."⁸³ This regulatory search for the "best" actual state and utility accomplishments through these several types of strategies thus benefitted from federalism-facilitated latitude for state experimentation that allowed for comparisons about what works "best." This investigation, in turn, led to the regulatory "standards of performance" that, as required by the statute, must "reflect" the benchmarked "best system" of emission reduction.⁸⁴

Challengers' stay and merits briefs directed the courts' attention to a few selected words in the CAA, but virtually ignored the strong textual and structural grounds for this central federalism-grounded element of the CPP.⁸⁵ Sound statutory interpretation requires attention to a provision's context and a statute's structure, as emphasized in the Court's recent *UARG* decision.⁸⁶

81. See EPA SURVEY, *supra* notes 69 and 78 (discussing the EPA survey and review of state initiatives) and *infra* note 87 (citing to industry comments in 2004 in support of EPA regulation of power plant mercury emissions via a cap-and-trade scheme and in most comments noting the benefits of flexibility due to the nature of energy markets and diverse ways to curtail emissions); see also Carlson, *Iterative Federalism*, *supra* note 59, at 1141–58 (discussing efforts to design cap-and-trade regulation and regional trading regimes and how federalism left room for "iterative" learning and adjustments).

82. CPP, *supra* note 5, at 64,723–26; EPA SURVEY, *supra* note 69.

83. The CPP parses the BSER language and history, as well as the CPP's application of this language to power plants and state compliance options. CPP, *supra* note 5, at 64,717–64,811.

84. *Id.*

85. These included stay briefs filed with the D.C. Circuit and the U.S. Supreme Court and, after the stay by the Supreme Court, merits briefs before the D.C. Circuit.

86. *Util. Air Regulatory Grp. v. EPA (UARG)*, 134 S. Ct. 2427, 2442 (2014).

First, the most significant language in Section 111 is only evident in comparison to other parts of the Act. In a statute that often references “technology,” this provision instead mentions a “system.” Further, the “standard” is to “reflect” this “best system.” To read this provision as calling for regulatory constraints based on a very narrow plant-specific technological assessment is contrary to the statute’s actual textual choice of the word “system” and the absence of the frequently-used reference to “technology.” This language and statutory structure has been noted in the past in support of a very similar proposed regulatory effort: when utilities and associations speaking for the energy industry in 2004 supported EPA’s proposal under Section 111(d) to regulate mercury emissions via a cap-and-trade regime, they argued for the benefits of flexibility, for regulation not focused merely on what particular plants could control, and viewed the Act’s “system” language as supporting this effort.⁸⁷

That this language calls for a hybrid process that harnesses federalism structures and combines area-wide assessment and planning with later allocations of regulatory burdens is further evident in Section 111(d)’s explicit cross referencing of Section 110 and its cooperative federalism State Implementation Plan (“SIP”) planning process. Section 111(d) calls on EPA to “establish a procedure similar to that provided by Section 110” in setting the existing plant emission level guidelines which, in turn, lead to state creation of a “plan” that will comply with those federal guidelines. Under Section 110, linked regulations, and Supreme Court explication in *Union Electric*, the Section 110 SIP process involves federal setting of permissible pollution levels and then state design of plans to meet those obligations.⁸⁸ The Supreme Court in *Union Electric* declared that states alone choose how to meet their obligations. This body of law hence also supports the assertion that Section 111(d) does not call for technology- or plant-specific based regulation, but for larger planning choices within a cooperative federalism structure with a target of achieving a “performance” level.

87. See, e.g., Comments of Arizona Electric Power Cooperative [to EPA on the Proposed Mercury Rule] at 2 (Apr. 29, 2004, docketed May 7, 2004) (supporting EPA regulation via a cap-and-trade program and arguing against mandating use of “specific technologies” as more expensive due to how it “limits compliance choice”); Comments of Edison Electric Institute to [EPA on the Proposed Mercury Rule] at 40–43 (June 29, 2004) (supporting EPA regulation under Section 111(d), advocating cap-and-trade regimes using the “largest area possible” as the best system, and arguing against state latitude to regulate differently); Electric Power Supply Association (“EPSA”) Comments on the Proposed Mercury Rule at 3 (Apr. 30, 2004, docketed May 3, 2004) (calling a cap-and-trade program “the best approach for the power sector” because it is “cost-effective,” provides “flexibility” and creates “incentives” to “accelerate environmental benefits,” and arguing against “unit-specific” regulation); Comments of the Utility Air Regulatory Group [on the Proposed Mercury Rule] at 128–37 (June 29, 2004) (emphasizing “system” language, calling cap-and-trade the “best system,” and even arguing that states should be prohibited from regulating existing plants via other means); [EPA] Response to Significant Comments on the Clean Air Mercury Rule, Chapter 5 Mercury Cap-and-Trade Program at 5-1 to 5-5 (Mar. 15, 2005) (summarizing many supportive industry comments), https://www3.epa.gov/airtoxics/utility/sec_111_respcom_oar-2002-0056-6206.pdf.

88. *Union Elec. v. EPA*, 427 U.S. 246 (1976).

Challengers to the CPP claim the federalism mantle to attack the CPP, but virtually ignore the implications of the federalism-linked justifications for the plan. They devote substantial argument in their first court filings to Section 111(d)'s single reference to "any particular source," making ubiquitous use of ellipses and paraphrases to argue that this section supports the contention that Section 111 precludes the system-based analysis actually mandated by the statute and used by EPA.⁸⁹ They repeatedly talk about a focus on "particular" or "individual" sources, but assessed in context and with attention to the law's federalism-respecting structure, this "particular source" clause does not support their claim.

