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Cooperative Federalism and the Clean Air Act[1]

> *Where does that leave the States? After 10 years and tens of millions of dollars in lawyers' fees, their agreement disappears with only the promise of more litigation to follow. All because the government won't accept a settlement providing it with everything it once sought, and now seeks to promote the use of an alternative 1938 baseline that no party seeks and New Mexico represents could cost it tens of thousands of jobs and a large segment of the State's economy. Cooperative federalism that is not.* Texas v. New Mexico and Colorado 602 U.S. ___ *(2024) (slip op. at 25) (Gorsuch dissent).*

Many federal environmental laws embody the cooperative federalism framework.[2] Scholars have come to understand cooperative federalism as a partnership between federal and state governments where both entities work together to establish and implement rules that achieve federal environmental standards.[3] Under this framework, and in general, EPA has the authority to set national environmental standards[4] while the states are tasked with administration, implementation, and enforcement.[5]

The Clean Air Act is "an experiment in cooperative federalism."[6] Congress has given state and local governments the "primary responsibility" for regulating air pollution.[7] While the EPA is charged with developing national ambient air quality standards to set a uniform level of air quality across the country, decisions regarding how to meet those standards are left to individual states, typically in state implementation plans.[8] Stated differently, "[t]he federal government through the EPA determines the ends – the standards of air quality – but Congress has given the states the

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[1] Authored by Taylor Holcomb, Ben Rhem, and Ava Moran.
[2] *See* 42 U.S.C. § 7416; New York v. United States, 505 U.S. 144, 167–168 (1992) (details several examples of federal regulatory programs that use the "cooperative federalism" framework).
[3] Roderick M. Hills Jr., *The Political Economy of Cooperative Federalism: Why State Autonomy Makes Sense and "Dual Sovereignty" Doesn't*, 96 MICH. L. REV. 813, 815 (1998).
[4] Douglas Williams "*Cooperative Federalism and the Clean Air Act: A Defense of Minimum Federal Standards*," Saint Louis University Public Law Review: Vol. 20 : No. 1 , Article 8, 67, 74 (2001).
[5] *Id.* at 76.
[6] Michigan v. EPA, 268 F.3d 1075, 1083 (D.C. Cir. 2001).
[7] 42 U.S.C. § 7401(a)(3).
[8] Bell v. Cheswick Generating Station, Genon Power Midwest, L.P., 734 F.3d 188, 190 (3d Cir. 2013).

initiative and a broad responsibility regarding the means to achieve those ends through state implementation plans and timetables for compliance."[9] And for good reason: the federal government alone would struggle to tailor rules to the unique needs of states, and federal implementation would be unreasonably slow and expensive.[10]

The experiment is ongoing. A federal court recently struck down a Bureau of Land Management rulemaking, in part because the rule "upend[ed] the CAA's cooperative federalism framework and usurp[ed] the authority to regulate air emissions Congress expressly delegated to the EPA and States."[11] In recent rulemakings, EPA has sought to expand the federal role within the cooperative federalism framework. States and others have challenged EPA's approach on cooperative federalism grounds. This article briefly addresses three examples of how cooperative federalism principles are being tested in legal challenges to EPA rulemakings.

A. The Ozone Transport Rule

In the Clean Air Act's "good neighbor" provision, Congress requires the EPA and states to address interstate transport of air pollution that affects the ability of downwind states to attain and maintain national ambient air quality standards.[12] Section 110(a)(2)(D)(i)(l) of the Clean Air Act requires states to address in their state implementation plans how they will prohibit emissions that will significantly contribute to nonattainment of a national ambient air quality standard, or interfere with maintenance of a national ambient air quality standard, in a downwind state. As a backstop, EPA is empowered to promulgate a federal implemental plan where a state fails.

