

The Siren’s Song of a Trickle-Down Bureaucracy: The Transport Rule, The Problem of Air Contamination Crossing State Lines, and the EPA Crossing Its Line

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INTRODUCTION

It is a fair and reasonable demand on the part of a sovereign that the air over its territory should not be polluted on a great scale by sulphurous acid gas, that the forests on its mountains, be they better or worse, and whatever domestic destruction they have suffered, should not be further destroyed or threatened by the act of persons beyond its control, that the crops and orchards on its hill should not be endangered from the same source.¹

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1. Georgia v. Tenn. Copper Co., 206 U.S. 230, 238 (1907).

When the states by their union made the forcible abatement of outside nuisances impossible to each, they did not thereby agree to submit to whatever might be done. They did not renounce the possibility of making reasonable demands on the ground of their still remaining quasi-sovereign interests; and the alternative to force is a suit in this [C]ourt.²

In 1907, based upon the foregoing, the United States Supreme Court created a cause of action for states injured from air contamination, heedless of state boundaries, as well as an implied call to Congress to address the issue. To be sure, the crux of the problem is if downwind pollution is left unregulated, the emitting or upwind state reaps the benefits of the economic activity causing the pollution without bearing all the costs.³ Cross-state air pollution provides a unique problem: transient by its nature, as air pollution travels out of state, upwind states are relieved of the associated costs, which are borne instead by downwind states whose ability to achieve and maintain national air quality standards is systemically hampered by the steady stream of infiltration pollution.

After a series of legislative enactments, Congress delegated the newfound authority to regulate emissions that cross state lines to the Environmental Protection Agency (EPA), which became known as the Good Neighbor Provision of the Clean Air Act (CAA).⁴ Since then, rule promulgations by the EPA have been the ongoing subject of judicial scrutiny;⁵ each has met a fate either in failure or requiring remand to the EPA to create a rule consistent with its statutory grant of authority.⁶ The EPA's tumultuous history for rendering regulations that fail constitutional muster necessarily raises the question, how can the EPA continually be wrong in enacting regulations to effectuate the Good Neighbor Provision?

Over the years, agencies like the EPA have been afforded great deference.⁷ This deference gives agencies and their unelected officials the confidence to push the limits of their authority by making audacious policy-based decisions, sometimes in derogation of more

2. *Id.* at 237.

3. See Richard L. Revesz, *Federalism and Interstate Environmental Externalities*, 144 U. PA. L. REV. 2341, 2343 (1996). Conversely, downwind states to which the pollution travels are unable to achieve clean air because of the influx of out-of-state pollution they lack authority to control. See S. Rep. No. 101-228, p. 49 (1989).

4. 42 U.S.C. § 7410(a)(2)(E).

5. See *infra* notes 9, 28, and 35.

6. See, e.g., *infra* note 46.

7. See E. Donald Elliot, *Chevron Matters: How the Chevron Doctrine Redefined the Roles of Congress, Courts, and Agencies in Environmental Law*, 16 VILL. ENVTL. L.J. 1, 5 (2005).

appropriate and conservative legal decisions.⁸ In the midst of this lies the United States Supreme Court, teetering in a muddled intersection between adherence to *stare decisis* and the practice of giving deference to administrative agencies. As a product of the Court's internal battle, the superior methodology applied in statutory interpretation issues involving administrative agencies is seemingly unclear. As explained by Justice Scalia:

I know of no case, *in the entire history of the federal courts*, in which [the Court has] allowed a judicial interpretation of a statute to be set aside by an agency—or ha[s] allowed a lower court to render an interpretation of a statute subject to correction by an agency.⁹

The EPA promulgated the Transport Rule to quantify states' Good Neighbor obligations regarding sister states.¹⁰ That is, the Transport Rule is a regulation that the EPA enacted, anchored by the rule-making power given to it by Congress via the CAA, to abate ambient pollutant particles that are transported to downwind states causing potentially serious health problems.¹¹ In enacting the Transport Rule, the EPA necessarily had to interpret the Good Neighbor Provision. However, its own statutory interpretation is not the only cornerstone on which the EPA had to rely when promulgating the Transport Rule; its interpretation must also be guided by prior case law. As a result, the validity of the Transport Rule hinges on whether the EPA acted within its statutory authority and whether its interpretation of the Good Neighbor Provision was constitutional.

This comment seeks to explore how the Court erred in analyzing the EPA's interpretation of the CAA, and how the Court should have decided the issue by minimizing the deference accorded to the EPA's interpretations. Part I of this article discusses the historical background of the CAA, the evolution of the Good Neighbor Provision and regulations purporting to effectuate Good Neighbor obligations, including the current Transport Rule. Part II of this article analyzes how the Transport Rule is in derogation of the EPA's statutory authority and how the United States Supreme Court erred in according deference to the EPA in upholding the mechanics of the

8. See *id.* at 11–12.

9. *United States v. Mead Corp.*, 533 U.S. 218, 248–49 (2001) (Scalia, J., dissenting) (emphasis added).

10. Approvals, 76 Fed. Reg. 48,208 (Aug. 8, 2011) (to be codified at 40 C.F.R. pts. 51, 52, 72, 78, 97) [hereinafter Transport Rule].

11. See generally *id.*

Transport Rule. Lastly, this article concludes that the EPA should not have been awarded any deference under the seminal deference regime provided by *Chevron, U.S.A., Inc. v. NRDC*.¹²

I. HISTORICAL BACKGROUND

A. Statutory Evolution

Originally, the school of thought on how to address the issue of cross-state air contamination was premised on the notion that states could negotiate abatement on their own; the affected downwind states would initiate negotiations with the upwind-polluter states by offering payment in exchange for pollution abatement.¹³ Though this utopian idea of deferring to the states may be a true Federalist's dream, it proved wanting for some kind of federal government intervention.¹⁴ In 1962, this motivated promulgation of the CAA.

In 1970, in order to remedy the complex mechanism in place for abatement of interstate air pollution,¹⁵ Congress began to amend the CAA, starting with a structure that, predominantly, remains the same today. Congress delegated to the EPA the responsibility of establishing national ambient air quality standards (NAAQS) for ambient pollutant particles that "cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare."¹⁶ The CAA also requires that, once the EPA has established the NAAQS, the burden shifts to the states to craft a state implementation plan designed to get the state to attain the

12. 467 U.S. 837 (1984).

13. See R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 15 (1960) (explaining, in more general terms, that a downwind state would bargain with a polluting upwind state by paying the upwind-polluter in exchange for reducing emissions downwind).

14. In the seminal case to address the issue of cross-state air contamination, the Supreme Court of the United States saw the true problem with voluntary interstate bargaining: the State of Georgia took to the courts only after "a vain application to the State of Tennessee for relief [in the form of pollution abatement]." *Tenn. Copper Co.*, 206 U.S. at 236 (1907). In effect, payment is an incentive for a polluter state to abate its emissions; however, initiating emission controls proves a costly endeavor and absent a mandatory regulation requiring emissions reduction, the burden on upwind states overpowers incentives proposed by downwind states.

15. 42 U.S.C. §§ 1857d(c)–(g) (1964). Later, during the 1970's, Congress recognized the 1963 mechanism for abatement of interstate air pollution to be "cumbersome, time consuming, and unwieldy." H.R. REP. NO. 95-294, at 330 (1977). Thus, Congress came to terms with the need for amendments. *Id.*

16. 42 U.S.C. § 7408(a)(1)(A) (2010). This provision is found in Title I of the CAA. *Id.* Additionally, Title I also requires the EPA to divide the country into designated areas. *Id.* at § 7407(c). These designated areas are christened as either "nonattainment," *id.* at § 7407(d)(1)(A)(i), "attainment," *id.* at 7407(d)(1)(A)(ii), or "unclassifiable," *id.* at 7407(d)(1)(A)(iii), as the air quality pertains to each of the air pollutants on the NAAQS.

NAAQS.¹⁷ These initial amendments sparked a series of later and more progressive amendments that addressed the issue of cross-state air contamination.

Using this amended structure of the CAA, Congress required state plans to include “adequate provisions for intergovernmental cooperation” on interstate air pollution.¹⁸ However, the EPA did not interpret this new requirement to be a “binding enforcement agreement.”¹⁹ As a result, state enforcement did not occur and “serious inequities among several States” persisted.²⁰

Continuance, rather than elimination of the problem, forced Congress to conclude that the 1970 Amendment was “an inadequate answer to the problem of interstate air pollution[,]” so Congress amended the CAA again in 1977 in yet another attempt to “establish an effective mechanism for prevention, control, and abatement of interstate air pollution.”²¹ This time, Congress’s goal for the new amendment was to “mak[e] a source at least as responsible for polluting another State as it would be for polluting its own State.”²² In order to bring this to fruition, Congress adopted the Good Neighbor Provision, which requires that all state plans include “adequate” provisions “prohibiting any stationary source within the [s]tate from emitting any air pollutant in amounts which will *prevent* attainment or maintenance [of the NAAQS] for any other State.”²³ Unfortunately, despite Congress’s effort to hold upwind states accountable, this version of the Good Neighbor Provision ultimately proved inadequate.²⁴

17. 42 U.S.C. § 7410(a)(1). The CAA also provides that if a state submits an inadequate state plan or fails to submit a state plan altogether, then the EPA is required to administer a federal implementation plan (federal plan). See 42 U.S.C. §§ 7410(c)(1)(A)–(B). These 1970 amendments reflected Congress’s effort to “sharply increase[] federal authority and responsibility in the continuing effort to combat air pollution.” *Train v. NRDC*, 421 U.S. 60, 64 (1975).

18. 42 U.S.C. § 1857c-5(a)(2)(E).

