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# DIAGONAL FEDERALISM: HOW STATES SHOULD RESPOND TO INCONSISTENT FEDERAL CLIMATE CHANGE MITIGATION POLICY

MICHAEL ARNONE\*

## INTRODUCTION

Federalism is a bedrock principle of American Democracy.<sup>1</sup> It informs the structure, powers, and function of the Federal Government.<sup>2</sup> It establishes the parameters of the Federal Government's relationship with the states and the states' relationships with one another.<sup>3</sup> It is often the backdrop to policymaking at the federal and state levels.<sup>4</sup> There are many advantages to this approach to governance, but federalism is not without its limits, particularly with respect to collective action problems like climate change,<sup>5</sup> which can only be successfully addressed when multiple jurisdictions work together.<sup>6</sup>

The Covid-19 Pandemic, perhaps more than any recent public policy challenge, laid bare the advantages and disadvantages of federalism as a model for responding to collective action problems.<sup>7</sup> In the absence of strong federal leadership for much of the pandemic, states were left largely on their own as they responded to a public health crisis which was

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<sup>1</sup> Robert P. Inman & Daniel L. Rubinfeld, *Rethinking Federalism*, 11 J. ECON. PERSP. 43, 43 (1997).

<sup>2</sup> Connor M. Ewing, *Structure and Relationship in American Federalism: Foundations, Consequences, and "Basic Principles" Revisited*, 51 TULSA L. REV. 689, 698–99 (2016).

<sup>3</sup> *Id.* at 699–702.

<sup>4</sup> *Id.*

<sup>5</sup> Erin Ryan, *Lessons from the Coronavirus Pandemic for Environmental Governance*, L. PROFESSOR BLOGS: ENV'T L. PROF BLOG (Feb. 21, 2021, 10:00 PM), [https://lawprofessors.typepad.com/environmental\\_law/2020/06/lessons-from-the-coronavirus-pandemic-for-environmental-governance.html](https://lawprofessors.typepad.com/environmental_law/2020/06/lessons-from-the-coronavirus-pandemic-for-environmental-governance.html) [<https://perma.cc/XR8X-3CFV>].

<sup>6</sup> See Todd Sandler, *Collective Action: Fifty Years Later*, 164 PUB. CHOICE 195, 196 (2015) (defining "collective action" as a situation ". . . when the efforts of two or more individuals or agents (e.g. countries) are required to accomplish an outcome.").

<sup>7</sup> Ryan, *supra* note 5.

national in scope.<sup>8</sup> This contributed to a patchwork of policies across the nation;<sup>9</sup> less efficient allocation and use of scarce healthcare resources;<sup>10</sup> and frequent spikes in Covid-19 cases as regional outbreaks spread to states which had previously contained the disease's spread.<sup>11</sup>

One can easily imagine a very different scenario with a very different outcome. The Federal Government provides a strong, centralized response to a national problem, but also partners with the states and allows them to tailor their responses as needed. This policymaking approach preserves the balance of federal-state power, but leads to more consistent and efficient outcomes. States can presumably respond to unique local issues stemming from the larger national problem more efficiently than the Federal Government. The Federal Government, in turn, can distribute resources more efficiently and ensure a level of consistency across state policies.

How the Federal Government and the states respond to climate change is unlikely to fit cleanly into either of the paradigms described above. Ideally, the latter approach would predominate, but states should be prepared for it to be the exception, not the rule. Covid-19 and its aftereffects have shown that while states should not have to act without the Federal Government, alternative means of making policy in the face of a collective action problem are available to them when the Federal Government becomes an unreliable policymaking partner.

This Note will argue that diagonal federalism—a model of governance in which states partner with one another and local governments to pursue shared policy goals—is an ideal response to inconsistent climate change mitigation policy by the Federal Government. Part I provides an overview of the foundations of American environmental policy, how that policy is predicated on federal-state partnership, and the historical precedent for state-led action on climate change mitigation policy. Part II discusses how and why federal environmental policy, and by extension, federal climate change mitigation policy, has been so inconsistent. Part III illustrates how collaboration between the Federal Government and the states

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<sup>8</sup> *Id.*

<sup>9</sup> Ellen Barry, *It's Totally Ad Hoc: Why America's Virus Response Looks Like a Patchwork*, N.Y. TIMES (Mar. 15, 2020), <https://www.nytimes.com/2020/03/15/us/united-states-corona-virus-response.html> [<https://perma.cc/PC7C-EJSX>].

<sup>10</sup> *Id.*

<sup>11</sup> Manny Fernandez & Mitch Smith, *As Virus Hits Rural U.S., Numbers May Be Small, but the Impact Is Not*, N.Y. TIMES (Oct. 20, 2020), <https://www.nytimes.com/live/2020/10/14/world/covid-coronavirus> [<https://perma.cc/5QNA-4H4S>].

is possible but remains rare with respect to climate change mitigation policy. Part IV proposes diagonal federalism as an alternative course of action for states in lieu of cooperation with the Federal Government. While there are important legal and practical limitations to this approach, it remains the most viable alternative to states as they grapple with an unreliable partner in the Federal Government.

I. FEDERALISM AS A VEHICLE FOR CLIMATE CHANGE MITIGATION POLICY

A. *American Environmental Policy Is Rooted in Cooperative Federalism*

For most of American history, the states have been responsible for their own environmental policy.<sup>12</sup> It was not until the amended Clean Air Act (“CAA”) and the Clean Water Act (“CWA”) were passed in the 1970s that the Federal Government began to play a larger role.<sup>13</sup> These landmark statutes form the basis of modern American environmental policy, and they were crafted with the intention of federal and state governments acting as partners.<sup>14</sup> Under this cooperative federalism model, the Federal Government is empowered to set overall policy goals through regulations, and states are tasked with their implementation and enforcement.<sup>15</sup>

Congress’s motivation in using cooperative federalism as a guiding principle when drafting the CAA and CWA was rooted in concerns that the regulatory task was simply too large for the Federal Government alone to manage and that if states were completely preempted, federal resources would be overwhelmed.<sup>16</sup> Scholars have argued that Congress was simply shifting blame to the states for a sensitive issue.<sup>17</sup> Others

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<sup>12</sup> Gabriel Pacyniak, *Making the Most of Cooperative Federalism: What the Clean Power Plan has Already Achieved*, 29 GEO. INT’L ENV’T L. REV. 301, 313 (2017).

<sup>13</sup> Adam Isen et al., *Every Breath You Take—Every Dollar You’ll Make: The Long-Term Consequences of the Clean Air Act of 1970*, 125 J. POL. ECON. 848, 855–56 (2017); Josh Epperly et al., *Relationships between Borders, Management Agencies, and the Likelihood of Watershed Impairment*, 13 PLOS ONE 1, 1–2 (2018).

<sup>14</sup> Pacyniak, *supra* note 12, at 313.

<sup>15</sup> *Id.*

<sup>16</sup> John P. Dwyer, *The Practice of Federalism Under the Clean Air Act*, 54 MD. L. REV. 1183, 1192 (1993).

<sup>17</sup> *Id.*; Jonathan R. Macey, *Federal Deference to Local Regulators and the Economic Theory of Regulation: Toward a Public-Choice Explanation of Federalism*, 76 VA. L. REV. 265, 275 (1990).

have suggested, less cynically, that the rationale was to prevent a race to the bottom by states seeking to attract industry with more lax environmental policies.<sup>18</sup>

This regulatory scheme has been criticized by proponents of a more centralized policymaking model, especially in recent years.<sup>19</sup> Arguments for the latter are, on their face, attractively simple and powerful.<sup>20</sup> Climate change specifically, and the environment generally, are issues too large for any one state to address.<sup>21</sup> Furthermore, even partial regulation by an individual state risks more lax jurisdictions free riding on the former's regulatory benefits.<sup>22</sup> That laxity, in turn, could contribute to overall pollution increases.<sup>23</sup> In short, the size of the regulator should be comparable to that of the problem.<sup>24</sup> Thus, a top-down approach to climate change mitigation policy would be ideal.<sup>25</sup>

Advocates for a strong state role in American climate change mitigation policy, conversely, point out that the very size of the problem requires a more nuanced policy solution.<sup>26</sup> Climate change is far from one dimensional—its effects are diverse and varied from region to region.<sup>27</sup> As such, unique local consequences will inevitably arise—whether they be economic, environmental, or both.<sup>28</sup> A top-down approach would deprive states of the flexibility needed to address such problems.<sup>29</sup>

State-led policy initiatives may be more likely to encourage bottom-up participation by affected constituencies in ways a federal, top-down

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<sup>18</sup> Richard L. Revesz, *Rehabilitating Interstate Competition: Rethinking the "Race-to-the-Bottom" Rationale for Federal Environmental Regulation*, 67 N.Y.U. L. REV. 1210, 1226 (1992).

<sup>19</sup> See Michael S. Greve, *Against Cooperative Federalism*, 70 MISS. L. J. 557, 584–93 (2000).