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[9] Texas v. U.S. Envtl. Prot. Agency, 690 F.3d 670, 674-75 (5th Cir. 2012) (citing Bethlehem Steel Corp. v. Gorsuch, 742 F.2d 1028, 1036 (7th Cir. 1984)).
[10] Douglas Williams "*Cooperative Federalism and the Clean Air Act: A Defense of Minimum Federal Standards*," Saint Louis University Public Law Review: Vol. 20 : No. 1 , Article 8., 67, 70-1 (2001).
[11] Wyoming v. U.S. Dep't of the Interior, 493 F. Supp. 3d 1046, 1065 (D. Wyo. 2020).
[12] Federal "Good Neighbor Plan" for the 2015 Ozone National Ambient Air Quality Standards, 88 Fed. Reg. 36,654, 36,658 (June 5, 2023) (to be codified at 40 C.F.R. pts 52, 75, 78, 97).

On October 1, 2015, EPA revised the primary and secondary 8-hour standards for ozone to 70 parts per billion. That started a clock for states to submit SIP revisions to fulfill interstate transport obligations. In February 2023, EPA disapproved SIP submissions by numerous states. And on June 5, 2023, EPA promulgated a federal implementation plan.

Various parties have filed lawsuits regarding the SIP disapprovals and the EPA's FIP.[13] Appellants across jurisdictions have raised cooperative federalism arguments,[14] with most claiming the EPA's decision to implement the FIP, instead of allowing states the opportunity to resubmit SIPs, violates the Clean Air Act by disrupting the federal and state partnership.[15]

After the EPA rejected numerous SIPs and adopted a FIP, aggrieved states challenged EPA's actions.[16] The Clean Air Act requires the EPA to approve plans that satisfy national standards, regardless of whether EPA believes it is the best method.[17] The appellants claim their SIPs satisfied the national standards, and EPA wrongly rejected the proposals in violation of the Clean Air Act.[18] Even if the SIPs were deficient, the Clean Air Act allows states up to two years to remedy a deficient SIP.[19] But the EPA implemented its FIP quickly after the SIP denials.[20] The states also claim the EPA analyzed the SIPs using different models than originally provided, seemingly moving the goalpost without communicating new requirements to states until after rejecting the plans.[21] The EPA contends the states' failure to submit sufficient plans required

[13] *See* Petition for Review, State of Texas and Texas Commission on Environmental Quality v. EPA, No. 23-60069 (5th Cir. Feb. 14, 2023).
[14] State Applicants' Emergency Application for a Stay of Administrative Action at 14-15, Ohio v. Environmental Protection Agency, No. 23-1183 (S. Ct. Oct. 18, 2023).
[15] *Id.*
[16] *Id.* at 2.
[17] *Id.* at 4.
[18] *Id.* at 8.
[19] *Id.* at 7.
[20] *Id.*
[21] *Id.* at 8.

intervention to protect the downwind parties.[22] Six courts of appeals granted the appellants motion for stay, excluding the D.C. Circuit.[23] The appellants in the D.C. Circuit requested an emergency stay from the Supreme Court.[24]

State briefs in the litigation focus on cooperative federalism principles. For instance, Texas made the following arguments:

- That EPA's disapproval of Texas's SIP openly contravenes cooperative federalism principles and that, in disapproving Texas's SIP, EPA "disagree[d] that it is obligated to defer to [S]tates' choices in the development of good neighbor SIP submissions."[25]
- According to Texas, EPA asserted that its role is "secondary" only "in time" because its review occurs chronologically after the State makes its SIP submission, not because the State has the primary role in determining how to substantively comply with the statutory requirements. EPA's view is that *EME Homer* gives EPA the primary role in the SIP review process for interstate transport and holds that EPA, not the State, is "afforded deference" "in evaluating state SIP submissions." Texas disagrees, arguing that *EME Homer* dealt exclusively with EPA's promulgation of federal implementation plans, not SIPs.[26]
- Texas argues that EPA applied a "heightened standard" when evaluating the Texas SIP that inverts the statute's cooperative-federalism mandate and "reflects a misapprehension by the EPA of its authorized role in the SIP-approval process."[27]

[22] *Id.*
[23] *Id.* at 11.
[24] *Id.* at 2.
[25] Brief for Petitioner-Appellant at 31, State of Texas v. EPA, No. 23-60069 (5th Cir. March 30, 2024).
[26] Brief for Petitioner-Appellant at 32, State of Texas v. EPA, No. 23-60069 (5th Cir. March 30, 2024).
[27] Brief for Petitioner-Appellant at 34, State of Texas v. EPA, No. 23-60069 (5th Cir. March 30, 2024).