19. *NRDC v. EPA*, 483 F.2d 690, 692 (8th Cir. 1973).

20. S. REP. NO. 95-127, at 47 (1977).

21. H.R. REP. NO. 95-294, at 330 (1977).

22. S. REP. NO. 95-127, at 48 (1977).

23. 42 U.S.C. § 7410(a)(2)(E) (Supp. II 1977) (emphasis added). This provision is commonly referred to as the original “Good Neighbor Provision.” *Id.*

24. Specifically, this provision’s demise was rooted in semantics. As written, any upwind state would be in violation of the provision only if it “*prevented* attainment” in a downwind state. However, due to the nature of cross-state air pollution, something akin to a spaghetti-like matrix, it most often proved “impossible to say that any single source or group of sources is the one which actually prevents attainment.” S. REP. NO. 101-228, at 49 (1989) (emphasis added). Furthermore, the provision only applied to “single sources,” which made it inapplicable to prohibiting emissions from multiple sources. *Id.* at 21. Ambient air pollution is a complicated process. Once emissions are put into the atmosphere, they immediately mix with pollutant particles and depending on the wind, will be “transported” to downwind states. However, due to the very nature of the wind, one day an upwind state is classified as an

In 1990, Congress put its quill to the paper again, extending the Good Neighbor Provision to encompass emissions from multiple sources, which “eliminat[ed] the need to establish a causal relationship between a polluted state and violation of an ambient standard.”²⁵ This amendment provides that state plans must “[c]ontain adequate provisions *prohibiting* . . . any source or other type of emissions activity within the State from emitting any air pollutant in amounts which will *contribute significantly* to nonattainment in, or interference with maintenance by, any other state with respect to any such [NAAQS].”²⁶ After this amendment, the EPA subsequently began a series of rulemakings to enforce the Good Neighbor Provision.

B. Regulatory Evolution with Judicial Intervention

The CAA grants the EPA authority to create necessary regulations to enforce the Good Neighbor Provision.²⁷ After the most recent amendments to the CAA in 1990, the EPA established the “NO_x

upwind, while the next it is a downwind. This spaghetti-like matrix makes finding a causal connection between a *single* source polluter and a specific downwind nonattainment area an arduous task.

25. S. REP. NO. 101-228, at 75 (1989).

26. 42 U.S.C. § 7410(a)(2)(D)(i)(I) (emphasis added). This was the 1990 amendment to the Good Neighbor Provision and remains, unchanged, as the current reading of the Good Neighbor Provision today.

27. See generally 42 U.S.C. § 7410(a)(2)(E).

SIP Call,” the first regulation to enforce the Good Neighbor Provision.²⁸ This rule addressed NO_x emissions by quantifying obligations of the upwind states via the Good Neighbor Provision.²⁹ The NO_x SIP Call required states to submit plans that set statewide ozone season NO_x budgets with the overarching goal of reducing NO_x emissions within the state; in effect, this reduces the amount of NO_x transported across states.³⁰ In *Michigan v. EPA*, the NO_x SIP Call was upheld, despite attempts by states, industries, and labor unions to set it aside.³¹

The crux of the NO_x SIP Call litigation was the rule’s failure to define “amounts which will contribute significantly to nonattainment”³² *solely* on the grounds of downwind air quality impact from upwind polluter states. Instead, the EPA “considered how much NO_x could be eliminated by sources in each [s]tate if those sources

28. Finding of Significant Contribution and Rulemaking for Certain States in the Ozone Transport Assessment Group Region for Purposes of Reducing Regional Transport of Ozone, 63 Fed. Reg. 57,356 (Oct. 27, 1998) (to be codified at 40 C.F.R. pts. 51, 72, 75, 96) [hereinafter NO_x SIP Call]. Each of the EPA regulations in regard to enforcement of the Good Neighbor Provision deal with the collective contribution of nitrogen oxide (“NO_x”) and sulfur dioxide (“SO₂”). The collective contribution of NO_x and SO₂ emissions affect ozone and fine particle (“PM_{2.5}”) pollution problems in the atmosphere. The effect of these emissions in the atmosphere is a complicated technical melting pot; however, the crux of it can be summarized generally. In regard to ozone pollution, emissions of NO_x and volatile organic compounds (“VOCs”—an example of a VOC is something that has very low vapor pressure and changes to the gaseous state very easily. A basic and common example of a VOC is gasoline) mix in the atmosphere, in the presence of sunlight, to form ozone. VOCs, by their nature, can be composed of tens of thousands of varying chemical combinations, some of which have low reactivity with NO_x; as such the one common denominator and primary component for interstate ozone pollution is NO_x. See Brief for Federal Petitioners, *EME Homer City Generation v. EPA*, 696 F.3d 7 (D.C. Cir. 2013). As for PM_{2.5} (which can be emitted directly or formed secondarily once mixed with other emissions in the atmosphere), the primary interstate component is attributable to sulfates formed by the emission of SO₂ from power plants, automobiles, and other combustion sources. *Id.* Both NO_x and PM_{2.5} primary interstate components travel across state borders and are the major contributors to downwind state’s nonattainment of the NAAQS.

Understanding the underlying chemical mechanisms is nothing short of complex, but the purpose behind regulating these particular emissions is effervescently clear: short term exposure to ozone in sufficient concentrations has proven to “irritate the respiratory system,” aggravate asthma, and it has been associated with premature mortality. Brief for Federal Petitioners, *supra*, at 5 n.1. “Longer-term ozone exposure can inflame and damage the lining of the lungs, which may lead to permanent changes in lung tissue and irreversible reductions in lung function.” *Id.* As for the negative public health and welfare effects of PM_{2.5}, fine particles “are associated with a number of serious health effects including premature mortality, aggravation of respiratory and cardiovascular disease[,] . . . lung disease, . . . asthma attacks, and certain cardiovascular problems.” *Id.* at 5 n.2.

29. See generally NO_x SIP Call, *supra* note 29, at 57,356.

30. Nitrogen Oxide (NO_x) Control Regulations, U.S. ENVTL. PROT. AGENCY, <http://www.epa.gov/region1/airquality/nox.html> (last updated Sept. 13, 2013).

31. *Michigan v. EPA*, 213 F.3d 663, 695 (D.C. Cir. 2000). However, the court remanded the case to the EPA on four minor issues. *Id.*

32. 42 U.S.C. § 7410(a)(2)(D)(i)(I).

installed ‘highly cost-effective’ emissions controls.”³³ The court held that the EPA may consider differences in cutback costs, so that, after reduction of all that could be cost-effectively eliminated, any remaining “contribution” would not be considered “significant.”³⁴ In other words, the EPA can use cost considerations to lower an upwind state’s obligation under the Good Neighbor Provision in addition to the amount of emissions that contribute to downwind non-attainment.

In 2005, the EPA issued its second regulation, known as the Clean Air Interstate Rule (CAIR).³⁵ In a neoteric and more stringent fashion, CAIR continued to address the interstate issue of NO_x as relating to ozone level pollution, but additionally regulated SO₂ emissions that contribute to nonattainment in downwind states of the air quality standard for PM_{2.5}.³⁶ With the precedent established in *Michigan*, CAIR employed two different formulas—both of which incorporated cost considerations—to quantify each upwind state’s obligations in downwind abatement.³⁷ At first glance, CAIR seemed

33. *EME Homer City Generation v. EPA*, 696 F.3d 7, 14 (D.C. Cir. 2012) *cert. granted in part*, 133 S. Ct. 2857 (2013).

34. *Michigan*, 213 F.3d at 677–79. However, the *Michigan* court rejected the argument that the Good Neighbor Provision forbids cost-considerations in regard to abatement of pollution and found no “clear congressional intent to preclude consideration of cost.” *Id.* at 677. Judge Sentelle, in his dissent, agreed with the reading of the statutory text promulgated on behalf of some of the states and representatives of the labor industry stating that the language of the Good Neighbor Provision unambiguously “set forth one criterion [in determining the amount of emissions reduction of an upwind state]: the emission of an amount of pollutant [with no reference to cost considerations that is] sufficient to contribute significantly to downwind nonattainment.” *Id.* at 696 (Sentelle, J., dissenting).

35. Rule to Reduce Interstate Transport of Fine Particulate Matter and Ozone (Clean Air Interstate Rule), 70 Fed. Reg. 25,162 (May 12, 2005) (to be codified at 40 C.F.R. pts. 51, 72, 73, 74, 77, 78, 96) [hereinafter CAIR].

36. *Id.* at 25,171.

37. The epicenter of the litigation surrounding CAIR was the definition of the phrase “contribute significantly” as used within the Good Neighbor Provision. *North Carolina v. EPA*, 531 F.3d 896, 903 (D.C. Cir. 2008) [hereinafter *North Carolina I*]. In CAIR, the EPA took a region-wide emissions abatement approach. *Id.* at 904. North Carolina challenged this region-wide approach on the premise that the “EPA did not purport to measure each state’s significant contribution to specific downwind nonattainment areas and eliminate [the pollution] in an isolated, state-by-state manner[,]” but rather designed CAIR to eliminate emissions contributions of upwind states as a whole. *Id.* at 907. According to North Carolina, this design is in derogation of the requirements of the Good Neighbor Provision that each state will abate its *own* significant contribution downwind. *See id.* at 921.

