

ARTICLES

THE SUPREMACY CLAUSE, COOPERATIVE FEDERALISM, AND THE FULL FEDERAL REGULATORY PURPOSE

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INTRODUCTION

The Supremacy Clause is a slippery thing, considering its few, straightforward words.¹ The U.S. Supreme Court says the Clause “is not a source of any federal rights” but merely governs the priority of rights and duties when our sovereigns’ laws conflict.² Nonetheless, the Clause gives rise to a stand-alone private cause of action for preemption of state (and local³) laws.⁴ Preemption claims are therefore available to members of the regulated community to fend off state regulation that is inconsistent with

1. U.S. CONST. art. VI, cl. 2 states:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

2. *Golden State Transit Corp. v. City of L.A.*, 493 U.S. 103, 107 (1989) (quoting *Chapman v. Hous. Welfare Right Org.*, 441 U.S. 600, 613 (1979)).

3. For simplicity’s sake, the balance of this Article refers to state and local law together as “state” law. *See Wis. Pub. Intervenor v. Mortier*, 501 U.S. 597, 612 (1991) (“The term ‘State’ is not self-limiting since political subdivisions are merely subordinate components of the whole.”).

4. 28 U.S.C. § 1331 (2006); *Verizon Md. Inc. v. Pub. Serv. Comm’n*, 535 U.S. 635, 642 (2002) (“We have no doubt that federal courts have jurisdiction under § 1331 to entertain such a suit.”); *Indep. Living Ctr. of S. Cal., Inc. v. Shewry*, 543 F.3d 1050, 1065 (9th Cir. 2008) (“Under well-established law of the Supreme Court, this court, and the other circuits, a private party may bring suit under the Supremacy Clause to enjoin implementation of state legislation allegedly preempted by federal law.”). *Cf. Bond v. United States*, 131 S. Ct. 2355, 2364 (2011) (“An individual has a direct interest in objecting to laws that upset the constitutional balance between the National Government and the States when the enforcement of those laws causes injury that is concrete, particular, and redressable.”).

national programs for protecting public health and welfare.⁵ More questionable, however, is the extent to which members of the public may use the Clause to challenge state action that undermines national health and welfare standards.⁶ This is because the Supremacy Clause becomes even more slippery in the context of federal laws that employ a scheme known as cooperative federalism to allocate responsibility between sovereigns. But if the regulated community can wield preemption claims to fend off overreaching state law, why not also allow people who seek full implementation of national health and welfare standards to assert preemption?⁷

5. See *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 497 (1987) (“Vermont nuisance law is inapplicable to a New York point source” because the Clean Water Act “precludes . . . those suits that may require standards of effluent control that are incompatible with those established by the procedures set forth in the Act.”); *North Carolina, ex rel. Cooper v. Tenn. Valley Auth.*, 615 F.3d 291, 303 (4th Cir. 2010) (holding a North Carolina public nuisance suit to require control of power plant emissions in Alabama and Tennessee is preempted because, *inter alia*, “Congress has chosen to grant states an extensive role in the Clean Air Act’s regulatory regime through the [state implementation plan] and permitting process, [and therefore] field and conflict preemption principles caution at a minimum against according states a wholly different role and allowing state nuisance law to contradict joint federal–state rules so meticulously drafted.”); *Fireman’s Fund Ins. Co. v. City of Lodi*, 302 F.3d 928, 952 (9th Cir. 2002) (holding that parts of a City of Lodi municipal ordinance are “preempted by CERCLA [i.e., the federal Comprehensive Environmental Response Compensation and Liability Act] only to the extent that they permit Lodi to order use of procedures more stringent than the [federal National Contingency Plan].”), *cert. denied*, 538 U.S. 961 (2003); *Rollins Env’tl. Servs. (FS), Inc. v. Parish of St. James*, 775 F.2d 627, 637 (5th Cir. 1985) (holding that a St. James Parish, Louisiana, ordinance was an “impermissible intrusion into territory preempted under [the Toxic Substances Control Act].”).

6. See *Wis. Dep’t of Health & Family Servs. v. Blumer*, 534 U.S. 473, 495 (2002) (explaining that in the context of cooperative federalism, the Court has “not been reluctant to leave a range of permissible choices to the States, at least where the superintending federal agency has concluded that such latitude is consistent with the statute’s aims”); *N.Y. State Dep’t of Soc. Servs. v. Dublino*, 413 U.S. 405, 421 (1973) (“Where coordinate state and federal efforts exist within a complementary administrative framework, and in the pursuit of common purposes, the case for federal pre-emption becomes a less persuasive one.”); see also *Legal Env’tl. Assistance Found., Inc. v. Pegues*, 904 F.2d 640, 644 (11th Cir. 1990) (affirming dismissal of an environmental group’s preemption challenge to an allegedly illegal state-issued permit). *But see Boyes v. Shell Oil Prods. Co.*, 199 F.3d 1260, 1270 (11th Cir. 2000) (“[The Resource Conservation and Recovery Act] sets a floor for regulation of hazardous waste . . . and to allow the Florida program to restrict or limit the federal remedy would lower that floor.” (citation omitted)).

7. It is, however, not unusual for the law to favor economic interests over those favoring health protection and quality of life. See, e.g., Oliver A. Houck, *Standing on the Wrong Foot: A Case for Equal Protection*, 58 SYRACUSE L. REV. 1, 31 (2007) (arguing that, according to some judges and scholars, “courts are for private interests and not for those of the public at large”).

This Article shows that private litigants may use the preemption doctrine to police the national standards of cooperative federalist regulatory programs without undermining the state primacy that Congress intended those programs to preserve. It focuses on the environmental cooperative federalist schemes that Congress employs in many antipollution laws. These schemes provide for Environmental Protection Agency (EPA) authorization for states to administer federal regulatory programs, so long as those states conform to minimum national standards for protection of public health and welfare. State laws, regulations, or orders that authorize activities inconsistent with these minimum federal standards create a potential for preemption claims. This is because under “conflict preemption” doctrine, federal law preempts state action that “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”⁸

On its face, conflict preemption would seem to apply to every state departure from federal mandates in a cooperative federalist regulatory scheme. But if that were the law, affected parties would be able to run to federal court with a preemption claim every time an EPA-authorized state issued an illegal permit, arguably to the detriment of the states’ ability to “function as political entities in their own right.”⁹ It is difficult to believe that Congress intended to launch this “parade of horrors”¹⁰ every time it employed a cooperative federalist system to allow states to administer health and welfare protections.¹¹ It is equally difficult to believe, however, that Congress meant to suspend operation of preemption doctrine and allow state regulatory programs to drift away from national goals to the detriment of public health and welfare. Careful analysis of conflict preemption doctrine in the context of cooperative federalist schemes

8. *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

9. *Bond*, 131 S. Ct. at 2364 (explaining that the “allocation of powers in our federal system” serves in part to preserve “the integrity, dignity, and residual sovereignty of the States.”).

10. See Antonin Scalia, *Assorted Canards of Contemporary Legal Analysis*, 40 CASE W. RES. L. REV. 581, 590 (1989) (explaining that “parade of horrors” refers to a “contention that the principle embraced by the other side will produce certain specified undesirable consequences”).

11. Of course, similar arguments—based on similar parades of horrors—could be made about preemption in other contexts. See *North Dakota v. United States*, 495 U.S. 423, 459 n.6 (1990) (Brennan, J., concurring in part and dissenting in part) (“The plurality suggests that my recognition of this aspect of federal immunity doctrine will lead to a parade of horrors: Every state regulation will be potentially subject to challenge. But this particular parade has long been braved by our court system, not only under the doctrine of federal immunity but also under the much broader doctrine of pre-emption.” (citation omitted)).

eliminates this conundrum.

This Article demonstrates that state actions which conflict with federal mandates do not *always* pose a true obstacle to accomplishment of the “full purposes and objectives” of the federal regulatory program that imposes the mandates.¹² Instead, state–federal conflicts within cooperative federalist systems fall within one of the three categories described below. Once these conflicts are sorted into appropriate categories they can be handled under familiar Supremacy Clause principles.

“Category 1” conflicts arise from the types of isolated mistakes that occur inevitably in any regulatory system. When federal agencies make such mistakes they are simply mistakes. When state agencies make mistakes on decisions governed by national standards, those mistakes constitute state action that conflicts with federal law. By employing a cooperative federalist system to achieve its purposes, however, Congress implicitly decided to tolerate these types of conflicts, unless it specified otherwise. Therefore, Category 1 conflicts do not pose a true obstacle to accomplishment of the full federal regulatory purpose¹³ and should not give rise to preemption.

“Category 2” conflicts are systemic conflicts rather than isolated mistakes, but they are subject to “robust corrective mechanisms” under the relevant federal regulatory scheme. Robust corrective mechanisms are mechanisms that are reasonably calculated to remove any state-law obstacle to achievement of the full federal regulatory purpose. When the cooperative federalist system has such mechanisms, conflicts are handled within the system and therefore do not pose true obstacles to the full federal regulatory purpose that would give rise to preemption.

“Category 3” conflicts arise when state actions pose systemic conflicts with federal mandates and are not subject to robust federal corrective mechanisms. Because these are not conflicts that Congress implicitly decided to tolerate or that the federal regulatory program handles in a robust way, they pose an obstacle to achievement of cooperative federalist systems’ full federal regulatory purposes. Thus, Category 3 conflicts are true conflicts, and courts should hold that the federal mandates at issue preempt the conflicting state actions in this category.

Part I of this Article reviews Supremacy Clause jurisprudence to show that all preemption questions can be treated as arising under the doctrine of conflict preemption—which is usually analyzed as one of three types of

12. See *Hines*, 312 U.S. at 67.

13. As used in this Article, the phrase “full federal regulatory purpose” should not imply that state laws must conflict with *all* of Congress’s purposes to be preempted. Rather the phrase suggests that when federal regulatory programs are driven by multiple goals, state law conflicts must be assessed in light of the federal purposes considered as a whole.

preemption. This Part then discusses the “ultimate touchstone in every pre-emption case,” which the U.S. Supreme Court has identified as “the purpose of Congress.”¹⁴ As used by the Court in this context, however, the phrase “purpose of Congress” is a term of art that refers to the full federal regulatory purpose, including the purposes behind regulations that administrative agencies promulgate. This Part also shows that state action may sometimes be inconsistent with a specific federal mandate without posing a true obstacle to accomplishment of the *full* federal regulatory purpose.

Part II of the Article discusses abstention doctrine to show that the doctrine should not be a significant impediment to the use of the Supremacy Clause to police state implementation of national mandates imposed by cooperative federalist regulatory systems.

Part III of the Article reviews the basics of cooperative federalism in antipollution law, emphasizing Congress’s three major goals for the approach, to: (1) achieve national standards to protect public health and welfare, (2) overcome bureaucratic inertia, and (3) preserve state primacy. These goals underlie the full federal regulatory purpose that serves as the ultimate touchstone for Part IV’s preemption analysis. Part III also reviews typical mechanisms in antipollution laws for keeping EPA-authorized state programs on track and discusses the enforcement discretion doctrine’s role in reducing the effectiveness of some mechanisms. These mechanisms are important to Part IV’s discussion of whether cooperative federalist regulatory systems contain robust mechanisms to correct state-law conflicts with federal mandates.

Part IV of the Article analyzes the three categories of state–federal conflicts listed above and suggests a “robust federal corrective mechanism” test. It shows that courts should allow members of the public and the regulated community to wield preemption claims to block only state actions that pose true obstacles to accomplishment and execution of the *full* federal regulatory purpose. The Article concludes that once true conflicts are distinguished from false conflicts, the preemption doctrine can serve as a useful source of private claims to police cooperative federalist systems without undermining them.

14. *Wyeth v. Levine*, 555 U.S. 555, 565 (2009) (“[T]he purpose of Congress is the ultimate touchstone in every pre-emption case.” (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996))).

I. PREEMPTION DOCTRINE

The Supremacy Clause establishes that the “Constitution, and the Laws of the United States” are “the supreme Law of the Land.”¹⁵ Because federal law is supreme, it necessarily preempts inconsistent state law.¹⁶ This Part begins an analysis of how preemption should work in the context of cooperative federalist regulatory schemes. It shows that (A) the gravamen of preemption is conflict between state laws and federal regulatory objectives; (B) in preemption analysis, judicial inquiry into federal regulatory objectives is necessarily and appropriately wide-ranging; and (C) to advance the “full” federal purpose in the context of cooperative federalism, courts must strike a balance among multiple federal goals.

A. Preemption and Conflict

Federal preemption cases are typically sorted into one of three types: express, field, or conflict preemption.¹⁷ But because the fundamental purpose of the Supremacy Clause is to establish the priority of federal rights “whenever they come in conflict with state law,”¹⁸ this Article invites the reader to view all federal preemption cases as subject to conflict preemption. In other words, conflict preemption essentially swallows all other preemption types.¹⁹ For example, the first type of preemption,

15. U.S. CONST. art. VI, cl. 2.

16. See *Wis. Pub. Intervenor v. Mortier*, 501 U.S. 597, 604 (1991) (“Under the Supremacy Clause . . . state laws that ‘interfere with, or are contrary to the laws of congress, made in pursuance of the constitution’ are invalid.” (citation omitted) (quoting *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 211 (1824))); *Sperry v. Florida ex rel. Fla. Bar*, 373 U.S. 379, 383–84 (1963) (“‘[T]he law of the State, though enacted in the exercise of powers not controverted, must yield’ when incompatible with federal legislation.” (quoting *Gibbons*, 22 U.S. (9 Wheat.) at 211)); see also JAMES T. O’REILLY, *FEDERAL PREEMPTION OF STATE AND LOCAL LAW: LEGISLATION, REGULATION AND LITIGATION* 5 (2006) (“Alexander Hamilton was sadly incorrect when he predicted that ‘it will always be far more easy for the State governments to encroach upon the national authorities than for the national government to encroach upon the State authorities.’” (quoting THE FEDERALIST NO. 17)).

17. See *Mortier*, 501 U.S. at 604–05 (summarizing the three categories). Scholars have argued about whether there should be more categories. See Thomas W. Merrill, *Preemption and Institutional Choice*, 102 NW. U. L. REV. 727, 739–40 (2008) (noting that “the exact number [of preemption categories] depend[s] on who is doing the counting” and arguing for four: “express, field, conflict, and frustration”).

18. *Golden State Transit Corp. v. City of L.A.*, 493 U.S. 103, 107 (1989) (quoting *Chapman v. Hous. Welfare Rights Org.*, 441 U.S. 600, 613 (1979)).

19. Similarly, the U.S. Supreme Court has recognized that the second step of the *Chevron* test essentially swallows the first. See *Entergy Corp. v. Riverkeeper, Inc.*, 129 S. Ct. 1498, 1505 n.4 (2009) (explaining that the Court may skip the first part of the *Chevron* test for statutory interpretation in administrative law (whether Congress has spoken directly to the

“express preemption,” occurs when Congress expressly displaces state law.²⁰ In those cases, of course, state attempts to continue to regulate in the preempted area would conflict with Congress’s purpose. Similarly, type two—“field preemption”—applies when Congress occupies an entire field with federal law (implicitly expressing its intent to bar state regulation of that field).²¹ Again, therefore, any state regulation would pose a conflict.²² This leaves the third and final type, which is already labeled “conflict preemption.” This category covers two sets of circumstances, the second of which swallows the first: (1) when “compliance with both federal and state regulations is a physical impossibility,”²³ and (2) when state law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”²⁴

Assuming, therefore, that Congress has the power to enact the potentially preempting federal law, the bottom-line question underlying all preemption cases is: Does the state action at issue pose a conflict with

question at issue) and move directly to the test’s second step (whether the agency interpretation under review is reasonable) because “if Congress has directly spoken to an issue then any agency interpretation contradicting what Congress has said would be unreasonable” (citing *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984)). This is logical; nonetheless, skipping directly to the bottom-line question posed by a multipart test may affect outcomes by changing the test’s emphasis.

20. See *California v. ARC Am. Corp.*, 490 U.S. 93, 100 (1989) (“Congress has the authority, in exercising its Article I powers, to pre-empt state law.”); see also *Bruesewitz v. Wyeth LLC*, 131 S. Ct. 1068, 1074–75 (2011) (holding that the National Childhood Vaccine Injury Act of 1986 “expressly eliminates liability for a vaccine’s unavoidable, adverse side effects,” including “those resulting from design defects”).

21. See *Barnett Bank of Marion Cnty., N.A. v. Nelson*, 517 U.S. 25, 31 (1996) (explaining that Congress “may create a scheme of federal regulation ‘so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it.’” (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947))). Federal occupation of an entire field reveals “a clear, but implicit, pre-emptive intent.” *Id.* at 31.

22. Indeed, the U.S. Supreme Court’s decision in *Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Commission*, 461 U.S. 190 (1983)—which appears to turn on the boundaries of “the [federally] occupied field” at issue, *id.* at 216—makes more sense when viewed as a response to the question: Does the state action at issue conflict with Congress’s full purposes and objectives? See *infra* note 58 and accompanying text.

23. *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142–43 (1963).

24. *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941); see also *Barnett Bank*, 517 U.S. at 31 (“Alternatively, federal law may be in irreconcilable conflict with state law.” (quoting *Rice v. Norman Williams Co.*, 458 U.S. 654, 659 (1982)) (internal quotation marks omitted)). Conflict preemption only applies when the federal objective at issue is “significant.” *Williamson v. Mazda Motor of Am., Inc.*, 131 S. Ct. 1131, 1137 (2011) (“Like the regulation in [*Geier v. Am. Honda Motor Co.*, 529 U.S. 861 (2000)], the [seatbelt] regulation here leaves the manufacturer with a choice. And, like the tort suit in *Geier*, the tort suit here would restrict that choice. But unlike *Geier*, we do not believe here that choice is a significant regulatory objective.”).

achievement of a federal law's "full purposes and objectives"?²⁵

B. Preemption Doctrine's "Ultimate Touchstone" Is the Federal Regulatory Purpose

The U.S. Supreme Court says that the "purpose of Congress is the ultimate touchstone in every pre-emption case."²⁶ In this context, however, the phrase "purpose of Congress" is a term of art.²⁷ What the Court really means is that the ultimate touchstone is the purpose of the regulatory program launched by congressional legislation.²⁸ This is clear because lawful federal regulations have "no less pre-emptive effect than federal statutes."²⁹ So the "purpose of Congress" in this context cannot be limited to specific evidence of congressional intent; it is a changeable concept. Regulatory programs develop and evolve to respond to new conditions and

25. *Davidowitz*, 312 U.S. at 67.

26. *Wyeth v. Levine*, 555 U.S. 555, 565 (2009) (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996)).

27. Once a phrase has "become a term of art . . . any attempt to break down the term into its constituent words is not apt to illuminate its meaning." *Sullivan v. Stroop*, 496 U.S. 478, 483 (1990).