<sup>20</sup> William W. Buzbee, *Federalism Hedging, Entrenchment, and the Climate Challenge*, 2017 WIS. L. REV. 1037, 1071.

<sup>21</sup> See *id.* at 1068–69.

<sup>22</sup> *Id.* at 1069.

<sup>23</sup> See Robert N. Stavins, *A Meaningful U.S. Cap-and-Trade System to Address Climate Change*, 32 HARV. ENV'T L. REV. 293, 298–99 (2008).

<sup>24</sup> Buzbee, *supra* note 20, at 1071.

<sup>25</sup> *Id.*

<sup>26</sup> Robert B. McKinstry, Jr. & Thomas D. Peterson, *The Implications of the New "Old" Federalism in Climate-Change Legislation: How to Function in a Global Marketplace When States Take the Lead*, 20 PAC. MCGEORGE GLOBAL BUS. & DEV. L.J. 61, 87–89 (2007).

<sup>27</sup> 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, 798 (2008).

<sup>28</sup> *Id.*

<sup>29</sup> See Shama Gamkhar & J. Mitchell Pickerell, *The State of American Federalism in 2011–2012: A Fend for Yourself and Activist Form of Bottom-Up Federalism*, 42 J. FEDERALISM 357, 368–71 (2012).

policy might not.<sup>30</sup> That engagement can provide policymakers with information critical to more effective responses.<sup>31</sup> Greater state independence allows for greater regulatory innovation.<sup>32</sup> This “laboratories of democracy” argument is particularly strong in the face of new, uncertain public policy challenges such as climate change.<sup>33</sup> Differing approaches could provide regulatory models, good and bad, for other jurisdictions to emulate.<sup>34</sup> Allowing this room for adjustment and experimentation is beneficial in response to a fluid policy problem.<sup>35</sup> It also provides protection against unforeseen negative consequences that may result from a particular policy.<sup>36</sup> If a policy falls short in a top-down regulatory scheme, preempted states are powerless to counteract its negative effects.<sup>37</sup> With greater state power, that risk is significantly reduced.<sup>38</sup>

Despite these diverging arguments for greater state independence versus greater federal control, the overall framework of American environmental policy has not changed substantially since the 1970s. Cooperative federalism remains the backdrop for such policymaking, whether at the federal or state level, and is the context within which American climate change mitigation policy has evolved.

*B. Historical Precedent Supports State-Level Climate Change Mitigation Policy*

Contrary to what critics of American environmental federalism have alleged, the scale of climate change as a problem has not deterred states from taking action independent of the Federal Government.<sup>39</sup> This has, of course, been enabled by the federal-state partnership envisioned

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<sup>30</sup> McKinstry & Peterson, *supra* note 26, at 87.

<sup>31</sup> *Id.*

<sup>32</sup> See William W. Buzbee, *Asymmetrical Regulation: Risk, Preemption, and the Floor/Ceiling Distinction*, 82 N.Y.U. L. REV. 1547, 1619 (2007); Kristen H. Engel, *Harnessing the Benefits of Dynamic Federalism in Environmental Law*, 56 EMORY L.J. 159, 182 (2006).

<sup>33</sup> Buzbee, *supra* note 32, at 1619.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> Henry N. Butler & Jonathan R. Macey, *Externalities and the Matching Principle: The Case for Reallocating Environmental Regulatory Authority*, 14 YALE L. & POL'Y REV. 23, 51–53 (1996).

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> Pacyniak, *supra* note 12, at 316.

by the drafters of the CAA and CWA.<sup>40</sup> It must be acknowledged that this system has led to inconsistent environmental policies among the states, with some taking a more proactive approach to climate change and others a more passive stance.<sup>41</sup> That said, the consistency with which states have taken the lead on climate change policy far exceeds what the drafters of the CAA and CWA anticipated.<sup>42</sup>

This state-led action has included widespread adoption of renewable energy and efficiency mandates; development and implementation of greenhouse gas vehicle standards by over a dozen states, most notably California; adoption of the regional Greenhouse Gas Initiative cap-and-trade program for power plants by nine states in the northeast and mid-Atlantic; and a similar cap-and-trade program implemented by California.<sup>43</sup> States have also created renewable portfolio standards, tax credits, deductions, and subsidies to reduce greenhouse gas emissions and achieve co-benefits such as reduced climate change-related health risks and market presence in the green economy.<sup>44</sup>

Superficially, these policies could be explained away as state government officials responding to the policy preferences of their electorates or, alternatively, a desire to protect economic development from the effects of climate change to better compete with other states.<sup>45</sup> Cooperative federalism, however, has played an important role as well.<sup>46</sup> California's greenhouse gas vehicle standards and the Regional Greenhouse Gas Initiative, for instance, initially resulted from interactions between the Federal Government and those states.<sup>47</sup>

The Federal Government has contributed to these state-led policies by indirect means.<sup>48</sup> The Bush administration, particularly toward the end of its tenure, resisted taking any action to mitigate climate change.<sup>49</sup>

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<sup>40</sup> See Dwyer, *supra* note 16, at 1192.

<sup>41</sup> U.S. EPA, OFF. INSPECTOR GEN., REP. NO. 12-P-0113, EPA MUST IMPROVE OVERSIGHT OF STATE ENFORCEMENT (2011); Nicholas L. Fowler, States and Federal Environmental Policy: A Hierarchical Linear Model of CAA and CWA Implementation (May 2013) (Ph.D. dissertation, Mississippi State University) (ProQuest).

<sup>42</sup> See Dwyer, *supra* note 16, at 1192.

<sup>43</sup> Pacyniak, *supra* note 12, at 316.

<sup>44</sup> Buzbee, *supra* note 20, at 1072.

<sup>45</sup> Pacyniak, *supra* note 12, at 316; see discussion *infra* Section II.A.

<sup>46</sup> See Barry G. Rabe et al., *State Competition as a Source Driving Climate Change Mitigation*, 14 N.Y.U. ENV'T J.L. 1, 18–41 (2005).

<sup>47</sup> Ann E. Carlson, *Iterative Federalism and Climate Change*, 103 NW. L. REV. 1097, 1099–100 (2009).

<sup>48</sup> See *id.*

<sup>49</sup> Buzbee, *supra* note 20, at 1071; see discussion *infra* Part II.

While tensions emerged between the White House and agency officials, notably when Center for Disease Control (“CDC”) language acknowledging the impact of climate change on human health was deleted from an official report, federal inaction was the result.<sup>50</sup>

This federal inaction led to the state actions described above, among other policy initiatives.<sup>51</sup> While it is true that some of those initiatives were informed by federal-state engagement, states themselves took action in the absence of stronger federal leadership on climate change mitigation policy.

States have not limited themselves to policy initiatives in the face of federal inaction; they have also pursued legal action against the Federal Government to further their own policy goals.<sup>52</sup> *Massachusetts v. EPA* is notable because it set in motion several climate change-related Environmental Protection Agency (“EPA”) regulatory actions which were consistent with Massachusetts’s own policies.<sup>53</sup> As a result of the litigation, the EPA instituted limits on future auto emissions and issued the “Tailoring Rule,”<sup>54</sup> which sought to regulate existing stationary sources of greenhouse gas emissions.<sup>55</sup>

The historical trend of state-led action on climate change mitigation policy shows the extent to which states, not the Federal Government, have frequently taken the lead in responding to a pressing collective action problem. States have thus shown that while they have not always acted consistently with the cooperative federalism framework established by the CAA and CWA, effective policymaking is possible in the absence of federal action, even within the boundaries of that framework. And, despite the contrary expectations of academics and policymakers alike, state-led climate change mitigation has been effective, if limited in scope. While a consistently engaged Federal Government would enhance the reach of these policies, it is notable what states have already achieved

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<sup>50</sup> Buzbee, *supra* note 20, at 1072; see discussion *infra* Sections II.A, III.A.

<sup>51</sup> Hillary Rosner, *How State and Local Governments Are Leading the Way on Climate Policy*, AUDUBON (Fall 2019), <https://www.audubon.org/magazine/fall-2019/how-state-and-local-governments-are-leading-way> [<https://perma.cc/S9K3-CE9K>]; Nieves et al., *States Are Doing What Big Government Won't Stop Climate Change, and Want Stimulus Funds to Help*, INSIDE CLIMATE NEWS (Sept. 9, 2020), <https://insideclimatenews.org/news/09092020/states-rural-government-coronavirus-stimulus-climate-change/> [<https://perma.cc/W3KB-GVLW>].

<sup>52</sup> Buzbee, *supra* note 20, at 1073; see generally *Massachusetts v. EPA*, 549 U.S. 497 (2007).

<sup>53</sup> Buzbee, *supra* note 20, at 1074; see discussion *infra* Section II.B.

<sup>54</sup> Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. 31514-01 (June 6, 2010).