This single reference to a "particular source" is not a term directed at the level of stringency EPA should set as "reflect[ing] the best system of emission reduction." Instead, this is language directed at what "states" are "permit[ted]" to take into account in their compliance plans.⁹⁰ So, for example, states can take into account "remaining useful lives" when their plans might work down to the level of a "particular source." EPA makes clear in the CPP and its court filings that nothing in the CPP tells states exactly how to meet the performance levels set by EPA.⁹¹ As discussed in *Union Electric* and other Section 110 law and regulations, states are in the driver's seat in choosing how to devise strategies and allocate burdens en route to meeting required pollution levels set by the federal regulations (which are referred to under Section 111(d) as guidelines).⁹² Hence, the "inside the fenceline" argument actually founders in substantial part due to a failure to appreciate the import of a federalism-linked provision. The "particular source" language preserves state planning discretion under a federally set cap. It does not mandate a federal focus on each "particular" power plant.

Other arguments about how references to a "source" must be interpreted are less laden with federalism concerns, instead turning largely on issues of interpretive discretion retained by EPA. Challengers dispute that EPA can tailor its regulation to particular attributes of the energy sector and incentivize use of market-embracing forms of regulation. This is addressed further below, but one oddity is worthy of note. The lead state challengers rely substantially on the D.C. Circuit's 1978 *ASARCO* ruling, which was based on the 1970 Clean Air Act and construed the term "stationary source," but preceded the pathbreaking *Chevron*

89. State Challengers' Stay Brief, *supra* note 11, at 7, 21–23; Reply of 29 States and State Agencies in Support of Application for Immediate Stay at 6–7, *West Virginia v. EPA*, 136 S. Ct. 1000 (2016) (No. 15A773) [hereinafter Reply of 29 States in Support of Stay].

90. 42 U.S.C. § 7411(d) (2015) (*italics added*).

91. CPP, *supra* note 5, at 64,826–64,914 *passim* (discussing state plan options with references to numerous state choices and flexibility); 64,869–73 (discussing statutory language about "remaining useful lives" and how it provides states with planning options).

92. *Union Elec. v. EPA*, 427 U.S. 246 (1976); CPP, *supra* note 5, at 64,826–64,914 (discussing state plan options and law and longstanding EPA regulations pertaining to state planning choice).

decision.⁹³ In *Chevron*, the Supreme Court was confronted with a challenge to a regulatory change rooted in the same “stationary source” statutory language. Despite EPA’s regulatory design (or tool) reversal unaccompanied by any change in underlying statutory language, the Court held that EPA had interpretive and policy discretion to regulate based on a bubble strategy and thereby gain the benefits of trading-based regulation.⁹⁴ In that decision, *ASARCO* is cited critically.⁹⁵ Furthermore, *ASARCO*’s constrained reading of EPA’s power was undoubtedly rejected by the Court in *Chevron*. And *Chevron*’s approval of the bubble strategy itself had federalism attributes: there, the Court approved EPA’s decision to allow states to use bubble strategies in developing their plans.

The CPP also embraces the Clean Air Act’s federalism choices and respects federalism’s doctrinal constraints by providing states with the choice to regulate or leave the CPP’s regulatory work to the federal government through a Federal Implementation Plan (“FIP”).⁹⁶ Despite this typical, long-recognized, and textually grounded cooperative federalism option—state regulation under a federal delegated program option or, if a state declines to so regulate, direct federal regulation—challengers assert that it violates the statute and the Constitution. However, a substantial line of cases—most famously in *New York v. United States*, *Printz*, and the earlier, foundational *Hodel* decision—upholds the constitutionality of this basic cooperative federalism strategy.⁹⁷ State challengers argue that, even under a FIP (itself only a proposed regulation at the time of briefing), resulting state burdens in overseeing state-regulated energy markets render the FIP unconstitutional.⁹⁸ No Supreme Court case, however, has ever held that such indirect ripple effects of federal regulation convert federal regulation into illegal commandeering. A finalized FIP would regulate power plants and their owners.

93. *ASARCO, Inc. v. EPA*, 578 F.2d 319 (D.C. Cir. 1978), cited in Opening Brief of Petitioners on Core Legal Issues at 24, 26, 53–54, *West Virginia v. EPA* (D.C. Cir. 2016) (No. 15-1363) [hereinafter Opening Brief of Petitioners on Core Legal Issues].

94. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 850–66 (1984) (discussing statutory language, regulatory choices, and why EPA could adopt a bubble strategy).

95. *Id.* at 847 n.17, 857 n.29 (explaining that EPA’s past stack-by-stack approach was “predicated on two Court of Appeals” decisions, citing to *ASARCO*, and continuing with discussion of why EPA could reject that earlier approach and interpret “stationary source” to justify a bubble strategy due to “cost-effectiveness and flexibility benefits”); *id.* at 864 (stating that it was the “the Court of Appeals that read the statute inflexibly” and concluding that EPA could adopt its new approach).

96. CPP, *supra* note 5, at 64,840; Federal Plan Requirements for Greenhouse Gas Emissions from Electric Utility Generating Units Constructed on or Before January 8, 2014; Amendments for Framework Regulations, 80 Fed. Reg. 64,966 (proposed Oct. 23, 2015) (to be codified at 40 C.F.R. pt. 60); Memorandum for the Federal Respondents in Opposition at 48–53, *West Virginia v. EPA*, 136 S. Ct. 1000 (2016) (No. 15A773) (discussing coercion allegations and emphasizing state choice to leave work to the United States under a FIP); EPA’s Initial CPP Brief, *supra* note 69, at 98–106 (same).