28. The Court explained:

Congress' intent, of course, primarily is discerned from the language of the pre-emption statute and the statutory framework surrounding it. Also relevant, however, is the structure and purpose of the statute as a whole, as revealed not only in the text, but through the reviewing court's reasoned understanding of the way in which Congress intended the statute and its surrounding regulatory scheme to affect business, consumers, and the law.

Medtronic, 518 U.S. at 486 (citations omitted) (internal quotation marks omitted); *see also* *Farina v. Nokia Inc.*, 625 F.3d 97, 118 (3d Cir. 2010) (citing *Lohr*, 518 U.S. at 485–86); Nina A. Mendelson, *Chevron and Preemption*, 102 MICH. L. REV. 737, 754 n.67 (2004) ("As a general matter, assuming the agency was exercising properly delegated authority, Congress would have wanted the agency's decision to be effective and to control." (citing Benjamin W. Heineman, Jr. & Carter G. Phillips, *Federal Preemption: A Comment on Regulatory Preemption After Hillsborough County*, 18 URB. LAW. 589, 592 (1986)); Viet D. Dinh, *Reassessing the Law of Preemption*, 88 GEO. L.J. 2085, 2116 (2000) (arguing that "congressional intent and federal interests" are both "gleaned from the regulatory structure").

29. *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 699 (1984) (quoting *Fid. Fed. Sav. & Loan Ass'n v. De la Cuesta*, 458 U.S. 141, 153 (1982)). This does not mean, however, that courts blindly defer to every administrative statement that a state law is preempted. *See* *Desiano v. Warner-Lambert & Co.*, 467 F.3d 85, 98 n.9 (2d Cir. 2006) ("[W]hatever deference would be owed to an agency's view in contexts where a presumption against federal preemption does apply, [it is arguable that] an agency cannot supply, on Congress's behalf, the clear legislative statement of intent required to overcome the presumption against preemption."), *aff'd by an equally divided court sub nom.* *Warner-Lambert Co. v. Kent*, 552 U.S. 440, 441 (2008); Ernest A. Young, *Executive Preemption*, 102 NW. U. L. REV. 869, 883 (2008) (arguing that when courts "review an agency's interpretation of a federal statute's preemptive effect . . . the presumption against preemption may conflict with the *Chevron* rule, which requires courts to defer to agency interpretations of the statute").

policies, at least some of which Congress may not have contemplated specifically. Indeed, the U.S. Supreme Court's policy in reviewing regulatory programs is to avoid "ossification" of statutory meanings.³⁰

The full federal regulatory purpose can be difficult to discern reliably—no "rigid formula or rule . . . can be used as a universal pattern to determine the meaning and purpose of every act of Congress."³¹ Where the regulatory program "does not speak directly to the issue, the Court must be guided by the goals and policies of the Act in determining whether it in fact pre-empts an action based on the law of an affected State."³²

At least in theory, courts begin their analyses of Congress's purpose with a rebuttable presumption "that the historic police powers of the States were not to be superseded."³³ This is the famous "presumption against pre-emption."³⁴ It is based on respect for the states as "independent sovereigns,"³⁵ and has particular force in fields that have traditionally been the states' province.³⁶ Nonetheless, even state laws "designed to protect vital state interests" are subject to federal preemption.³⁷

Scholars point out that the Supreme Court has been inconsistent in its application of the "now-you-see-it, now-you-don't presumption against preemption."³⁸ But by their nature presumptions are strange and

30. See *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 983 (2005) (quoting *United States v. Mead Corp.*, 533 U.S. 218, 247 (2001) (Scalia, J., dissenting)).

31. *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941); see also *Wis. Pub. Intervenor v. Mortier*, 501 U.S. 597, 617 (1991) (Scalia, J., concurring) (emphasizing "how unreliable [congressional] Committee Reports are—not only as a genuine indicator of congressional intent but as a safe predictor of judicial construction [since the Court uses] them when it is convenient, and ignore[s] them when it is not").

32. *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 493 (1987).

33. *Wyeth v. Levine*, 555 U.S. 555, 565 (2009) (quoting *Lohr*, 518 U.S. at 485).

34. *Id.* at 565 n.3.

35. *Id.* (quoting *Lohr*, 518 U.S. at 485) (rejecting the argument that the presumption should not apply "because the Federal Government has regulated drug labeling for more than a century"). But see *United States v. Locke*, 529 U.S. 89, 108 (2000) ("[A]n 'assumption' of nonpre-emption is not triggered when the State regulates in an area where there has been a history of significant federal presence.").

36. See *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993) ("[A] court interpreting a federal statute pertaining to a subject traditionally governed by state law will be reluctant to find pre-emption.").

37. *De Canas v. Bica*, 424 U.S. 351, 357 (1976); see also *Livadas v. Bradshaw*, 512 U.S. 107, 120 (1994) ("[U]nder the Supremacy Clause, [the Court's] office is not to pass judgment on the reasonableness of state policy.").

38. James M. Beck, *Notes on Bruesewitz*, LEXOLOGY (Feb. 23, 2011), <http://www.lexology.com/library/detail.aspx?g=fe474bb5-61ab-4d18-8d23-5a02cf71cf5a>; see also S. Candice Hoke, *Preemption Pathologies and Civic Republican Values*, 71 B.U. L. REV. 685, 733 (1991) (describing the U.S. Supreme Court's approach to the presumption as "fickle").

unpredictable things.³⁹ Whether a presumption is even worth talking about may depend on the strength of the evidence offered to rebut it. Presumptions, after all, are the “bats of the law flitting in the twilight, but disappearing in the sunshine of actual facts.”⁴⁰

Scholars also criticize the Court’s wide-ranging inquiry into the “purpose of Congress” as unpredictable.⁴¹ Professor David A. Dana argues that courts are attempting to answer “a wholly hypothetical question: if Congress had spoken directly and unambiguously to the precise preemption question at hand, which it did not, what would it have said?”⁴² Fair enough. But what Professor Dana describes is the essence of the judicial function—to weigh relevant factors despite uncertainty and reach decisions that resolve the disputes at hand and, over time, shed light on gray areas in the law.⁴³ Court decisions are unpredictable in large part because courts

39. See Adam Babich, *Can Preemption Protect Public Participation?*, 61 CASE W. RES. L. REV. 1109, 1131 & nn.124–29 (2011) (“Sometimes [presumptions] merely assign the burden of producing evidence to the disfavored party Other[s] . . . change the burden of persuasion. Still others behave like a thumb on the scale of justice . . . add[ing] a vague persuasive force to the favored party’s evidence.” (footnotes omitted)).

40. MCCORMICK’S HANDBOOK OF THE LAW OF EVIDENCE § 345, at 821 (Edward W. Cleary ed., 2d ed. 1972) (quoting *Mackowik v. Kan. City, St. J. & C.B.R. Co.*, 94 S.W. 256, 262 (Mo. 1906)).

41. See, e.g., THOMAS O. MCGARITY, *THE PREEMPTION WAR: WHEN FEDERAL BUREAUCRACIES TRUMP LOCAL JURIES* 51 (2008) (“[T]he Court has crafted an ornate, and often inconsistent, body of law to decide whether Congress has *impliedly* preempted state law.”); Dinh, *supra* note 28, at 2085 (“[T]he Supreme Court’s numerous preemption cases follow no predictable jurisprudential or analytical pattern.”); Hoke, *supra* note 38, at 716 (“[P]liant standards governing the degree of clarity with which Congress or an agency must speak for a rule to be preemptive . . . [lead to a] substitution of judicial policymaking for political decision”); Merrill, *supra* note 17, at 741 (“[T]he doctrine . . . systematically exaggerates the role of congressional intent, attributing to Congress judgments that are in fact grounded in judicial perceptions about the desirability of displacing state law in any given area.”); Garrick B. Pursley, *Preemption in Congress*, 71 OHIO ST. L.J. 511, 515 (2010) (“Judicial preemption doctrine is thin and confusing.”); Susan Raeker-Jordan, *The Pre-Emption Presumption that Never Was: Pre-Emption Doctrine Swallows the Rule*, 40 ARIZ. L. REV. 1379, 1388 (1998) (“[O]nce courts delve into the murky realm of congressional purposes to ascertain whether Congress intended to displace state law, it naturally follows that courts may overstep the federalism line”).

42. David A. Dana, *Democratizing the Law of Federal Preemption*, 102 NW. U. L. REV. 507, 510 (2008).

43. Jonathan T. Molot, *The Judicial Perspective in the Administrative State: Reconciling Modern Doctrines of Deference with the Judiciary’s Structural Role*, 53 STAN. L. REV. 1, 8 (2000) (“If we gain something in dispute resolution by shifting authority to resolve legal ambiguity from judges to agencies, we also lose an influence over lawmaking that was an important component of the Founders’ constitutional design.”); Cass R. Sunstein, *Law and Administration After Chevron*, 90 COLUM. L. REV. 2071, 2074 (1990) (the *Chevron* principle “is quite jarring to those who recall the suggestion, found in *Marbury v. Madison* and repeated time and again in American

reach those results in hard cases. The easy cases—those governed by bright lines—mostly settle out of court.⁴⁴ Because the parties to disputes cannot predict the results of difficult cases on their own, society carefully selects Article III judges.⁴⁵ Judges “are not automata,”⁴⁶ and—by and large—our expectation is that these judges will not rule according to rigid formula but instead apply their wisdom to traditional and evolving tools of legal and factual analysis, tempered by a humble appreciation of the Judiciary’s limited role in making policy.⁴⁷ Undoubtedly, judges sometimes get it wrong and—perhaps unconsciously—allow their policy preferences to affect results. But the same can be said of judgments based on almost any legal doctrine.⁴⁸ Like many aspects of U.S. government, the role of the Judiciary makes sense only when compared to the available alternatives.⁴⁹

Should courts ignore conflicts between state and federal law unless and until Congress unambiguously specifies otherwise?⁵⁰ That approach would ask courts to stand by passively as states frustrate attainment of congressional objectives expressed in lawfully enacted statutes.⁵¹ Granted,

public law, that it is for judges, and no one else, to ‘say what the law is’” (footnote omitted)).

44. See Matthew K. Roskoski, *Zen and the Art of Jurisprudence*, 98 MICH. L. REV. 1529, 1532 (2000) (reviewing PAUL F. CAMPOS, JURISMANIA: THE MADNESS OF AMERICAN LAW (1998)) (“[T]he *really* easy cases settle, the *relatively* easy cases are decided at trial and not appealed, and since the Supreme Court only grants certiorari on the *extremely* difficult cases, the Supreme Court is almost invariably making it up as it goes along.”).

45. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 489 (1951) (“The ultimate reliance for the fair operation of any standard is a judiciary of high competence and character and the constant play of an informed professional critique upon its work.”).

46. *Id.*

47. See Henry P. Monaghan, *Marbury and the Administrative State*, 83 COLUM. L. REV. 1, 14 (1983) (“*Marbury*’s justification for judicial review, grounded as it is in the ‘ordinary and humble judicial duty’ of the common law courts, seems necessarily to entail a general obligation of independent law-exposition by article III courts. This is what courts ‘do’; it is their ‘job.’”).

48. See Richard J. Pierce, Jr., *What Do the Studies of Judicial Review of Agency Actions Mean?*, 63 ADMIN. L. REV. 77, 97 (2011) (“I now share the view of many scholars that courts will never announce a doctrine that cannot accommodate the powerful tendency of judges and Justices to act in ways that are consistent with their strongly held political and ideological perspectives.”).

49. Cf. Winston S. Churchill, Speech at the House of Commons (Nov. 11, 1947), in 7 WINSTON S. CHURCHILL: HIS COMPLETE SPEECHES, 1897–1963, at 7563, 7566 (Robert Rhodes James ed., 1974) (“[I]t has been said that democracy is the worst form of Government except all those other forms that have been tried from time to time . . .”).

50. See Robert S. Peck, *A Separation-of-Powers Defense of the “Presumption Against Preemption,”* 84 TUL. L. REV. 1185, 1198 (2010) (explaining why “determining congressional intent [on preemption] can be challenging”).

51. *But see AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1748 (2011) (holding that even “a federal statute’s saving clause cannot in reason be construed as [allowing] a common law right, the continued existence of which would be absolutely inconsistent with

after watching enough of its programs fail, Congress *might* learn to include detailed instructions about preemption in every statute.⁵² The onus would be on the congressional drafters and their constituents to hold together or reassemble their coalitions and to draft legislative language and amendments that anticipate and expressly preempt whatever types of state law might pose an obstacle, and then to repeat this process as necessary when unanticipated situations arise and courts—purporting to exercise restraint—allow national goals to fall by the wayside. Given the biases for stalemate and ineffectiveness that are already built into the federal legislative system,⁵³ would such a laissez-faire judicial approach to state obstruction of federal statutory purposes really serve the Constitution and the public interest better than current doctrine?

At any rate, for purposes of this Article, it is unnecessary to resolve scholarly debates about preemption doctrine’s merits. For our purposes, it is enough to note that under current doctrine, litigants and courts base their analyses of the federal regulatory purpose on a wide-ranging inquiry.

*C. The Supremacy Clause Preempts State Action That Conflicts with the “Full”
Federal Regulatory Purpose*

Federal law preempts state action that conflicts with the “full purposes and objectives of Congress,”⁵⁴ i.e., the full federal regulatory purpose.⁵⁵ Preemption analysis, therefore, requires recognition that Congress (and the federal agencies that Congress assigns to administer its regulatory statutes)

the provisions of the act. In other words, the act cannot be held to destroy itself.” (alteration in original) (quoting *Am. Tel. & Tel. Co v. Cent. Office Tel., Inc.*, 524 U.S. 214, 227–28 (1998)) (internal quotation marks omitted).

52. See Peter M. Shane, *Federalism’s “Old Deal”: What’s Right and Wrong with Conservative Judicial Activism*, 45 VILL. L. REV. 201, 206 n.37 (2000) (arguing that by requiring a clear and manifest expression of congressional intent, the Court “in essence, is instructing Congress . . .”).

53. See Richard H. Fallon, Jr., *Constitutional Constraints*, 97 CALIF. L. REV. 975, 985 (2009) (“[T]he Constitution embodies the assumption, whether right or wrong, that presidential and legislative action is more dangerous than presidential and legislative inaction and, accordingly, that presidential and congressional action should be subject to an especially dense network of constitutional constraints.”); see also Victoria Nourse, *Misunderstanding Congress: Statutory Interpretation, the Supermajoritarian Difficulty, and the Separation of Powers*, 99 GEO. L.J. 1119, 1130 (2011) (“The filibuster rule exponentially increases the power of small minorities to block congressional action. Positive political theorists now agree that since the 1980s the filibuster threat has meant that legislation on even remotely salient political issues requires a supermajority—one must garner sixty votes on nearly every bill.”).

54. *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

55. See *supra* notes 26–30 and accompanying text (showing that the phrase “purposes of Congress” in this context really means the federal regulatory purpose).

can act with multiple purposes, some of which may themselves conflict.⁵⁶ Analysis of the *full* federal regulatory purpose may reveal that state action that conflicts with a particular federal mandate does not pose a true conflict when it is considered in context of the full and multiple purposes of the regulatory scheme that Congress launched. In other words, part and parcel of a federal regulatory decision to adopt multiple goals is sometimes “to tolerate whatever tension there [is] between them.”⁵⁷ When Congress and federal administrative agencies decide to tolerate such tension, it follows that the courts “can do no less.”⁵⁸

In *Ruiz v. Commissioner of the Department of Transportation of New York*,⁵⁹ the Southern District of New York was faced with a city regulation that purported to limit truck weights in conflict with a federal law that Congress

56. *Cf.* *Ohio v. EPA*, 997 F.2d 1520, 1532 (D.C. Cir. 1993) (upholding regulations as consistent with a law that “mandates the achievement of multiple goals” and distinguishing a situation in which a “court had before it a statute requiring a single goal to be achieved to the extent practicable”); Kevin O. Leske & Dan Schweitzer, *Frustrated with Preemption: Why Courts Should Rarely Displace State Law Under the Doctrine of Frustration Preemption*, 65 N.Y.U. ANN. SURV. AM. L. 585, 587 (2010) (“Congress often has competing objectives and crafts legislation as a product of compromise. For instance, Congress might conclude that a particular type of state tort action should proceed in order to provide remedies for injured consumers, even if it ‘frustrates’ to some degree the federal goal of uniformity.”); Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 281 (2000) (“The mere fact that Congress enacts a statute to serve certain purposes, then, does not automatically imply that Congress wants to displace all state law that gets in the way of those purposes. . . . It follows that a general doctrine of ‘obstacle preemption’ will . . . imply preemption clauses that the enacting Congress might well have rejected.” (footnote omitted)).

57. *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 256 (1984); *see also* *Int’l Paper Co. v. Ouellette*, 479 U.S. 481, 494 (1987) (“In determining whether Vermont nuisance law ‘stands as an obstacle’ to the full implementation of the [Clean Water Act (CWA)], it is not enough to say that the ultimate goal of both federal and state law is to eliminate water pollution. A state law also is pre-empted if it interferes with the methods by which the federal statute was designed to reach this goal.”).

58. *Silkwood*, 464 U.S. at 256; *see also* *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm’n*, 461 U.S. 190 (1983) (upholding California’s *economically motivated* regulation of nuclear power despite federal legislation occupying the field of nuclear safety); Christopher H. Schroeder, *Supreme Court Preemption Doctrine*, in *PREEMPTION CHOICE: THE THEORY, LAW, AND REALITY OF FEDERALISM’S CORE QUESTION* 119, 133 (William W. Buzbee ed., 2009) (“*Pacific Gas and Electric* . . . is exemplary in comprehending that while Congress surely has objectives for statutes when it enacts them, it may well not want those objectives pursued ‘at all costs.’”). *Cf.* *Wyeth v. Levine*, 555 U.S. 555, 575 (2009) (“The case for federal pre-emption is particularly weak where Congress has indicated its awareness of the operation of state law in a field of federal interest, and has nonetheless decided to stand by both concepts and to tolerate whatever tension there [is] between them.” (alteration in original) (quoting *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 166–67 (1989))).

59. 679 F. Supp. 341 (S.D.N.Y. 1988).

intended “to promote a uniform weight limit for trucks on federal highways.”⁶⁰ Congress, however, had “contemplated the existence of inconsistent local regulations” and selected a remedy: “withholding of federal highway funds” from noncompliant states.⁶¹ Because the court determined that Congress’s decision was “to live with” some inconsistency, the court found that the city’s weight regulations “cannot be considered, for federal preemption purposes, to have been an obstacle to the accomplishment of congressional purpose.”⁶²

It is far from clear that the *Ruiz* court got it right.⁶³ What federal purpose did the court serve by upholding inconsistent state regulation? To assume that Congress intends every specific remedy for a state’s violation of national policy to eliminate the possibility of preemption would be unreasonable, especially if the remedy that Congress provided is not robust enough to restore the federal mandate’s supremacy. Nonetheless, the *Ruiz* court’s basic insight is valuable: identification of a state-law conflict with a specific federal mandate is not enough to prove preemption unless that state law conflicts with the *full* purpose of the national regulatory program that imposes the mandate. And Congress’s specification of a particular mechanism for resolving the conflict at issue—while not necessarily dispositive of the preemption question—underscores the possibility that Congress’s full purpose may be more nuanced than a simple command for nationwide conformity.