<sup>55</sup> Buzbee, *supra* note 20, at 1075; but see *Utility Air Regulatory Group v. EPA*, 573 U.S. 302, 332–34 (2014) (The “Tailoring Rule” was later overturned.).

without substantial federal engagement. This background is important context within which diagonal federalism and climate change mitigation policy must be considered.

## II. INCONSISTENT FEDERAL ACTION

### A. *Federal Policy Influenced by Political Priorities*

Federal environmental policy, and, by extension, federal climate change mitigation policy, is complex, challenging to enact, and difficult to implement.<sup>56</sup> Some of that difficulty and complexity results from structural hurdles which must be overcome (as addressed further in subheading B), but American politics is perhaps the most salient contributing factor.<sup>57</sup>

As an electorate, Americans have historically been skeptical of federal environmental legislation and regulation.<sup>58</sup> As noted above, the Federal Government has traditionally been a minor player with respect to environmental policy.<sup>59</sup> Even since the passage of the CAA and CWA, the Federal Government has vacillated between playing an active role in environmental policy and adopting a more passive stance.<sup>60</sup> Furthermore, an active Federal Government has not always translated to the advancement of climate change mitigation.<sup>61</sup> At times, federal policy has been hostile even to state efforts to curb climate change.<sup>62</sup>

Resistance to climate change mitigation policies is particularly strong within the Republican Party, both among its voters and elected officials.<sup>63</sup> Since the 1980s and 1990s, the Republican Party has become more ideologically homogenous and coalesced around cultural issues that animate its base voters—voters who skew more conservative in their

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<sup>56</sup> Suriya Evans-Pritchard Jayanti, *Learning from the Leader: The European Union's Renewable Energy Mandates as a Blueprint for American Environmental Federalism*, 65 RUTGERS L. REV. 173, 183 (2012).

<sup>57</sup> *Id.* at 183–84.

<sup>58</sup> *Id.*

<sup>59</sup> See discussion *supra* Section I.A.

<sup>60</sup> Benjamin Sovacool, *The Best of Both Worlds: Environmental Federalism and the Need for Federal Action on Renewable Energy and Climate Change*, 27 STAN. ENV'T L.J. 397, 410–15 (2008).

<sup>61</sup> *Id.* at 415–17; James R. May, *Climate Change, Constitutional Consignment, and the Political Question Doctrine*, 85 DENV. L. REV. 919, 926–28 (2008).

<sup>62</sup> *Id.*

<sup>63</sup> Aaron M. McCright et al., *Increasing Influence of Party Identification on Perceived Scientific Agreement and Support for Government Action on Climate Change in the United States, 2006–12*, 6 WEATHER, CLIMATE & SOC'Y 194, 194 (2014).

political preferences.<sup>64</sup> Republicans generally view climate change with skepticism, often doubting scientific evidence that climate change is even happening.<sup>65</sup> Democrats, conversely, are more likely to trust that evidence.<sup>66</sup> Government actions that would address climate change, then, are frequently viewed by Republicans as vehicles for the Democratic Party's—or even socialist's—public policy preferences to be enacted.<sup>67</sup>

Consequently, climate change denial has become one of many litmus tests Republican candidates must often pass in order to win competitive primary elections.<sup>68</sup> As a result, Republican base voters have become over-represented among elected Republican officials.<sup>69</sup> At the same time, more moderate Republican voters and elected officials who might support policies that address climate change have become increasingly sidelined within their party.<sup>70</sup> Conservative Republican officials have cast climate change mitigation policies as a means for Democrats to curtail individual liberty and freedom.<sup>71</sup> Within this framework, climate change mitigation becomes a cultural issue to be fought, rather than a public policy challenge to be solved.<sup>72</sup>

That ideology renders federal intrusion into what is traditionally a state prerogative unpalatable at best to many political leaders.<sup>73</sup> And federal environmental regulation is simply antithetical to many similarly aligned interest groups and their representatives in Washington.<sup>74</sup>

This certainly explains efforts by the Republican Party to roll back the Federal Government's role in making climate change mitigation policy. In 1995, a Republican Congress passed the Unfunded Mandates Reform Act (“the Act”), which made it more difficult for the Federal Government to impose mandates on the states.<sup>75</sup> The Act required more detailed cost estimates for such mandates, which made it easier for their opponents

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<sup>64</sup> Jean-Daniel Collomb, *The Ideology of Climate Change Denial in the United States*, 9 EUR. J. AM. STUD. 1, 5–6 (2014).

<sup>65</sup> W.J. Wouter Botzen et al., *Political Affiliation Affects Adaptation to Climate Risks: Evidence from New York City*, 138 CLIMATIC CHANGE 353, 356–57 (2016); Collomb, *supra* note 64, at 5–6.

<sup>66</sup> Botzen et al., *supra* note 65, at 356–57.

<sup>67</sup> Collomb, *supra* note 64, at 6.

<sup>68</sup> McCright et al., *supra* note 63, at 194; Collomb, *supra* note 64, at 7.

<sup>69</sup> McCright et al., *supra* note 63, at 195.

<sup>70</sup> *Id.* at 194.

<sup>71</sup> Collomb, *supra* note 64, at 6.

<sup>72</sup> *Id.*

<sup>73</sup> Jayanti, *supra* note 56, at 184.

<sup>74</sup> *Id.*

<sup>75</sup> Sovacool, *supra* note 60, at 414; 2 U.S.C. §§ 1501–71 (1995).

to overturn or simply defund them through the legislative process.<sup>76</sup> Federal agencies under the Bush administration avoided creating new regulations on greenhouse gases (“GHG”), despite statutory authority to do so under the CAA.<sup>77</sup> In 2007, the EPA went so far as to deny a petition from California to regulate GHG emissions from new automobiles.<sup>78</sup>

More recently, the Trump administration adopted an even more conservative stance toward climate change mitigation.<sup>79</sup> During President Trump’s tenure, the Federal Government withdrew from the Paris Climate Accord;<sup>80</sup> dramatically expanded natural gas and oil drilling in American waters, national forests, and national monuments;<sup>81</sup> loosened vehicle emissions standards against the preferences of major automobile manufacturers;<sup>82</sup> and repealed the Clean Water Rule,<sup>83</sup> among other major climate change-related policy changes.

Additionally, the politics of climate change mitigation are unusual in that they involve a collective action problem, unlike many public policy issues.<sup>84</sup> So however attractive it may be to conclude that political ideology alone informs policymakers’ response to climate change, it is likely

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<sup>76</sup> Sovacool, *supra* note 60, at 414.

<sup>77</sup> May, *supra* note 61, at 927.

<sup>78</sup> *Id.* at 927–28.

<sup>79</sup> See Cayli Baker, *The Trump Administration’s Major Environmental Deregulations*, BROOKINGS: UP FRONT (Dec. 15, 2020), <https://www.brookings.edu/blog/up-front/2020/12/15/the-trump-administrations-major-environmental-deregulations/> [<https://perma.cc/M3QN-PUNH>].

<sup>80</sup> Lisa Friedman, *Trump Serves Notice to Quit Paris Climate Agreement*, N.Y. TIMES (Feb. 19, 2021), <https://www.nytimes.com/2019/11/04/climate/trump-paris-agreement-climate.html> [<https://perma.cc/ZQ4X-UFGL>].

<sup>81</sup> Nadja Popovich et al., *The Trump Administration Rolled Back More than 100 Environmental Rules. Here’s the Full List*, N.Y. TIMES (Jan. 20, 2021), <https://www.nytimes.com/interactive/2020/climate/trump-environment-rollbacks-list.html> [<https://perma.cc/7MZA-NZXJ>].

<sup>82</sup> Nathan Rott & Jennifer Ludden, *Trump Administration Weakens Auto Emissions Standards*, NPR (Mar. 31, 2020, 12:22 PM), <https://www.npr.org/2020/03/31/824431240/trump-administration-weakens-auto-emissions-rolling-back-key-climate-policy> [<https://perma.cc/GC5M-WMZS>]; Coral Davenport & Hiroko Tabuchi, *Automakers, Rejecting Trump Pollution Rule, Strike a Deal with California*, N.Y. TIMES (July 25, 2019), <https://www.nytimes.com/2019/07/25/climate/automakers-rejecting-trump-pollution-rule-strike-a-deal-with-california.html> [<https://perma.cc/6FEX-REUX>].

<sup>83</sup> Lisa Friedman & Coral Davenport, *Trump Administration Rolls Back Clean Water Protections*, N.Y. TIMES (Sept. 19, 2019), <https://www.nytimes.com/2019/09/12/climate/trump-administration-rolls-back-clean-water-protections.html> [<https://perma.cc/HK4R-S6XN>].