On June 27, 2024, in part due to EPA having "sidestep[ped]" the states' expressed concerns, the Supreme Court granted the appellants' motion for emergency stay, prohibiting EPA from enforcing the FIP while the D.C. Circuit considers the underlying legal challenges.[28]

B. The Clean Power Plan

Section 111(d) of the Clean Air Act permits the EPA, in some cases and under certain scenarios, to set air emissions standards for existing facilities.[29] In 2015, the Obama Administration began rolling out the Clean Power Plan.[30] The resultant emissions standards created three "building blocks" designed to regulate greenhouse gas emissions from existing sources.[31] The second and third blocks threatened to uproot the entire energy industry by compelling generation shifting – the transfer of power generation from fossil fuels to renewables.[32] Many states challenged the EPA's authority to adopt the Clean Power Plan under Section 111(d) in the landmark case *West Virginia v. EPA*.[33]

In *West Virginia v. EPA*, the Supreme Court reviewed EPA's authority to adopt the Clean Power Plan.[34] Invoking the major questions doctrine, the Court concluded that Congress must "speak clearly" if it wishes to delegate to EPA the authority to decide issues of "vast economic and political significance."[35] Accordingly, when it make those sorts of decisions, EPA must point to "clear congressional authorization."[36] It couldn't do so, resulting in the Supreme Court striking down the Clean Power Plan and EPA's preferred generation-shifting approach.

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[28] Ohio v. EPA, 603 U.S. ____ (2024) (slip op. at 14).
[29] 42 U.S.C. § 7411(d).
[30] *See Overview of the Clean Power Plan*, EPA (August 3, 2015), https://archive.epa.gov/epa/sites/production/files/2015-08/documents/fs-cpp-overview.pdf.
[31] *Id.* at 4.
[32] *Id.*
[33] West Virginia v. EPA, 142 U.S. 2587, 2599 (2022).
[34] *Id.*
[35] *Id.* at 2600.
[36] *Id.* at 2609.

Justice Gorsuch's concurring opinion arrived at the same conclusion relying on cooperative federalism principles. Justice Gorsuch concluded that "the major questions doctrine and the federalism canon often travel together."[37] In his concurrence, Justice Gorsuch argued that the EPA's rule disrupts the balance between the agencies and the states—"When an agency claims the power to regulate vast swaths of American life, it not only risks intruding on Congress's power, it also risks intruding on powers reserved to the States."[38]

After the Supreme Court struck down the Clean Power Plan in *West Virginia*, the EPA returned to the drawing board to create the Clean Power Plan 2.0, which it proposed in May 2023 and finalized in April 2024. Many states have argued that EPA's new version suffers from the same legal deficiencies as its first version. For instance, in legal challenges to Clean Power Plan 2.0, and specifically in seeking a stay of the rule, the States claim:

- When it comes to the States, Congress recognized that air pollution control is their "primary responsibility." So it gave each State "leeway to select means" for controlling pollution "consistent with its particular circumstances and priorities." Under Section 111, States develop "plan[s]" setting the "standards of performance" for the existing sources in their borders. The States' plans must "reflect[]" the "degree of emission limitation achievable" through EPA's best system of emission reduction. But Congress also said EPA "shall" respect the States' discretion to account for source-specific considerations, including (but not limited to) a facility's

[37] *Id.* at 2621.
[38] *Id.*

"remaining useful life." EPA may directly regulate existing sources only if States fail to submit or enforce a "satisfactory plan."[39]