97. *New York v. United States*, 505 U.S. 144 (1992); *Printz v. United States*, 521 U.S. 898 (1997); *Hodel v. Va. Surface Mining & Reclamation Ass’n*, 452 U.S. 264 (1981).

98. Opening Brief of Petitioners on Core Legal Issues, *supra* note 93, at 80–86; Reply of 29 States in Support of Stay, *supra* note 89, at 8–11.

How they would seek to comply with pollution control mandates and whether they would seek state actions is, at this point, speculative. But even if they undoubtedly would seek some sort of state action, that would not involve the federal government commandeering the states, but regulated private actors seeking state action in light of federal regulation of private actors.

If some possibility of state adjustment of policy and regulation in the face of federal regulation is enough to make federal regulation unconstitutional as a category of “commandeering,” little federal law, let alone federal laws utilizing cooperative federalism structures, would withstand scrutiny. After all, federal regulation is virtually always targeted at large categories of risk and often entire industries. No one has ever successfully questioned the constitutionality of past regulation of publicly owned sewage treatment plants, of whole industries, or National Ambient Air Quality standards (“NAAQS”) and resulting planning obligations under SIPs or FIPs. And, importantly, no such argument has succeeded in connection with numerous past federal regulations targeting power plant pollution.⁹⁹ However, even these claims of huge regulatory burdens are questionable; many other states and utilities see little actual burden in complying with the CPP even if they assume the laboring oar rather than leave the work to EPA under a FIP.¹⁰⁰

These federalism arguments hence seem strained and erroneous, but perhaps they have a different actual strategy and goal. Challengers may really be making a *SWANCC*-like move.¹⁰¹ Challengers relying on such a strategy amass all federalism-like concerns and point to those claimed aggregate impingements as triggering a federalism-driven narrowing construction of the CAA and federal power. Due to federalism concerns, opponents of the CPP argue, any statutory ambiguities should not translate into EPA interpretive discretion and deferential judicial review, but should be read against federal authority to promulgate the CPP.

This latter view—that these arguments are more about federalism values as a scale-tipper than actually establishing unconstitutionality or a statutory violation—worked in the *SWANCC* case. Today, these challengers’ arguments link federalism claims to heavy reliance on *Brown & Williamson’s* anti-regulatory and anti-deference “major questions” language and linked further language in *UARG*

99. CPP, *supra* note 5, at 65,696–98 (discussing past regulation of power plant pollution under the Clean Air Act); EPA’s Initial CPP Brief, *supra* note 69, at 104 and note 88 (arguing against the anti-commandeering argument of Petitioners and referring to past laws and regulations directed at power plants but without any such finding of constitutional impropriety).

100. See, e.g., Opposition of States, *West Virginia v. EPA*, 136 S. Ct. 1000 (2016) (No. 15A773). Eighteen states plus the District of Columbia, plus numerous energy sector companies, support the CPP and have in regulatory comments and briefs argued for its legality and reasonableness.

101. See discussion *supra* notes 20–35 and accompanying text (discussing the arguments and ruling in *SWANCC*).

against agency assertions of major new “unheralded” powers.¹⁰² In reality, this “you do it or we’ll do it” element of the CPP is on firm legal ground if federalism doctrine and statutory structure are respected in the courts.

Nonetheless, if judicial federalism preferences trump the political branches’ choices about federal and state power, are used to neutralize ordinary deference frameworks under *Chevron*, or, due to application of a “clear statement” interpretive canon, lead to a narrow interpretation of federal power, then federalism could be both be at the heart of the CPP and also its greatest vulnerability. The large state and industry CPP opposition coalition makes this clear in its stay motion reply brief, linking *Brown & Williamson*, *UARG*, and federalism to argue that the CPP flunks because EPA cannot point to any “clear statement” of authority for elements of the CPP that challengers claim are both unprecedented and violate federalism principles.¹⁰³ If claims of arbitrary and capricious regulation will not succeed, then a federalism-based knockout punch may be one of the best arguments available to challengers since it relies on structural infirmities or lack of agency power.

Turning now to a different point about federalism-facilitated regulatory innovation, the CPP reveals a counter-intuitive twist to how federalism, despite its usual legal hierarchy, can leave room for and even incentivize policy innovation at the state level. Due to the Clean Air Act’s federalism-linked provisions and the Constitution, states devising plans under the CPP actually can provide far more flexibility and room for creativity than can the federal government itself.¹⁰⁴ This is not due to any illegality in the CPP, but due to the essence of how federalism works. The CPP is built on a mix of statutory federalism choices, federalism doctrine, and linked retained state plenary powers. Perhaps these rewards for states to take over CPP roles are what irk CPP’s opponents the most: federalism choices and doctrine make state planning under the CPP attractive, cost-effective, and palatable and hence could speed the strong existing trends away from carbon-based energy, such as coal.

The CPP involves the following basic design, following closely the design of Section 110 that is explicitly cross-referenced in Section 111(d).¹⁰⁵ EPA has set state-by-state emissions targets based on assessment of what regions can accomplish under “best systems” found for controlling GHG emissions from fossil fuel fired power plants. Beyond meeting those targets, little else is actually required of

102. *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427 (2014), cited in Opening Brief of Petitioners on Core Legal Issues, *supra* note 93 *passim*.