<sup>84</sup> Jayanti, *supra* note 56, at 183; see Sandler, *supra* note 6, at 196 (defining “collective action” as a situation “. . . when the efforts of two or more individuals or agents (e.g.—countries) are required to accomplish an outcome.”).

that the nature of the problem itself *reinforces* the political ideology used to justify federal policy.<sup>85</sup>

For an individual, the tangible effects of climate change may not always comport with its perceived causes.<sup>86</sup> One may understand intellectually that GHG emissions from automobiles contribute to climate change but see little impact on daily life as a result. This contributes to a cognitive dissonance that buttresses a long-prevailing American political ideology that the Federal Government need not prescribe policy solutions to a problem when those solutions appear disproportionate in relation to that problem.<sup>87</sup> The average voter may simply be unwilling to accept higher automobile prices that result from more onerous federal GHG regulations if the impact of higher emissions does not manifest in that voter's daily life.<sup>88</sup>

Americans' political preferences may be a major contributing factor to federal climate change mitigation policy, but it would be reductive to treat those preferences as dispositive. A prevailing national political ideology which favors less federal climate change regulation and legislation plays an important role, to be sure; but the logic of that ideology is strengthened by the nature of climate change itself as a collective action problem. It is plausible, then, that absent the cognitive dissonance between the causes and effects of climate change that the national politics of climate change mitigation policy could shift in favor of a larger role for the Federal Government.

### *B. Institutional Barriers to Creating Federal Environmental Policy*

In addition to politics, the structure of the Federal Government itself substantially handicaps the process of making national environmental policy.<sup>89</sup> Legislation, the basis for federal policymaking, is difficult to

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<sup>85</sup> Jayanti, *supra* note 56, at 183.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> See Jedediah Purdy, *The Politics of Nature: Climate Change, Environmental Law, and Democracy*, 119 *YALE L.J.* 1122, 1135 (2010); Lee Ross et al., *The Climate Change Challenge and Barriers to the Exercise of Foresight Intelligence*, 66 *BIO SCIENCE* 363, 364–65 (2016); Nsikan Akpan, *How Your Brain Stops You from Taking Climate Change Seriously*, PBS (Jan. 7, 2019, 12:50 PM), <https://www.pbs.org/newshour/science/how-your-brain-stops-you-from-taking-climate-change-seriously> [<https://perma.cc/5ZD5-WWL2>].

<sup>89</sup> See Aziz Huq, *Does the Logic of Collective Action Explain Federalism Doctrine?*, 66 *STAN. L. REV.* 217, 266 (2014).

pass into law.<sup>90</sup> Starting in committees, which are the source of most proposed legislation, bills must first survive a vote to be sent to the floor of the House of Representatives or the Senate.<sup>91</sup> In the Senate, legislative filibusters often derail bills.<sup>92</sup> Senators can also place indefinite holds on a bill which functionally impose a unanimity rule before any proposed legislation can receive a floor vote.<sup>93</sup> Even if a bill passes both chambers, a president of a different party than the controlling majority in Congress—or one simply opposed to the bill for political or policy reasons—can issue a veto.<sup>94</sup> Congress can override that veto, but only by a two-thirds majority of each chamber.<sup>95</sup>

The result is that, in practice, the federal legislative process often fails to generate law, even when law is wanted or needed by a majority of the nation.<sup>96</sup> The CAA, for instance, has not been updated since 1990.<sup>97</sup> The 1990 CAA followed a series of environmental laws passed in the 1970s and 1980s and introduced a market-based approach to regulating emissions—cap-and-trade—to the federal regulatory process.<sup>98</sup> This law has inspired subsequent attempts at legislative reforms, notably in the early years of the Obama administration, but without success in large part because of the structural minefield through which proposed laws must pass.<sup>99</sup>

At the administrative level, federal agencies—in particular the EPA—have significant delegated power from Congress in shaping natural, environmental and climate change mitigation policy.<sup>100</sup> The regulatory law these agencies make is binding; however, the power to make such law is neither unlimited nor invulnerable to court challenges.<sup>101</sup>

This delegation produces inconsistent results, usually depending on the political priorities of the administration in power.<sup>102</sup> Under the Bush

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<sup>90</sup> *Id.*

<sup>91</sup> Huq, *supra* note 89, at 266; see Barbara Sinclair, *The Role of Committees in Agenda Setting in the U.S. Congress*, 11 LEGIS. STUD. Q. 35, 37 (1986).

<sup>92</sup> SARAH A. BINDER & STEVEN S. SMITH, POLITICS OR PRINCIPLE? FILIBUSTERING IN THE UNITED STATES SENATE 9–13 (1997).

<sup>93</sup> *Id.* at 11–12.

<sup>94</sup> Huq, *supra* note 89, at 266.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* at 267.

<sup>97</sup> Sovacool, *supra* note 60, at 413.

<sup>98</sup> *Id.*

<sup>99</sup> Buzbee, *supra* note 20, at 1075–76.

<sup>100</sup> Jayanti, *supra* note 56, at 191–92.

<sup>101</sup> *Id.* at 191.

<sup>102</sup> See generally Richard L. Revesz, *Poisoning America: The Trump Administration's Regulatory Shell Game*, 29 N.Y.U. ENV'T L.J. 471 (2021).

administration, the EPA was generally passive in its approach to GHG regulation.<sup>103</sup> This passivity was a significant driver behind Massachusetts's decision to sue the agency in *Massachusetts v. EPA*, which resulted in the Supreme Court ordering the EPA to regulate GHGs as pollutants.<sup>104</sup> Under the Bush administration, the EPA was also resistant to state measures meant to address climate change, such as the aforementioned denial of California's petition to regulate GHGs from new automobiles.<sup>105</sup>

Under the Obama administration, the EPA pursued an ambitious regulatory agenda known as the Clean Power Plan ("CPP") after failing to pass a comprehensive climate change bill through Congress.<sup>106</sup> The CPP was notable in that it would have intertwined federal regulation with state and utility innovations.<sup>107</sup> The goal of such an apparently contradictory approach was to encourage more regulators and businesses to participate and, in so doing, create a web of relationships that would incentivize climate change mitigation policies.<sup>108</sup> The CPP was met with pointed challenges that it was an unconstitutional power grab that infringed on the role of state regulators.<sup>109</sup> The finalized rule itself was stayed by the Supreme Court.<sup>110</sup>

Delegated authority from Congress allows federal agencies to act with more speed (and perhaps agility) than the federal legislative process.<sup>111</sup> Yet the confluence of competing political ideologies within this structural feature of federal environmental policymaking contributes to seesawing policies across administrations.<sup>112</sup>

Constitutional and judicial barriers can also impede or limit federal environmental policy. The Constitution itself does not explicitly grant any branch of the Federal Government power to create or enforce environmental law.<sup>113</sup> Such statutes have been upheld by the Supreme

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<sup>103</sup> May, *supra* note 61, at 927.

<sup>104</sup> *Massachusetts v. EPA*, 549 U.S. 497, 505 (2007).

<sup>105</sup> May, *supra* note 61, at 927–28; *see* discussion *supra* Section II.A.

<sup>106</sup> Buzbee, *supra* note 20, at 1078.

<sup>107</sup> *Id.* at 1080.

<sup>108</sup> *Id.* at 1080–81.

<sup>109</sup> *Id.* at 1081.

<sup>110</sup> *Id.*

<sup>111</sup> *See* CHARLES H. KOCH & RICHARD MURPHY, *ADMINISTRATIVE LAW AND PRACTICE* § 11:13 (3d ed. 2021).

<sup>112</sup> *See* J.R. DeShazo & Jody Freeman, *The Congressional Competition to Control Delegated Power*, 81 TEX. L. REV. 1443, 1454–55 (2003).

<sup>113</sup> *See* Elaine Bueschen, *Do Isolated Wetlands Substantially Affect Interstate Commerce?*, 46 AM. U. L. REV. 931, 935 (1997) (the CWA was enacted pursuant to Commerce Clause authority); U.S. CONST. art 1, § 8, cl. 3.

Court, however, as valid exercises of Congress's commerce and spending powers,<sup>114</sup> but that authority is not absolute.<sup>115</sup> The scope and power of many federal environmental statutes have been whittled away by numerous court challenges, usually in instances where Congress has crossed the line from encouraging to compelling state behavior.<sup>116</sup>

Finally, any federal environmental regulation cannot be the result of an impermissible delegation from Congress to a regulatory agency.<sup>117</sup> As discussed above, delegation of authority is an important part of federal policymaking, but taken too far, it can result in the invalidation of a regulation.<sup>118</sup> Under this Nondelegation Doctrine, Congress may delegate to an agency such that the agency is empowered to determine how a law will be implemented, but it must also provide that agency with an "intelligible principle" which constrains the agency's actions.<sup>119</sup> Congress cannot avoid a difficult decision by giving an agency power to decide what will inform its regulatory goals, it must provide that guidance through a statute.<sup>120</sup> Generally, nondelegation is seldom an impediment to federal environmental laws when they are challenged in court.<sup>121</sup> That said, the broader the language of a law, the greater the chance it will be struck down partially or entirely.<sup>122</sup>

In tandem, the political and structural barriers to creating federal environmental policy described above, present formidable challenges to a consistent national climate change mitigation policy. Many of the structural obstacles are inherent to a federal system of government, while the political impediments are somewhat more fluid in nature. Their confluence in the face of climate change has hobbled the Federal Government's ability to respond to what is perhaps the most pressing collective action problem of our time.