- The Rule also bungles the States' statutory authority to set existing sources' "standards of performance" and account for source-specific factors like a plant's "remaining useful life." Reflecting Congress's directive that controlling air pollution "is the primary responsibility of States and local governments," "the States set the actual rules governing existing" sources. State plans must "reflect[]" the emission limitations EPA's best system can achieve, not mirror them. That, plus the promise EPA will permit source-specific tailoring, means Section 111(d) "gives substantial latitude to the states in setting emission standards."[40]
- The Rule makes EPA's "presumptive standards" virtual requirements. And these extra-statutory presumptions go beyond ostensibly helpful shortcuts: EPA will not declare plans "satisfactory" if they fail to "achieve at least the level of emission reduction" the "presumptive standards" do. In fact, the Rule affirms States' "authority to deviate" from EPA's path only where they seek "to apply a more stringent standard of performance"—EPA will accept those standards without additional justification. Otherwise, instances warranting a different methodology "will be limited to anticipated changes in [plant] operation." So the presumptive standards veer too close to unlawful direct regulation. While EPA may voice a "preferred approach" for state plans, it cannot erase the States' discretion by insisting on it. Its role is to "guide States" in setting standards. Without the "real

[39] Petitioners Motion to Stay at 2-3, State of West Virginia v. EPA, No. 24-1120 (D.C. Cir. May 13, 2024).
[40] Petitioners Motion to Stay at 10-11, State of West Virginia v. EPA, No. 24-1120 (D.C. Cir. May 13, 2024).

choice" the statute affords, the Rule makes the States agents instead of co-regulators.[41]

- Inflexibility might be appropriate were EPA right that Congress meant to let States account for "exceptional circumstances" only. But in a statute expressly protecting the States' pollution-management role, Congress said EPA "shall permit" their source-specific judgments. The Rule turns "shall" into a virtual "shall not," at least absent non-statutory, EPA-approved exceptional circumstances. Rules that "overthrow" the CAA's "structure and design" are illegal. This Rule's cavalier approach to Section 111's text shows it's one of them.[42]
- The Rule invades the States' sovereignty—"intangible harm" that cannot be redressed. States have "sovereign interests" in regulating emissions and crafting "public polic[y]." And here specifically, "inver[ting]" the CAA's "federalism principles" is irreparable injury.[43]

A contested portion of Section 111(d) rulemaking is the RULOF provision. When EPA sets standards of performance for existing sources under Section 111(d), states must then submit a plan for implementation of those standards. But Section 111(d) requires EPA to permit states to take into consideration, among other factors, "the remaining useful life of the existing source to which such standard applies."[44] In other words, Congress has sensibly directed that states may include in their implementation plans standards that differ than what EPA prescribed based on the

[41] Petitioners Motion to Stay at 11-12, State of West Virginia v. EPA, No. 24-1120 (D.C. Cir. May 13, 2024).
[42] Petitioners Motion to Stay at 13, State of West Virginia v. EPA, No. 24-1120 (D.C. Cir. May 13, 2024).
[43] Petitioners Motion to Stay at 20, State of West Virginia v. EPA, No. 24-1120 (D.C. Cir. May 13, 2024).
[44] 42 U.S.C. § 7411(d).

age of the facilities to which those standards will apply.[45] Yet under its Clean Power Plan 2.0, the EPA has tried to preemptively constrain what states may consider under RULOF.[46] In legal challenges to Clean Power Plan 2.0, and specifically in seeking a stay of the rule, the States claim:

- The Rule doubles down on EPA's wrongheaded approach to "remaining useful life" and "other factors." EPA insists the Rule only repeats a new policy it promulgated elsewhere. Many of the States are challenging that policy, too. But EPA can't justify misreading Section 111(d) in the Rule just because it made the same error elsewhere first.[47]
- The Rule treats "remaining useful life" as a potential way to mitigate the presumptive standards' rigidity—if EPA agrees with the State's assessment, it might approve a variance. EPA forgets States have authority to consider remaining useful life "in applying a standard of performance to any particular source," not just in setting it. 42 U.S.C. § 7411(d)(1). Tailoring is a back-end failsafe to the standards' front-end regulation. Regardless, the Rule leaves little room for source-specific discretion anywhere in the analysis.[48]

The court has yet to rule on the stay motion.