There is relatively little discussion of multiple federal purposes in preemption case law. In fact, it is easy to get the impression from court opinions that once a litigant establishes that state action conflicts with a lawfully enacted federal mandate, preemption of that state action inevitably follows.⁶⁴ Nonetheless, considering common sense, the U.S. Supreme

60. *Id.* at 359.

61. *Id.* at 344, 359.

62. *Id.* at 359.

63. *See infra* notes 213–34 and accompanying text (explaining a “robust federal corrective mechanism” test). Whether the highway fund cutoff qualified as robust would depend on an analysis of the full federal regulatory purpose behind 23 U.S.C. § 127 (2006).

64. *See, e.g.,* Katharine Gibbs Sch. (Inc.) v. FTC, 612 F.2d 658, 667 (2d Cir. 1979) (“Where an explicitly formulated federal statute or regulation is in conflict with state law, preemption of state law follows inevitably from the supremacy clause of the Constitution.”); *see also* Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 YALE L.J. 1256, 1303 (2009) (“The Court’s readiness to find field preemption and its capacious view of what constitutes an obstacle for purposes of conflict preemption have led some commentators to argue that there is a presumption in favor of preemption, despite the Court’s refrain to the contrary.”). In *PLIVA, Inc. v. Mensing*, 131 S. Ct. 2567, 2577 n.4 (2011), however, the Court referred to a prior suggestion that it “might” be possible for state and federal law to conflict directly when it is not impossible to comply with both, perhaps

Court's occasional acknowledgment of more nuanced congressional goals, and the Court's clear direction that the Supremacy Clause only brings down those state laws that conflict with the *full* federal regulatory purpose, it should be uncontroversial to acknowledge that not every state–federal conflict leads to preemption.

II. ABSTENTION

This Part presents an analysis of abstention doctrine, which allows federal courts to decline (or defer⁶⁵) jurisdiction over legally valid lawsuits in deference to state judicial or administrative processes. On its surface, the doctrine *seems* relevant to the question of how preemption operates in cooperative federalist systems because (1) both abstention and preemption doctrines serve to prioritize federal and state exercises of authority; and (2) one purpose of abstention doctrine is to limit federal court interference

also implying that there *might* be no direct conflicts without impossibility. On the other hand, according to a plurality in *Mensing*, the Supremacy Clause “suggests that courts should not strain to find ways to reconcile federal law with seemingly conflicting state law.” *Id.* at 2580 (plurality opinion).

65. In *Pullman* and *Younger* abstention, the federal case is stayed to avoid interference with the state proceeding but can be resumed once the state proceeding is complete. See *Harris Cnty. Comm’rs Court v. Moore*, 420 U.S. 77, 88 n.14 (1975) (“Ordinarily the proper course in ordering ‘*Pullman* abstention’ is to remand with instructions to retain jurisdiction but to stay the federal suit pending determination of the state-law questions in state court.”); *Deakins v. Monaghan*, 484 U.S. 193, 202 (1988) (Under *Younger* abstention, “the District Court has no discretion to dismiss rather than to stay claims for monetary relief that cannot be redressed in the state proceeding”). But when the applicable state-court case is before a Texas court, the federal court “dismisses the case *without prejudice* rather than retaining jurisdiction” because Texas courts “cannot grant declaratory relief if a federal court retains jurisdiction over the case.” *Nationwide Mut. Ins. Co. v. Unauthorized Practice of Law Comm. of State Bar of Tex.*, 283 F.3d 650, 656 (5th Cir. 2002). In *Burford* abstention, the case is simply dismissed, albeit often without prejudice. See *S. Ry. Co. v. State Bd. of Equalization*, 715 F.2d 522, 527 (11th Cir. 1983) (“Because *Burford* abstention results in [*inter alia*] the dismissal rather than stay of federal proceedings . . . it is perhaps the most potent device in the abstention area.” (quoting *Nasser v. City of Homewood*, 671 F.2d 432, 440 (11th Cir. 1982)) (internal quotation marks omitted)); *Brandwein v. Cal. Bd. of Osteopathic Exam’rs*, 708 F.2d 1466, 1475 (9th Cir. 1983) (“Even if the district court were correct in dismissing under the *Burford* doctrine, the dismissal should have been without prejudice.”). *Colorado River* abstention can go either way. See *Boushel v. Toro Co.*, 985 F.2d 406, 409 (8th Cir. 1993) (*Colorado River* abstention “allows federal courts to dismiss or stay cases in deference to concurrent state court proceedings In such a case, ‘a stay of the federal suit pending resolution of the state suit mean[s] that there would be no further litigation in the federal forum; the state court’s judgment on the issue would be res judicata.’” (alteration in original) (quoting *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 10 (1983))).

“with the proceedings or orders of state administrative agencies.”⁶⁶ But none of the existing abstention categories neatly fit preemption challenges to state decisions that purport to implement federal law yet conflict with federal mandates. Abstention doctrine should therefore have no broad impact on private litigants’ use of the Supremacy Clause to police cooperative federalist systems, although abstention might prevent such challenges in specific situations. Readers who require no further convincing of this proposition may safely skip to Part III of this Article.

In general, “federal courts’ obligation to adjudicate claims within their jurisdiction [is] virtually unflagging.”⁶⁷ Abstention is “the exception, not the rule.”⁶⁸ This exception is rooted in the courts’ traditional discretion to grant or withhold equitable relief and therefore is more appropriately applied to claims for injunctive or declaratory relief than to claims for damages.⁶⁹

As it has evolved, abstention is not a coherent doctrine or collection of doctrines.⁷⁰ Instead, it is more a laundry list of circumstances that the

66. *New Orleans Pub. Serv., Inc. v. Council of New Orleans (NOPSI)*, 491 U.S. 350, 361 (1989); see Ann Woolhandler & Michael G. Collins, *Judicial Federalism and the Administrative States*, 87 CALIF. L. REV. 613, 617 (1999) (“Objections to [federal courts] entertaining state-law challenges to [state] agency action are grounded in fears that lower federal courts will be too involved in the shaping of state law and thus create problems of nonuniformity and illegitimacy.”).

67. *NOPSI*, 491 U.S. at 359 (quoting *Deakins*, 484 U.S. at 203) (internal quotation marks omitted).

68. *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 813 (1976).

69. See *NOPSI*, 491 U.S. at 359 (noting that “the federal courts’ discretion in determining whether to grant certain types of relief . . . was part of the common-law background against which the statutes conferring jurisdiction were enacted”); *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 718 (1996) (Although abstention doctrine is rooted “in the historic discretion exercised by federal courts sitting in equity, . . . we have recognized that the authority of a federal court to abstain from exercising its jurisdiction extends to all cases in which the court has discretion to grant or deny relief.” (internal quotation marks omitted) (citing *La. Power & Light Co. v. City of Thibodaux*, 360 U.S. 25, 28 (1959)). Further, “*Burford* might support a federal court’s decision to postpone adjudication of a damages action pending the resolution by the state courts of a disputed question of state law.” *Id.* at 730–31.

70. See Martha A. Field, *Abstention in Constitutional Cases: The Scope of the Pullman Abstention Doctrine*, 122 U. PA. L. REV. 1071, 1154 (1974) (“The scope of administrative abstention . . . is ambiguous largely because the reasoning that supports the abstention is not clear.”); Barry Friedman, *A Revisionist Theory of Abstention*, 88 MICH. L. REV. 530, 535 n.20 (1989) (“[T]he division of the abstention cases into discrete doctrines may be more imaginary than real. The abstention doctrines defy strict categorization, so it is not surprising that courts and commentators define the categories in different terms, and that the categories change over time.”); James C. Rehnquist, *Taking Comity Seriously: How to Neutralize the Abstention Doctrine*, 46 STAN. L. REV. 1049, 1114 (1994) (arguing that the doctrine is not a “theoretically satisfactory tool for mediating the friction that inheres in our federalist

Supreme Court has decided may “justify a federal court’s refusal to decide a case in deference to the States.”⁷¹ Courts typically group these circumstances into categories, even if the total number of categories and some of the boundaries between them are open to debate.⁷² The most popular four categories are: (1) *Younger* abstention, which applies when there is either a parallel state criminal proceeding or a parallel civil proceeding that is related or sufficiently analogous to a criminal proceeding;⁷³ (2) *Pullman* abstention, which applies when a state court ruling on an ambiguous issue under state law could allow a federal court to avoid, or to narrow, a difficult issue under the U.S. Constitution;⁷⁴ (3) *Burford* abstention, which applies when a federal ruling on state law would risk disruption to a complex state administrative process for achieving coherent state policy;⁷⁵ and (4) *Colorado River* abstention, which applies under “exceptional circumstances”⁷⁶ when “wise administration of justice”

judicial system”).

71. *NOPSI*, 491 U.S. at 368; see also *Quackenbush*, 517 U.S. at 716–17 (summarizing the list).

72. See *Pennzoil Co. v. Texaco Inc.*, 481 U.S. 1, 11 n.9 (1987) (“The various types of abstention are not rigid pigeonholes into which federal courts must try to fit cases. Rather, they reflect a complex of considerations designed to soften the tensions inherent in a system that contemplates parallel judicial processes.”); see also Charles R. Wise & Robert K. Christensen, *Sorting Out Federal and State Judicial Roles in State Institutional Reform: Abstention’s Potential Role*, 29 *FORDHAM URB. L.J.* 387, 394 (2001) (noting that “abstention remains shrouded in confusion”); Akhil Reed Amar, *The Two-Tiered Structure of the Judiciary Act of 1789*, 138 *U. PA. L. REV.* 1499, 1535 (1990) (“[T]he Court has proliferated a confusing assortment of various abstention doctrines, and dramatically expanded the scope of many of the individual categories of abstention.”).

73. See *Health Net, Inc. v. Wooley*, 534 F.3d 487, 494 (5th Cir. 2008) (“Although *Younger* abstention originally applied only to criminal prosecutions, it also applies ‘when certain civil proceedings are pending, if the State’s interests in the proceeding are so important that exercise of the federal judicial power would disregard the comity between the States and the National Government.’” (citations omitted) (quoting *Pennzoil Co.*, 481 U.S. at 11)).

74. See *Moore v. State Farm Fire & Cas. Co.*, 556 F.3d 264, 273 (5th Cir. 2009) (“*Pullman* abstention applies when an interpretation of an unclear state law will preclude the need to decide a federal constitutional issue.” (citing *R.R. Comm’n of Tex. v. Pullman Co.*, 312 U.S. 496, 499–500 (1941))); see also *Arizonans for Official English v. Arizona*, 520 U.S. 43, 75–76 (1997) (“Certification today covers territory once dominated by [*Pullman* abstention] *Pullman* abstention proved protracted and expensive in practice”); Jonathan Remy Nash, *Examining the Power of Federal Courts to Certify Questions of State Law*, 88 *CORNELL L. REV.* 1672, 1686 (2003) (“[T]he dominance of *Pullman* abstention ended with the rise of certification in the 1960s.”).

75. *Moore*, 556 F.3d at 272 (“*Burford* abstention applies when a case involves a complex issue of unsettled state law that is better resolved through a state’s regulatory scheme.” (citing *Burford v. Sun Oil Co.*, 319 U.S. 315, 332 (1943))).

76. *Stewart v. W. Heritage Ins. Co.*, 438 F.3d 488, 491 (5th Cir. 2006) (“Under *Colorado*

requires deference to a parallel state proceeding that raises substantially identical claims and issues.⁷⁷

It is not completely clear how abstention and preemption doctrines should interact, given the fact that both doctrines serve to prioritize federal and state exercises of authority. A preemption challenge asks whether Congress intended to displace the state's authority,⁷⁸ while abstention doctrine asks whether "the [s]tate's interests are paramount."⁷⁹ It seems logical to expect courts to answer the preemption question first, which would generally moot application of judge-made prudential abstention rules. On the other hand, federal abstention would not block preemption challenges. Instead, it would send litigants to state court, at least for their first crack at a resolution.⁸⁰ This area of the law is not entirely settled, but courts have recognized a "preemption exception" to at least some abstention categories when "the naked question, uncomplicated by [ambiguous language], is whether the state law on its face is preempted."⁸¹

River, a district court may abstain from a case only under 'exceptional circumstances.'" (quoting *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 813 (1976)). The *Western Heritage* court further held that "[i]f the suits are not parallel, the federal court must exercise jurisdiction." *Id.* at 491 n.3 (citing *RepublicBank Dall., N.A. v. McIntosh*, 828 F.2d 1120, 1121 (5th Cir. 1987)). The court explained:

In deciding whether 'exceptional circumstances' exist, the Supreme Court identified six relevant factors: 1) assumption by either court of jurisdiction over a res, 2) relative inconvenience of the forums, 3) avoidance of piecemeal litigation, 4) the order in which jurisdiction was obtained by the concurrent forums, 5) to what extent federal law provides the rules of decision on the merits, and 6) the adequacy of the state proceedings in protecting the rights of the party invoking federal jurisdiction.

Id. at 491 (quoting *Kelly Inv., Inc. v. Cont'l Common Corp.*, 315 F.3d 494, 497 (5th Cir. 2002)).

77. See *Nationwide Mut. Fire Ins. Co. v. George V. Hamilton, Inc.*, 571 F.3d 299, 307–08 (3d Cir. 2009).

78. *Wyeth v. Levine*, 555 U.S. 555, 565 (2009) ("[T]he purpose of Congress is the ultimate touchstone in every pre-emption case." (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996))).

79. *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 728 (1996) (ultimately, abstention is based on a "federal court's decision, based on a careful consideration of the federal interests in retaining jurisdiction over the dispute and the competing concern for the 'independence of state action' that the State's interests are paramount and that a dispute would best be adjudicated in a state forum" (quoting *Burford*, 319 U.S. at 334)).

80. See *Local Union No. 12004, United Steelworkers of Am. v. Massachusetts*, 377 F.3d 64, 77 (1st Cir. 2004) ("[T]he *Younger* analysis is in the end a question of who should decide whether there is some form of preemption by the federal labor laws: the state courts on review of any [Massachusetts Commission Against Discrimination] order, subject to review by certiorari in the Supreme Judicial Court, or the federal courts, which also have jurisdiction over the matter.").

81. *Norfolk & W. Ry. Co. v. Pub. Utils. Comm'n*, 926 F.2d 567, 573 (6th Cir. 1991) (alterations in original) (quoting *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 236–37 (1984)

Regardless of whether a preemption exception applies, the U.S. Supreme Court's 1989 opinion in *New Orleans Public Service, Inc. v. Council of New Orleans (NOPSI)*⁸² should limit the abstention doctrine's impact on litigants' use of preemption claims to police cooperative federalist regulatory systems. The *NOPSI* case was a preemption challenge to a New Orleans City Council regulatory decision. The council prohibited an electric utility from passing some costs of nuclear power on to the ratepayers, when the Federal Energy Regulatory Commission had already determined that those costs were appropriate. The utility brought preemption challenges in federal district court, which abstained.⁸³

In *NOPSI*, the Court rejected application of *Burford* abstention, in part because the *NOPSI* case involved neither "a state-law claim" nor a need to "untangle[]" a federal claim from "a skein of state law."⁸⁴ And "there is . . . no doctrine requiring abstention merely because resolution of a federal question may result in the overturning of a state policy."⁸⁵ A similar conclusion would be appropriate in most situations in which a state regulation, order, or permit that purports to implement a cooperative federalist regulatory scheme allegedly conflicts with federal law.⁸⁶ Such a

(internal quotation marks omitted); see also *Boyes v. Shell Oil Prods. Co.*, 199 F.3d 1260, 1266 & n.12 (11th Cir. 2000) (holding that "[a]bstention under *Burford* and under the primary jurisdiction doctrine is rarely, if ever, appropriate when federal law preempts state law" and noting that "[o]ther circuits agree that abstention is generally inappropriate in a preemption case"); *Fresh Int'l Corp. v. Agric. Labor Relations Bd.*, 805 F.2d 1353, 1362 (9th Cir. 1986) (requiring abstention where "preemption is not 'readily apparent' . . . [and the court could not] say that California's interest is superseded by preemptive federal law"). In *NOPSI*, the U.S. Supreme Court declined to resolve the issue. 491 U.S. 350, 367 (1989) ("NOPSI argues, even if a *substantial* claim of federal pre-emption is not sufficient to render abstention inappropriate, at least a *facially conclusive* claim is. Perhaps so. But we do not have to decide the matter here . . .").

82. 491 U.S. 350, 361 (1989).

83. *Id.* at 353–58.

84. *Id.* at 361 (quoting *McNeese v. Bd. of Educ. for Cmty. Unit Sch. Dist. 187*, 373 U.S. 668, 674 (1963)).

85. *Id.* at 363 (alteration in original) (quoting *Zablocki v. Redhail*, 434 U.S. 374, 380 n.5 (1978)).

86. In general, abstention arguments have fared poorly in disputes under federal antipollution laws. See *Chico Serv. Station, Inc. v. Sol P.R. Ltd.*, 633 F.3d 20, 31–32 (1st Cir. 2011) ("While we are not prepared to rule out categorically the possibility of abstention in a [Resource Conservation and Recovery Act (RCRA)] citizen suit, we believe that the circumstances justifying abstention will be exceedingly rare."); *Sierra Club, Inc. v. Sandy Creek Energy Assocs., L.P.* 627 F.3d 134, 144 (5th Cir. 2010) (affirming a district court's decision not to abstain under *Burford* "since no state cause of action is involved in a federal [Clean Air Act (CAA)] citizen suit"); *PMC, Inc. v. Sherwin-Williams Co.*, 151 F.3d 610, 619 (7th Cir. 1998) (finding that *Burford* abstention in a RCRA citizen suit "would be an end run around RCRA"); *Boyes*, 199 F.3d at 1270 ("The Boyes are entitled to bring their RCRA

state decision may have involved balancing of interesting and complex factors, but—in general—those factors would not be relevant to the question of whether there was a conflict with federal law. In other words, a preemption challenge in this context would usually be a facial challenge.⁸⁷ Thus, in *NOPSI*, “no inquiry beyond the four corners of the Council’s [order was] needed to determine whether it is facially pre-empted.”⁸⁸

The *NOPSI* Court also rejected application of *Younger* abstention because—in contrast to *Younger*’s roots in avoiding interference with state courts’ criminal and civil enforcement authorities—“it has never been suggested that *Younger* requires abstention in deference to a state judicial proceeding reviewing legislative or executive action.”⁸⁹ Further, *Younger* cannot apply to state administrative regulations, orders, or permits, because courts “have never extended it to proceedings that are not ‘judicial in nature.’”⁹⁰ After *NOPSI*, it would be an unreasonable stretch to apply *Younger* abstention to most decisions of state administrative agencies.