In response, the EPA argued that capped emissions in each state would be fruitless and not cost-effective for the states. *Id.* The intricacies of how the EPA calculated the caps on NO_x, SO₂, and PM_{2.5} are not relevant to this discussion; however, CAIR did employ an optional cap and trade program that the states can opt in to (trading allowances with other states or “banking” them for the future), and if not, then the state cannot exceed the cap set by the EPA. *Id.* Because the EPA assumed states would opt in to the cap and trade program because it is “highly cost effective,” the EPA never measured the “significant contribution” in regards to pollution emissions from sources within each state. *Id.* True, that this regional

to rest on *Michigan*'s precedential laurels, but in *North Carolina v. EPA*, the court held that the formulas employed by CAIR exceeded the EPA's statutory authority.³⁸ Expounding upon that holding, the *North Carolina I* court stated that the Good Neighbor Provision "gives [the] EPA no authority to force an upwind state to *share the burden* of reducing *other* upwind states' emissions. Each state must eliminate *its own significant contribution* to downwind pollution."³⁹ In critical language, the *North Carolina I* court underscored that the EPA "may not require some states to exceed the mark."⁴⁰ The mechanics of CAIR that the EPA utilized to determine a state's "significant contributions" on a cost-based region-wide basis,⁴¹ though premised upon notions of fairness, over-stepped the congressional

reduction method would yield the sum of the emission reductions required to improve nonattainment downwind, but it "would never equal the aggregate of each state's significant contribution . . ." *Id.*

38. The court explained that the EPA may use cost to "require termination of only a subset of each state's contribution," but the "EPA cannot just pick a cost for a region, and deem 'significant' any emissions that sources can eliminate more cheaply." *North Carolina I*, 531 F.3d at 918. Ultimately in its decision, the *North Carolina* court recognized the precedent in *Michigan*, giving the green light to the use of a cost-based approach to try to determine a state's "significant contribution;" however, the court stated the following:

[T]he flow of logic only goes so far. It stops at the point where the EPA is no longer effectuating its statutory mandate . . . CAIR must include some assurance that it achieves something measurable towards the goal of prohibiting sources "within the State" from contributing to nonattainment or interfering with maintenance in "any other State."

Id. at 908.

39. *Id.* at 921 (emphasis added). Additionally, "PM_{2.5}" is defined as particulate matter. *Frequent Questions-Fine Particle (PM_{2.5}) Designations*, U.S. ENVIRONMENTAL PROTECTION AGENCY, <http://www.epa.gov/pmdesignations/faq.htm#0> (last updated Feb. 6, 2014). These particles are found in the air, including dust, dirt, soot, smoke, and liquid droplets. *Id.* Particle less than 2.5 micrometers in diameter (PM_{2.5}) are referred to as "fine" particles and are believed to pose the greatest health risks. *Id.* To illustrate, PM_{2.5} is approximately 1/30 the average width of a human hair—as such, fine particles can lodge deeply into the lungs. *Id.*

40. *North Carolina I*, 531 F.3d at 921. "Exceed[ing] the mark" is the buzz phrase imputing a limitation on the EPA when promulgating rules to enforce the Good Neighbor Provision. *See id.* A simple illustration can be used to explain this abstraction. State A, an upwind state, has been deemed to "significantly contribute" NO_x emissions to downwind nonattainment site(s) at an amount (for simplicity purposes) of 25ppb (parts per billion). Similarly, State B has also been deemed a "significant contributor" downwind but at a lower amount of 15ppb. If State B, while trying to abate only its significant contribution, is required to essentially split the difference between itself and State A's significant contribution and abate 20ppb, State B has "exceeded the mark" and is now reducing portions of another upwind state's "significant contributions." In simpler terms, "the mark" can best be described as a ceiling; the EPA can require abatement of an upwind state's emissions but only to an amount that does not exceed the ceiling. In the sophomoric example described, State A's ceiling is 25ppb and State B's ceiling is 15ppb; by making State B abate 20ppb, it has gone above its ceiling and exceeded the mark.

41. *See supra* notes 38–39 and accompanying text.

breadth of authority.⁴² The EPA attempted to justify CAIR by arguing that the region-wide cost effectiveness was “fair,” however the court disagreed and held that:

[The] EPA’s redistributive instinct may be laudatory, . . . [the Good Neighbor Provision] gives [the] EPA no authority to force an upwind state to share the burden of reducing other wind states’ emissions. Each state must eliminate its own significant contribution to downwind pollution. While CAIR should achieve something measurable towards that goal, it may not require some states to exceed the mark.⁴³

In effect, *North Carolina I* establishes a caveat to *Michigan’s* approval of cost considerations: the Good Neighbor Provision allows the EPA to use cost to *lower* an upwind state’s obligations⁴⁴ but not to *increase* an upwind state’s obligations or to force a state to “exceed the mark.”⁴⁵ As such, holding true to precedent, this interpretation must be present in future rules.⁴⁶

C. *The Transport Rule*

The EPA promulgated the Transport Rule in response to the *North Carolina II* court’s holding mandating that the EPA furnish a rule “consistent with [its prior] opinion” in *North Carolina I*.⁴⁷ The Transport Rule is an attempt to quantify a state’s Good Neighbor Provision obligations in regard to three NAAQS: the 1997 annual PM_{2.5} NAAQS; the 1997 ozone NAAQS; and the 2006 24-hour PM_{2.5} NAAQS.⁴⁸

The Transport Rule is bifurcated into phases. The purpose of the first phase is to determine what states are subject to the Transport Rule and then define the amounts that each state is to abate its emissions downwind pursuant to the Good Neighbor Provision. The

42. *North Carolina I*, 531 F.3d at 919.

43. *Id.* at 921.

44. *See Michigan*, 213 F.3d at 679.

45. *North Carolina I*, 531 F.3d at 921. The court emphasized the plain language of the statute to capitulate congressional intent. *Id.* at 910. In analyzing CAIR, the court kept the congressional intent of the Good Neighbor Provision in mind: “[A]ccording to Congress, individual state contributions to downwind nonattainment areas do matter. [The Good Neighbor Provision] prohibits sources “within a state” from “contribut[ing] significantly to nonattainment in . . . any other State . . .” *Id.* at 907 (emphasis added). Showing, according to the court, that region-wide abatement forces states to “share the burden.” *Id.* at 921.

46. The *North Carolina* court remanded CAIR without vacatur, leaving it in place “until it is replaced by a rule consistent with our opinion.” *North Carolina v. EPA*, 550 F.3d 1176, 1178 (D.C. Cir. 2008) (on rehearing) [hereinafter *North Carolina II*].

47. *North Carolina II*, 550 F.3d at 1178.

48. *See* Transport Rule, *supra* note 10.

purpose of the second phase, which only applies to states that are subject to the Transport Rule, is to prescribe “Federal Implementation Plans” to implement obligations at the state level.⁴⁹

In phase one, the EPA appraised the amount that each state was to abate its emissions based upon “amounts which will ‘contribute significantly’ to nonattainment in, *or* interfere with maintenance” of the three NAAQS in other downwind states.⁵⁰ This initial “quantifying” phase of the Transport Rule is broken down further into two subordinate steps. In the first sub-step, the EPA decided which states are “contributing significantly” based upon “linkages” between each upwind state and specific downwind nonattainment areas.⁵¹ This first step was designed to determine which states were actually subject to the Transport Rule.

In this first sub-step, the EPA instituted a threshold requirement to determine whether an upwind state is “linked” to a downwind state’s “nonattainment” or “maintenance” areas.⁵² The EPA set the threshold amount equivalent to one percent of the relevant NAAQS.⁵³ If EPA modeling showed that an upwind state exceeded the one percent air quality threshold limit (of NO_x and PM_{2.5}), then there was a viable linkage between the upwind state and the downwind state—meaning that the upwind state is a “significant contributor” and subject to the Transport Rule.⁵⁴

Next, in the second sub-step within the first “quantifying” phase, the EPA determined the “amount” of emissions that the “significant contribut[ing]” states were to reduce. In this step, the “EPA determined how much pollution each upwind State’s power plants could eliminate if the upwind State’s plants applied all emission controls available at or below a given cost per ton of pollution reduced.”⁵⁵

49. *EME Homer City Generation v. EPA*, 696 F.3d 7, 15 (D.C. Cir. 2012).

50. *North Carolina I*, 531 F.3d at 908 (emphasis in original).

51. Transport Rule, *supra* note 10, at 48,236. The Good Neighbor Provision does not limit state emission abatement to those that only “contribute significantly” to nonattainment in downwind states, but it also requires emission reductions from such states that interfere with “maintenance” of a site’s attainment of the NAAQS. 42 U.S.C. § 7410(a)(2)(D)(i)(I). This statutory text includes abatement on behalf of upwind states whose emission affect specific “maintenance” areas that, absent regulation, would not be able to “maintain” the NAAQS. Transport Rule, *supra* note 10, at 48,236.

52. Transport Rule, *supra* note 10, at 48,236.

53. *Id.* That is, the threshold for the relevant NAAQS were: 0.8 ppb for ozone, 0.015 µg/m³ for annual PM_{2.5}, and 0.35 µg/m³ for 24-hour PM_{2.5}. *Id.*

54. In other words, if an upwind state sent any amount greater than these threshold limits to a downwind state, there was a linkage between the two states, and consequently the upwind state was deemed a significant contributor. It necessarily follows that any state that emitted less than these threshold amounts to downwind states were not deemed a “significant contributor” and did not have to reduce its emissions for purposes of compliance with the Good Neighbor Provision.

55. *EME Homer City Generation*, 696 F.3d at 16–17.

The caveat, however, is that these “cost per ton levels” were applied without regard to the findings in step one; that is, they were applied without any reference to the amount each state “significantly contributed” to downwind nonattainment or maintenance areas, thus totally abandoning air quality thresholds in lieu of a cost-based standard.⁵⁶ The significance of this approach is that the amount of pollution that the EPA required a state to reduce its emissions by, in effect, was not tied to the amount of air pollution that is transported downwind to nonattainment areas.⁵⁷

After this initial “quantifying” phase, the EPA then moved onto the second phase of the Transport Rule. With the amounts now configured as to which state is a “significant contributor,” and therefore the amount each state is required to abate, the EPA did not shift authority to the states to create implementation plans.⁵⁸ Instead, the EPA *simultaneously* implemented federal plans that usurped the state’s power and mandated abatement as defined by

56. *Id.* at 17.