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<sup>114</sup> Jayanti, *supra* note 56, at 188–89.

<sup>115</sup> See *United States v. Morrison*, 529 U.S. 598, 608 (2000).

<sup>116</sup> See generally *Solid Waste Agency v. Army Corps of Engrs.*, 531 U.S. 159 (2001) (invalidating the Migratory Bird Rule, promulgated under the CWA, for extending Army Corps Jurisdiction to intrastate waters); *Burlington N. & Santa Fe R. Co. v. United States*, 556 U.S. 599 (2009) (narrowing the scope of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA)); *EPA v. Brown*, 431 U.S. 99 (1977) (case remanded as moot when the EPA conceded the scope of the regulation at issue needed to be narrowed); see also *New York v. United States*, 505 U.S. 144, 174 (1992) (Congress may encourage but not coerce state behavior).

<sup>117</sup> Cass R. Sunstein, *Is the Clean Air Act Unconstitutional?*, 98 MICH. L. REV. 303, 330 (1999).

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*; *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928).

<sup>120</sup> Jayanti, *supra* note 56, at 192.

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

### III. FEDERAL-STATE COLLABORATION

#### A. *Federal-State Collaboration Is the Exception, Not the Rule, in American Climate Change Mitigation Policy*

Beginning in the 1970s, the Federal Government asserted a larger role in American environmental policy with the enactment of the CAA and CWA.<sup>123</sup> In addition, a number of similar statutes entered into force in the 1970s.<sup>124</sup> Together, these form the basic framework of modern American environmental—and by extension—climate change mitigation policy.<sup>125</sup> Under this policymaking model, the Federal Government sets general policy goals and parameters, but delegates substantial enforcement and implementation powers to the states.<sup>126</sup> That framework presumes the Federal Government and the states will act as partners in pursuing shared public policy challenges.<sup>127</sup> Indeed, its success arguably depends upon such collaboration.<sup>128</sup> The historical trend, however, is one of federal disengagement from, and even hostility toward, the states with respect to climate change mitigation policy.

Following the creation of this statutory framework the Federal Government began to retrench from collaboration with the states.<sup>129</sup> Congress has not passed landmark environmental or climate change mitigation legislation since the passage of the CAA of 1990,<sup>130</sup> which amended the original CAA to include cap and trade provisions.<sup>131</sup> Federal policymaking with respect to climate change mitigation since 1990 has occurred almost exclusively through administrative rule-making.

Concurrently, skepticism of climate change and resistance to mitigation policies began to grow within the Republican Party around this time.<sup>132</sup> This contributed to the emergence of a prevailing plurality (if not a majority) within the American electorate that disfavors climate change mitigation policies at the federal level.<sup>133</sup> It is within this context that successive administrations have addressed climate change.

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<sup>123</sup> See discussion *supra* Section I.A.

<sup>124</sup> Sovacool, *supra* note 60, at 412.

<sup>125</sup> *Id.*

<sup>126</sup> See discussion *supra* Section I.A.

<sup>127</sup> See discussion *supra* Section I.A.

<sup>128</sup> See discussion *supra* Section I.A.

<sup>129</sup> Sovacool, *supra* note 60, at 413–15.

<sup>130</sup> *Id.* at 413.

<sup>131</sup> *Id.*

<sup>132</sup> See discussion *supra* Section II.A.

<sup>133</sup> See discussion *supra* Section II.A.

The Clinton administration did enact more stringent air pollution regulations than its predecessors.<sup>134</sup> These limited emissions from power plants, and promoted cleaner, more efficient cars and alternative fuels.<sup>135</sup> Yet for most of its tenure, the Clinton administration had to contend with a Republican Congress opposed to much of its agenda.<sup>136</sup> As noted above, Congress passed the Unfunded Mandates Act of 1995.<sup>137</sup> This limited the Federal Government's ability to impose mandates on the states without also providing funding for those mandates.<sup>138</sup> With Congress also controlling the appropriation of federal funds, the Clinton administration's ability to address climate change was curtailed.<sup>139</sup>

The Bush administration accelerated the trend of federal retrenchment from climate change mitigation policy.<sup>140</sup> With unified Republican control of the Federal Government, there was potential at the outset of President Bush's term for more collaborative climate change mitigation policy between the Federal Government and the states.<sup>141</sup> Two statutes that promised such collaboration, the 2002 Small Business Liability and Revitalization Act<sup>142</sup> and the 2003 Healthy Forests Restoration Act,<sup>143</sup> were both enacted during President Bush's first term. The former was meant to engage state and local governments in the cleanup and redevelopment of Superfund sites. The latter was intended to offer state and local officials greater authority over land-use decisions to prevent wildfires.<sup>144</sup> Both of these initiatives failed, however, because of subsequent substantial cuts in federal funding.<sup>145</sup>

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<sup>134</sup> John H. Cushman, Jr., *Clinton Sharply Tightens Air Pollution Regulations Despite Concern Over Costs*, N.Y. TIMES (June 26, 1997), <https://www.nytimes.com/1997/06/26/us/clinton-sharply-tightens-air-pollution-regulations-despite-concern-over-costs.html> [<https://perma.cc/TF7W-EA4B>]; *The Clinton Administration's Clean Air Accomplishments*, THE WHITE HOUSE (Dec. 21, 1999), <https://clintonwhitehouse4.archives.gov/CEQ/clean.html> [<https://perma.cc/H25R-8ZL9>].

<sup>135</sup> See Cushman, *supra* note 134.

<sup>136</sup> See E.J. Dionne, Jr., *Governing in an Age of No Majorities: Bill Clinton's Mission for a Second Term*, BROOKINGS (Dec. 1, 1997), <https://www.brookings.edu/articles/governing-in-an-age-of-no-majorities-bill-clintons-mission-for-a-second-term/> [<https://perma.cc/WVV6-TST2>].

<sup>137</sup> See discussion *supra* Section II.A.

<sup>138</sup> See discussion *supra* Section II.A.

<sup>139</sup> See discussion *supra* Section II.A.

<sup>140</sup> Barry Rabe, *Environmental Policy and the Bush Era: The Collision Between the Administrative Presidency and State Experimentation*, 37 PUBLIUS: J. FEDERALISM 413, 415 (2007).

<sup>141</sup> See *id.*

<sup>142</sup> 42 U.S.C. §§ 9601–75 (2002).

<sup>143</sup> 16 U.S.C. §§ 6501–91 (2003).

<sup>144</sup> Rabe, *supra* note 140, at 416.

<sup>145</sup> *Id.*

The 2005 Energy Policy Act, which the Bush administration strongly supported, constrained state authority over environmental policy.<sup>146</sup> The EPA advanced regulations under this Act which were favorable to the energy industry, ostensibly to promote domestic energy development, but overrode state and local government influence in the process.<sup>147</sup> Also in 2005, Congress passed, with the Bush administration's support, an appropriations bill that prohibited states from duplicating California's more stringent emissions standards for cars and trucks.<sup>148</sup>

The Bush administration's hostility towards the states with respect to climate change mitigation policy contributed to many states pursuing their own climate change mitigation policies.<sup>149</sup> Some states, like Massachusetts, litigated against the Federal Government's inaction and hostility.<sup>150</sup> Many pursued renewable energy initiatives and GHG reduction goals.<sup>151</sup> Others partnered together in regional agreements like the Greenhouse Gas Initiative.<sup>152</sup>

The Obama administration attempted to enact the American Clean Energy and Security Act in 2009, which, if adopted would have been the first major federal legislation to address climate change.<sup>153</sup> The bill was passed by the House of Representatives but failed to overcome a filibuster in the Senate.<sup>154</sup> The administration instead pursued regulatory action to mitigate climate change.<sup>155</sup> These actions, discussed further below, are outliers in the overall trend of federal disengagement from or hostility toward climate change mitigation policy.

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<sup>146</sup> Energy Policy Act of 2005, 42 U.S.C. §§ 15801–16524 (2005).

<sup>147</sup> Rabe, *supra* note 140, at 418.

<sup>148</sup> Engine Coolant and Antifreeze Bittering Agent Act of 2005, S. 1110, 109th Cong. § 25(c)(1) (2005).

<sup>149</sup> Rabe, *supra* note 140, at 422–23.

<sup>150</sup> *See generally* Massachusetts v. EPA, 549 U.S. 497 (2007).

<sup>151</sup> Rabe, *supra* note 140, at 423–25.