NOPSI does not eliminate the possibility of abstention with respect to every conceivable claim that a federal mandate preempts state administrative action.⁹¹ But the precedent—together with the “preemption

claims for remediation in federal court. The *Burford* and primary jurisdiction abstention doctrines are inapplicable.”); *see also* *Adkins v. VIM Recycling, Inc.*, 644 F.3d 483, 505 (7th Cir. 2011) (“The majority of district courts addressing *Burford* abstention in this context have also refused to abstain.”). *But see* *Ellis v. Gallatin Steel Co.*, 390 F.3d 461, 481 (6th Cir. 2004) (“[Claims] that the Kentucky agency [violated Kentucky law and] the Clean Air Act by issuing Gallatin’s [prevention of significant deterioration (PSD)] permit exclusive of Harsco’s operations and by determining that a PSD permit was unnecessary with respect to Harsco . . . offer a classic explanation for applying *Burford* abstention.”); *Coal. for Health Concern v. LWD, Inc.*, 60 F.3d 1188, 1194–95 (6th Cir. 1995) (distinguishing *NOPSI* because “Kentucky has enacted and is operating its own authorized program under RCRA and is attempting to establish a coherent policy under its law concerning the operation and licensing of hazardous waste disposal facilities”).

87. A facial challenge is either (1) “a challenge to an entire legislative enactment or provision,” showing illegality “in every conceivable application,” *Hoye v. City of Oakland*, 653 F.3d 835, 857 (9th Cir. 2011), or (2) a challenge that alleges overbreadth, *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 n.6 (2008).

88. 491 U.S. at 363. The Court explained that “[u]nlike a claim that a state agency has misapplied its lawful authority or has failed to take into consideration or properly weigh relevant state-law factors, federal adjudication of this sort of pre-emption claim would not disrupt the State’s attempt to ensure uniformity in the treatment of an ‘essentially local problem.’” *Id.* at 362 (quoting *Ala. Pub. Serv. Comm’n v. S. Ry. Co.*, 341 U.S. 341, 347 (1951)).

89. *Id.* at 368.

90. *Id.* at 370.

91. *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 727 (1996) (the Supreme Court’s cases “do not provide a formulaic test for determining when dismissal under *Burford* is appropriate”).

exception”⁹²—should apply to enough such claims to ensure that preemption challenges remain a viable tool for policing state implementation of cooperative federalist regulatory schemes.⁹³

III. ENVIRONMENTAL COOPERATIVE FEDERALISM

This Part begins an analysis of the full federal regulatory purpose behind environmental cooperative federalist regulatory schemes. Subpart A puts the relevant terminology in perspective. Next, subpart B describes the characteristics of typical environmental cooperative federalist systems. Subpart C shows that Congress enacted environmental cooperative federalist regulatory schemes to (1) attain national standards, (2) overcome bureaucratic inertia, and (3) preserve state primacy. Finally, subpart D summarizes the process by which states obtain EPA approval to implement federal environmental laws and examines legislative and regulatory mechanisms for keeping states on track to achieve regulatory purposes.

A. Terminology and Scope

Since at least the 1930s, lawyers have used the phrase “cooperative federalism” to refer to a variety of approaches to power sharing among our sovereigns.⁹⁴ These approaches have one thing in common: they are not “dual federalism,” that is, they do not relegate federal and state sovereigns to mostly separate spheres.⁹⁵ Instead, theories of cooperative federalism

92. See *supra* note 81 and accompanying text (citing, *inter alia*, the *Norfolk & Western Railway Co.* case).

93. But see *supra* note 86 (citing, *inter alia*, the *Gallatin Steel Co.* case). Cases that apply *Burford* abstention to alleged violations of federal environmental mandates ignore an important limitation on the *Burford* doctrine: it applies only to claims arising under state law. See *Sierra Club, Inc. v. Sandy Creek Energy Assocs., L.P.*, 627 F.3d 134, 144 (5th Cir. 2010) (noting that *Burford* abstention is inappropriate where the case “does not involve a state-law claim” (quoting *NOPSI*, 491 U.S. at 361)).

94. See Joseph F. Zimmerman, *Preemption in the U.S. Federal System*, *PUBLIUS*, Fall 1993, at 1, 10 (noting that “cooperative federalism” fittingly describes a variety of approaches and characteristics but fails to describe others).

95. See *Younger v. Harris*, 401 U.S. 37, 44 (1971) (“[T]he National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways.”); Edward S. Corwin, *The Passing of Dual Federalism*, 36 *VA. L. REV.* 1, 4 (1950) (dual Federalism comprised postulates that, *inter alia*: “Within their respective spheres the two centers of government are ‘sovereign’ and hence ‘equal’”); Harry N. Scheiber, *American Federalism and the Diffusion of Power: Historical and Contemporary Perspectives*, 9 *U. TOL. L. REV.* 619, 635–36 (1978) (arguing that dual federalism’s diffusion of power created a “record of liberty [that] was stained by the legitimacy given slavery”); see also Nestor M. Davidson, *Cooperative Localism: Federal–Local Collaboration in an Era of State Sovereignty*, 93 *VA. L. REV.* 959, 964–65 (2007) (“This [dual federalism] conception of constitutional structure, often

recognize that federal and state powers and responsibilities overlap and interact.

In the early 1970s, Congress passed the Clean Air and Clean Water Acts, beginning the modern era of cooperative federalist antipollution regulation.⁹⁶ These enactments followed a dramatic expansion of federal power under the Commerce Clause, first in response to the Great Depression⁹⁷ and then to battle racial segregation.⁹⁸ By the late 1960s and early 1970s, the commerce power seemed broad enough to completely displace state environmental regulation.⁹⁹ But just because Congress *could*, in theory, displace state power,¹⁰⁰ did not mean it wanted to do so. Instead,

described as a layer cake, posits the federal government and state governments operating in separate, clearly demarcated spheres.”); Robert A. Schapiro, *Toward a Theory of Interactive Federalism*, 91 IOWA L. REV. 243, 284 (2005) (“The term [*cooperative federalism*] arose out of the recognition that the separation of state and national authority assumed in dual federalism did not accurately describe the actual interaction of state and national governments.”).

96. See Richard J. Lazarus, *The Greening of America and the Graying of United States Environmental Law: Reflections on Environmental Law’s First Three Decades in the United States*, 20 VA. ENVTL. L.J. 75, 77–78 (2001) (discussing the “first generation” of U.S. environmental protection laws, including “the Clean Air Act of 1970 [and] the Federal Water Pollution Control Act Amendments of 1972 (now, as further amended, referred to as the Clean Water Act)” (footnote omitted)).

97. See, e.g., *Wickard v. Filburn*, 317 U.S. 111, 127–28 (1942) (upholding Commerce Clause regulation of consumption of wheat “on the farm where grown”). Bruce Ackerman argues that it was only after the new deal that “the federal government would operate as a truly national government, speaking for the People on all matters that sufficiently attracted the interest of lawmakers in Washington, D.C.” BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 105 (1991).

98. See, e.g., *Katzenbach v. McClung*, 379 U.S. 294, 304 (1964) (holding that Congress “had a rational basis for finding that racial discrimination in restaurants had a direct and adverse effect on the free flow of interstate commerce”).

99. See J. William Futrell, *The History of Environmental Law*, in *SUSTAINABLE ENVIRONMENTAL LAW* 3, 38 (Celia Campbell-Mohn et al. eds., 1993) (“The Supreme Court’s vindication of the 1964 Civil Rights Act opened the door for sweeping environmental health and safety regulation.”). More recently, limits to that power have emerged. See RICHARD J. LAZARUS, *THE MAKING OF ENVIRONMENTAL LAW* 204 (2004) (arguing that “the U.S. Supreme Court’s emerging framework for defining the limits of congressional authority under the Commerce Clause is potentially . . . threatening to environmental law”). At least for now, however, most antipollution regulations remain squarely within the modern conception of the commerce power’s reach. See, e.g., *United States v. Olin Corp.*, 107 F.3d 1506, 1511 (11th Cir. 1997) (“[T]he regulation of intrastate, on-site waste disposal constitutes an appropriate element of Congress’s broader scheme to protect interstate commerce and industries thereof from pollution.”).

100. See *United States v. Lopez*, 514 U.S. 549, 558–59 (1995) (in general, the commerce power extends to: (1) “the channels of interstate commerce”; (2) “the instrumentalities of interstate commerce, or persons or things in interstate commerce”; and (3) “activities having a substantial relation to interstate commerce”); *Olin Corp.*, 107 F.3d at 1510 (concluding that the Superfund Act “regulates a class of activities [disposal of hazardous waste at the site of

to allocate responsibility between sovereigns to implement modern antipollution laws, Congress created environmental cooperative federalism.¹⁰¹

Perhaps because the word *cooperative* sounds so friendly, some have used other labels—for example, “coercive” federalism—to describe Congress’s relatively heavy-handed approaches to federal–state interaction.¹⁰² This Article follows the U.S. Supreme Court, however, in using the phrase “cooperative federalism” to include a relatively bare-knuckled form of cooperation.¹⁰³ In *New York v. United States*,¹⁰⁴ the Court defined “a program of ‘cooperative federalism’” as an arrangement in which federal law “offer[s] States the choice of regulating . . . according to federal standards or having state law pre-empted by federal regulation.”¹⁰⁵ More colorfully, the Court has also described this arrangement as Congress “taking a stick to the States.”¹⁰⁶

One problem with trying to nail *cooperative federalism* to any one definition is that federal laws ignore definitional boundaries. This suggests that

production] that substantially affects interstate commerce”).

101. See Adam Babich, *Our Federalism, Our Hazardous Waste, and Our Good Fortune*, 54 MD. L. REV. 1516, 1532 (1995) (“Cooperative federalism holds the promise of allowing the states continued primacy and flexibility in their traditional realms of protecting public health and welfare, while ensuring that protections for all citizens meet minimum federal standards.”).

102. See Joseph F. Zimmerman, *National–State Relations: Cooperative Federalism in the Twentieth Century*, PUBLIUS, Spring 2001, at 15, 27 (offering a “theory of coercive federalism”); see also Erin Ryan, *Federalism and the Tug of War Within: Seeking Checks and Balance in the Interjurisdictional Gray Area*, 66 MD. L. REV. 503, 640 (2007) (noting that “[s]ome critics of cooperative federalism thus argue that it would be more accurately characterized as ‘coercive federalism’”).

103. Tenth Amendment doctrine prohibits Congress from “commandee[ring] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.” *New York v. United States*, 505 U.S. 144, 161 (1992) (quoting *Hodel v. Va. Surface Mining & Reclamation Ass’n*, 452 U.S. 264, 288 (1981)); see also *Env’tl. Def. Ctr., Inc. v. EPA*, 344 F.3d 832, 847 (9th Cir. 2003) (“[W]hile the federal government may not *compel* them to do so, it may *encourage* States and municipalities to implement federal regulatory programs. . . . [But] the State or municipality must retain ‘the ultimate decision’ as to whether [it] will comply with the federal regulatory program.”).

104. 505 U.S. 144 (1992).

105. *Id.* at 145; Mark Squillace, *Cooperative Federalism Under the Surface Mining Control and Reclamation Act: Is This Any Way to Run a Government?*, [1985] 15 *Env’tl. L. Rep.* (Env’tl. Law Inst.) at 10,039, 10,039 (“One of the hallmarks of the environmental legislation passed by Congress in the 1970s was its increased reliance on a regulatory framework that has come to be known as cooperative federalism. . . . To varying degrees, virtually all of the major regulatory laws in the environmental field employ this scheme.”).

106. *Train v. Natural Res. Def. Council*, 421 U.S. 60, 64 (1975) (describing Congress’s first use of environmental cooperative federalism, which was in the Clean Air Act Amendments of 1970, as Congress “taking a stick to the States” as a reaction to the states’ disappointing response to “increasing congressional concern with air pollution”).

Congress did not purposefully implement theories about types of federalism but focused instead on navigating the practical and political problems posed by each enactment.¹⁰⁷ Almost any generalization about cooperative federalist systems, therefore, is subject to important exceptions. For example, neither the Superfund Act's mechanisms for involving states in cleanup of hazardous substances¹⁰⁸ nor the Clean Air Act's program for regulating automobile emissions¹⁰⁹ are very forthcoming in "offer[ing] States the choice"¹¹⁰ of regulating according to minimum federal standards. Nonetheless both programs employ variations of the cooperative federalist model to involve both sovereigns in the regulatory process. Also, both programs function within a larger cooperative federalist framework created by the cumulative impact of the Nation's antipollution laws.¹¹¹

For purposes of this Article it is sufficient to focus on meat-and-potatoes environmental cooperative federalist schemes. These schemes center on EPA-authorized programs, in which states (once they receive EPA approval) take the lead in implementing minimum federal standards subject to federal oversight. Despite many exceptions and variations, this arrangement is the environmental cooperative federalist system's foundation. And although it may sound straightforward, any system that relies on state sovereigns to consistently follow federal policy in the midst of a constantly changing political, economic, scientific, and regulatory framework is inherently complex.

107. See John P. Dwyer, *The Practice of Federalism Under the Clean Air Act*, 54 MD. L. REV. 1183, 1192–93 (1995) (When creating environmental cooperative federalism in the 1970 Clean Air Act Amendments, "[f]ew members of Congress . . . expressed any sentiments for the abstract values of state autonomy On the contrary, federal legislators viewed state autonomy with suspicion because the states had failed to impose adequate air pollution controls.").

108. See Babich, *supra* note 101, at 1537 (arguing that the Superfund Act's "scheme has pitted [the Environmental Protection Agency (EPA)] against the states in a continuing battle to control the stringency of Superfund cleanups").

109. See *Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist.*, 541 U.S. 246, 256 (2004) (interpreting Clean Air Act § 209(a), 42 U.S.C. § 7543(a) (2006), to preempt state auto emission regulations imposed "through purchase restrictions").

110. *New York v. United States*, 505 U.S. 144, 145 (1992).

111. Rena I. Steinzor, *Devolution and the Public Health*, 24 HARV. ENVTL. L. REV. 351, 357 (2000) ("All of the major federal environmental laws divide the authority to implement programs between the federal and state governments."); Squillace, *supra* note 105, at 10,039 ("To varying degrees, virtually all of the major regulatory laws in the environmental field employ this scheme [of cooperative federalism].").

B. *Environmental Cooperative Federalist Systems*

Although they vary significantly in their details,¹¹² the basic outline of modern cooperative federalist systems is that:

- (1) EPA promulgates minimum federal standards that preempt less stringent state standards;¹¹³
- (2) States that wish to run their own antipollution programs (that is, essentially all states) develop those programs through their own legislative and administrative processes and then submit them to EPA;¹¹⁴
- (3) EPA reviews and approves (or disapproves) the state programs. Once a state's program is approved, the state's regulations apply instead of most EPA regulations associated with the approved program and the state becomes the primary issuer and enforcer of permits;¹¹⁵

112. The major antipollution laws' approaches to cooperative federalism vary not only from statute to statute, but also from program to program within statutes. While some of this variation results from historical accident and vagaries of the legislative process, there are policy reasons behind other differences. For example, the Clean Air Act affords the states less discretion to regulate "mobile sources," such as cars and trucks, than "stationary sources," such as factories or refineries. *Compare supra* note 109 and accompanying text, *with infra* note 114 and accompanying text. This avoids some of the practical problems that would be involved in tailoring mass-produced mobile sources to meet standards that varied among the fifty states.

113. See A. Dan Tarlock, *Environmental Law: Then and Now*, 32 WASH. U. J.L. & POL'Y 1, 23 (2010) ("Cooperative federalism rested on two ideas: first, the federal government would set floors, which the states could raise but not lower; second, the states would be responsible for administering the major regulatory programs, primarily the Clean Air and Water Acts, 'incentivized' by federal grants and fiscal sanctions for non-enforcement.").

114. See, e.g., Clean Air Act § 4(a), 42 U.S.C. § 7410(a) (2006) ("[E]ach State shall . . . adopt and submit to the Administrator . . . a plan which provides for implementation, maintenance, and enforcement of such primary standard . . ."); Clean Water Act § 402, 33 U.S.C. § 1342(b) (2006) ("[T]he Governor of each State desiring to administer its own permit program for discharges into navigable waters within its jurisdiction may submit to the Administrator a full and complete description of the program it proposes to establish and administer under State law . . ."); Resource Conservation and Recovery Act § 3006, 42 U.S.C. § 6926(b) ("Any State which seeks to administer and enforce a hazardous waste program pursuant to this subchapter may develop and . . . submit to the Administrator an application . . . for authorization of such program.").

115. See, e.g., *Gen. Motors Corp. v. United States*, 496 U.S. 530, 537 (1990) ("The Administrator is to approve the proposed revision if he determines that 'it'—that is, the revision—meets the substantive requirements imposed on a [state implementation plan] by [Clean Air Act] § 110(a)(2)."); Resource Conservation and Recovery Act § 3006, 42 U.S.C. § 6926(b) (an approved state "is authorized to carry out such program in lieu of the Federal program under this subchapter in such State and to issue and enforce permits for the storage, treatment, or disposal of hazardous waste . . ."). In addition to its authority to

- (4) EPA provides oversight of state implementation;¹¹⁶ and,
- (5) Sweetening the deal, EPA provides significant funding to the states to assist in running EPA-approved programs.¹¹⁷

One policy justification for this system is that it allows for state experimentation and variety within federal mandates' ambit.¹¹⁸ Indeed, even when mandatory federal standards apparently govern most permit standards, states retain enormous discretion.¹¹⁹ For example, determining whether a pollution source exceeds a regulatory threshold includes myriad decisions about which emission streams to consider and how to estimate them.¹²⁰ Even when the underlying methodology is relatively rigid, regulators can have varying impacts depending on the extent to which they defer to—or rework—applicants' assumptions and calculations.¹²¹

approve state plans under Clean Air Act § 110(a), the EPA asserts authority under 40 C.F.R. § 52.21(u) (2010), to delegate federal regulatory power to states that are without approved plans. EPA enters into delegation agreements with some states to authorize state implementation of “prevention of significant deterioration” regulations. *See, e.g.*, Prevention of Significant Deterioration; Delegation of Authority to State Agencies, 46 Fed. Reg. 9580, 9580 (Jan. 29, 1981) (codified at 40 C.F.R. pt. 52).

116. *See, e.g.*, Reed D. Benson, *Pollution Without Solution: Flow Impairment Problems Under Clean Water Act Section 303*, 24 STAN. ENVTL. L.J. 199, 204 (2005) (“[T]he CWA requires protection of U.S. waters through ‘cooperative federalism,’ with major roles for the states subject to EPA oversight . . .”).