57. *Id.* at 16–17. During this second sub-step within the “quantifying phase,” the EPA used these cost-levels to gauge how much power plants’ emissions would fall if power plants within a state were obligated to install controls at least at the cost-level, measured by a cost per ton of the pollutant reduced. *Id.* at 17. For example, in order to set the cost-threshold, if a certain control mechanism eliminated four tons of emissions and cost \$2,000 dollars to install, the price to the power plant to install this emission control would be \$500/ton. Using the EPA’s methodology, with this \$500/ton cost-threshold as a capped ceiling, the EPA then used modeling to predict how much emissions could be eliminated, started at the bottom at \$1/ton and analyzing sequentially for each dollar amount up to the \$500/ton cap. The EPA then added these numbers together with other states’ numbers to render a region-wide total for the amount that each pollutant can be reduced by the region at each cost-threshold from \$1/ton to \$500/ton. *See* Transport Rule, *supra* note 10, at 48,250–53. Logically, the higher the cost-level for installing emission controls that the EPA could select as its cost-level threshold, the higher the amount of emissions that could be reduced; however, with that naturally follows the profound burden on the power plants within the industry as well as the states themselves to install exorbitant emissions controls.

In the same stroke, the EPA looked at these cost-controls from the vantage point of the downwind states. *See EME Homer City Generation*, 696 F.3d at 17. The EPA used modeling to quantify how much the air quality in a downwind state would improve based upon the various cost-level emissions reductions that were predicted previously. Transport Rule, *supra* note 10, at 48,253.

With cost-level analyses from the opposite perspectives of both upwind states and downwind states, the EPA was fully equipped to make a decision and choose a region-wide cost-level threshold for each of the three pollutants relevant to Transport Rule regulation. Consequently, the EPA decided on a \$500/ton threshold for annual NO_x and ozone-season NO_x for every state. *Id.* at 48,256–57. For SO₂, rather than employing a universal cost-threshold, the EPA divided the upwind states into two groups with two different cost-thresholds: Seven upwind states were subjected to a cost-threshold of \$500/ton, and sixteen states, where the \$500/ton threshold would be ineffective, were subject to a harsh \$2,300/ton cost-threshold. *EME Homer City Generation*, 696 F.3d at 17–18.

58. Title I of the CAA gives the states “the primary responsibility for assuring air quality” within their respective sovereignties. 42 U.S.C. § 7407(a).

the EPA, giving the states a secondary role.⁵⁹ These federal plans “remain fully in place in each covered state until a state’s [plan] is submitted and approved by [the] EPA to revise or replace a [federal plan].”⁶⁰

D. Present Debate and the United States Supreme Court’s Resolution

“An array of power companies, coal companies, labor unions, trade associations, states, and local governments petitioned for review of [the] EPA’s Transport Rule.”⁶¹ The gravamen of this collective protesting was that the EPA exceeded its statutory authority under the Good Neighbor Provision in enacting the Transport Rule.⁶² Specifically, the petitioners argued that the EPA ran afoul of its statutory authority in a blatant disregard for the language of the Good Neighbor Provision by: (1) issuing federal plans prematurely, without allowing the states to first submit plans;⁶³ (2) regulating emissions on a region-wide basis in contravention of the holding in *North Carolina I* that required a state’s proportional abatement; and (3) using cost-only considerations to determine whether a state was a significant contributor.⁶⁴ The EPA argued that the Transport Rule and its policy decisions are sound and anchored to its authority within the CAA. Accordingly, the EPA asserted that its regulation should be given the deference usually given to expert administrative agencies involving highly complex issues.

In *EME Homer City Generation*, the D.C. Circuit Court agreed with the labor industry and state petitioners and held that the EPA exceeded its statutory authority under the Good Neighbor Provision

59. “States have the option of submitting [state plans] that modify some elements of the [federal plans].” *EME Homer City Generation*, 696 F.3d at 18. State’s can submit plans in the hopes of replacing the federal plans in their entirety, but this is contingent upon EPA approval. *Id.*

60. Transport Rule, *supra* note 10, at 48,328.

61. *EME Homer City Generation*, 696 F.3d at 19.

62. *North Carolina I*, 531 F.3d at 919.

63. *EME Homer City Generation*, 696 F.3d at 11–12. Rooted within the statutory language, the CAA is devised to adhere to a cooperative federalism approach. *See* 42 U.S.C. § 7402. When Congress delegated its rulemaking authority to the EPA, it ultimately allowed the EPA to set air-quality standards (i.e., the NAAQS); however, the power then shifts to the states to determine how to successfully meet those standards. *See id.* The “EPA determines the ends . . . but Congress has given the states the initiative and a broad responsibility regarding those means to achieve those ends The [CAA] is an experiment in federalism, and the EPA may not run roughshod over the procedural prerogatives that the Act has reserved the states” *Virginia v. EPA*, 108 F.3d 1397, 1408 (D.C. Cir. 1997).

64. Final Reply Brief for Industry and Labor Petitioners, *EME Homer City Generation v. EPA*, 696 F.3d 7 (D.C. Cir. 2012).

of the CAA in implementing the Transport Rule and that the EPA could not issue federal plans without giving states an initial opportunity to implement the required reductions through state plans.⁶⁵ The United States Supreme Court granted certiorari to determine the ultimate legal questions: (1) whether the court of appeals correctly interpreted the statutory language in the Clean Air Act; and (2) whether an upwind state is free from obligations under the Transport Rule until the EPA has quantified the state's contribution to downwind states' air pollution?⁶⁶ On April 29, 2014, the Court rendered final decisions on these issues by applying *Chevron* deference.⁶⁷

As to the first issue, the Court held that the Court of Appeals did not correctly interpret the statutory language of the CAA and vis-à-vis that misinterpretation, the EPA's cost-effective allocation of emission reductions among upwind states is a permissible, workable, and an equitable interpretation of the Good Neighbor Provision.⁶⁸ In support of its holding, the Court described in unambiguous terms how it accords agency discretion, stating "[t]his Court routinely accords *dispositive* effect to an agency's reasonable interpretation of ambiguous statutory language."⁶⁹ The Court noted that the Good Neighbor Provision delegates authority to the EPA to reduce upwind pollution only to those "amounts" of pollution that "contribute significantly to nonattainment" in downwind states.⁷⁰

Further, the Court noted that because a downwind state's excess pollution is often caused by multiple upwind states, the EPA had to address how to allocate responsibility among multiple contributors.⁷¹ In establishing the EPA's interpretation of the statute as laudatory, the Court stated that the Good Neighbor Provision does not dictate an apportionment method, and as such, nothing in the provision directs the proportional allocation method advanced by the D. C. Circuit Court.⁷² According to the Court, Congress' silence effectively delegates authority to the EPA to select from reasonable options.⁷³ Based upon the Courts analysis, the EPA was tasked with choosing which equal "amounts" to eliminate, and the EPA's

65. *Id.* at 37–38.

66. *See* EPA v. EME Homer City Generation, 133 S. Ct. 2857 (2013).

67. EPA v. EME Homer City Generation, 134 S. Ct. 1584, 1603 (2014); *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837 (1984).

68. *Id.* at 1589.

69. *Id.* (emphasis added).

70. *Id.*; *see also* §7410(a)(2)(D)(i).

71. *Id.*

72. *Id.*

73. *Id.* (citing *United States v. Mead Corp.*, 533 U.S. 218, 229(2001)).

choice to reduce the amount that was easier, i.e., less costly to eradicate,⁷⁴ was a permissible statutory interpretation.⁷⁵

In regard to the second issue, whether an upwind state is free from obligations under the Transport Rule until the EPA has quantified the state's Good Neighbor obligations, the Court held "[t]he CAA's plain text supports the [EPA]: Disapproval of a [state plan], without more, triggers EPA's obligation to issue a [federal plan]."⁷⁶ In support of its holding the Court summarized that the statute sets forth deadlines for both the states and the EPA,⁷⁷ and in an effort to reinforce its rationale in overturning the D.C. Circuit Courts's holding of the same issue, the Court stated, "[h]owever sensible the D.C. Circuit's exception to this strict time prescription may be, a reviewing court's task is to apply the text [of the statute], not to improve upon it."⁷⁸ The Court held that the CAA does not condition the duty for the EPA to promulgate a federal plan on its having first quantified an upwind state's Good Neighbor obligations.⁷⁹ According to the Court, "[b]y altering Congress' [state plan] and [federal plan] schedule, the D.C. Circuit allowed a delay Congress did not order and placed an information submission obligation on [the] EPA Congress did not impose."⁸⁰

Based upon the Court's analysis and holdings, it refused to invalidate the entire Transport Rule.⁸¹ However, the Court's holdings are not grounded upon approbative precedent or interpretation; rather, the holdings are a natural by-product of an extreme, if not willfully blind, deference to agency interpretation. As such, through its deference to agency interpretation and rule making, the

74. *Id.*

75. *Id.* In support the Court noted that nothing in the Good Neighbor Provision expressly foreclosed the possibility of using cost as a variable for eradication of ambient air particles. The Court further rationalized that the EPA's interpretation was reasonable because it was "efficient" and "equitable" in stating, "[it is] [e]fficient because the EPA can achieve the same levels of attainment, i.e., of emission reductions, the proportional approach aims to achieve, but at a much lower overall cost. Equitable because, by imposing uniform cost thresholds on regulated States, the EPA's rule subjects to stricter regulation those States that have done less in the past to control their pollution." *Id.*

76. *Id.* at 1588.