103. Reply of 29 States and State Agencies in Support of Application for Immediate Stay, *supra* note 89, at 1–11.

104. CPP, *supra* note 5, at 64,826–64,914 (discussing state plan options).

105. Notably, challengers not only fail to grapple with the Section 110 cross-reference, but also contrast EPA’s latitude under Section 110 with alleged Section 111 constraints. Opening Brief of Petitioners on Core Legal Issues, *supra* note 93, at 54–56.

the states.¹⁰⁶ EPA proposes a number of “building blocks” that it presumptively trusts states to utilize in their plans, but also allows states to use rate or mass based regulation, to engage in cross-state and regional trading, and even to create trading-ready regulatory approaches in their plans.¹⁰⁷ EPA also makes clear that states are permitted to devise other credible strategies that EPA did not highlight or propose.¹⁰⁸ States can go easy on particular plants due to their age and limited remaining “useful lives,” as the statute requires in the “particular plant” language referenced above.¹⁰⁹

As long found by the Supreme Court, EPA, economists, and through other trading-based or market-mimicking forms of regulation, cost-effective achievement of regulatory goals is a likely result of the CPP’s market-utilizing modes of regulation.¹¹⁰ And in cases such as *Chevron*, *Homer*, and *Entergy Corp. v. Riverkeeper, Inc.*, the Court found that statutory provisions lacking any explicit hook requiring market-utilizing or cost-sensitive regulation were adequate to justify agency decisions to use such regulatory strategies.¹¹¹ The recent *Michigan* case goes even further, finding that a minimal textual foundation and likely even statutory silence regarding regulatory costs is ordinarily enough to trigger an agency obligation to consider costs; only strong contrary statutory signals would justify agency choices made without considering costs.¹¹² Sections 110 and 111 provide far more explicit grounds for EPA’s crafting the CPP to minimize compliance costs and encourage state plans to embrace market-utilizing forms of regulation than statutory language underlying these earlier cases. Energy industry commenters in 2004 argued in support of EPA power to regulate power plants through a cap-and-trade regime relying on this linkage of sections 111(d) and 110.¹¹³

106. CPP, *supra* note 5, at 64,717–64,811.

107. *Id.*

108. *Id.*

109. See *supra* notes 89–92 and accompanying text; CPP, *supra* note 5, at 64,869–73.

110. See, e.g., *Chevron*, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 863, n.37 (citing economists and benefits of regulation utilizing “economic incentives”); GLICKSMAN ET AL., *supra* note 1, at 1190–94 (discussing strategies to reduce GHG emissions levels and summarizing arguments for pollution trading, taxes, or other economic incentives); WILLIAM NORDHAUS, A QUESTION OF BALANCE 148–64 (2008) (discussing merits of regulatory strategies based on pollution trading and taxes).

111. *Chevron*, 467 U.S. at 863; *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208 (2008); *EPA v. EME Homer City Generation, L.P.*, 134 S. Ct. 1584 (2014).

112. *Michigan v. EPA*, 135 S. Ct. 2699 (2015) (finding the statutory language “appropriate and necessary” adequate to create an agency obligation to consider regulatory costs). All justices, including the dissenters, appeared to agree with a default rule of agency sensitivity to costs unless the relevant statute contains a strong contrary textual indication. None, however, equated such agency sensitivity with any requirement of formal cost-benefit analysis.

113. See *supra* note 87 (citing supportive industry comments from 2004). The Electric Power Supply Association (“EPSA”) emphasized the importance of the Section 111(d) and Section 110 cross-reference. See EPSA Comments, *supra* note 87, at 6–7 (noting the reference and flexible planning allowed under Section 110 as supporting EPA’s “broad discretion” in fashioning Section 111(d) regulation).

Furthermore, the CPP gives states flexibility to choose how to allocate regulatory burdens both among sources and over time.¹¹⁴ States can also choose to bring new sources into regulatory plans utilizing such market-based regulation or if they convert rate-based regulation into mass-based performance limits; a trading-based scheme that would reward innovation and create scarcity is hard if not impossible to design if new market entrants could escape regulation and the need to acquire pollution allowances.¹¹⁵ The federal government probably could not itself directly regulate power plants via such a regulatory choice of market-based regulation with pollution trading and inclusion of new sources under such a strategy, but states can. Under some of their possible regulatory alternatives, states might have to impose such requirements in order to show their ability to meet federal performance standards.¹¹⁶

That states have such broad flexibility under the CPP is a result of what can be understood as the Supremacy-plenary power paradox. Federal regulation is supreme and states must achieve the performance levels set in the CPP guidelines. The federal government will have to find state plans adequate. But EPA also can choose to give states great flexibility, as it has. That latitude for state innovation, trading, and choice has long been viewed as the heart of Section 110's SIP planning process.¹¹⁷ Furthermore, the 1990 amendments to the Clean Air Act embraced SIP use of marketable permits, providing an explicit (even if unneeded for reasons below) legal hook for states utilizing market-based regulatory approaches.¹¹⁸ And if there was ever doubt about agency power to consider cost effectiveness and economic impacts of regulatory choices, the recent decisions referenced above, culminating in *Michigan v. EPA*, affirm that agencies can include such considerations and ordinarily must do so unless confronted with strong contrary statutory indicators.¹¹⁹

That 1990 language about the use of marketable permits was probably unnecessary due to a combination of the Act's federalism structures and preserved state powers. The law's floor preemption and savings clause provisions preserve state power to take additional, more stringent regulatory action than required by federal law.¹²⁰ That provision links to and supports the state planning primacy recognized in *Union Electric*. This preserved power links as well to states' retained plenary police powers in the absence of preemption. Unlike EPA

114. CPP, *supra* note 5, at 64,717–64,811.

115. *Id.* at 64,822–23; EPA's Initial CPP Brief, *supra* note 69, at 160–63 (explaining the market dynamics making this necessary and how such a possibility arises for states opting into a mass-based trading program).