117. *See, e.g.*, 42 U.S.C. § 7405 (2006) (describing grants for air pollution and control programs). EPA’s proposed 2011 budget “[p]rovides grants for States and Tribes to administer delegated environmental programs at \$1.3 billion.” OFFICE OF MGMT. & BUDGET, TERMINATIONS, REDUCTIONS, AND SAVINGS: BUDGET FOR THE U.S. GOVERNMENT FISCAL 2011, at 125, <http://www.gpoaccess.gov/usbudget/fy11/pdf/budget/environmental.pdf>. Federal funding subjects state environmental agencies to EPA’s Title VI (i.e., environmental justice) regulations. 40 C.F.R. § 7.50; *see, e.g., id.* § 7.35(b) (“A recipient shall not use criteria or methods of administering its program or activity which have the effect of subjecting individuals to discrimination because of their race, color, national origin, or sex . . .”).

118. *See* *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (“It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”); *see also* Kirsten H. Engel, *Harnessing the Benefits of Dynamic Federalism in Environmental Law*, 56 EMORY L.J. 159, 184 (2006) (noting that federal preemption can leave “the responsibility of generating policy ideas to the federal government alone”).

119. *See* Dwyer, *supra* note 107, at 1223 (“Despite the imposition of federal priorities and requirements over the last twenty-five years, many state legislatures and agencies have become significant players in environmental policy-making.”).

120. *See, e.g.*, *Atl. States Legal Found., Inc. v. Eastman Kodak Co.*, 12 F.3d 353, 359 (2d Cir. 1993) (holding that a discharger is not liable under the Clean Water Act for discharging chemicals that the state declined to limit in a water discharge permit).

121. *See* EPA Order Denying Petition for Objection to Permits, No. VI-04-02, at 13

Moreover, even if a state were to consistently issue permits as stringent as those EPA issues, members of the regulated community would likely still prefer to deal with state bureaucracies. State administrators can ease the pain of regulation by making decisions relatively promptly and by providing access to decisionmakers willing to explain difficult decisions. In contrast, a huge federal bureaucracy such as EPA can be frustratingly slow and difficult to work with even when, at the end of the day, the regulatory decisions are reasonable.¹²² When business transactions are contingent on regulatory approvals, a prompt decision may be preferable to one that is less stringent, but slow. If only because states have smaller bureaucracies and more direct incentives to avoid blocking activities that might add vitality to state economies, states are almost always better situated than EPA to provide decisionmaking that is prompt and—within the bounds of federal mandates—industry friendly.¹²³

When two cooperate, of course, it tends to be “the stronger member of the combination who calls the tunes.”¹²⁴ States have nonetheless shown an ability to wield power in the cooperative federalist structure.¹²⁵ That power is based on (1) politics, i.e., “the built-in restraints that our system provides through state participation in federal governmental action”;¹²⁶ (2) practicalities, since making good on federal threats to preempt state regulatory authority would require the federal government to come up with the budget and personnel to take over;¹²⁷ and (3) the Judiciary, which

(Dec. 22, 2004), available at http://www.epa.gov/region7/air/title5/petitiondb/petitions/dow_decision2002.pdf (rejecting a petition to veto a Clean Air Act permit when a state “apparently accepted” the permittees’ rationale for use of an alternative baseline for calculating emission increases, and cautioning that “[i]n the future,” the state “should ensure that the record clearly demonstrates the rationale for accepting an alternative baseline”).

122. See *United States v. Ottati & Goss, Inc.*, 900 F.2d 429, 444 (1st Cir. 1990) (“Has the government, in fact, spent enormous administrative (and judicial) resources in an effort to force improvement from ‘quite clean’ . . . to ‘extremely clean,’ at three to four times the ‘quite clean’ costs?”).

123. See William W. Buzbee, *Clean Air Act Dynamism and Disappointments: Lessons for Climate Legislation to Prompt Innovation and Discourage Inertia*, 32 WASH. U. J.L. & POL’Y 33, 41 (2010) (“State and local governments are more dependent on local employment and tax revenues than federal actors, resulting in a frequent bias in favor of industry and against regulatory rigor.”).

124. Edward S. Corwin, *The Passing of Dual Federalism*, 36 VA. L. REV. 1, 21 (1950).

125. Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1, 6 (1988) (“In both courts and Congress, therefore, states can provide a particularly organized and effective opposition to federal policies.”).

126. *Garcia v. San Antonio Metro. Transit Auth.* 469 U.S. 528, 556 (1985) (“The political process ensures that laws that unduly burden the States will not be promulgated.”).

127. A former EPA official explains: “The stick can shift to another hand. States always have the option of returning their delegated programs back to the EPA, a frightening

introduces an element of uncertainty into the outcome of those federal–state disputes that go all the way to the mat.¹²⁸ This uncertainty helps encourage sovereigns to work things out cooperatively.¹²⁹

C. Three Congressional Goals

Environmental cooperative federalism arose from Congress’s attempt to balance multiple and conflicting concerns: frustration with the states’ protracted failure to effectively regulate pollution,¹³⁰ profound distrust of regulatory bureaucracies, and reluctance to abrogate the states’ historical role as the primary protectors of public health and safety.¹³¹ These concerns translate into three goals: to (1) provide all U.S. citizens¹³² with a

prospect for budget managers at the agency.” G. Tracy Mehan, III, *A Symphonic Approach to Water Management: The Quest for New Models of Watershed Governance*, 26 J. LAND USE & ENVTL. L. 1, 20 (2010).

128. *New York v. United States*, 505 U.S. 144, 160 (1992) (court decisions defining the extent of federal power have “traveled an unsteady path”).

129. *Alaska Dep’t of Envtl. Conservation v. EPA*, 540 U.S. 461 (2004) (upholding EPA’s authority to block a project with a state Clean Air Act permit because of a conflict with federal “prevention of significant deterioration” regulations), was a 4-to-5 opinion, and three members of the majority are no longer on the Court.

130. See *Train v. Natural Res. Def. Council*, 421 U.S. 60, 64 (1975) (describing Congress’s first use of environmental cooperative federalism (in the Clean Air Act Amendments of 1970) as Congress “taking a stick to the States” as a reaction to the states’ disappointing response to “increasing congressional concern with air pollution”).

131. See Jeffrey G. Miller, *Theme and Variations in Statutory Preclusions Against Successive Environmental Enforcement Actions by EPA and Citizens* (pt. 2: *Statutory Preclusions on EPA Enforcement*), 29 HARV. ENVTL. L. REV. 1, 10 (2005) (“Beginning with the CAA, Congress modeled complicated ‘cooperative federalism’ constructs as the bedrock of its environmental programs. It envisioned that state laws, approved by EPA and meeting federal requirements, would be the cores of the statutes.”).

132. Use of the term *citizen* in this context is arguably problematic. See M. Isabel Medina, *Exploring the Use of the Word “Citizen” in Writings on the Fourth Amendment*, 83 IND. L.J. 1557, 1567 (2008) (“Substitution of the word ‘citizen’ for the word ‘person’ or ‘individual’ erects a barrier between classes of persons which negates the basic humanity that is common to all.”). A safe and healthful environment benefits not only citizens, but anyone who happens to reside in, or visit, the United States, as well as corporate, governmental, and other interests. Antipollution laws’ famous “citizen suit” provisions, therefore, are not limited to citizens but generally authorize suits by any “person” with legal standing. See 33 U.S.C. § 1365(g) (2006) (defining “citizen” under the Clean Water Act as “a person or persons having an interest which is or may be adversely affected”). On the other hand, the word *citizen* packs a rhetorical power that the phrase “person having an interest” seems to lack. So legislators are apt to say that “all citizens” or “all Americans” are entitled to a safe and healthful environment, even if they intend to protect all entities at risk of injury from poor air quality within U.S. borders. Compare 116 CONG. REC. 32,900, 32,901 (1970) (statement of Sen. Edward Muskie) (“This bill states that all Americans in all parts of the Nation should have clean air to breathe . . .”), with Clean Air Act § 302(e), 42 U.S.C.

minimum level of environmental protection,¹³³ (2) overcome bureaucratic inertia,¹³⁴ and (3) preserve state primacy.¹³⁵ An analysis of preemption

§ 7602(e) (2006) (defining “person” to include “an individual, corporation, partnership, association, State, municipality, political subdivision of a State, and any agency, department, or instrumentality of the United States”).

133. Clean Water Act § 101(a)(3), 33 U.S.C. § 1251(a)(3) (“[I]t is the national policy that the discharge of toxic pollutants in toxic amounts be prohibited”); Resource Conservation and Recovery Act § 1002, 42 U.S.C. § 6901(a)(4) (2006) (finding, *inter alia*, that “the problems of waste disposal as set forth above have become a matter national in scope and in concern and necessitate Federal action through financial and technical assistance and leadership in the development, demonstration, and application of new and improved methods and processes”); 116 CONG. REC. at 32,901 (statement of Sen. Edward Muskie) (“It is also clear that ambient air quality standards which will protect the health of persons must be set as minimum standards for all parts of the Nation, and that they must be met in all areas within national deadlines.”).

134. ENVTL. POLICY DIV., COMM. ON PUB. WORKS, 93D CONG., SERIAL NO. 93-18, A LEGISLATIVE HISTORY OF THE CLEAN AIR AMENDMENTS OF 1970, at 351 (Comm. Print 1974) (remarks of Sen. Edward Muskie) (“The concept of compelling bureaucratic agencies to carry out their duties is integral to democratic society. . . . The concept in the bill is that administrative failure should not frustrate public policy and that citizens should have the right to seek enforcement where administrative agencies fail.”); 116 CONG. REC. at 32,901 (statement of Sen. Edward Muskie) (“On all levels, the air pollution control program has been underfunded and undermanned. . . . [N]o level of government has implemented the existing law to its full potential. We have learned . . . that States and localities need greater incentives and assistance to protect the health and welfare of all people.”); *see also* James J. Florio, *Congress as Reluctant Regulator: Hazardous Waste Policy in the 1980’s*, 3 YALE J. ON REG. 351, 351–52 (1986) (Congress has taken on role of regulator due to EPA’s refusal to carry out congressional intent); Walter E. Mugdan & Bruce R. Adler, *The 1984 RCRA Amendments: Congress as a Regulatory Agency*, 10 COLUM. J. ENVTL. L. 215, 217 (1985) (amendments to RCRA indicate congressional distrust of EPA’s implementation of regulations); E. Donald Elliott, *U.S. Environmental Law in Global Perspective: Five Do’s and Five Don’ts from Our Experience*, 5 NAT’L TAIWAN U. L. REV. 143, 153 (2010) (“We sometimes find . . . that agencies might be reluctant to implement or enforce the law even though they have the power to do because of the fear of political backlash. In response, the Congress eventually developed something that my colleague Bruce Ackerman at Yale named the ‘Agency Forcing Statute.’” (citing BRUCE A. ACKERMAN & WILLIAM T. HASSLER, *CLEAN COAL/DIRTY AIR* (1981))); Daniel P. Selmi, *Jurisdiction to Review Agency Inaction Under Federal Environmental Law*, 72 IND. L.J. 65, 68 (1996) (noting the importance of environmental laws’ “empowerment of citizens to force a recalcitrant EPA to act”).

135. Clean Air Act § 101, 42 U.S.C. § 7401(a)(3) (finding that “pollution control at its source is the primary responsibility of States and local governments”); Clean Water Act § 101, 33 U.S.C. § 1251(b) (announcing Congress’s policy to “recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under [the Act].”); Resource Conservation and Recovery Act § 1002, 42 U.S.C. § 6901(a)(4) (finding, *inter alia*, that “the collection and disposal of solid wastes should continue to be primarily the function of State, regional, and local agencies”). When introducing the Clean Air Act Amendments of 1970, Senator Muskie explained:

doctrine's role within environmental cooperative federalist systems should account for all three of these goals.¹³⁶

Cooperative federalism serves other valuable functions. These, however, do not appear to qualify as goals of the system but fit better into a category of happy accidents. For example, because cooperative federalist systems spread regulatory expertise among federal and state agencies,¹³⁷ there is always an experienced “minor league” to draw from when political considerations require replacement of federal regulatory agencies' leaders.¹³⁸ Further, cooperative federalism allows our sovereigns to attempt to regulate one another, helping to provide some oversight of our nation's most persistent polluters,¹³⁹ despite the difficulty of convincing powerful sovereigns to comply with their own laws.¹⁴⁰

D. Keeping States on Track

Environmental laws provide various mechanisms—some more robust than others—for keeping states on track to fully implement national standards. These include mechanisms for approval and withdrawal of state

In 1963, Congress recognized that the Federal Government could not handle the enforcement task alone, and that the primary burden would rest on States and local governments. However, State and local governments have not responded adequately to this challenge. It is clear that enforcement must be toughened if we are to meet the national deadlines. More tools are needed, and the Federal presence and backup authority must be increased.

...

... The committee remains convinced that the most effective enforcement of standards will take place on the State and local levels. It is here that the public can participate most actively and bring the most effective pressure to bear for clean air.

Public participation is therefore important in the development of each State's implementation plan. These plans . . . involve public policy choices that citizens should make on the State and local level. They should be consistent with a rational nationwide policy and would be subject to the approval of the Secretary.

116 CONG. REC. at 32,901–03 (statement of Sen. Muskie).

136. See *supra* note 58 (discussing *Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Commission*, 461 U.S. 190 (1983), and related authority).

137. See Dwyer, *supra* note 107, at 1224 (“[F]ederal funding and federal environmental legislation have promoted the development and growth of state environmental bureaucracies and expertise.”).

138. See Merritt, *supra* note 125, at 7 (“[S]tate governments help maintain the multiparty system and prevent the growth of a monolithic political power on the federal level.”).

139. See Adam Babich, *Circumventing Environmental Laws: Does the Sovereign Have a License to Pollute?*, NAT. RESOURCES & ENV'T, Summer 1991, at 28; Howard Kohn, *America's Worst Polluter*, ROLLING STONE, May 3, 1990, at 47, 48.

140. See Babich, *supra* note 101, at 1551 (arguing that “one of the ‘happy incidents of the federal system’ is that it can cause its various governments to begin to regulate each other” (footnote omitted)).

programs, for dealing with illegal permits or approvals, for direct federal enforcement, and residual authority to prevent potential imminent hazards.

1. *Program Approval*

Most environmental cooperative federalist programs require EPA to approve each state program before that program can operate in lieu of the federal regulatory program. EPA approval is “final agency action,” taken after notice and an opportunity for public comment, and is thus subject to judicial review.¹⁴¹ Environmental statutes and regulations specify standards for approval to ensure that approved state programs are “consistent with” and “no less stringent than” applicable federal programs.

When federal regulatory programs change, states must change their programs, too, if they are to continue to fully implement national standards.¹⁴² It would be unrealistic, however, to expect sovereigns to instantaneously enact or promulgate needed legislative or regulatory changes to keep pace with federal programs. After all, states do not have a clear target for needed changes until revisions to the federal programs are final. And state legislative and administrative processes—like federal processes—take time. The necessary state regulations require notice and an opportunity for public comment, and may be subject to judicial review in state court.¹⁴³ For this reason, most environmental cooperative federalist schemes provide a grace period—usually about one year—to allow state programs to catch up without running afoul of federal requirements of consistency with the changed federal program.¹⁴⁴ After that grace period is over, however, there is no automatic sanction for states that miss the deadline.¹⁴⁵ Instead, the offending state risks becoming subject to the

141. See, e.g., 42 U.S.C. § 7607(b) (2006).

142. See, e.g., 40 C.F.R. § 271.21(e)(1) (2011) (“As the Federal program changes, authorized State programs must be revised to remain in compliance with this subpart.”).

143. See *Akiak Native Cmty. v. EPA*, 625 F.3d 1162, 1166 (9th Cir. 2010) (noting EPA’s requirement that approved states “provide an opportunity for judicial review in State Court of the final approval or denial of permits by the State that is sufficient to provide for, encourage, and assist public participation in the permitting process” (quoting 40 C.F.R. § 123.30 (2010))).

144. See, e.g., 40 C.F.R. § 271.21(e)(2)(i) (“For Federal program changes occurring before July 1, 1984, the State program must be modified within one year of the date of the Federal program change.”); *id.* § 271(e)(2)(ii) (with exceptions, for changes “after July 1, 1984, the State program must be modified by July 1 of each year to reflect all changes to the Federal program occurring during the 12 months preceding the previous July 1”).

145. See, e.g., *id.* § 271.21(g)(1) (“States that are unable to modify their programs by the deadlines in paragraph (e) *may* be placed on a schedule of compliance to adopt the program revision(s)” (emphasis added)); *id.* § 271.21(g)(2) (“If a State fails to comply with the schedule of compliance, the Administrator *may* initiate program withdrawal

approved-program withdrawal procedure discussed below.

There is an important exception to the “grace period” approach to changed federal rules discussed above. When amending the Resource Conservation and Recovery Act in 1984, Congress decided that all of the changes it was authorizing to the federal hazardous waste regulatory program were so important that no grace period would do. Instead, Congress provided that hazardous waste requirements “imposed . . . pursuant to the [1984] amendments” would take effect on the same date in all states.¹⁴⁶ EPA carries out those requirements “directly in each such State” unless and until EPA authorizes that state’s program to implement the new requirement.¹⁴⁷

None of this works as reliably in the real world as it does in theory, and there is no shortage of litigation about program approvals or EPA-approved programs that fail to meet national goals.¹⁴⁸ At least in theory, however, on the date of approval, a state program should not pose significant conflicts with national standards.¹⁴⁹ And of course, once EPA’s approval of a program survives judicial review, if any, or once the period for seeking judicial review expires (usually sixty days after publication), the courts should have little patience with arguments that the approved state program violates federal law.¹⁵⁰

But what happens if the state changes its program after obtaining EPA approval? Or if the state fails to keep up with EPA’s revisions to the federal program?

procedures . . .” (emphasis added)).

146. 42 U.S.C. § 6926(g)(1).

147. *Id.* This creates a complicated regulatory regime, with different sovereigns responsible for different aspects of the same hazardous waste permit. See Adam Babich, *Is RCRA Enforceable by Citizen Suit in States with Authorized Hazardous Waste Programs?*, [1993] 23 *Envtl. L. Rep. (Envtl. Law Inst.)* at 10,536, 10,538 (explaining that “unwary regulated entities that meet the requirements of only one sovereign may miss important deadlines enforced by the other”).

148. See, e.g., *BCCA Appeal Grp. v. EPA*, 355 F.3d 817 (5th Cir. 2003).

149. *But see Pub. Citizen, Inc. v. EPA*, 343 F.3d 449, 456 (5th Cir. 2003) (upholding an EPA decision to move from interim to full approval of a state Clean Air Act program despite an EPA determination that the state’s program “did not meet all of [the Act’s] requirements”).