77. *Id.* at 1600. The Court articulates these respective obligations as follows:

Once EPA issues any new or revised NAAQS, a State "shall" propose a state plan within three years, 42 U.S.C. §7410(a)(1), and that state plan "shall" include, inter alia, provisions adequate to satisfy the Good Neighbor Provision, §7410(a)(2). If the EPA finds a state plan inadequate, the Agency has a statutory duty to issue a federal plan "at any time" within two years.

Id. at 1588.

78. *Id.* (internal quotation omitted).

79. *Id.*

80. *Id.* at 1589.

81. *Id.* at 1590.

Court approved the undemocratic revision of the CAA, and fundamentally erred in reaching its holdings.⁸²

II. ANALYSIS

A. *Applicable Rules of Law—Deference Regimes*

The Great Depression placed enormous pressure on the government to respond to economic disrepair. Within 100 days of taking office, President Franklin Delano Roosevelt was successful in passing a number of regulatory laws and creating many administrative agencies, armed with purported expertise, to heal the wounded economy. But, in a series of cases, the United States Supreme Court struck down most of this New Deal legislation, holding that it was beyond Congress's power. The reaction to the Court's decisions in these cases was intense. President Roosevelt proposed his infamous "court-packing" plan, designed to place justices on the bench who would support the government's ability to regulate economic activity.⁸³ Although President Roosevelt's court-packing plan failed, the firestorm in the face of this attempted hostile takeover forced the Court to eventually change its position on these issues. This change yielded a new and highly deferential standard in favor of the legislature. However, what precise deference to accord an agency has been developed over time through a litany of cases addressing the issue.

When Congress delegates its power to an administrative agency, it is axiomatic that that agency only act—that is, regulate—within the power that is given to them statutorily from Congress.⁸⁴ If an agency exceeds its authority in promulgating a regulation, the regulation is unenforceable; however, the high deference accorded to agency action makes invalidation difficult to render.⁸⁵

82. See *id.* at 1610 (Scalia, J., dissenting).

83. See generally William E. Leuchtenburg, *FDR's Court-Packing Plan: A Second Life, A Second Death*, 1985 DUKE L.J. 673 (1985) (explaining the background, motives, scheme, and impact on government posterity of President Roosevelt's court-packing plan).

84. *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988). To be sure, administrative agencies can also rule-make, as opposed to strictly promulgating regulations to effectuate Congress-created laws, provided that this authority is statutorily deferred to the agency.

85. Challenging an administrative agency regulation on the basis that the agency acted outside of its statutory authority is not the only way a challenge may be brought; however, alternative challenges are outside the scope of this paper.

Case law reveals what appears to be a continuum of deference regimes accorded to administrative agencies' interpretation of statutes, regulations, or rule-makings.⁸⁶ The first regime is *Curtiss-Wright*⁸⁷ deference. It affords a tenacious deference to executive interpretations concerning foreign affairs and issues of national security. The *Seminole Rock*⁸⁸ regime provides a strong deference to agency interpretations of the agency's own regulations. *Chevron*⁸⁹ deference involves a notorious two-prong analysis centered around whether agency interpretation of a statute is reasonable, contingent upon the requirement that the statute has not clearly addressed the issue at bar. *Beth Israel*⁹⁰ deference, a Pre-*Chevron* analysis, allows reasonable agency interpretations so long as they are consistent with the statute it purports to modify. *Skidmore*⁹¹ deference gives agency interpretations respect proportional to its power to persuade. The next regime employed, though not expressly acknowledged, by the Court is Consultative Deference. It relies on the agency in some form to guide its reasoning. The last regime, Anti-Deference, involves a presumption against agency interpretation.⁹² These pre-*Chevron* deference regimes are proper to explain the evolution of of deference accorded to administrative agencies; however, in analyzing the Transport Rule, the Court did not rely on these regimes and as such, discussion of them is outside the scope of this paper.⁹³

86. See generally William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan*, 96 GEO. L.J. 1083 (2008).

87. *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936); Eskridge & Baer, *supra* note 86, at 1098.

88. *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945); Eskridge & Baer, *supra* note 86, at 1098.

89. *Chevron*, 467 U.S. at 837; Eskridge & Baer, *supra* note 86, at 1098.

90. *Beth Israel Hosp. v. NLRB*, 437 U.S. 483 (1978); Eskridge & Baer, *supra* note 86, at 1098.

91. *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944); Eskridge & Baer, *supra* note 86, at 1098.

92. Eskridge & Baer, *supra* note 86, at 1098.

93. To be sure, the Court did not rely on them because many of these pre-*Chevron* regimes, though not expressly overruled, are applicable only to limited controversies. Logically, *Curtiss-Wright* deference is not appropriate to the present issue because the EPA's quantification of the Good Neighbor Provision of the CAA is not a matter of foreign policy or national security. *Id.* at 1098–101. *Seminole Rock* deference is not appropriate because the EPA is not interpreting its own regulation but rather, what is at issue is the EPA's interpretation of a provision within the CAA. *Id.* Finally, the *Beth Israel* test is also not appropriate. *Id.* Though the analogous nature between the *Beth Israel* and *Chevron* tests is glaring, statistical trends show that the *Beth Israel* test, which had its genesis before *Chevron*, survived *Chevron* and is primarily used in cases concerning labor law, immigration, treaty interpretation, sentencing, education, and regulated industries. *Id.* at 1107–08.

In *Skidmore v. Swift*, the Court held that agency interpretations were merely persuasive, not controlling, and that courts should look to factors, including the validity and consistency of the agency's reasoning when deciding if the agency deserved deference.⁹⁴ After *Skidmore*, the Court developed another deference regime. *Chevron* expounded a new standard for judicial deference to administrative agencies.⁹⁵ The *Chevron* two prong-test is as follows: (1) Congress has directly spoken to the precise question at issue, and if the intent of Congress is clear, that is the end of the matter; and (2) "If . . . the court determines Congress has not directly addressed the precise question at issue" because "the statute is silent or ambiguous with respect to the specific issue," the court must determine whether the agency's interpretation of the statute is *reasonable*.⁹⁶ In a shift from *Skidmore*,⁹⁷ the *Chevron* Court recognized that an inherent part of interpreting an ambiguous statute is making policy decisions, and the agencies, in their official expert capacities, are best equipped to make these policy decisions.⁹⁸ The *Chevron* rule gives agencies more deference and, through that deference, more freedom to interpret rules; however, *Chevron* is not a *carte blanche* for agencies to rule with unfettered discretion. Courts still retain a narrow authority to strike down a regulation if it is unreasonable—quantified as whether it is "arbitrary, capricious, or manifestly contrary to the statute."⁹⁹

To scholars, lawyers, and law school students, *Chevron* seems to be the alpha and the omega regarding the applicable law of administrative agency deference. Undoubtedly notorious and fundamentally reinforced by subsequent case law, there has, however, been a growing view that *Chevron* allows administrative agencies to press for more aggressive statutory interpretations—acting fast and loose with confidence that courts will invoke the *Chevron* test and approve agency actions as a matter of course.¹⁰⁰

94. *Skidmore*, 323 U.S. at 140.

95. *Chevron*, 467 U.S. at 837.

96. *Id.* at 842–44 (emphasis added).

97. *Skidmore*, 323 U.S. at 134. *Skidmore* gave the courts significant discretion in determining factors that gave the agency power to persuade and hence, getting deference. See generally *id.*

98. 467 U.S. at 843.

99. *Id.* at 844.

100. See Elliott, *supra* note 7, at 11–12. Donald Elliott, former General Counsel of the EPA, asserts that *Chevron* allowed the EPA to be more aggressive in pursuing a policy-oriented approach to environmental statutes (at the expense of a legalistic approach) with some confidence that the D.C. Circuit would go along with the agency's interpretations. *Id.*

However, even after a careful reading of *Chevron*, the question still remained as to whether *Chevron* eliminated and replaced previous deference regimes like *Skidmore*. In *United States v. Mead Corp.*, this question was finally answered. The Court retained *Skidmore*'s vintage and pronounced its deference regime as good law.¹⁰¹ Furthermore, the *Mead* Court limited *Chevron* deference to those instances when a court unequivocally finds that: (1) Congress implicitly delegated to the agency primary interpretive power; and (2) the agency interpretation claiming deference was promulgated in the exercise of that authority.¹⁰² *Mead* held that when Congress has not delegated lawmaking authority to an agency, *Skidmore* deference governs.¹⁰³ As such, *Mead* purports to draw a bright line rule delineating when to apply *Skidmore* or *Chevron*.

When Congress delegated power to the EPA, it implicitly delegated primary interpretive power, and the EPA exercised such power through regulation promulgation, including NO_x SIP Call, CAIR, and the Transport Rule.¹⁰⁴ Thus, the EPA has met the two-part threshold requirement created in *Mead*, triggering the Transport Rule to be subject to *Chevron* deference analysis.¹⁰⁵

*B. Cost-Considerations to Define "Contribute Significantly"
Analyzed within the Context of Chevron Deference*

The EPA's interpretation of the phrase "contribute significantly" within the Good Neighbor Provision can only be grounded upon an ambiguous reading of the statute. However, the statute is not ambiguous, and therefore the Court should not have given *Chevron* deference to the EPA's interpretation.

Justice Stevens, writing for the Court in *Chevron*, established the *Chevron* deference rule. The Court explained,

When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent

101. 533 U.S. 218, 238 (2001). To the contrary, Justice Scalia has pronounced the *Skidmore* test obsolete post-*Chevron*. *Christensen v. Harris Cnty.*, 529 U.S. 576, 589 (2000) (Scalia, J., concurring). However, the statistics show the *Skidmore* test is alive and well. Eskridge & Baer, *supra* note 86, at 1109.