C. Oil and Gas NSPS (40 C.F.R. Subparts OOOOb/c)

The bounds of cooperative federalism are being tested not only in power sector rulemakings, but also in oil and gas rulemakings. On March 8, 2024, EPA finalized revisions to

[45] New Source Performance Standards for Greenhouse Gas Emissions From New, Modified, and Reconstructed Fossil Fuel-Fired Electric Generating Units; Emission Guidelines for Greenhouse Gas Emissions From Existing Fossil Fuel-Fired Electric Generating Units; and Repeal of the Affordable Clean Energy Rule, 89 Fed. Reg. 39,798, 39,836 (May 9, 2024).
[46] 40 C.F.R. § 60.24a(e).
[47] Petitioners Motion to Stay at 12, State of West Virginia v. EPA, No. 24-1120 (D.C. Cir. May 13, 2024).
[48] Petitioners Motion to Stay at 12, State of West Virginia v. EPA, No. 24-1120 (D.C. Cir. May 13, 2024).

its Quad O suite of standards applicable to oil and gas facilities in order to reduce GHG and VOC emissions.[49] EPA's rulemaking also included emission guidelines for states to follow in developing, submitting, and implementing state plans to establish performance standards to limit GHG emissions from existing oil and gas sources. In legal challenges, and specifically in seeking a stay of the rule, the States claim:

- The Rule abandoned the cooperative-federalism framework in several ways. Take the "presumptive standards." Rather than merely identifying the best system of emission reduction, the Rule sets emission guidelines that would purportedly result from the application of those standards and then lists out specific technologies and methods that should be employed to hit the guidelines (or targets). It also presumptively requires States to adopt an extra-statutory Super Emitter Program, wherein third parties are empowered to monitor and report emissions by covered facilities on their own. And it emphasizes that States should include all the presumptions, not just some. Appeasing EPA is crucial, as EPA further declares that it must find state plans "satisfactory" (based on its own sense) before approving them.[50]
- Although EPA insists that these "presumptions"—a concept nowhere addressed in the statute—are different from direct regulation, it concedes that the agency will use those same presumptions in shaping its own federal standards, if necessary. Any State that takes a different path will be "thoroughly reviewed." Among other things, States that prefer a different route must follow a distinct and rigorous three-step "equivalency" approval process. And a "state's standards of performance" must be "no less stringent" than the "presumptive standard." No wonder, then that the EPA ominously warned at

[49] 89 Fed. Reg. 16,820 (Mar. 8, 2024).
[50] Petitioners Motion to Stay at 7-8, State of Oklahoma v. EPA, No. 24-1059 (D.C. Cir. April 12, 2024).

the proposed-rule stage that "it would likely be difficult for States to demonstrate that the presumptive standards are not reasonable for the vast majority of designated facilities."[51]

- Things get no better when it comes to Section 111's command that States be permitted to consider the remaining useful life of a facility, along with other facility-specific factors, in developing standards of performance. To limit that discretion, EPA has written in several more factors that States must meet. States must now show "unreasonable cost," "physical impossibility," and similarly tough facts to justify invoking their discretion. States must also identify "fundamental differences" between the information available to the States and the information that was available to the EPA; if EPA and the States draw different conclusions from the same body of data, EPA's judgment automatically prevails—even though the statute contemplates the opposite. And for some facilities, EPA essentially erases "remaining useful life" as a consideration altogether, confining it to situations where EPA's "presumptive standards" would involve a "significant capital investment." All these atextual limits on state authority offend the CAA.[52]

The court has yet to rule on the stay motion.

III. Conclusion

Recent EPA rulemakings test the balance of federal and state power under the CAA. Accordingly, these new rules have prompted states to file a bevy of lawsuits. As courts issue decisions in the coming months, the proper role of the federal government and the states in addressing domestic environmental issues under the CAA should become more clear.

[51] Petitioners Motion to Stay at 8-9, State of Oklahoma v. EPA, No. 24-1059 (D.C. Cir. April 12, 2024).
[52] Petitioners Motion to Stay at 9-10, State of Oklahoma v. EPA, No. 24-1059 (D.C. Cir. April 12, 2024).