150. See, e.g., 42 U.S.C. § 7607(b)(1) (“Any petition for review under this subsection shall be filed within sixty days from the date notice of such promulgation, approval, or action appears in the Federal Register [with exceptions] . . .”).

2. Program Withdrawal

EPA regulations generally allow the agency to withdraw approval of state programs that stop meeting federal criteria.¹⁵¹ EPA rarely exercises this authority, since such withdrawals are politically complex and require the agency to come up with the personnel and budget to administer the withdrawn program itself. But because EPA accomplishes withdrawals through rulemaking, Administrative Procedure Act (APA) § 553(e)—which allows “an interested person” to petition federal agencies for rulemaking—empowers citizens to petition EPA to withdraw inadequate state programs.¹⁵² Further, EPA’s mere *consideration* of a petition to withdraw launches a powerful process, which motivates state agencies to take EPA suggestions for program improvement seriously. Typically, such a proceeding concludes with an EPA denial of the applicable petition *after* the state has made enough improvements to its program to eliminate the petitioner’s best arguments for withdrawal.¹⁵³

Under some environmental laws (for example, the Clean Water Act and the Resource Conservation and Recovery Act), EPA must “respond in writing to any petition to commence withdrawal proceedings.”¹⁵⁴ Although other regulatory programs (for example, the Clean Air Act) fail to specifically require an EPA response, the APA supplies a duty to respond.¹⁵⁵

151. *See, e.g.*, 33 U.S.C. § 1342(c)(3) (2006) (Clean Water Act); 40 C.F.R. § 123.63(a)(2)(iii) (2011) (Clean Water Act regulations); 42 U.S.C. § 6926(e) (Resource Conservation and Recovery Act); 40 C.F.R. § 271.22(a)(2)(iii) (Resource Conservation and Recovery Act regulations); 42 U.S.C. §§ 7410(a)(2)(H), 7410(c)(1), 7410(k)(5), 7509, 7661a(i) (Clean Air Act); 40 C.F.R. § 52.31 (Clean Air Act regulations).

152. 5 U.S.C. § 553(e) (2006).

153. *See, e.g.*, State Program Requirements: Approval of Revisions to the National Pollutant Discharge Elimination System (NPDES) Program; Louisiana, 70 Fed. Reg. 810, 816 (Jan. 5, 2005) (reviewing EPA and Louisiana’s response to a 2001 petition for EPA withdrawal of Louisiana’s authority to administer a Clean Water Act discharge permitting program).

154. 40 C.F.R. § 123.64(b)(1) (Clean Water Act regulations); *id.* § 271.23(b)(1) (Resource Conservation and Recovery Act regulations); *see also* Weatherby Lake Improvement Co. v. Browner, No. 96-1155-CV-W-8, 1997 WL 687656, at *1 (W.D. Mo. Apr. 17, 1997) (“Plaintiff may petition EPA to commence proceedings to withdraw an approved NPDES program as set forth in 40 C.F.R. § 123.64(b)(1)”); Nat’l Wildlife Fed’n v. Adamkus, 936 F. Supp. 435, 442–43 (W.D. Mich. 1996) (holding that EPA has “a nondiscretionary duty” to reply to plaintiffs’ petition, but that “[w]hether EPA has delayed unreasonably in responding . . . is a claim properly reviewed under the [Administrative Procedure Act (APA)]”).

155. 5 U.S.C. § 553(e) (“Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.”); *see also* *In re Am. Rivers & Idaho Rivers United*, 372 F.3d 413, 418 (D.C. Cir. 2004) (“Under the APA a federal agency is obligated

EPA responses to petitions for withdrawal are “agency action” that should be subject to judicial review under the APA, providing a quality-control check on the integrity of the cooperative federalist system.¹⁵⁶ The question is whether the underlying statutes and regulations provide “standards by which [the courts] can review the EPA’s decision not to commence withdrawal proceedings.”¹⁵⁷ For example, could EPA lawfully respond to a valid petition by stating that it had more important things to do than restore the supremacy of the federal mandates at issue?¹⁵⁸

In a 2007 Clean Air Act opinion, the U.S. Supreme Court reviewed an EPA response to a petition for rulemaking against the Act’s standards for the regulatory decision that was the petition’s subject, noting that although the Act “condition[s] the exercise of EPA’s authority on its formation of a ‘judgment,’” this does not create “a roving license to ignore the statutory text.”¹⁵⁹ Thus, the Court rejected a dissenting argument that the Act

to ‘conclude a matter’ presented to it ‘within a reasonable time,’ 5 U.S.C. § 555(b), and a reviewing court may ‘compel agency action unlawfully withheld or unreasonably delayed.’ *Id.* § 706(1).”

156. 5 U.S.C. § 702.

157. *Tex. Disposal Sys. Landfill Inc. v. EPA*, 377 F. App’x 406, 408 (5th Cir. 2010) (“Neither the [RCRA] statute nor the regulations present standards by which we can review the EPA’s decision not to commence withdrawal proceedings.”), *cert. denied*, 131 S. Ct. 665 (2010); *see Nat’l Wildlife Fed’n v. EPA*, 980 F.2d 765, 774 (D.C. Cir. 1992) (holding that the Safe Drinking Water Act’s “language indicates that a state is not entitled to primacy after the EPA ‘determines’ that it no longer meets the primacy requirements”); *Sierra Club v. EPA*, 377 F. Supp. 2d 1205, 1208 (N.D. Fla. 2005) (holding that “[a] citizens’ suit to enforce such discretionary duties is not available”); *Adamkus*, 936 F. Supp. at 440 (“The plain language of the regulation says that it is within the Administrator’s discretion to order the commencement of withdrawal proceedings in response to a petition from the interested person, regardless of the content of the petition.”).

158. Courts generally review “an agency’s refusal to institute rulemaking proceedings . . . at the high end of the range [of levels of deference].” *Am. Horse Prot. Ass’n v. Lyng*, 812 F.2d 1, 4–5 (D.C. Cir. 1987). Deference may be particularly appropriate when an agency’s decision not to regulate is based lawfully on “factors not inherently susceptible to judicial resolution” such as “internal management considerations as to budget and personnel; evaluations of its own competence; weighing of competing policies within a broad statutory framework.” *Natural Res. Def. Council, Inc. v. SEC*, 606 F.2d 1031, 1046 (D.C. Cir. 1979).

159. *Massachusetts v. EPA*, 549 U.S. 497, 532–33 (2007) (quoting 42 U.S.C. § 7521(a)(1) (2006)); *id.* at 533 (the word judgment is “but a direction to exercise discretion within defined statutory limits”); *see also Alliance to Save the Mattaponi v. U.S. Army Corps of Eng’rs*, 606 F. Supp. 2d 121, 140 (D.D.C. 2009) (holding that an EPA decision not to veto a U.S. Army Corps of Engineers permit was arbitrary and capricious when EPA based its decision, not on a “determination that the permit would not likely have unacceptable adverse effects, but on a whole range of other reasons completely divorced from the statutory text”); *O’Keeffe’s, Inc. v. U.S. Consumer Prod. Safety Comm’n*, 92 F.3d 940, 944 (9th Cir. 1996) (rejecting an argument that an agency “looked only at the cost of amending the regulations” because the

imposes no constraints on the agency's discretion to deny such petitions by declining to form a "judgment" on the substantive issue one way or the other.¹⁶⁰ Similarly, the Court of Appeals for the District of Columbia Circuit has noted that its "right to review denial of the petition for revision [of a regulation] is no different than our right to review the standard on the basis of new information under [Clean Air Act] Section 307."¹⁶¹ This type of analysis would give petitions to withdraw program authorizations the teeth to overcome bureaucratic inertia.

Based on the doctrine of enforcement discretion, several appellate court opinions suggest that judicial review cannot be used to compel EPA to correct systemic deficiencies in state program implementation.¹⁶² These opinions ignore the fact that EPA approves and withdraws approval of state programs (and also imposes "sanctions" on recalcitrant states) through notice-and-comment rulemaking—not enforcement actions.¹⁶³ Further, under the U.S. Constitution, EPA can have *no* enforcement authority over the states in their capacity as regulators (and sovereigns).¹⁶⁴ Instead, EPA's authority to supervise state regulation is limited to implementation of *incentives*—which, of course, is the essence of cooperative federalist systems.¹⁶⁵

Under the enforcement–discretion doctrine—embodied in the famous case of *Heckler v. Chaney*¹⁶⁶—courts presume that administrative decisions

record showed that the agency had "addressed the relevant statutory factors in determining that an amendment to the regulations was not appropriate or necessary").

160. See *Massachusetts v. EPA* at 549–50 (Scalia, J., dissenting) ("Does anything *require* the Administrator to make a 'judgment' whenever a petition for rulemaking is filed? Without citation of the statute or any other authority, the Court says yes. Why is that so? When Congress wishes to make private action force an agency's hand, it knows how to do so."); see also Jack M. Beermann, *The Turn Toward Congress in Administrative Law*, 89 B.U. L. REV. 727, 741–42 (2009) (discussing whether "requiring agency action to be based on statutory factors is likely to be more consistent with Congress's intent than the Agency's view").

161. *Oljato Chapter of the Navajo Tribe v. Train*, 515 F.2d 654, 667 (D.C. Cir. 1975). *But see supra* note 158.

162. See *N.Y. Pub. Interest Research Grp. v. Whitman*, 321 F.3d 316, 330–31 (2d Cir. 2003) (declining to review EPA's failure to act when "it is made aware of deficiencies in a state permitting program"); *Pub. Citizen, Inc. v. EPA*, 343 F.3d 449, 464 (5th Cir. 2003) ("Under the APA, an agency's decision not to invoke an enforcement mechanism provided by statute is not typically subject to judicial review."); *Ohio Pub. Interest Research Grp., Inc. v. Whitman*, 386 F.3d 792, 798 (6th Cir. 2004) (the Clean Air Act "does not mandate that where there are confirmed areas of needed improvement a NOD [that is, an EPA Notice of Deficiency] must issue"); see also *Sierra Club v. Jackson*, 724 F. Supp. 2d 33 (D.D.C. 2010).

163. See *supra* note 151.

164. See *supra* note 103.

165. *Id.*

166. 470 U.S. 821 (1985).

not to bring enforcement actions are “committed to agency discretion by law” and therefore unreviewable under the APA.¹⁶⁷ Noting that “[a]n agency generally cannot act against each technical violation of the statute it is charged with enforcing,” the *Heckler* Court explained that so many factors go into enforcement decisions that judicial review would amount to little more than second-guessing.¹⁶⁸ In addition, the Court suggested that it has less interest in correcting errors leading to a failure to enforce, than it does in curbing government overreaching, noting that “when an agency refuses to act it generally does not exercise its *coercive* power over an individual’s liberty or property rights, and thus does not infringe upon areas that courts often are called upon to protect.”¹⁶⁹ The *Heckler* Court specified that its holding did not “involve the question of agency discretion not to invoke rulemaking proceedings.”¹⁷⁰

Expansion of the enforcement–discretion doctrine to encompass EPA’s use of rulemaking to supervise state regulatory programs reinforces bureaucratic inertia. In many garden-variety enforcement cases, of course, defendants are relatively powerless—and the enforcer is unlikely to face significant pressure when deciding whether to pursue a violation. But the situation is different when potential defendants include major corporations, capable of pulling political strings and otherwise pushing back. This problem of relative power looms even larger when the “enforcement” target is a sovereign state that is giving myriad powerful companies a break by refusing to regulate up to minimum federal standards. Not only does the state have a significant ability to push back, but all affected members of the regulated industry have an incentive to supplement that power.¹⁷¹

When a government bureaucracy is subject to such pressures and yet possesses unreviewable authority to ignore deviations, it is unrealistic to expect that bureaucracy to consistently and effectively restore the supremacy of federal mandates.¹⁷² Indeed, such a combination of

167. *Id.* at 837–38 (interpreting 5 U.S.C. § 701(a)(2) (1982)).

168. *Id.* at 831 (noting that the agency must assess “whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency’s overall policies, and, indeed, whether the agency has enough resources to undertake the action at all”).

169. *Id.* at 832; see also William W. Buzbee, *Recognizing the Regulatory Commons: A Theory of Regulatory Gaps*, 89 IOWA L. REV. 1, 42 (2003) (“Solicitude for targets of regulation and general lack of concern about agency inaction pervade administrative law jurisprudence.”).

170. 470 U.S. at 825 n.2.

171. David E. Aaronson, *New Rights and Remedies: The Federal Crime Victims’ Rights Act of 2004*, 28 PACE L. REV. 623, 674 (2008) (“Decisions involving prosecutorial discretion . . . are susceptible to political and public influence . . .”).

172. William L. Andreen, *The Evolution of Water Pollution Control in the United States—State, Local, and Federal Efforts, 1789–1972* (pt. 1) 22 STAN. ENVTL. L.J. 145, 194–95 (2003) (before

temptation and lack of accountability invites poor decisions. Use of the enforcement–discretion doctrine to insulate federal agencies from judicial review when they fail to use rulemaking powers to correct breakdowns in the cooperative federalist system is, in essence, a decision to tolerate state failures to provide their residents with the health and welfare protections that Congress mandated for everyone in the nation. If EPA exercises discretion to look the other way when a state as large as, say, Texas fails to implement federal mandates,¹⁷³ a sizable percentage of the nation’s population will lose the protection of national standards.

3. *Other Sanctions*

The U.S. Supreme Court has recognized Congress’s access to “permissible method[s] of encouraging a State to conform to federal policy choices.”¹⁷⁴ For example, “under Congress’ spending power, ‘Congress may attach conditions on the receipt of federal funds’”¹⁷⁵ so long as those conditions “bear some relationship to the purpose of the federal spending.” Those conditions, of course, “may influence a State’s legislative choices.”¹⁷⁶ Thus, for example, an EPA finding that a state has failed to follow federal mandates under the Clean Air Act begins an eighteen-month “sanctions clock,” that includes a provision for a cutoff of federal highway funds.¹⁷⁷

4. *Objections to State Permits*

Environmental laws generally give EPA authority to block illegal state permits.¹⁷⁸ Usually, this authority is discretionary,¹⁷⁹ but the Clean Air Act

enactment of federal mandates in the 1970s, “having to deal with politically powerful cities and industries with major economic clout made moderation a virtue in the eyes of the pragmatic engineers who ran the [state environmental] agencies” (footnote omitted).

173. See *Pub. Citizen, Inc. v. EPA*, 343 F.3d 449, 464 (5th Cir. 2003) (allowing EPA to ignore deviations in Texas’s Clean Air Act program).

174. *New York v. United States*, 505 U.S. 144, 168 (1992).

175. *Id.* at 167 (quoting *South Dakota v. Dole*, 483 U.S. 203, 206 (1987)).

176. *Id.*

177. See 42 U.S.C. § 7509(a) (2006); 40 C.F.R. § 52.31(d) (2011).

178. See *Clean Water Act* § 402(d), 33 U.S.C. § 1342(d)(2) (2006) (providing EPA authority to block illegal permits); *Clean Air Act* § 505(b), 42 U.S.C. § 7661d(b) (2006) (same); *Clean Air Act* § 167, 42 U.S.C. § 7477 (authorizing EPA to block construction of sources of air pollution that fail to meet federal requirements to prevent significant deterioration of air quality that currently meets federal ambient standards); see also *Alaska Dep’t of Envtl. Conservation v. EPA*, 540 U.S. 461, 495 (2004) (confirming “EPA’s authority, pursuant to §§ 113(a)(5) and 167” to block construction of facilities with state permits that fail to meet the Clean Air Act’s provisions for preventing significant deterioration of air that currently meets minimum federal standards).

179. See *District of Columbia v. Schramm*, 631 F.2d 854, 861 (D.C. Cir. 1980) (EPA’s

provides for a robust federal petition process that allows citizens to challenge state-issued permits in petitions submitted to EPA, requires EPA to respond by a date certain, and requires EPA to veto permits that petitioners show to be illegal.¹⁸⁰ EPA's failure to grant a petition for such an objection is subject to judicial review.¹⁸¹

Thus the Clean Air Act is unusual in offering citizens a process for (non-discretionary) federal review of state permits that overlaps state administrative and judicial review processes. In most other situations, however, federal administrative responses to citizen petitions for objection are discretionary, and even an APA "unreasonable delay" lawsuit is of questionable utility.¹⁸²

5. *Amendments to and Termination of State Permits*

In its regulations, EPA often asserts authority to (effectively) modify state permits without actually vetoing them. Under the Resource Conservation and Recovery Act's hazardous waste regulatory program, for example, EPA has the option of "indicat[ing] in a comment, that issuance of the permit would be inconsistent with the approved State program."¹⁸³ EPA includes in such a comment specification of the permit condition(s) "necessary to implement approved State program requirements."¹⁸⁴ EPA withdraws the comment if "satisfied that the State has met or refuted [the agency's] concerns."¹⁸⁵ Otherwise, EPA may directly enforce its comment—even if the state does not adopt it. In the regulation's words, EPA "may take action . . . against a holder of a State-issued permit at any time on the ground that the permittee is not complying with a condition

"decision not to review or to veto a state's action on an NPDES permit application is 'committed to agency discretion by law'" (quoting 5 U.S.C. § 701(a)(2) (1976)); *Save the Bay, Inc. v. EPA*, 556 F.2d 1282, 1295 (5th Cir. 1977) ("EPA's decision not to veto a particular [Clean Water Act] permit takes on a breadth that in our judgment renders the bottom line of that decision unreviewable in the federal courts.").

180. Clean Air Act § 505(b), 42 U.S.C. § 7661d(b).

181. *Id.* See generally *N.Y. Pub. Interest Research Grp., Inc. v. Johnson*, 427 F.3d 172, 176 (2d Cir. 2005) (summarizing the Clean Air Act § 505(b) mechanism). Region VII publishes CAA § 505 petitions and EPA responses on its web page. *Title V Petition Database*, ENVTL. PROT. AGENCY, <http://www.epa.gov/region7/air/title5/petitiondb/petitiondb.htm> (last visited Jan. 23, 2012).

182. *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 64 (2004) (a claim under 5 U.S.C. § 706(1) for judicial review of agency action withheld or unreasonably delayed "can proceed only where a plaintiff asserts that an agency failed to take a *discrete* agency action that it is *required to take*").

183. 40 C.F.R. § 271.19(b) (2011).

184. *Id.* § 271.19(e)(3).