102. *Mead Corp.*, 533 U.S. at 226–27.

103. *Id.* at 237.

104. *See supra* notes 10, 29, and 36.

105. *Mead Corp.*, 533 U.S. at 226–27.

of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.¹⁰⁶

Thus, if a court finds that Congress has directly spoken to its statutory intent, the inquiry ends there and any regulation must effectuate Congress's express intent. In regard to the first prong, the Court has stated that the traditional tools of statutory construction are available.¹⁰⁷

With respect to the second prong—the reasonableness of the EPA's interpretation—“[w]hen the legislative prescription is not free from ambiguity, the administrator must choose between conflicting reasonable interpretations.”¹⁰⁸ Courts have continually found the agency's interpretation is reasonable where it is consistent with any of the following: (1) the statute's plain language or meaning;¹⁰⁹ (2) congressional intent and underlying purpose of the statute;¹¹⁰ or (3) agency expertise in administering a technical regulatory scheme.¹¹¹

The EPA centered its arguments on the view that the Good Neighbor Provision is ambiguous, and therefore, allowed it to make a reasonable interpretation of the statute.¹¹² Specifically, when the EPA included a cost-based analysis in its calculations of what makes an upwind state a significant contributor, it premised this inclusion on the statute's “ambiguous and undefined terms.”¹¹³ Indeed, the EPA is correct; the statute is silent as to prescribing how

106. *Chevron* 467 U.S. at 842–43.

107. *Id.* at 843 n.9. “If a court, employing traditional tools of statutory construction, ascertains that Congress has an intention on the precise question at issue, that intention is the law and must be given effect.” *Id.*

108. *Holly Farms Corp. v. NLRB*, 517 U.S. 392, 398–99 (1996).

109. *See Nat'l R.R. Passenger Corp. v. Boston & Me. Corp.*, 503 U.S. 407 (1992).

110. *See Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81 (2002) (striking down a Labor Department regulation imposing a penalty on employers because the penalty was against Congress's intent in enacting the controlling legislation).

111. *See Bd. of Governors of Fed. Reserve Sys. v. Dimension Fin. Corp.*, 474 U.S. 361 (1986). Agency expertise in administering a complicated regulatory scheme is, however, irrelevant as to whether the interpretation is in derogation of the plain language of the statute as “[n]o amount of agency expertise—however sound may be the result—[could support an agency interpretation inconsistent with the statutory language].” *Id.* at 368.

112. *See* Brief for Federal Petitioners, *supra* note 28, at 45.

113. *Id.*

to quantify a state as a significant contributor. In furtherance of this observation, the EPA necessarily extended its argument to allow it to take into account cost-based analyses into the “significant contributor” determination because the statute does not expressly compel a “strict air quality-only methodological approach.”¹¹⁴ In other words, the EPA argued that “significant,” as it is used for the purposes of “significantly contribute,” can mean different things and that “significantly” is not limited to an emissions-only valuation.

However, fragments of a statute must not be read in a vacuum. The EPA “makes a fundamental mistake by divorcing the adverb ‘significantly’ from the verb it modifies, ‘contribute,’” and continues to “compoun[d] their error by divorcing significantly from the rest of the statutory provision.”¹¹⁵ The Good Neighbor Provision requires each state to prohibit only those “amounts” of ambient pollutant particles emitted within a state that “contribute significantly” to another state’s nonattainment.¹¹⁶ Stated differently, the statute addresses solely the environmental consequences of emissions, *not* the facility of reducing them; and it requires states to shoulder burdens in proportion to the size of their contributions, *not* in proportion to the ease of bearing them.¹¹⁷ “[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there.”¹¹⁸ Thus, the EPA cannot read broader authority into a statute in contravention of its text.¹¹⁹

114. *Id.* at 46.

115. Michigan, 213 F.3d at 696 (Sentelle, J., dissenting).

116. State implementation plans must contain adequate provisions “prohibiting . . . emissions activity within the state from emitting any air pollutant in *amounts* which will . . . contribute significantly to nonattainment in, or interfere with maintenance by, any other State with respect to [the NAAQS].” 42 U.S.C. §§ 7410(a)(2)(D)(i), (I) (emphasis added).

117. EPA v. Homer City Generation, 134 S.Ct. 1584, 1611 (2014) (Scalia, J., dissenting) (emphasis in original).

118. Barnhart v. Sigmon Coal Co., 534 U.S. 438, 461–62 (2002).

119. See generally 42 U.S.C. § 7410(a)(2)(D)(i)(I) (plain language of the statute requires abating state’s respective “significant shares” downwind). Perhaps the solution is an amendment to the CAA. As the statute is written, each state is responsible for its proportional share that significantly contributes to downwind nonattainment in other states. *Id.* What the EPA is trying to do is to regionalize a national problem. Though a seemingly great solution to an immensely difficult complication, the only issue is the lack of statutory authority for a program that “shares the burden” within the Good Neighbor Provision. Taking cue from the very successful Acid Rain Program, a cap and trade system could create an industrial emissions trading market, while meeting the NAAQS, without having each state restricted to only abating their proportionate share. See *Acid Rain Program*, U.S. ENVTL. PROT. AGENCY, <http://www.epa.gov/airmarkets/progsregs/arp/basic.html> (last updated July 25, 2012). During oral argument Justice Scalia stated that a statute that could provide for such a regulation could potentially be the answer to the problem at hand and act as a better statute than the one currently in place. Oral Argument at [13:30], *EME Homer City Generation v. EPA*, 696 F.3d 7 (D.C. Cir. 2012), http://www.oyez.org/cases/2010-2019/2013/2013_12_1182 [hereinafter Oral Argument]. However, Congress failed in 2003 and 2004 to enact the Bush

This proposition finds support in a United States Supreme Court decision that confronted a similar issue. In *Whitman v. American Trucking Ass'n*, the Court held that the EPA may not consider costs in setting the NAAQS.¹²⁰ The Court underscored that other provisions within the CAA “explicitly permitted or required economic costs to be taken into account in implementing the air quality standards” and thus, the Court “refused to find implicit in ambiguous sections of the CAA an authorization to consider costs that has elsewhere, and so often, been expressly granted.”¹²¹ The *Whitman* Court concluded that absent a “textual commitment of authority to the EPA to consider costs in setting NAAQS,” the text of the statute, interpreted in its historical context, “unambiguously bars cost consideration from the NAAQS-setting process, and thus ends the matter for [the Court] as well as the EPA.”¹²²

In extending this holding to its logical conclusion, the EPA must accordingly “show a textual commitment of authority to [the] EPA to consider costs” in defining “contribute significantly” under the Good Neighbor Provision.¹²³ The EPA cannot meet this burden because the Good Neighbor Provision is resoundingly silent as to any mention of allowing cost-considerations to define “contribute significantly.”¹²⁴ It necessarily follows that had Congress intended the EPA to have authority to consider costs, it would have expressly allocated that authority—as it has done in various other provisions

Administration’s Clear Skies initiative designed to reduce air pollution via a nationwide trading system. See Elliott, *supra* note 7, at 3. Instead, the EPA has proposed rules to implement pollution trading systems, as seen by the Transport Rule, over most of the country under existing law. *Id.* “Before *Chevron*, [the] EPA would not even imagine that it possessed the authority to work such fundamental reforms into a major statutory scheme without the benefit of statutory amendment.” *Id.* As such, this brazen attitude that the EPA post-*Chevron* has grown to be one of the landmark holding’s greatest criticisms; making policy-based decisions notwithstanding legal oversight. *Id.*

120. 531 U.S. 457, 471 (2001).

121. *Id.* at 467.

122. *Id.* at 468, 471.

123. *Id.* at 468 (clarifying that “that textual commitment must be a clear one. Congress . . . does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes.”).

124. *Michigan*, 213 F.3d at 679. In *Michigan*, the court found no “clear congressional intent to preclude consideration of cost.” *Id.* at 678–79. However, in *Michigan*, cost-controls were allowed to be “considered” in determining whether a state was a significant contributor. *Id.* at 679. That is, cost can be considered not as the only factor, but rather in addition to or as a conduit to emission levels. In the Transport Rule, the EPA totally abandons any consideration of emission levels after a state has met the one percent threshold subjecting it to the Transport Rule. See *EME Homer City Generation*, 696 F.3d at 17. It is the next stage that distinguishes the *Michigan* case from the one at bar: after the threshold has been met, the EPA then *only* considered costs as to whether a state contributes significantly. See *supra* text accompanying note 58. This is a direct aspersion to the statutory language because it fails to take into account the “amounts” that contribute significantly to downwind nonattainment and is not consistent with the holding in *Michigan*. See *supra* note 33.

of the CAA.¹²⁵ As a maxim of statutory construction, “[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.”¹²⁶

In its defense, the EPA ignored the aforementioned string of precedent and relied upon a self-serving case that would permit it to consider costs except where “unambiguously precluded by statute.”¹²⁷ However, the *Entergy* case interpreted a provision of the Clean Water Act;¹²⁸ an Act whose language is facially distinguishable from that of the CAA.¹²⁹ The Clean Water Act’s equivalent standard to the CAA’s “contribute significantly” standard is the phrase “best technology available.”¹³⁰ “Best technology available” is easily interpreted as encompassing cost-considerations, and the Court made mention of such an appropriate interpretation.¹³¹ Another significant contrast from the CAA is that the Clean Water Act was “silent not only with respect to cost-benefit analysis but with respect to all potentially relevant factors.”¹³² Conversely, the CAA is not silent, but rather mentions *the* relevant factor; the “amounts” of pollution from upwind states. This is the factor to be considered when determining whether a state contributes significantly.¹³³

The EPA made a critical error in comparing the Clean Water Act to that of the distinguishable language of the CAA and thereby unfortunately compared apples to oranges. Furthermore, the EPA premised its interpretation of the Good Neighbor Provision on extrapolating isolated phrases in order to yield its desired results. However, an interpretation that is created from a patchwork of excised phrases overlooks context and is fundamentally unsound.