116. EPA's Initial CPP Brief, *supra* note 69, at 160–63 (noting the likely need to bring new sources under such a state-selected mass-based trading cap option, but leaving to states the design of “measures” to address “leakage” risks).

117. *Union Elec. v. EPA*, 427 U.S. 246 (1976).

118. 42 U.S.C. § 7410(a)(2)(A) (2015).

119. *Michigan v. EPA*, 135 S. Ct. 2699 (2015).

120. 42 U.S.C. § 7416 (2015).

acting under the Clean Air Act in the setting of a FIP, states are not limited in what pollution sources they target or strategies at their disposal. States, often through their public utility commissions, can incentivize consumer efficiency, or encourage or discourage or even shut down or subsidize particular polluters.¹²¹ States can regulate new pollution sources, can adjust land use and transportation policies, or link their regulation to larger pollution trading markets. They could hand out pollution allowances or auction pollution rights.

Such state plenary authority to assess pollution reduction goals and means alongside many other societal goals and areas of regulatory power, including overseeing their energy providers and juggling public utility goals, is something states can do, but EPA cannot if regulating power plants directly. Nor can EPA tell states to choose such measures. Federal law may be supreme, but apart from meeting federally set performance levels, states under saved powers and their plenary authority can choose differently. In addition, in adopting their preferred mix of regulatory strategies, states can regulate sources in ways that might be unreachable by federal regulators directly. EPA could give power plant owners options that provide flexibility and room for cost-effective adjustments and compliance modes, as the draft FIP indicates it would do.¹²² But EPA will never have the virtually unlimited flexibility in planning and policy preserved to states by the Clean Air Act and its federalism-related provisions, as well as constitutionally preserved state powers.

Although opponents of the CPP have mounted a fierce regulatory challenge to the CPP, it is worth a brief thought experiment linked to courts' roles in reviewing federalism-laden regulatory judgments. Could EPA have proposed Section 111(d) regulation that was more rigid and plant-bound and surmounted judicial scrutiny under prevailing federalism, statutory interpretation, and administrative law precedents? Coal interests and coal-dependent states might have applauded, but virtually all other states, power plants, and consumers would have lost, and GHG emissions would have remained far higher. Any such approach, as briefs indicate would have been preferred by coal states and aligned challengers, would have ignored the Clean Air Act's federalism choices, would have raised the costs of compliance, and would have tied states' hands in devising politically palatable and flexible plans. (As noted earlier, such an approach would also have been contrary to arguments about EPA's authority made by power industry advocates in 2004; they strongly championed EPA's power under Section 111(d) to regulate power plant pollution via a cap-and-trade regime, calling it flexible, cost-

121. See Boyd & Carlson, *supra* note 68 (discussing varied industry and state actions to reduce GHG emissions and improve energy efficiency); EPA SURVEY, *supra* note 69 (surveying state policies and programs reducing power sector carbon dioxide emissions).

122. Federal Plan Requirements for Greenhouse Gas Emissions from Electric Utility Generating Units Constructed on or Before January 8, 2014, Model Trading Rules; Amendments to Framework Regulations, 80 Fed. Reg. 64,966 (proposed Oct. 23, 2015) (to be codified at 40 C.F.R. pt. 60).

effective, and well-suited to the interconnected energy sector.¹²³) Such a rigid and facility-tethered CPP would have ignored state and utility innovations that are already in place and reducing GHG pollution and hence appear both “best” and “adequately demonstrated.” Such an approach therefore would have done violence to the statute’s language, contradicted past industry views about EPA power, and ignored trends and proven strategies to reduce power sector pollution. Unsurprisingly, many states are planning to devise CPP plans, and many utilities and states have aligned themselves in court in support of the CPP.¹²⁴

To return to this article’s broader focus on federalism-facilitated regulatory innovation, the net effect of the CAA’s particular federalism choices and EPA’s CPP is to provide substantial state latitude for innovation and progress, even in the face of unchanged federal statutory law. The CPP is itself built on the regulatory progress and innovations of many states, which in turn triggered and informed federal action. Much of the nation’s climate progress is hence attributable to federalism doctrine and linked CAA provisions that provide latitude for innovation, federal-state interaction, and even federal-state disagreement that can overcome regulatory stasis.¹²⁵

V. FEDERALISM’S INDETERMINACY PROBLEM

Federalism’s pro- and anti-regulatory facets create a legal indeterminacy problem. Any area of law that is so indeterminate as to render legal predictions speculative undercuts rule of law aspirations.¹²⁶ And even if federalism is itself a valuable constitutional feature due to the latitude for experimentation and differences that it provides, indeterminate legal boundaries and doctrinal vacillations are not a virtue.¹²⁷ Such indeterminacy renders planning and regulatory design difficult. Nonetheless, the Supreme Court’s federalism doctrine at this time provides a toe-hold for arguments that courts can engage in the value-laden role of putting federalism values on the scale and redrawing federalism lines even

123. See discussion *supra* notes 87 and 112 and accompanying text.

124. See, e.g., Opposition of States, *supra* note 100.

125. Another example of such federal-state clashing resulting in ultimate climate progress is evident in California’s efforts to secure a federal waiver to regulate motor vehicle greenhouse gas emissions. Different administrations clashed on California’s waiver petition and ultimately two federal agencies, California and other states, and the automobile industry agreed to a single stringent federal regulatory standard. See Jody Freeman, *The Obama Administration’s National Auto Policy: Lessons from the “Car Deal”*, 35 HARV. ENVTL. L. REV. 343 (2011) (recounting and analyzing these developments and underlying law); Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 YALE L.J. 1256, 1276–78 (2009) (analyzing this clash before the regulatory resolution).