<sup>152</sup> *Id.*

<sup>153</sup> John M. Broder, *House Passes Bill to Address Threat of Climate Change*, N.Y. TIMES (June 26, 2009), <https://www.nytimes.com/2009/06/27/us/politics/27climate.html> [<https://perma.cc/MKU6-8S3N>]; American Clean Energy and Security Act of 2009, H.R. 2454, 111th Cong. (2009).

<sup>154</sup> Daniel J. Weiss, *Anatomy of a Senate Climate Bill Death*, CTR. AM. PROGRESS (Oct. 12, 2010, 9:00 AM), <https://www.americanprogress.org/issues/green/news/2010/10/12/8569/anatomy-of-a-senate-climate-bill-death/> [<https://perma.cc/9DP2-HPUM>]; *see also* Ryan Lizza, *As the World Burns*, NEW YORKER (Oct. 11, 2010), <https://www.newyorker.com/magazine/2010/10/11/as-the-world-burns> [<https://perma.cc/9E7R-SNDL>].

<sup>155</sup> *See* David Bookbinder, *Obama Had a Chance to Really Fight Climate Change. He Blew It.*, VOX (Apr. 29, 2017, 7:23 AM), <https://www.vox.com/the-big-idea/2017/4/28/15472508/obama-climate-change-legacy-overrated-clean-power> [<https://perma.cc/F8M5-8KL4>].

The Obama administration pursued higher vehicle fuel efficiency standards and allocated funds to encourage domestic renewable energy production.<sup>156</sup> Most significantly, however, the Obama administration's CPP represented a major shift toward increased federal-state collaboration on climate change mitigation.<sup>157</sup> The CPP was subject to lawsuits almost as soon as it was announced, and the Supreme Court stayed the final rule from going into effect while lower courts adjudicated those cases.<sup>158</sup> The Trump administration took office while the CPP was being litigated in court and attempted to replace the rule.<sup>159</sup> The Obama administration's regulatory actions demonstrate the limits of efforts to further collaboration between the Federal Government and the states to mitigate climate change in the face of significant structural and political obstacles.

The Trump administration, by contrast, continued and amplified the trend of federal disengagement and hostility toward state-level climate change mitigation. The Trump administration attempted to revoke California's waiver from the EPA to set stricter emissions standards than the Federal Government.<sup>160</sup> This proposed rule change prompted California and several other states to sue the administration.<sup>161</sup>

The EPA under the Trump administration also proposed the Affordable Clean Energy rule ("ACE") as a replacement of the CPP.<sup>162</sup> *Massachusetts v. EPA* required the EPA to regulate GHGs, so the EPA

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<sup>156</sup> Press Release, White House, Fact Sheet: The Recovery Act Made the Largest Single Investment in Clean Energy in History, Driving the Deployment of Clean Energy, Promoting Energy Efficiency, and Supporting Manufacturing (Feb. 25, 2016), <https://obamawhitehouse.archives.gov/the-press-office/2016/02/25/fact-sheet-recovery-act-made-largest-single-investment-clean-energy> [<https://perma.cc/HQS8-NE4W>].

<sup>157</sup> See Buzbee, *supra* note 20, at 1080.

<sup>158</sup> Robert Barns & Steven Mufson, *Supreme Court Freezes Obama Plan to Limit Carbon Emissions*, WASH. POST (Feb. 9, 2016), [https://www.washingtonpost.com/politics/courts\\_law/supreme-court-freezes-obama-plan-to-limit-carbon-emissions/2016/02/09/ac9dfad8-cf85-11e5-abc9-ea152f0b9561\\_story.html](https://www.washingtonpost.com/politics/courts_law/supreme-court-freezes-obama-plan-to-limit-carbon-emissions/2016/02/09/ac9dfad8-cf85-11e5-abc9-ea152f0b9561_story.html) [<https://perma.cc/Z6TX-W9G3>].

<sup>159</sup> News Release, EPA, EPA Finalizes Affordable Clean Energy Rule, Ensuring Reliable, Diversified Energy Resources while Protecting our Environment (June 19, 2019) [hereinafter EPA News Release], <https://www.epa.gov/newsreleases/epa-finalizes-affordable-clean-energy-rule-ensuring-reliable-diversified-energy> [<https://perma.cc/D8FJ-PX4K>].

<sup>160</sup> Coral Davenport, *Trump to Revoke California's Authority to Set Stricter Auto Emissions Rules*, N.Y. TIMES (Sept. 20, 2019), <https://www.nytimes.com/2019/09/17/climate/trump-california-emissions-waiver.html> [<https://perma.cc/PNC9-8R35>].

<sup>161</sup> Brady Dennis & Juliet Eilperin, *California and Nearly Two Dozen Other States Sue Trump Administration for the Right to Set Fuel-Efficiency Standards*, WASH. POST (Nov. 15, 2019), <https://www.washingtonpost.com/climate-environment/2019/11/15/california-nearly-two-dozen-other-states-sue-trump-administration-right-require-more-fuel-efficient-cars/> [<https://perma.cc/GW9W-3DKH>].

<sup>162</sup> EPA News Release, *supra* note 159.

could not permissibly shirk this responsibility.<sup>163</sup> ACE, however, only applied to coal-fired power plants, which meant that states were limited in their options if they attempted to reduce carbon emissions from other sources.<sup>164</sup> States would still have some flexibility in implementing ACE, but the EPA indicated that it would not approve of state regulatory plans that were more stringent than ACE itself, unlike the agency's approach to implementing the CPP under the Obama administration.<sup>165</sup> ACE was challenged in court and never entered into force. On January 19, 2021, the Court of Appeals for the DC Circuit overturned the CPP on grounds that it violated the CAA of 1990, leaving the incoming Biden administration an opportunity to rewrite the rule.<sup>166</sup>

As the overview above demonstrates, collaboration between the Federal Government and the states on climate change mitigation is historically rare. The overall trend in recent decades has been one of federal neglect and hostility toward state mitigation efforts. Enacting federal legislation to address climate change has proven daunting, in large part due to Senate filibusters and Republican opposition to such statutory changes.

As a consequence, the federal response to climate change has taken the form of regulatory action. Regulations, by their nature, are less static than statutes and more vulnerable to the ideological differences between administrations. Indeed, the CPP, arguably the best attempt yet at federal-state collaboration to mitigate climate change, was itself stymied by the Trump administration, albeit with only partial success.

This recent history would seem to suggest that states can and should expect a Federal Government that is at best disengaged and at worst hostile toward their own attempts at climate change mitigation. Absent major changes in American politics and institutional structures—particularly Republican climate change denial and the Senate filibuster, respectively, it is likely that federal climate change policy will continue through regulation, not legislation. While states may hope for more collaborative federal rule-making like the CPP in the future, the vulnerability of such regulations to court challenges and changes in presidential administrations severely curtails their longevity and stability.

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<sup>163</sup> See discussion *supra* Section II.B.

<sup>164</sup> John A. Ormiston, Note, *The Clean Power Plan Autopsy: Lessons the Affordable Clean Energy Rule Can Learn from Its Deceased Predecessor*, 98 TEX. L. REV. 791, 798–99 (2020).

<sup>165</sup> *Id.*

<sup>166</sup> Rachel Frazin, *Court Strikes Down Trump Coal Power Plant Rule*, HILL (Jan. 19, 2021, 10:55 AM), <https://thehill.com/policy/energy-environment/534772-court-strikes-down-trump-coal-power-plant-rule> [<https://perma.cc/HKL2-D2L8>].

*B. The Clean Power Plan as a Model for Federal-State Collaboration*

The CPP was the first major federal regulation to address climate change under the EPA's CAA authority.<sup>167</sup> While it never went into effect and is not without flaws, the CPP remains an aspirational model for future federal-state collaboration in climate change mitigation policymaking.

The CPP represented a break from the overall trend in federal environmental policy for several reasons.<sup>168</sup> First, it regulated carbon emissions from existing sources of GHGs as well as future sources.<sup>169</sup> Second, it applied to the electricity industry as a whole, rather than individual sources of carbon emissions.<sup>170</sup> Finally, the CPP was informed by extensive outreach and engagement with affected stakeholders and incorporated their feedback into the final rule.<sup>171</sup> This departs from a traditionally top-down approach to the EPA's rule-making.<sup>172</sup>

The CPP would have set overall reductions in power plant carbon emissions but given states flexibility in meeting those goals.<sup>173</sup> States would have had the choice of meeting these emission reductions by: (1) increasing the efficiency of fossil fuel power plants (primarily coal-fired plants); (2) substituting natural gas-fired power plants for coal-fired plants; and/or (3) maintaining and increasing zero-emission sources of energy.<sup>174</sup>

The CPP is notable for its focus on collaboration between the Federal Government and the states.<sup>175</sup> Many of the CPP's performance standards were drawn directly from similar state policies already in effect.<sup>176</sup> Rather than crafting its standards in a vacuum, the EPA drew on the policy experiences of states that had taken the lead on climate change mitigation policy.<sup>177</sup>

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<sup>167</sup> EPA, OVERVIEW OF THE CLEAN POWER PLAN 1 [hereinafter OVERVIEW OF THE CLEAN POWER PLAN], <https://archive.epa.gov/epa/sites/production/files/2015-08/documents/fs-cpp-overview.pdf> [<https://perma.cc/J3KB-DNHJ>] (last visited Jan. 12, 2022).