Based upon the foregoing, the Good Neighbor Provision is not ambiguous, thus the EPA’s argument that is entirely contingent upon the statute being ambiguous, implodes. Basic schema of statutory interpretation shows that the Good Neighbor Provision is not ambiguous, because the provision indeed was designed to address the physical effects of physical causes, and it is only the magnitude of

125. See, e.g., 42 U.S.C. §§ 7404(a)(1), 7511b(d), 7628(a)(1)(A), 7651c(f)(1)(A).

126. *Sebelius v. Cloer*, 133 S. Ct. 1886, 1894 (2013) (citing *Bates v. United States*, 522 U.S. 23, 29–30 (1997)).

127. *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208, 219–20 (2009).

128. See generally *id.*

129. 33 U.S.C. § 1251 (1972).

130. 33 U.S.C. § 1326(b).

131. *Entergy Corp.*, 556 U.S. at 218.

132. *Id.* at 222 (“If silence here implies prohibition, then the EPA could not consider *any* factors in implementing [the statute]—an obvious logical impossibility.”).

133. 42 U.S.C. § 7410(a)(2)(D)(i)(I).

the relationship sufficient to trigger regulation that admits of some vagueness. In other words, the statute is ambiguous insofar as *how much* of a contribution to downwind pollution is “significant,” but it is not at all ambiguous regarding factors unrelated to the *amount of pollutants* that make up a contribution affecting the analysis.¹³⁴ To be sure, the EPA ignores the plain language of the statute and thereby sacrifices democratically adopted text to bureaucratically favored policy. An interpretation that is in direct derogation of the plain text of the statute is not reasonable, and the Court erred in concluding the opposite. Therefore, the EPA’s interpretation as it pertains to its quantification of “significantly contribute” within the Good Neighbor Provision should not have been given *Chevron* deference.

C. *Cooperative Federalism Analyzed within the Context of Chevron Deference*

When the EPA promulgated federal implementation plans on the same day as implementing the Transport Rule, it failed to give the states the first attempt to attain air quality standards. This is another reason why the Court erred in giving the EPA deference, as it failed to adhere to the cooperative federalism dynamic of the CAA.

A major component of the CAA is its call to the states to implement their own state-initiated plans on how they will comply with EPA regulations.¹³⁵ In essence, this federal agency, a creature of statute, has left a gap to be filled by the states. This “gap” typifies a concept that is recognized as cooperative federalism.¹³⁶ Preserving this cooperative federalism dynamic is pivotal to the CAA. When this dynamic is skewed and federal power usurps the province of the states, this depreciates the original congressional intent of the CAA that “air pollution prevention . . . and air pollution control at its source is the primary responsibility of the States and local governments.”¹³⁷ Instead of adhering to this province, the EPA took this fundamental power from the states.¹³⁸ Moreover, the states never had an opportunity to comply with the Transport Rule before the EPA implemented federal plans. As such, it is hard-pressed to find any reasonable ground that justifies frustrating an indispensable province of the CAA—cooperative federalism.

134. *EPA v. Homer City Generation*, 134 S. Ct. 1584, 1611 (2014) (Scalia, J., dissenting).

135. 42 U.S.C. § 7401(a)(3) (2010).

136. *See Connecticut v. EPA*, 696 F.2d 147, 151 (2d Cir. 1982).

137. 42 U.S.C. § 7401(a)(3) (emphasis added).

138. Brief for State and Local Respondents, *EME Homer City Generation v. EPA*, 696 F.3d 7 (D.C. Cir. 2013).

In *Train v. Natural Resources Defense Council, Inc.*, the Court was presented with the question “whether Congress intended the States to retain any significant degree of control of the manner in which they attain and maintain [the NAAQS], at least once their initial plans have been approved.”¹³⁹ The Court held that the statute “plainly” consigns the EPA to a “secondary role in the process of determining and enforcing the specific, source-by-source emission limitations which are necessary if the [NAAQS] it has set are to be met.”¹⁴⁰ The EPA cannot inquire into the wisdom of a state’s plan; “so long as the ultimate effect of a [s]tate’s choice of emission limitations is compliance with [the NAAQS] for ambient air, the State is at liberty to adopt whatever mix of emission limitations it deems best suited to its particular situation.”¹⁴¹

Thus, “[t]he [CAA] is an experiment in federalism, and the EPA may not run roughshod over the procedural prerogatives that the [CAA] has reserved to the states.”¹⁴² This notion has steadfastly remained untouched, even after the 1990 CAA Amendments.¹⁴³ Unambiguously, the statute provides exactly when the EPA may “run roughshod” and usurp this power reserved to the states—that is, only when a state’s plan is ineffective in attaining the air quality standards or the state has completely failed to implement a plan.¹⁴⁴

Notably, the CAA ensures states an opportunity to avoid an EPA-imposed federal plan by submitting a state plan.¹⁴⁵ This insurance, section 7410(a)(1), provides:

Each State shall, after reasonable notice and public hearings, adopt and submit to the Administrator, within 3 years (or such shorter period as the Administrator may prescribe) after the promulgation of a national primary ambient air quality standard . . . , a plan which provides for implementation, maintenance, and enforcement of such primary standard in each air quality control region . . . within such State.¹⁴⁶

This provision is an example of the cooperative federalism dynamic that the CAA has pioneered. It empowers the states to first

139. 421 U.S. 60, 78 (1975).

140. *Id.* at 79.

141. *Id.*

142. *Bethlehem Steel Corp. v. Gorsuch*, 742 F.2d 1028, 1036–37 (7th Cir. 1984) (noting that this is especially true when the EPA is overriding state policy).

143. *Virginia v. EPA*, 108 F.3d 1397, 1410 (D.C. Cir. 1997).

144. 42 U.S.C. §§ 7410(c)(1)(A)–(B).

145. 42 U.S.C. § 7410(a)(2). The state plan must comply with the requirements as set forth in 42 U.S.C. § 7410(a)(2). *Id.*

146. *Id.* at § 7410(a)(1).

solve their air pollution problem by creating a state plan, and if there is failure to do so or if the plan is inadequate, then the federal government can supplant the state plan with its attainment plan.¹⁴⁷

The Transport Rule acts to directly undermine this cooperative dynamic because the EPA failed to inform the states how they would define “contribute significantly” until the moment that the Transport Rule was promulgated while concurrently implementing federal plans.¹⁴⁸ According to the states, implementing state plans is their statutory entitlement.¹⁴⁹ The EPA undermined this statutory guarantee when it failed to inform the states how they should quantify states’ Good Neighbor obligations.¹⁵⁰

In response, the EPA asserted that for every state that it promulgated a federal plan, the agency determined that the state’s submission of its state-plan was overdue or had been met with EPA disapproval.¹⁵¹ As such, the EPA had not only the authority, but also what they classified as a “mandatory duty” to implement federal plans for those states.¹⁵² Reinforcing its point, the EPA contended that even if it could be concluded that the states did not have an opportunity to provide state plans, the states still had the same data available to them concerning nonattainment levels as were available to the EPA.¹⁵³ Thus, the EPA argued that armed with this data, states needed to make policy judgments about how much to emit within their own borders and necessarily have to take into account the likely contribution that goes into their neighboring states.¹⁵⁴ As such, the EPA viewed the states that did not have a state plan submitted to the EPA for approval as being in default of their obligation.¹⁵⁵ Stated differently, the operative antecedent to

147. 42 U.S.C. § 7410. Other provisions of the CAA also prescribe this cooperative federalism dynamic. *See, e.g.*, 42 U.S.C. § 7589(c)(2)(F) (authorizing the EPA to establish an adequate clean-fuel program only if California does not); 42 U.S.C. § 7651e(b) (authorizing the EPA to allocate certain emissions allowances only if states do not). Additionally, when a state plan or program is insufficient (rather than omitted) to meet the requirements of an EPA regulation, the CAA authorizes the EPA to step in. *See, e.g.*, 42 U.S.C. § 7412(l)(5) (addressing this notion in hazardous air pollutants programs); *id.* at 7424(b) (addressing this notion for fuel-burning sources); *id.* at § 7661a(d)(1) (addressing this notion for permit programs).

148. Brief for State and Local Respondents, *supra* note 138, at *16.

149. *Id.* at *56.

150. *See id.* at *22.

151. Petition for Rehearing En Banc, *EME Homer City Generation v. EPA*, 696 F.3d 7 (D.C. Cir. 2012).

152. *Id.*

153. *Id.*

154. *See* Oral Argument, *supra* note 119.

155. In default of the obligation of the states to have their respective plan within three years of the relevant NAAQS. Brief for Federal Petitioners, *supra* note 28, at *30–31.

a state plan is issuance of the NAAQS, not issuance of a fully-quantified Good Neighbor obligation.¹⁵⁶ Because the NAAQS were available, the states needed to have viable state plans regardless of when the EPA solidified the Transport Rule and quantified states' Good Neighbor obligations.¹⁵⁷ The states' default of their state-plan-first requirement is the foundation upon which the EPA asserted its authority allowing it to implement federal plans when the Transport Rule was promulgated.¹⁵⁸ According to the EPA, this fit squarely within its interpretation of section 7410(c)(1) of the CAA—and the Court agreed.¹⁵⁹

However, a self-proclaimed correct interpretation of a statute has no merit; the constitutional constraints of *Chevron* provides:

When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.¹⁶⁰

Accordingly, the EPA's actions in implementing a federal plan on the same day that it promulgated the Transport Rule must be directly supported by the language of the Good Neighbor Provision in order to be a congressionally authorized authority. However, as per

156. *Id.*

157. *See id.* at *16.