185. *Id.* § 271.19(d).

that [EPA] in commenting . . . stated was necessary to implement approved State program requirements, whether or not that condition was included in the final permit.”¹⁸⁶ Similarly, EPA has authority to “terminate a State-issued permit.”¹⁸⁷

6. *Direct Federal Enforcement*

EPA generally retains authority to bring enforcement actions in states that it has approved to administer cooperative federalist programs.¹⁸⁸ EPA enforcement can be civil or criminal in nature. Such enforcement sometimes serves as the only governmental response to a particular violation. More controversially, however, EPA enforcement might consist of “overfiling,” i.e., adding a layer of federal enforcement on top of an ongoing or concluded state enforcement action.¹⁸⁹

In addition, most antipollution statutes contain a fail-safe provision to allow EPA to abate dangerous industrial activities regardless of whether those activities are permitted or are otherwise consistent with regulations.¹⁹⁰ These provisions allow EPA to seek injunctive relief or to issue administrative orders to abate situations that “may present an imminent and substantial endangerment to the public or the environment.”¹⁹¹ This language sounds like “emergency” authority. The courts, however, have interpreted it to apply to significant risks of eventual harm, without proof of an emergency. This reading flows from statutory language under which an “endangerment” (i.e., a risk) triggers EPA’s authority—suggesting that the

186. *Id.* § 271.19(e)(2).

187. *Id.* § 271.19(e).

188. *Id.* (“Under section 3008(a)(3) of RCRA, EPA may terminate a State-issued permit or bring an enforcement action . . . in the case of a violation of a State program requirement.”).

189. Compare *United States v. Power Eng’g Co.*, 303 F.3d 1232, 1240 (10th Cir. 2002) (deferring to EPA’s interpretation that “EPA overfiling is permissible”), with *Harmon Indus., Inc. v. Browner*, 191 F.3d 894, 901–02 (8th Cir. 1999) (“EPA may not . . . fill the perceived gaps it sees in a state’s enforcement action by initiating a second enforcement action without allowing the state an opportunity to correct the deficiency and then withdrawing the state’s authorization.”).

190. See, e.g., 42 U.S.C. § 6973 (2006); see also OFFICE OF ENFORCEMENT & COMPLIANCE ASSURANCE, ENVTL. PROT. AGENCY, EC-G-1998-378, GUIDANCE ON THE USE OF SECTION 7003 OF RCRA 13 (1997), <http://www.epa.gov/compliance/resources/policies/civil/rcra/rcrasect7003-rpt.mem.pdf>.

191. 42 U.S.C. § 6973(a) (Resource Conservation and Recovery Act); see *id.* §7603 (Clean Air Act); *id.* §300i (Safe Drinking Water Act); 33 U.S.C. §1364 (2006) (Clean Water Act). See generally Clean Air Act; Enforcement Authority Guidance, 56 Fed. Reg. 24,393, 24,396 (May 30, 1991) [hereinafter EPA Enforcement Guidance] (discussing EPA imminent hazard authority).

agency need not wait for actual harm to occur. And it is the endangerment—not the harm—that must be “imminent and substantial.” Moreover, the whole phrase is usually preceded by a “may”—meaning that even the risk may be potential instead of existing.¹⁹² Based on this analysis, courts have ruled that the “imminent hazard” provisions of antipollution laws contain authority for EPA to abate essentially “any risks” within the statute’s scope.¹⁹³ In the real world, however, few federal courts are likely to issue equitable relief about “any risk,” without a showing that the risk merits such relief.¹⁹⁴ One antipollution law—the Resource Conservation and Recovery Act—allows citizen enforcers to wield similar “imminent hazard” claims.¹⁹⁵

Imminent hazard claims provide a means of protecting the public and environment when states drop the ball in implementing cooperative federalist law. These claims, however, are not specific to state failures to meet national standards, but are mechanisms for providing a (discretionary) safety net for all types of regulatory failures.

IV. PREEMPTION ANALYSIS APPLIED: SORTING FALSE FROM TRUE CONFLICTS WITH THE FULL FEDERAL REGULATORY PURPOSE

This Part presents the Article’s suggested approach to preemption analysis in the context of cooperative federalism. Subpart A describes the three categories of state–federal conflicts that arise in the context of a cooperative federalist regulatory system. Subpart B shows how courts can use four questions to sort those claims into the appropriate categories. Subpart C explains the “robust federal corrective mechanism” test that two of those questions implement. Subpart D presents an illustrative table to show how various federal mechanisms for keeping states on track affect the preemption analysis. Finally, Subpart E shows that revisions to the applicable federal regulatory program can change how particular types of conflicts are sorted.

192. *Lincoln Props., Ltd. v. Higgins*, No. S-91-760DFL/GGH, 1993 WL 217429, at *13 (E.D. Cal. Jan. 21, 1993).

193. *United States v. Price*, 688 F.2d 204, 214 (3d Cir. 1982).

194. *See Weinberger v. Romero-Barcelo*, 456 U.S. 305, 311 (1982) (an injunction “is not a remedy which issues as of course, or to restrain an act the injurious consequences of which are merely trifling” (citations omitted) (internal quotation marks omitted)).

195. 42 U.S.C. § 6972(a)(1)(B); *see* Adam Babich, *RCRA Imminent Hazard Authority: A Powerful Tool for Businesses, Governments, and Citizen Enforcers*, [1994] 24 *Envtl. L. Rep.* (Envtl. Law Inst.) at 10,122.

A. *Categories of State–Federal Conflicts*

Usually, courts seem to treat a conflict between state action and federal law as all-but-conclusive evidence that Congress intended to preempt that state action.¹⁹⁶ But when Congress has elected to employ a system of cooperative federalism, analyses of congressional intent (i.e., the full federal regulatory purpose) must be more nuanced. In this context, conflicts between state and federal law can be usefully sorted into three categories: (1) isolated mistakes; (2) systemic conflicts subject to robust federal corrective mechanisms; and (3) conflicts with the full federal regulatory purpose (i.e., conflicts other than isolated mistakes that are not subject to robust federal corrective mechanisms).

1. *Isolated Mistakes*

State agencies—like their federal counterparts—sometimes make mistakes. When Congress employs a cooperative federalist system to assign states the day-to-day responsibility for issuing permits, therefore, it must know that even states fully committed to meeting minimum national standards will occasionally make decisions that conflict with one or another federal mandate. Further, it is inevitable that some of these defective decisions will survive review by the state’s court system—just as some would slip by the federal judiciary. These types of errors, however, have nothing to do with the “priority” of federal rights over state law.¹⁹⁷ Instead they are the inevitable by-product of *any* administrative system, whether state or federal.¹⁹⁸

U.S. legal systems minimize such errors by providing for judicial review, which serves a quality control function capable of keeping agency action more or less in line with the rule of law.¹⁹⁹ When Congress elects to employ cooperative federalist systems, Congress signals its intent—at least in most

196. See *supra* note 64.

197. See *Golden State Transit Corp. v. City of L.A.*, 493 U.S. 103, 107 (1989) (the Supremacy Clause “secure[s] federal rights by according them priority whenever they come in conflict with state law” (alteration in original) (quoting *Chapman v. Hous. Welfare Rights Org.*, 441 U.S. 600, 613 (1979))).

198. Cf. *Paul v. Davis*, 424 U.S. 693, 699–701 (1976) (rejecting a line of reasoning that would logically “result in every legally cognizable injury . . . inflicted by a state official acting under ‘color of law’ establishing a [due process] violation”—a reading that would make “the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the States”).

199. Thomas O. McGarity, *Some Thoughts on “Deossifying” the Rulemaking Process*, 41 *DUKE L.J.* 1385, 1452 (1992) (noting that “judicial review can steer agencies back on the track when they stray from their congressionally assigned roles” and “perform a necessary ‘quality control’ function”).

cases—to let state court systems perform the quality control function for state-issued permits. In other words, the decision to provide for state implementation involves an implicit decision to tolerate isolated conflicts that arise from imperfections in state administrative and judicial systems—subject to important exceptions.²⁰⁰ But given that Congress is inconsistent at best in the degree of respect it affords state administrative processes,²⁰¹ why assume that Congress intended to tolerate these Category 1 conflicts? In other words, why not allow the preemption doctrine to provide a federal layer of review for every potentially illegal state permit? In the final analysis, the “presumption against preemption” should tip the scale toward the assumption that when Congress provides that states will serve as the primary implementers of federal policy, it must—absent evidence to the contrary²⁰²—also expect the states’ administrative law systems to provide the primary quality control mechanism. Moreover, if the federal regulatory system did not take the states’ administrative processes seriously, it would make little sense for EPA regulations to specify minimum procedural rights that members of the public must enjoy in state administration of EPA-authorized programs.²⁰³

Can illegal permits ever become Category 2 or 3 conflicts? Yes: Category 1 errors do not include mistakes—no matter how well-meaning—that qualify as systemic deviations from federal minimum standards.²⁰⁴ For example, state administrative misinterpretation of a federal regulation, if ratified by the state’s court system, could cause the state’s regulatory system to depart more or less permanently from national standards and, thus, would not qualify as a Category 1 error.²⁰⁵ Also, if illegal permits are part

200. See, e.g., *supra* notes 180–81 and accompanying text (discussing provisions for EPA objection to Clean Air Act permits).

201. See *Alaska Dep’t of Env’t. Conservation v. EPA*, 540 U.S. 461, 495 (2004) (upholding EPA’s interpretation of the Clean Air Act “to allow substantive federal Agency surveillance of state permitting authorities’ BACT [Best Available Control Technology] determinations subject to federal-court review”); see also *supra* notes 180–87 and accompanying text.

202. See, e.g., *N.Y. Pub. Interest Research Grp., Inc. v. Johnson*, 427 F.3d 172, 176 (2d Cir. 2005) (analyzing the Clean Air Act scheme for federal judicial review of state-issued Clean Air Act permits).

203. See *supra* note 143.

204. Why not sort *all* state–federal conflicts in cooperative federalist systems into Category 1? Tolerating systematic conflicts that survived state court review would undermine Congress’s goal of providing a national minimum level of protection for public health and welfare. If federal standards could be interpreted differently in each of the fifty states, an important goal of the cooperative federalist federal regulatory programs would—absent a Category 2 fix—be defeated.

205. For example, in *Andersen v. Department of Natural Resources*, 796 N.W.2d 1 (Wis. 2011), the Wisconsin Supreme Court ratified the state Department of Natural Resources’

of a pattern of practice which shows that the state agency lacks the resources, expertise, or political will to run a program consistent with federal law, the conflict would fall under Category 2 or Category 3.

2. *Systemic Conflicts Subject to Robust Federal Corrective Mechanisms*

Sometimes Congress and the agencies it charges with administering its statutes build into cooperative federalist systems robust mechanisms for correction of deviations from the federal mandates that those systems impose. A federal corrective mechanism is “robust” if it is reasonably calculated to remove any state-law obstacle to achievement of the full federal regulatory purpose. Therefore, a robust federal corrective mechanism in the environmental cooperative federalist context²⁰⁶ must be likely: (1) to restore the supremacy of national standards and (2) overcome bureaucratic inertia as to both (a) the procedural questions of whether and when the federal agency will determine whether or not to invoke the mechanism, and (b) the substantive decisions as to whether and how the mechanism will apply.²⁰⁷ In other words, a robust federal corrective

determination that affected people could not challenge state-issued permits as violating federal regulations because a permit “properly reissued under the state’s statutory and regulatory authority . . . necessarily complies with federal law—unless and until the EPA determines otherwise.” *Id.* at 17. This arguably means that Wisconsin’s Clean Water Act program is now out of compliance with 40 C.F.R. § 123.30 (2011), which requires that state water quality programs provide for an opportunity for “judicial review that is the same as that available to obtain judicial review in federal court of a federally-issued NPDES permit (see § 509 of the Clean Water Act).”

206. Other goals might be relevant to analyses of “robustness” under cooperative federalist systems other than the antipollution systems discussed here.

207. In this context, therefore, wholly discretionary EPA authority should not be viewed as “robust” because it is not reasonably calculated to overcome federal bureaucratic inertia—and therefore not an “adequate substitute” for a private right of action that any person with standing could initiate. See Tracy A. Thomas, *Congress’ Section 5 Power and Remedial Rights*, 34 U.C. DAVIS L. REV. 673, 756 (2001) (arguing that the “key to reconciling legislative and judicial remedies is . . . the evaluation of whether the legislative remedy is an adequate substitute”); Cass R. Sunstein, *Section 1983 and the Private Enforcement of Federal Law*, 49 U. CHI. L. REV. 394, 432–33 (1982) (suggesting that the argument that another statutory remedy precludes use of § 1983 “is strengthened if the statute provides explicitly or implicitly for a private remedy against the federal government in the event of federal agency inaction” because the “existence of such a remedy provides evidence that Congress intended the executive, and not the courts, to be the primary guarantor of state compliance with federal law”); Elliott, *supra* note 134, at 152 (“The ability of any affected member of a citizen’s group to go to court, to an independent judiciary, to make the government live up to its obligations under the law, or to make a polluter comply with its obligations under the law, is one of the very best features of the American system.”). Similarly, when a federal mechanism for correcting a state conflict would require an unreasonably sustained commitment of resources—for example challenging every permit that a state issues as a way of

mechanism provides reliable (not, of course, guaranteed) correction for systemic problems and provides for judicial review.

One example of a robust federal corrective mechanism is the Clean Air Act's provision for EPA veto of state permits that implement Title V of that Act. The mechanism provides for judicial review to overcome bureaucratic inertia, and—although it operates on a permit-by-permit basis—it is likely to result in definitive EPA rejection of state action that conflicts with federal law.²⁰⁸ But this mechanism would not apply to all state deviations from federal Title V permitting mandates. For example, a state policy that exempted sources from the Clean Air Act's Title V permitting process (such as by classifying those sources as “minor” rather than “major”) might fall between the cracks of this corrective mechanism and end up in Category 3, described below. This is because the Clean Air Act Title V petition process, on its face, applies to EPA review of state-issued Title V permits—not state failures to require such permits.

3. *Conflicts with the Full Federal Regulatory Purpose*

The third Category comprises conflicts that do not fit into Categories 1 or 2 and therefore stand as an obstacle to achievement of the full federal regulatory purpose behind environmental cooperative federalist systems. By definition, these are systemic, not isolated conflicts and also by definition they are not subject to robust federal corrective mechanisms that would be reasonably calculated to fix them. For example, to the extent that the Clean Air Act's withdrawal procedures are insulated from judicial review by an extrapolation from the enforcement–discretion doctrine,²⁰⁹ they are clearly not robust. They fail to create a mechanism for overcoming bureaucratic inertia and therefore fall short of removing state-law obstacles to the goals of cooperative regulatory federalist systems. To provide another example, the Resource Conservation and Recovery Act's solid waste program allows EPA to cut off solid waste funding to states with inadequate programs²¹⁰ and authorizes “any person” to bring enforcement

compensating for illegalities in the state permitting system—the mechanism would not be reasonably calculated to restore the supremacy of national health and welfare standards.

208. The argument on the other side is that this mechanism fails to provide a systematic fix for systematic problems. At least in theory, a litigant might need to file repeated petitions for essentially every Title V Clean Air Act permit that a state issued in order to police the cooperative federalist system effectively. But such repeated state defiance of federal mandates, even in the face of EPA rulings, should be treated as a different category of conflict—part of a pattern and practice of defiance that potentially falls within Category 3.

209. *See supra* notes 157–73 and accompanying text (discussing judicial review in relation to the doctrine of enforcement discretion).

210. 42 U.S.C. § 6947(b)(3) (2006).

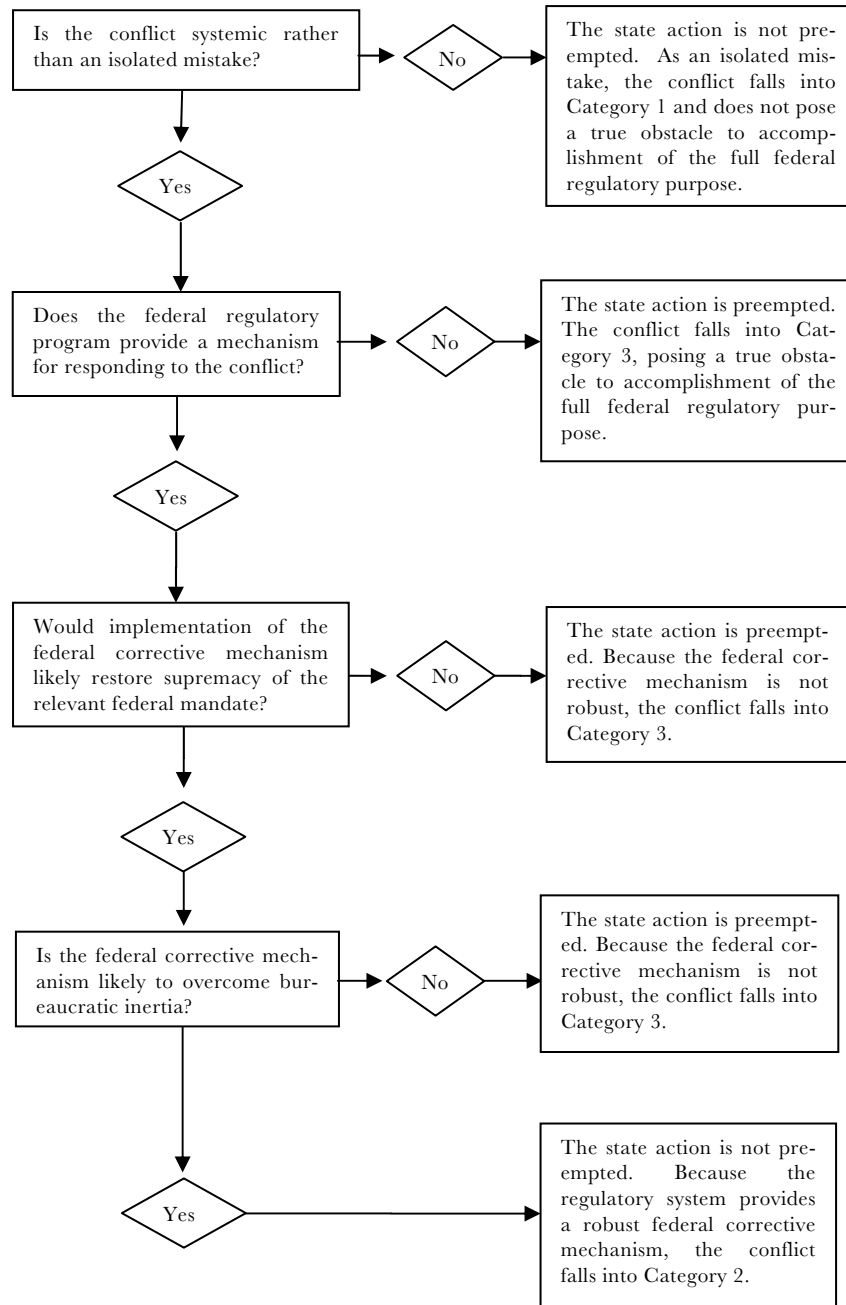
suits against operators of landfills that fail to meet EPA criteria.²¹¹ Neither of these mechanisms is a reliable fix for systemic conflicts between state and federal solid waste regulations. An EPA funding cutoff would have no direct effect on the offending state regulations and would likely be subject to bureaucratic inertia. Citizen enforcement actions against offending landfills would be too indirect to provide a reliable mechanism for reforming state solid waste law that falls short of federal criteria. Thus, neither mechanism is robust.