<sup>168</sup> Kirsten H. Engel, *EPA's Clean Power Plan: An Emerging New Cooperative Federalism?*, 45 OXFORD U. PRESS 452, 457 (2015).

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

<sup>171</sup> OVERVIEW OF THE CLEAN POWER PLAN, *supra* note 167.

<sup>172</sup> See Buzbee, *supra* note 20, at 1080–81.

<sup>173</sup> Engel, *supra* note 168, at 458.

<sup>174</sup> James B. Bushnell et al., *Strategic Policy Choice in State-Level Regulation: The EPA's Clean Power Plan*, 9 AM. ECON. J.: ECON. POL'Y 57, 60 (2017).

<sup>175</sup> Engel, *supra* note 168, at 465; Pacyniak, *supra* note 12, at 332–34.

<sup>176</sup> Engel, *supra* note 168, at 465.

<sup>177</sup> *Id.*

The CPP's performance standards, furthermore, were tailored to each state individually based on that state's ability to meet the CPP's emission reduction goals.<sup>178</sup> This assumed good faith and best practices on the part of each state in implementing the CPP, and was a stark contrast to more traditional rule-making.<sup>179</sup> This made sure that states would be more likely to actually meet the EPA's emissions reductions goals.<sup>180</sup> By avoiding a more rigid rule, the CPP imposed burdens on the states that reflect their individual ability to implement climate change mitigation policies.<sup>181</sup>

There are many advantages to the CPP's structure. First, it capitalized on existing expertise among the states to mitigate climate change instead of starting from scratch.<sup>182</sup> Second, in giving states flexibility to meet emissions standards, states would have been encouraged to continue innovating.<sup>183</sup> Rather than a blunt mandate, the CPP's nuanced approach to implementation increased the likelihood that it would cultivate a web of relationships between the Federal Government, the states, regulated entities, and consumers.<sup>184</sup> This interconnectedness would presumably create incentives for all parties to work collaboratively toward addressing a collective action problem.<sup>185</sup> More traditional federal environmental regulation, by its top-down nature, did not foster such relationships.<sup>186</sup>

A major downside to the CPP's structure, however, stemmed from its flexibility.<sup>187</sup> In crafting emissions standards for each state based on its ability to actually reduce emissions, some states were given larger reduction goals than others.<sup>188</sup> This would have disproportionately required states that had already invested in renewable energy sources and emissions reduction technologies to do more to reduce their emissions.<sup>189</sup> States that had not made such investments, especially those relying on coal-fired power plants for electricity, by comparison, would have had lower emissions reduction targets.<sup>190</sup>

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<sup>178</sup> *Id.* at 464.

<sup>179</sup> *Id.*

<sup>180</sup> See Buzbee, *supra* note 20, at 1080–81.

<sup>181</sup> *Id.*

<sup>182</sup> Engel, *supra* note 168, at 465.

<sup>183</sup> See Buzbee, *supra* note 20, at 1080–81.

<sup>184</sup> *Id.*

<sup>185</sup> *Id.*

<sup>186</sup> *Id.*

<sup>187</sup> Engel, *supra* note 168, at 466–67.

<sup>188</sup> *Id.*

<sup>189</sup> *Id.*

<sup>190</sup> *Id.*

How successful the CPP would have been is difficult to anticipate with certainty, as it was never implemented. Some empirical evidence, however, suggests that the CPP would have reduced American carbon emissions over the course of the century.<sup>191</sup> The degree to which emissions would be reduced, however, would have been dependent on the nature and consistency of state enforcement of the CPP.<sup>192</sup>

Nevertheless, the CPP remains a model for potential federal-state collaboration in climate change mitigation policymaking. As noted above, it seems unlikely that such collaboration will occur in the future. The success of such federal action would be enhanced if it was legislative in origin, rather than regulatory.<sup>193</sup> Still, state policies to mitigate climate change will be more effective if they take place within a broader federal framework, which is national in scope. Accordingly, states should seek opportunities to collaborate with the Federal Government on climate change mitigation policymaking whenever possible, however unlikely such opportunities may be in practice.

#### IV. DIAGONAL FEDERALISM AS AN ALTERNATIVE TO FEDERAL-STATE COLLABORATION

##### A. *Defining Diagonal Federalism and Its Advantages*

Diagonal federalism derives its theoretical underpinnings from cooperative federalism.<sup>194</sup> Both focus on cooperation between different levels of government, but while cooperative federalism is generally concerned with the relationship between the Federal Government and the states, diagonal federalism emphasizes cooperation between and among the states, municipalities, and the Federal Government.<sup>195</sup> Diagonal federalism, then, is an approach to regulatory governance that blends vertical interactions between different levels of government (e.g., state to municipality) and horizontal interactions across jurisdictions at the same level of government (e.g., state to state, municipality to municipality).<sup>196</sup>

Diagonal federalism is inherent to most public policymaking in the United States, although it is usually characterized more broadly as

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<sup>191</sup> See Bjorn Lomborg, *Impact of Current Climate Proposals*, 7 GLOB. POL'Y 109, 111 (2016).

<sup>192</sup> *Id.*

<sup>193</sup> See discussion *supra* Section III.A.

<sup>194</sup> Hari M. Osofsky, *Diagonal Federalism and Climate Change Implications for the Obama Administration*, 62 ALA. L. REV. 237, 241 (2011).

<sup>195</sup> See *id.*

<sup>196</sup> See *id.*

cooperative federalism.<sup>197</sup> The relationship between the Federal Government and the states demonstrates this dynamic, which incorporates vertical and horizontal elements.<sup>198</sup> Diagonal federalism does happen on smaller scales, often between states and municipalities.<sup>199</sup> State and local governments pursuing joint climate change mitigation policies in recent decades are an example.<sup>200</sup> Such policies can dovetail with complimentary ones that happen at a larger scale, as is the case with states and municipalities conforming to the Paris Climate Accord, even after the Trump administration withdrew from it.<sup>201</sup>

Diagonal federalism has become more prevalent in the United States, particularly with respect to climate change mitigation policy, since the 1990s.<sup>202</sup> As the Federal Government has disengaged and become openly hostile to climate change mitigation, state and local governments have increasingly taken the lead in developing mitigation policies.<sup>203</sup> This trend accelerated markedly during the Trump administration's tenure.<sup>204</sup>

This approach to policy creation has many advantages. In certain ways, horizontal regulatory structures may be particularly effective at making policy.<sup>205</sup> Participating stakeholders, usually various states, benefit from commonalities in governance that allow them to experiment with different policies more efficiently because they can share infrastructure and resources.<sup>206</sup> Yet without some degree of vertical integration with higher levels of government, horizontal policymaking can duplicate efforts in other jurisdictions and cause leakage.<sup>207</sup> The latter in particular can instigate a race to the bottom, where jurisdictions compete to capture the economic and social benefits of especially lax regulations.<sup>208</sup>

Vertical regulatory structures, conversely, are often more efficient in their operation but can suffer from too little interaction between their

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<sup>197</sup> *Id.* at 270–73.

<sup>198</sup> *Id.*

<sup>199</sup> *Id.* at 273–74.

<sup>200</sup> Osofsky, *supra* note 194, at 273–74.

<sup>201</sup> Hiroko Tabuchi & Henry Fountain, *Bucking Trump, These Cities, States and Companies Commit to Paris Accord*, N.Y. TIMES (June 1, 2017), <https://www.nytimes.com/2017/06/01/climate/american-cities-climate-standards.html> [<https://perma.cc/8P3C-H7RQ>].

<sup>202</sup> Engel, *supra* note 168, at 455.

<sup>203</sup> *Id.*

<sup>204</sup> Elizabeth Bomberg, *Environmental Politics in the Trump Era: An Early Assessment*,

26 ENV'T POL. 956, 959–60 (2017).

<sup>205</sup> See Osofsky, *supra* note 194, at 278–79.

<sup>206</sup> See *id.*

<sup>207</sup> *Id.* at 282.