126. See generally Michael C. Dorf, *Legal Indeterminacy and Institutional Design*, 78 N.Y.U. L. REV. 875 (2003).

127. See John F. Manning, *Federalism and the Generality Problem in Constitutional Interpretation*, 122 HARV. L. REV. 2003, 2058, 2063–66 (2009) (questioning the constitutional justification for pro-federalism interpretive norms and observing the difficulty in constraining judges’ use of “generality shifting” through some sort of “benchmark for fidelity” in application of such norms).

in the face of explicit congressional choices about federal and state roles in areas of undoubted federal power. Moreover, such federalism-based scale-tipping also threatens to controvert factually informed judgments of regulators about how best to divide or (more typically) embrace overlapping and intertwined federal and state roles. Most recent cases reject invitations to redraw such regulatory design lines, but *SWANCC* did so. And while it is not an environmental law case or a case involving an administrative agency, the recent *Bond* decision prominently featured federalism scale-tipping. In *Bond*, the Court limited federal criminal law authority due to the lack of an adequately clear statement authorizing application of the federal law regulating “chemical weapons” to a “purely local crime.”¹²⁸ Anti-regulatory advocates also often use such scale-tipping federalism arguments to argue against application of deferential reviewing regimes.¹²⁹

SWANCC should not, however, be read too broadly. Although the Supreme Court has never overruled *SWANCC* or disavowed its authority to engage in such federalism values-based scale-tipping, the case is becoming an outlier. If one looks at the actual line of recent precedents resolving such arguments in the setting of complex regulatory programs, the Court more often rejects federalism scale-tipping. This growing line of precedents, mostly in the realm of environmental law, show a Supreme Court mode of review and interpretation that is sensitive to congressional statutory choices, a statute’s functioning and plan, and the nuances of cooperative federalism regimes. The Court also generally defers to fact-based regulatory policy judgments about how to regulate and allocate or preserve federal and state roles.

Hence, in the recent *FERC v. EPSA* case, the Court did not rely on *Chevron* deference to uphold FERC’s power to regulate wholesale energy market demand response aggregators.¹³⁰ This lack of Court reliance on deferential review under *Chevron* was not due to any federalism concerns, although such arguments were made. Instead, it simply said that it found “FERC’s authority clear” and hence did “not address” the alternative arguments for *Chevron* deference. The Court nonetheless displayed substantial deference not to language-based choices, but to FERC’s empirically-driven regulatory judgments about energy technology and market dynamics underpinning that assertion of federal power. The Court rejected challengers’ federalism arguments about intrusion onto state turf as a “power grab,” while conceding that energy regulation involves some bright state

128. *Bond v. United States*, 134 S. Ct. 2077, 2088–90 (2014) (finding no “clear indication that Congress meant to reach purely local crimes” and hence declining to interpret the statute’s “expansive language” defining and penalizing use of a “chemical weapon” in a way “that intrudes on the police power of the States”).

129. See discussion *supra* notes 88, 100–03 and accompanying text (summarizing and citing CPP challengers’ arguments against EPA power and judicial deference).

130. *FERC v. Elec. Power Supply Ass’n*, 136 S. Ct. 760 (2016).

and federal statutory authority lines.¹³¹ The Court nonetheless found that the regulatory actions were factually and legally sound despite arising in a gray area implicating state retail regulation and federal wholesale regulation due to “connections, running in both directions, between the States’ policies and [FERC’s] own.”¹³² The majority dismissed EPSA’s “more feverish idea” that FERC’s action emerged from a “yen to usurp State authority over, or impose its own regulatory agenda on, retail sales.”¹³³ The Court instead engaged in a careful review of statutory language, discussing the integrated functioning of energy markets and how retail and wholesale markets relate.¹³⁴ It found FERC’s action not only “reasoned decisionmaking” but consistent with what it called FERC’s “obligat[i]ons” and “dut[ies],” emphasizing provisions precluding an energy regulation “no-man’s land.”¹³⁵ The Court also noted FERC’s “notable solicitude toward the States” in granting states “veto power” over their consumers’ ability to participate in demand response markets.¹³⁶ Thus, despite disputes over federal and state turfs and challengers’ reliance on federalism as a scale-tipper weighing against federal power, the Court rejected invitations to adjust its statutory interpretation methodology or its standard of review. Deference to FERC’s “reasoned decisionmaking” perhaps did more work for the Court (and FERC) than expected; many of the Court’s conclusions could have been couched in terms of language-based choices and hence been subject to *Chevron* deference. Such deference was, however, found unnecessary.

In *Alaska v. DEC*, Alaska and the dissenters raised state sovereignty concerns in objecting to EPA’s power to second guess state permits under a cooperative delegated program federalism regime. The majority, however, looked closely at statutory language and federal supremacy under the statute to uphold EPA’s power.¹³⁷

Similarly, in the recent *Homer* case, several states and affected industry challenged EPA’s latest effort to address the “thorny” challenge of interstate ozone pollution, again arguing that EPA had transgressed the boundaries of its power and calling for EPA to provide an additional stage of notice and process to ease states’ regulatory burdens.¹³⁸ The Court, however, rejected this invitation to remold the statutory language and process out of solicitude for the states.¹³⁹ It

131. *Id.* at 779.