B. Four Questions for Sorting Conflicts

To determine which category a state–federal conflict in an environmental cooperative federalist system fits into,²¹² courts should analyze the following four questions, presented in the form of a flow chart:

211. *Id.* § 6945(a) (“The prohibition contained in the preceding sentence shall be enforceable under section 6972 of this title against persons engaged in the act of open dumping.”).

212. This discussion assumes that the federal purpose at issue in the state–federal conflict is “significant.” See *Williamson v. Mazda Motor of Am., Inc.*, 131 S. Ct. 1131, 1137 (2011) (“Like the regulation in *Geier* [*v. Am. Honda Motor Co.*, 529 U.S. 861 (2000)], the [seatbelt] regulation here leaves the manufacturer with a choice. And, like the tort suit in *Geier*, the tort suit here would restrict that choice. But unlike *Geier*, we do not believe here that choice is a significant regulatory objective.”).



C. *The Robust Federal Corrective Mechanism Test*

The “robust federal corrective mechanism” test is grounded in preemption jurisprudence because it is derived from preemption’s ultimate touchstone—the federal regulatory programs’ purposes.²¹³ Accordingly, it also answers the question of whether the federal corrective mechanism is an “adequate substitute” for the private remedy of preemption.²¹⁴ The test is arguably similar to the Supreme Court’s “sufficiently comprehensive remedy” test,²¹⁵ which the Court uses to determine whether a litigant is barred by another remedy from using 42 U.S.C. § 1983 to vindicate a constitutional or statutory right.²¹⁶ That test asks whether “the remedial devices provided in a particular Act are sufficiently comprehensive . . . to demonstrate congressional intent to preclude the remedy of suits under § 1983.”²¹⁷ In the § 1983 context, the Court—so far—does not “lightly conclude that Congress intended to preclude reliance on § 1983 as a remedy for the deprivation of a federally secured right.”²¹⁸ The question is whether “a § 1983 action would be inconsistent with Congress’s carefully tailored scheme.”²¹⁹ When congressional remedies “diverge in significant ways” from “rights and protections . . . existing under the Constitution,” it is appropriate to infer “lack of congressional intent” to preclude § 1983 claims.²²⁰ On the other hand, the Court has stated that “the existence of a

213. *See supra* notes 133–35 and accompanying text (describing the three goals of providing citizens a minimum level of environmental protection, overcoming bureaucratic inertia, and preserving state primacy).

214. *See* Thomas, *supra* note 207, at 756 (noting that the “key to reconciling legislative and judicial remedies” is to evaluate “whether the legislative remedy is an adequate substitute”). Because the preemption doctrine implements the ultimate touchstone of the full federal regulatory purpose, an adequate substitute for a preemption claim must, with reasonable reliability, implement that same purpose.

215. *Middlesex Cnty. Sewerage Auth. v. Nat’l Sea Clammers Ass’n*, 453 U.S. 1, 20 (1981).

216. Section 1983 provides a remedy for people injured by being deprived of their constitutional or statutory rights “under color of” state law. 42 U.S.C. § 1983. The tests apply to different situations; however, since § 1983 is a statutory remedy and preemption is rooted in the Constitution.

217. *Nat’l Sea Clammers Ass’n*, 453 U.S. at 20.

218. *Golden State Transit Corp. v. City of L.A.*, 493 U.S. 103, 107 (1989) (quoting *Wright v. City of Roanoke Redevelopment & Hous. Auth.*, 479 U.S. 418, 423–24 (1987)); *see, e.g.*, *Charvat v. E. Ohio Reg’l Wastewater Auth.*, 246 F.3d 607, 615 (6th Cir. 2001) (“In sum, the defendants have failed to prove that Congress intended for the whistleblower provisions of the CWA and [the Safe Drinking Water Act] to preclude the enforcement of constitutional rights through § 1983.”).

219. *Charvat*, 246 F.3d at 615 (quoting *Golden State Transit Corp.*, 493 U.S. at 107).

220. *Fitzgerald v. Barnstable Sch. Comm.*, 555 U.S. 246, 252–53 (2009).

more restrictive private remedy for statutory violations has been the dividing line between those cases in which we have held that an action would lie under § 1983 and those in which we have held that it would not.”²²¹ To be consistent with the preemption doctrine, however, the robust federal corrective mechanism test should remain tied to the federal regulatory programs’ purposes, rather than hinging on whether a legislative remedy is “more restrictive.”

The robust federal corrective mechanism test also bears some resemblance to the “adequate remedial mechanisms”²²² test that the Court applies when determining whether a statutory remedy precludes availability of a *Bivens* remedy for a constitutional tort.²²³ *Bivens* created “an implied private action for damages against federal officers alleged to have violated a citizen’s constitutional rights.”²²⁴ The *Bivens* test is not crystal clear. At least for now, the bottom-line question is “whether an elaborate remedial system that has been constructed step by step, with careful attention to conflicting policy considerations, should be augmented by the creation of a new judicial remedy for the constitutional violation at issue.”²²⁵ But there is a current in the Court in favor of applying *Bivens* more narrowly, characterizing *Bivens* as “a relic of the heady days in which this Court assumed common-law powers to create causes of action.”²²⁶

221. *City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 121 (2005). *But cf.* *Verizon Md. Inc. v. Pub. Serv. Comm’n*, 535 U.S. 635, 643 (2002) (“The mere fact that some acts are made reviewable should not suffice to support an implication of exclusion as to others.” (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 141 (1967))).

222. *See Schweiker v. Chilicky*, 487 U.S. 412, 423 (1988) (“When the design of a Government program suggests that Congress has provided what it considers adequate remedial mechanisms for constitutional violations that may occur in the course of its administration, we have not created additional . . . remedies.”).

223. *See Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 397 (1971) (inquiring whether the petitioner is entitled to redress through a “particular remedial mechanism” in the federal courts); *see also Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 66 (2001) (“We first exercised this authority [to imply a new constitutional tort] in *Bivens*, where we held that a victim of a Fourth Amendment violation by federal officers may bring suit for money damages against the officers in federal court.”).

224. *Malesko*, 534 U.S. at 66; *see also Schweiker*, 487 U.S. at 421 (explaining that in *Bivens*, the “Court noted that Congress had not specifically provided for such a remedy and that ‘the Fourth Amendment does not in so many words provide for its enforcement by an award of money damages for the consequences of its violation’” but created a remedy “finding ‘no special factors counseling hesitation in the absence of affirmative action by Congress,’ and ‘no explicit congressional declaration’ that money damages may not be awarded” (quoting *Bivens*, 403 U.S. at 396–97)).

225. *Bush v. Lucas*, 462 U.S. 367, 388 (1983); *see also Wilkie v. Robbins*, 551 U.S. 537, 554 (2007) (citing *Bush*).

226. *Wilkie*, 551 U.S. at 568 (Thomas, J., concurring) (“Accordingly, in my view, *Bivens* and its progeny should be limited ‘to the precise circumstances that they involved.’” (quoting

The robust federal corrective mechanism test is related to the “detailed remedial scheme” test, which the Court uses to decide whether another remedy precludes courts from asserting jurisdiction over state officers under the *Ex parte Young* doctrine.²²⁷ The tests are related because in many preemption cases about cooperative federalist programs, plaintiffs will rely on *Ex parte Young* to avoid states’ Eleventh Amendment immunity.²²⁸ The *Ex parte Young* doctrine allows litigants to challenge state action or inaction in federal court by suing state officials rather than the states themselves.²²⁹

When plaintiffs use the *Ex parte Young* doctrine to bring preemption claims about cooperative federalist regulatory systems, the “robust federal

Malesko, 534 U.S. at 75 (Scalia, J., concurring)).

227. See *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 74 (1996) (“[W]here Congress has prescribed a detailed remedial scheme for the enforcement against a State of a statutorily created right, a court should hesitate before casting aside those limitations and permitting an action against a state officer based upon *Ex parte Young*.”).

228. See *Blatchford v. Native Vill. of Noatak*, 501 U.S. 775, 779 (1991) (“[W]e have understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition of our constitutional structure which it confirms: that the States entered the federal system with their sovereignty intact; that the judicial authority in Article III is limited by this sovereignty . . .”).

229. See *Ex parte Young*, 209 U.S. 123, 159–60 (1908) (“It is simply an illegal act upon the part of a state official in attempting by the use of the name of the State to enforce a legislative enactment which is void because unconstitutional.”); *Edelman v. Jordan*, 415 U.S. 651, 664 (1974) (“*Ex parte Young* was a watershed case in which this Court held that the Eleventh Amendment did not bar an action in the federal courts seeking to enjoin the Attorney General of Minnesota from enforcing a statute claimed to violate the Fourteenth Amendment of the United States Constitution.”). The *Edelman* Court noted that *Ex parte Young* “has permitted the Civil War Amendments to the Constitution to serve as a sword, rather than merely as a shield, for those whom they were designed to protect.” *Edelman*, 415 U.S. at 664. The doctrine, however, is generally limited to suits for prospective relief, as opposed to retroactive awards that are “in practical effect indistinguishable in many aspects from an award of damages against the State.” *Id.* at 668. Also, the doctrine only applies to state violation of duties under *federal law*. *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 106 (1984) (“A federal court’s grant of relief against state officials on the basis of state law, whether prospective or retroactive, does not vindicate the supreme authority of federal law. . . . We conclude that *Young* and *Edelman* are inapplicable in a suit against state officials on the basis of state law.”).

The doctrine is rooted in legal “fiction.” See *Idaho v. Coeur d’Alene Tribe of Idaho*, 521 U.S. 261, 281 (1997) (referring to “the *Ex parte Young* fiction”). *But see* *Planned Parenthood of Hous. & Se. Tex. v. Sanchez*, 403 F.3d 324, 334 n.47 (5th Cir. 2005) (“[O]ne school of thought holds that the Supremacy Clause itself creates [the *Ex parte Young* doctrine, as an] implied cause of action.” (citing 13B CHARLES A. WRIGHT ET AL. FEDERAL PRACTICE AND PROCEDURE: JURISDICTION 2D § 3566, at 102 (1984)). *Cf.* *Va. Office for Prot. & Advocacy v. Stewart*, 131 S. Ct. 1632, 1638 (2011) (“This doctrine has existed alongside our sovereign-immunity jurisprudence for more than a century, accepted as necessary to permit the federal courts to vindicate federal rights.” (quoting *Pennhurst*, 465 U.S. at 105) (internal quotation marks omitted)).

corrective mechanism” test should serve as a special application of the detailed remedial scheme test. This is because the detailed remedial scheme test is ultimately about discerning Congress’s intent.²³⁰ And, as discussed above,²³¹ the robust federal corrective mechanism test is grounded in preemption doctrine’s ultimate touchstone—the “*full* purposes and objectives of Congress,”²³² that is, the full federal regulatory purpose.²³³ Thus, the test should hinge on whether the relevant mechanism is reasonably calculated to remove any state-law obstacle to achievement of that purpose, i.e., to protect public health and welfare up to the minimum level of national standards and overcome bureaucratic inertia.²³⁴

D. An Illustrative Table

The following table illustrates the discussion above in terms of the mechanisms—discussed in Part III.D for keeping states on track. For each illustrative federal corrective mechanism, the table specifies whether the mechanism is robust and the impact that mechanism should have on preemption analysis in the context of environmental cooperative federalist systems.

230. In *Seminole Tribe of Florida v. Florida*, the Court declined to allow an *Ex parte Young* cause of action in deference to a statutory remedy that was not only lacked robustness, it was useless—since it was unconstitutional. 517 U.S. at 75–76. But the Court justified this result in terms of Congress’s intent, explaining that when Congress tried (and failed) to create a limited remedy for state violations of the Indian Gaming Regulatory Act, 25 U.S.C. § 2710(d) (2006), Congress “strongly indicat[ed]” that it did not wish to impose broader *Ex parte Young* liability. 517 U.S. at 75–76.

231. See *supra* notes 213–14 and accompanying text.

232. *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941) (emphasis added).

233. See *supra* notes 27–29 and accompanying text (showing that the Court’s use of the phrase “purpose of Congress” in the preemption context really refers to the federal regulatory purpose).

234. *But see* Legal Envtl. Assistance Found., Inc. v. Pegues, 904 F.2d 640, 644 (11th Cir. 1990) (“Applying *Young* in these circumstances would ignore the important distinction between remedies implied to redress constitutional violations and remedies, whether implied or express, for violations of statutory rights.”). But preemption claims can also arise in situations in which the Eleventh Amendment immunity of the states is not an issue, for example because of waiver, because the defendant is not a state, or because the action is before a state court.

| Federal Mechanism | Is the Federal Mechanism Robust? | Impact on Preemption Analysis |
|--|---|---|
| Federal approval and delegation ²³⁵ | Yes—EPA approval is a system-wide review and thus likely to maintain the supremacy of national standards. It is also subject to judicial review and therefore capable of overcoming bureaucratic inertia. | Because of this mechanism, conflicts between the terms of EPA-approved state programs and federal law (that do not result from post-approval state or federal changes) belong in Category 2. |
| Federal withdrawal proceedings ²³⁶ | Maybe—EPA withdrawal is a system-wide fix and thus is likely to restore the supremacy of national standards. Judicial review may be available to overcome bureaucratic inertia. ²³⁷ | If judicial review is available, systemic conflicts between EPA-approved state programs and federal mandates belong in Category 2. Otherwise, such conflicts belong in Category 3. |
| Direct EPA administration of federal program changes pending supplemental authorization of state programs ²³⁸ | Yes—This mechanism preserves supremacy of federal mandates before even giving the states a chance to drop the ball. Judicial review is available if filed within sixty days after EPA publishes a final rule announcing the program change. | This mechanism should cause state conflicts with the applicable federal mandates to be classified under Category 2. Before EPA-approval, the federal mandate may be directly applied and enforced. Judicial review is available to correct any EPA attempt to approve a conflicting state program change. |

235. *See supra* notes 141–50 and accompanying text (discussing the EPA approval mechanism).

236. *See supra* notes 151–73 and accompanying text (discussing EPA authority to withdraw approval).

237. *See supra* notes 156–73 and accompanying text (discussing judicial review of EPA withdrawal proceedings).

238. *See supra* notes 146–47 and accompanying text (discussing RCRA’s approach to keeping state programs up with federal program changes).

| Federal Mechanism | Is the Federal Mechanism Robust? | Impact on Preemption Analysis |
|--|---|---|
| Other system-wide federal sanctions (e.g., withholding federal funds) ²³⁹ | No (at least with respect to sanctions discussed in this Article)—some of these sanctions may be strong enough to prod states into compliance, and are thus likely to restore the supremacy of national standards. But federal causes of action are generally not available to overcome bureaucratic inertia with respect to these sanctions. | These mechanisms would not prevent state action that conflicts with federal mandates from falling into Category 3. |
| Federal objection, amendment, or termination of illegal state permits ²⁴⁰ | Sometimes—when these mechanisms apply, and when judicial review is available to overcome bureaucratic inertia, they are likely to restore the supremacy of national standards. Some permitting problems, however, may fall between the cracks of these mechanisms. | When judicial review is available to overcome bureaucratic inertia (i.e., in the Clean Air Act’s Title V petition), the conflicts at issue would fall into Category 2. When judicial review is unavailable, the conflicts belong in Category 3. |

239. *See supra* notes 174–77 and accompanying text (discussing sanctions such as withholding federal funds).

240. *See supra* notes 178–87 and accompanying text (discussing EPA authority to veto, modify, and terminate permits).

| Federal Mechanism | Is the Federal Mechanism Robust? | Impact on Preemption Analysis |
|------------------------------------|--|--|
| Federal enforcement ²⁴¹ | No—These mechanisms offer important protections, but do not directly address state actions that conflict with federal mandates. Instead, review of such state action would be collateral—usually in the context of an enforcement target’s defense. Also, because federal agencies enjoy enforcement discretion, judicial review is not available to overcome bureaucratic inertia. ²⁴² | These mechanisms would not prevent state action that conflicts with federal mandates from falling into Category 3. |

E. Changing Categories

The full federal regulatory purpose, i.e., the ultimate touchstone in preemption analysis, should not become “ossified” except by unambiguous statutory language.²⁴³ Thus, particular types of conflicts may change categories as EPA amends its regulations. For example, EPA’s ability to impose sanctions (including with program withdrawal) on states with Clean Air Act programs that conflict with federal law probably does not qualify as robust. This is because EPA’s authority in this regard is—under current case law—“committed to agency discretion by law,” meaning that affected members of the public have no means to advance Congress’s goal of overcoming bureaucratic inertia. But EPA could amend its regulations to create a petition process—including an administrative obligation to respond on the merits—that would provide a mechanism to overcome bureaucratic inertia. Similarly, courts can interpret federal regulatory mechanisms that seem robust to eliminate their ability to reliably overcome

241. See *supra* notes 188–95 and accompanying text (discussing federal enforcement authority).

242. See *supra* notes 166–70 and accompanying text (discussing enforcement discretion).

243. See *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 983 (2005) (noting that if deference depended on whether the agency’s construction came before a court’s construction, it would “lead to the ossification of large portions of our statutory law” (quoting *United States v. Mead Corp.*, 533 U.S. 218, 247 (2001) (Scalia, J., dissenting))).

bureaucratic inertia.²⁴⁴ The viability of preemption challenges to conflicting state programs could therefore change as federal regulatory programs evolve in response to agency rulemaking, judicial interpretations, and—of course—legislative changes. If regulatory programs’ built-in mechanisms for policing cooperative federalist systems become more robust, the role of preemption in policing those programs will shrink.

CONCLUSION

Preemption doctrine should ensure that state laws do not obstruct attainment of federal regulatory systems’ lawful goals. Cooperative federalist regulatory systems pose challenges in this regard because these systems’ goals can conflict. But with careful analysis, preemption doctrine will help strengthen cooperative federalist systems—stepping in when needed to prevent systemic conflicts between state and federal law but avoiding unnecessary marginalization of state administrative systems.

For preemption doctrine to operate appropriately in this context, courts must recognize that (a) the ultimate touchstone of preemption analysis is the full federal regulatory purpose, and (b) multiple federal goals drive cooperative federalist schemes. It is then practical to distinguish true conflicts between state action and the *full* federal regulatory purpose from false conflicts, in which state action may conflict with a particular federal mandate, but not with the federal regulatory purpose when considered as a whole. This distinction can be implemented by sorting state–federal conflicts in cooperative federalist systems into three categories: (1) isolated administrative mistakes; (2) deviations subject to robust federal corrective mechanisms, defined in terms of the cooperative federalist systems’ goals; and (3) true obstacles to accomplishment of the full federal regulatory purpose. Preemption of state action in the third category only will allow litigants—whether members of the regulated community or citizens seeking full implementation of regulatory protections—to use preemption doctrine to police, but not undermine, cooperative federalism.

244. See *supra* note 157.