<sup>208</sup> *Id.*

stakeholders.<sup>209</sup> This dynamic often limits the effectiveness of top-down policy initiatives, most often at the federal level.<sup>210</sup>

Integrating the two approaches, however, allows for a regulatory process that captures the benefits of each.<sup>211</sup> There is sufficient interaction among stakeholders for policymaking to be efficient and creative, but also a degree of discipline and control imposed from a higher level of government.<sup>212</sup>

As an approach to climate change mitigation policy, diagonal federalism allows for policy-driven successes and progress without necessarily involving the Federal Government.<sup>213</sup> The Regional Greenhouse Gas Initiative (“the Initiative”) is an example of such action below the federal level.<sup>214</sup> Created by several northeastern states, the Initiative is a regional cap-and-trade program for electric utilities within those states.<sup>215</sup> It established a regional emissions cap and state-specific caps, but gives member states a degree of flexibility to tailor their own cap-and-trade policies within the agreement.<sup>216</sup>

### *B. Limits to Diagonal Federalism*

As a means for making policy, diagonal federalism is not without its limits. Most importantly, it raises a number of constitutional concerns that can be fatal to a policy initiative between and among state and local governments.

First, the Constitution’s Supremacy Clause may preempt such initiatives.<sup>217</sup> Preemption may be express in the form of a federal statute or regulation.<sup>218</sup> State and local laws that frustrate or otherwise interfere with federal law can be invalidated on implied preemption grounds.<sup>219</sup>

Next, the Commerce Clause may limit the scope of policy agreements between states, which can be invalidated if they interfere with the

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<sup>209</sup> *Id.* at 279–80.

<sup>210</sup> *Id.* at 282.

<sup>211</sup> Osofsky, *supra* note 194, at 282.

<sup>212</sup> *Id.*

<sup>213</sup> See Kaswan, *supra* note 27, at 817–18.

<sup>214</sup> *Id.*

<sup>215</sup> *Id.*

<sup>216</sup> *Id.*

<sup>217</sup> U.S. CONST. art. VI, cl. 2.

<sup>218</sup> Margaret R. Grossman, *Climate Change and the Law*, 58 AM. J. COMPAR. L. 223, 250 (2010).

<sup>219</sup> *Id.*

Federal Government's power to regulate interstate commerce.<sup>220</sup> The Dormant Commerce Clause is also implicated in instances where an agreement may place unreasonable burdens on interstate commerce.<sup>221</sup> If states limit the scope of their agreements to in-state entities and transactions, Commerce Clause concerns are likely moot.<sup>222</sup> States may still adopt complimentary and effective policies consistent with these parameters.

Lastly, agreements between states and other nations could run afoul of the Constitution's Compact Clause.<sup>223</sup> This is unlikely, but still a concern that states must consider when coordinating to make climate change mitigation policy.<sup>224</sup> Agreements in which states adopt similar regulations and retain individual authority over their own statutes, however, are unlikely to conflict with the Compact Clause.<sup>225</sup>

From a pragmatic perspective, diagonal federalism raises other concerns as well. As suggested above, finding a balance between horizontal and vertical government actors can be difficult.<sup>226</sup> Thus, a policymaking model that is truly diagonal is not always simple to create and maintain.<sup>227</sup> An overly horizontal structure can be duplicative and ineffective without a degree of centralizing authority.<sup>228</sup> An overly vertical structure can stifle policy implementation and innovation.<sup>229</sup> Absent a more natural center of gravity like the Federal Government, it may be more difficult for states to organize themselves effectively under a diagonal federalism framework.

Finally, not all of the government actors within a diagonal federalism model are guaranteed to be cooperative.<sup>230</sup> This can lead to breakdowns in policymaking that can threaten progress and success.<sup>231</sup> The Trump administration's attempt to revoke California's emissions standards waiver from the EPA is a high-profile example.<sup>232</sup> Yet non-cooperativeness,

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<sup>220</sup> U.S. CONST. art. I, § 8, cl. 3.

<sup>221</sup> See Daniel A. Farber, *Climate Change, Federalism, and the Constitution*, 50 ARIZ. L. REV. 879, 896–900 (2008).

<sup>222</sup> *Id.* at 900.

<sup>223</sup> U.S. CONST. art. I, § 10, cl. 3.

<sup>224</sup> Grossman, *supra* note 218, at 250–51.

<sup>225</sup> *Id.*

<sup>226</sup> See discussion *supra* Section IV.A.

<sup>227</sup> See Osofsky, *supra* note 194, at 284.

<sup>228</sup> *Id.* at 282.

<sup>229</sup> *Id.* at 284.

<sup>230</sup> *Id.*

<sup>231</sup> *Id.*

<sup>232</sup> See Davenport, *supra* note 160.

if managed effectively, can be highly beneficial.<sup>233</sup> If a regulatory structure provides space for dissenting views, it can ultimately lead to better policy outcomes.<sup>234</sup> Disaffected stakeholders may seek judicial relief that can force a more effective policy response, as was the case in *Massachusetts v. EPA*.<sup>235</sup> Non-cooperativeness can also ensure that policymakers feel pressure to be more accommodating in their decisions, leading to a more inclusive policy that reflects the priorities of multiple stakeholders.<sup>236</sup>

### C. *Diagonal Federalism as a Response to Climate Change*

Despite its limitations, diagonal federalism remains the best model of governance within which states can respond to federal inaction on and hostility toward climate change mitigation policy.

Climate change is arguably the most pressing public policy challenge the United States faces.<sup>237</sup> Yet as the effects of climate change have grown more severe, the Federal Government has demonstrated a pattern of disengagement and even hostility toward state-level attempts at mitigating climate change.<sup>238</sup> This pattern is the result of a confluence of political and structural factors at the federal level, most notably the broad opposition of the Republican Party to mitigation efforts and numerous structural hurdles that must be overcome to enact legislation which could address climate change.<sup>239</sup> The federal response to climate change has been largely through administrative rules, yet even these are subject to changes across administrations of different political parties and potentially crippling legal challenges.<sup>240</sup> Even if future rules like the CPP are enacted, it seems unlikely that they will remain in force long enough for states to rely on them.

Given the above context, it seems reflexive that states would act to address climate change. States have long taken the lead on climate

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<sup>233</sup> Osofsky, *supra* note 194, at 284–85.

<sup>234</sup> *Id.*

<sup>235</sup> See, e.g., Buzbee, *supra* note 20, at 1074; *Massachusetts v. EPA*, 549 U.S. 497 (2007).

<sup>236</sup> Osofsky, *supra* note 194, at 284–85.

<sup>237</sup> Chris Mooney & Brady Dennis, *The World Has Just Over a Decade to Get Climate Change Under Control, U.N. Scientists Say*, WASH. POST (Oct. 7, 2018), <https://www.washingtonpost.com/energy-environment/2018/10/08/world-has-only-years-get-climate-change-under-control-un-scientists-say/> [https://perma.cc/S923-36LE].

<sup>238</sup> See discussion *supra* Sections II.A, II.B.

<sup>239</sup> See discussion *supra* Sections II.A, II.B.

<sup>240</sup> See discussion *supra* Section II.B.

change mitigation in the United States.<sup>241</sup> Indeed, nearly all have climate action plans and renewable portfolio standards.<sup>242</sup> Many others have pursued carbon emission reduction plans.<sup>243</sup> California established a statewide carbon cap-and-trade program.<sup>244</sup> The Regional Greenhouse Gas Initiative serves a similar purpose.<sup>245</sup>

Diagonal federalism offers a framework within which state and local governments can amplify the effects of existing climate change mitigation policies and expand the reach of future ones. The structural and political constraints that have hampered the Federal Government's response to climate change do not apply as readily to state and local governments.<sup>246</sup> While states must be mindful of the legal and practical limits of diagonal federalism, especially constitutional ones, they ought to continue pursuing climate change mitigation policies in line with its principles.

The sheer number of states, local governments, and private actors that pledged to uphold the Paris Climate Accord following the Trump administration's withdrawal demonstrated the potential of climate change mitigation policy pursued through a framework of diagonal federalism.<sup>247</sup> In lieu of stronger federal action to limit the effects of climate change, states and local governments ought to continue collaborative efforts to do the same.

## CONCLUSION

Climate change is a collective action problem that poses a significant public policy challenge to the United States. Under such circumstances, the Federal Government and the states would ideally collaborate to mitigate the effects of climate change. Because of entrenched political and structural factors, the Federal Government's response to climate change, however, has been characterized by disengagement from and hostility toward state efforts to blunt its effects.

Given this seemingly intractable situation, states should act in line with the principles of diagonal federalism to mitigate climate change

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<sup>241</sup> Engel, *supra* note 168, at 455–56; *see also* Bomberg, *supra* note 204, at 959–60.

<sup>242</sup> Engel, *supra* note 168, at 455–56.

<sup>243</sup> *Id.*

<sup>244</sup> *Id.*

<sup>245</sup> *Id.*

<sup>246</sup> *See* discussion *supra* Section II.B.

<sup>247</sup> Tabuchi & Fountain, *supra* note 201.

to the greatest extent possible. This framework of governance emphasizes collaboration between and among state and local governments in the absence of federal engagement. States and municipalities have taken the lead on climate change mitigation policy for decades. By continuing that trend through diagonal federalism, they will amplify the effectiveness of their existing policies and widen the scope of future initiatives. This approach remains the most viable option for states as they grapple with climate change and an unreliable partner in the Federal Government.