132. *Id.*

133. *Id.*

134. *Id.* at 781–84.

135. *Id.* at 780–81 (citations omitted).

136. *Id.* at 779–80.

137. *Alaska Dep’t of Env’tl. Conservation v. EPA*, 540 U.S. 461, 473–74, 484–88, 489–95 (2004) (majority reviewing provisions regarding federal and state roles and rejecting dissenters’ construction of the Clean Air Act); *id.* at 502–08, 512–18 (Kennedy, J., dissenting (joined by Chief Justice Rehnquist and Justices Scalia and Thomas)) (arguing against EPA’s power to act directly due to federalism concerns).

138. *EPA v. EME Homer City Generation, L.P.*, 134 S. Ct. 1584 (2014).

139. *Id.* at 1601, 1609–10.

closely analyzed the statute and upheld the reasonableness of EPA's judgment calls in devising a regulatory process that allocated regulatory burdens and considered resulting costs.¹⁴⁰

In the preemption arena, although not in an environmental case, the Court in *Wyeth v. Levine* engaged in similar close analysis of statutory language, regulatory experience, and lack of evidence of claimed harmful state action in upholding retained state authority and denying a federal agency claim of preemptive impact.¹⁴¹ The Court declined to defer to the Food and Drug Administration ("FDA"), which had sought judicial deference to its pro-preemption views. The Court instead engaged in a variant of hard look review to find the FDA's argument lacking in justification and, due to the absence of participatory administrative process, undeserving of *Chevron* deference.¹⁴² *Gonzalez v. Oregon* is another notable non-environmental case demonstrating how such statute and regulation-specific scrutiny can be sensitive to federalism concerns yet show fealty to congressional choices about allocations of authority.¹⁴³ The Court moved beyond broad claims of deference and state sovereignty to assess exactly how the statute allocated or preserved roles for two federal agencies and for state medical regulators.

The blockbuster *King v. Burwell* case, while also not an environmental law case, involved a federalism-laden dispute triggered by a drafting glitch or mistake about state programs, fallback federal programs, and linked tax treatment should a state decline to accept federal support and participate in health care markets structured by the Affordable Care Act.¹⁴⁴ The majority in *King* engaged in a rigorous, integrative, and functionalist analysis of the law to understand its plan and rejected challengers' arguments, preserving space for a backup federal plan and thereby avoiding an interpretation that would have led to the health law's financial "death spiral."¹⁴⁵

140. *Id.* at 1601, 1605–07.

141. *Wyeth v. Levine*, 555 U.S. 555 (2009).

142. *Id.* at 1201–03. For analysis of *Wyeth* and how its opinion appears to be a variant on hard look review, see William W. Buzbee, *Preemption Hard Look Review, Regulatory Interaction, and the Quest for Stewardship and Intergenerational Equity*, 77 GEO. WASH. L. REV. 1521 (2009). Professor Sharkey notes how the Court in *Wyeth* engaged in an "agency-forcing" role, creating incentives for agencies to put preemption decisions through more rigorous participatory process. Catherine M. Sharkey, *Federalism Accountability: "Agency-Forcing" Measures*, 58 DUKE L. J. 2125, 2178–80 (2009).

143. *Gonzales v. Oregon*, 546 U.S. 243 (2006). For discussion of *Oregon* and how it uses administrative law as a form of "new federalism" doctrine, see Metzger, *supra* note 7, at 2032–36. In *Oregon*, the Court mentioned federalism values as supporting its conclusion.

144. *King v. Burwell*, 135 S. Ct. 2480 (2015).

145. *Id.* at 2493. The Court in *King* did not apply *Chevron* deference, but not due to federalism concerns. The Court instead viewed the case as subject to the *Brown & Williamson* "major questions" line of cases, also finding that the statute's structure and the key provisions' locations cut against the idea that Congress meant to give the Internal Revenue Service interpretive primacy. *King*, 135 S. Ct. at 2489 (citing to *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000)). For exploration of the *King* Court's reasoning, the challengers' strategies, and how the Court in *King* engaged in a functionalist analysis attentive to the legislative "plan," yet

So should federalism concerns disappear once Congress has devised a cooperative federalism regime? The answer is undoubtedly no. As illustrated by the cases just reviewed, courts can police agency actions and interpret underlying laws in ways sensitive to federalism issues yet without value-laden and politicized judging. Federal and state turf, and even allocations of power among federal agencies, can vary in nuanced ways under different laws. In these cases, those differences are respected and the agency actions still subjected to judicial review for potential violations. Deference to or rejection of an agency's regulatory choices in these cases seems to hinge on the regulator's respect for and consideration of congressional federalism-linked power allocations and, in the regulatory action, state concerns.¹⁴⁶ And if an agency further heeds *Michigan*, *Homer*, and other cases upholding or requiring regulatory judgments that consider cost impacts of regulation, then they should stand in an even more secure position. Agency sensitivity to federalism-linked allocations of authority and state interests will often translate into regulatory requirements that embrace presumptive regulatory flexibility and cost-effective or market-based regulation options. *FERC v. EPSA* provides a near-model form of such analysis, examining but deferring to FERC judgments about federal and state roles, market realities, and noting as further evidence of agency reasonableness FERC's preservation of a state right to opt out of wholesale demand reduction markets. Judicial oversight remains, but without courts redrawing congressional or factually informed agency decisions about how to allocate federal and state roles.

In addition, the Court has repeatedly and consistently upheld cooperative federalism regimes that give states a choice to regulate to meet federal targets or step aside and allow federal regulators to do the work. Those precedents—especially *New York v. United States* and *Printz*—are strong in their emphasis on the importance of state choice. It would be an unusual and major expansion of

without expanding on statutory purpose or going outside the law's actual text, context, and structure, see Abbe R. Gluck, *Imperfect Statutes, Imperfect Courts: Understanding Congress's Plan in the Era of Unorthodox Lawmaking*, 129 HARV. L. REV. 62, 62–66, 80–81, 87–93 (2015) (citing and later analyzing Chief Justice Roberts' majority opinion in *King*, 135 S. Ct. at 2496, for the statement that “[a] fair reading of legislation demands a fair understanding of the legislative plan”).

146. Justice Scalia, in his *EME Homer* dissent, called for a variant of what I suggest is ordinarily appropriate and even logically part of the law, although he made an odd and arguably erroneous claim when he alluded to state “primacy” under the Clean Air Act's cooperative federalism structures; the Act actually places EPA in the most powerful standard-setting and oversight roles while inviting states to play ongoing regulatory roles. *EPA v. EME Homer City Generation, L.P.*, 134 S. Ct. 1584, 1619–20 (2014) (Scalia, J., dissenting) (calling it “an abuse of discretion” for EPA not to use its “discretion to arrange things so as to preserve the Clean Air Act's core principle of state primacy”). If a statute requires or even just preserves agency latitude for federal respect for the states and, especially, federal ability to respect state policy flexibility, allocational discretion, and cost-effective modes of regulation, then courts appropriately under the “reasoned decisionmaking” framework and also *Chevron* interpretive deference could expect agencies to consider and choose such options if they are reasonably available in law and fact. The *EME Homer* majority, however, found the explicit statutory commitment to EPA too clear to justify judicial rejection of EPA's action and judicial imposition of an additional regulatory stage not called for by the Clean Air Act. 134 S. Ct. at 1600–01.

anti-commandeering doctrine if the Court added yet more federalism values to some indeterminate scale to reject those choices of the political branches.

A. THE EMERGENT BEST PRACTICES FOR REVIEWING REGULATORY ACTIONS
IMPLICATING FEDERALISM CHOICES

These cases and the indeterminacy challenges posed by federalism-based advocacy and scale-tipping suggest an emergent set of interpretive “best practices” for courts to apply when reviewing a regulatory challenge implicating federalism choices and concerns. They are concededly in tension with *SWANCC*'s resort to barely articulated constitutional concerns and reference to state land use regulation primacy, but these emergent best practices are drawn from this increasingly strong line of cases sharing a common methodology.

First, law implementers and courts should discern and respect the federalism mix chosen by Congress. Close, rigorous analysis of a law's text, context, and structure, with attention to the law's functioning and plan, is essential. Second, as a corollary to the first element, neither law implementers nor courts should take the actual congressional choice and then distort it with additional free-floating, scale-tipping federalism concerns that nullify a regulatory power or shift those congressional allocations of authority. Third, because legal compliance with congressional regulatory designs involving federal and state actors will involve context-specific regulatory judgments, courts should remain in the business of assessing the “reasoned decisionmaking” of federal regulators, in particular looking to see if agencies considered state concerns. State concerns would not invariably win, but federal agency inattention to state interests and roles where Congress made them matter would appropriately be viewed with concern. In addition, reviewing courts asked to approve federal preemption of state common law or regulations due to claimed “obstacle preemption” concerns should demand actual evidence of such burdens and obstacles. Mere hot-button federalism words and reflexive citation to cases articulating federalism values should not be enough, especially in the face of savings clauses or floor preemption provisions. Fourth, in this realm characterized by cooperative federalism schemes and other sorts of federal-state regulatory overlap or divisions, shadow dual federalism arguments proposing ouster of a federal or state regulator should not trump the normal congressional choice to retain roles for both.

A fifth element in such federalism-implicating judicial review is perhaps emerging and worthy of embrace. It is, however, subject to contrary congressional choices and not yet linked in the Supreme Court's cases. Courts likely should link this emerging sort of text and fact-dominant federalism interpretive methodology plus the new default rule favoring cost-sensitive regulation, as articulated by all justices in *Michigan v. EPA*. If a federal agency acting in a cooperative federalism setting or area of federal and state overlap considers state interests and presumptively preserves latitude for state policy flexibility, that respect for state

roles and cost-effective or tailored regulation should count in support of deference to that regulatory action. Hence, a regulation such as the Clean Power Plan, with its many elements that respect states, preserve state policy flexibility, and encourage market-based regulation, should benefit from such efforts when reviewed in the courts.

CONCLUSION

This article has shown how federalism doctrine, statutory choices, rhetoric, and values have provided room for legal movement despite almost twenty-five years of congressional environmental gridlock. This gridlock has frustrated efforts to improve environmental laws and pass new laws to address challenges such as climate change. Although the article shows areas of regressive action, vacillation, and progress, federalism's facets and strategic uses also reveal a degree of problematic doctrinal indeterminacy. This article closes by observing and embracing what may be an emerging cooperative federalism interpretive methodology. This analytic approach focuses on a law's structures, functional plan, and allocation of roles, thereby reducing judicial latitude for value-laden and over-politicized use of federalism. It has several simple elements grounded in legislative supremacy, and it recognizes the reality that most regulatory fields, especially environmental law, turn on particular contexts and fact-dependent choices about federal and state roles. Federal environmental laws call for federal regulators to make regulatory choices that balance substantive and federalism-linked goals. Those choices are worthy of judicial monitoring, but also judicial respect.