158. *See* 42 U.S.C. § 7410.

159. *See id.*; *see also* EPA v. Homer City Generation, 134 S. Ct. 1584, 1588 (2014). As the Court saw it, once the EPA issues any new or revised NAAQS, a state "shall" propose a state plan within three years, pursuant to 42 U.S.C. § 7410(a)(1), and that state plan "shall" include, *inter alia*, provisions adequate to satisfy the Good Neighbor Provision, pursuant to § 7410(a)(2). *Id.* If the EPA were to find a state plan inadequate after the issuance of the new or revised NAAQS, the EPA has the statutory "duty" to issue a federal plan "at any time" within two years. *Id.* According to the Court, "[n]othing in the [CAA] differentiates the Good Neighbor Provision from the several other matters a state must address in its state plan . . . [n]or does the [CAA] condition the duty to promulgate a [federal plan] on [the] EPA's having first quantified an upwind [s]tate's good neighbor obligations." *Id.* at 1589–90.

160. *Chevron*, 467 U.S. at 842–43.

Chevron's mandate, to say that the intent of Congress is clear—that Congress has “directly spoken to the precise question at issue”—is a foundationless claim. Section 7410(a)(1), the provision of the CAA that calls for a state plan imposition before a federal plan, is noticeably silent to the “precise question at issue.” That precise issue is whether the EPA can undermine state-first implementation of a newly promulgated rule when the states had no prior knowledge of how the EPA was going to quantify their Good Neighbor requirements. In applying the *Chevron* test, the statute does not address the specific issue. As a result, Congress has not spoken directly to the precise issue and therefore fails under the first prong of the *Chevron* test.¹⁶¹ Therefore, analysis into *Chevron's* second prong is implicated.

The pivotal question—and the second prong of *Chevron*—in determining whether the EPA's construction of a provision is valid, turns on whether its interpretation is reasonable.¹⁶² There is no reasonable ground to support frustrating an indispensable province of the CAA—cooperative federalism. The EPA supplanted the states' fundamental power when it failed to inform the states how it would quantify their Good Neighbor obligations within the new Transport Rule. The states never had any opportunity to comply with the new Transport Rule before the EPA implemented federal plans.¹⁶³

In the past, the EPA has repeatedly acknowledged the need to give states a reasonable opportunity to implement newly promulgated obligations through state plans *after* a final rule quantifies the Good Neighbor Provision.¹⁶⁴ In CAIR, the EPA stated:

[Where the data and analytical] tools and information may not be available [to identify a significant contribution from upwind states to nonattainment areas in downwind states,] [i]n such circumstances, [a state's] section [74]10(a)(2)(D) [state implementation plan] submission should indicate that the necessary information is not available at the time the submission is made or that, based on the information available, the State believes

161. *Id.*

162. *Id.* (stating that the agency's interpretation must be based on a “permissible construction of the statute.”).

163. See Brief for State and Local Respondents, *supra* note 138, at *57.

164. *Id.* at *59.

that no significant contribution to downwind nonattainment exists.¹⁶⁵

Furthermore, the EPA rightfully claims that the statute calls for states to implement their own plans within three years of the promulgated NAAQS, which facially seems as if the states have no other alternative than creating a state plan—even in the face of an unquantified regulation that they need to follow.¹⁶⁶ This, however, is not the case. Yet again in CAIR, the EPA identified section 7410(k)(5) of the CAA as the vehicle to utilize when there are new obligations, stating:

The EPA can always act at a later time after the initial section [74]10(a)(2)(D) submissions to issue a call under [74]10(k)(5) to States to revise their [state plans] to provide for additional emission controls to satisfy the section [74]10(a)(2)(D) obligations if such action were warranted based upon subsequently-available data and analyses.¹⁶⁷

In turn, the EPA did not rely on its own precedent. Rather, the EPA implemented its federal plans without giving the states the opportunity to revise their plans first after they were made aware of their Good Neighbor Provision obligations. This does not heed cooperative federalism, but rather, usurps that design.

The United States Supreme Court, however, agreed with the EPA: “By altering Congress’ [state plan and federal plan] schedule, the D.C. Circuit allowed a delay Congress did not order and placed an information submission obligation on [the] EPA Congress did not impose.”¹⁶⁸ The EPA eschewed any usurpation of the cooperative federalism dynamic by stating that states routinely undertake technically complex air quality determinations and that emissions information from all states is publicly available.¹⁶⁹ But “[a]ll the scientific knowledge in the world is useless if the States are left to

165. CAIR, *supra* note 35, at 25,263. However, *see contra* EPA v. Homer City Generation, 134 S.Ct. 1584, 1589 (2014) (“The fact that [the] EPA had previously accorded upwind [s]tates a chance to allocate emission budgets among their in-state sources does not show that the Agency acted arbitrarily by refraining to do so here.”).

166. *See* Brief for Federal Petitioners, *supra* note 28, at *16.

167. CAIR, *supra* note 35, at 25,263–64. Succinctly put, if the EPA promulgates a new rule, it can issue a directive to the states to reform their current plans to comport to the new rule after it has been quantified, rather than forcing states to comport to an EPA rule that yet has defined parameters for states to satisfy.

168. EPA v. Homer City Generation, 134 S. Ct. 1584, 1589 (2014).

169. Brief for Federal Petitioners, *supra* note 28, at 29.

guess the way in which [the] EPA might ultimately quantify ‘significance.’”¹⁷⁰ As the D.C. Circuit Court explained, this results in “punish[ing] the states for failing to meet a standard that the EPA had not yet announced and [it] did not yet know.”¹⁷¹ The United States Supreme Court has even stated:

It is one thing to expect regulated parties to conform their conduct to an agency’s interpretations once the agency announces them; it is quite another to require regulated parties to divine the agency’s interpretations in advance or else be held liable when the agency announces its interpretations for the first time . . . and demands deference.¹⁷²

In a statutory scheme such as the CAA that was borne upon the foundations of cooperative federalism, this principle is the cornerstone. The EPA failed to adhere to this mainstay and as such, its interpretation is manifestly unreasonable; it fails the second prong of the *Chevron* test and should not have been given deference.¹⁷³

It should be noted that it is true, there is nothing stopping the states from issuing a counter state plan to replace the implemented federal plan;¹⁷⁴ however, the availability of this possibility does not render the EPA’s federal-plan-first strategy moot—let alone, harmless. The EPA must comply with the cooperative federalist ideals set forth in the CAA. The presence of a post-injury remedy is merely palliative; it is an exception trying to prove the rule and does not make the initial injury any less unconstitutional.

CONCLUSION

Addressing the constitutionality of the EPA’s promulgation of the Transport Rule entails delving no deeper than into the maxims of administrative law. Since President Roosevelt’s era, a Court culture of seemingly *per se* deference to agencies has reigned supreme. This put agencies like the EPA on a pedestal of great power. With great power, however, comes the risk of abuse. Deference regimes have been present since the early portions of the twentieth century; however, *Chevron* seemingly solidified the extreme deference to

170. Brief for Federal Petitioners, *supra* note 28, at 50.

171. *EME Homer City Generation v. EPA*, 696 F.3d 7, 28 (D.C. Cir. 2012). Elaborating further, the court explained that it is like asking the states “to hit the target . . . before the EPA defines [it],” it requires the states “to take [a] stab in the dark,” and “sets the States up to fail.” *Id.*

172. *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2168 (2012).

173. *Chevron*, 467 U.S. at 842–43 (*Chevron* second prong).

174. See Oral Argument, *supra* note 119.

which administrative agencies are entitled.¹⁷⁵ Knowledge of this deference has allowed administrative agencies to make policy-based decisions, perhaps grounded upon good motives and impressionable problem-solving, but nonetheless lacking statutory authorization. The EPA did exactly that when it defined “significantly contribute” in the CAA based exclusively upon cost-considerations; when it: (1) failed to prevent over-control and ensure that the amount of ambient air pollutant particles that each state needs to abate is in proportion to its contribution to downwind nonattainment; and (2) ignored the fundamental premise of the CAA—that is, cooperative federalism—by implementing federal plans on the same day that the Transport Rule was promulgated and thereby ignoring the mandated initial call to the states.

For both the “significant contributor” and federal-plan-first issues, the EPA is seemingly acting upon illogical stretches in interpreting the CAA, and the Court deferred to the same; hook, line, and sinker. “Post-*Chevron*, statutes no longer possess a single prescriptive meaning on many questions; rather, they describe . . . a ‘policy space,’ a range of permissible interpretive discretion, within which a variety of decisions that the agency might make would be legally defensible to varying degrees.”¹⁷⁶ This is exactly what the EPA purported and the Court agreed with—unconstitutional, policy-based interpretations in the hope that the Court would employ the most forgiving deferential regime in its favor.

Unfortunately, the EPA has faulty foundation and has failed to anchor its rules to statutory authority in almost every attempt it has made to promulgate a rule to address cross-state air contamination. The EPA cannot meet the requirements of *Chevron* deference because of its lack of statutory authority—its only source of rule-making power.¹⁷⁷ Allowing the EPA to rule-make without express support from the statute it purports to effectuate allows administrative agencies to gain greater power than they were designed to have. In agreeing with the EPA, the Court allowed the same and in effect composed its own intoxicating siren song, luring administrative agencies like the EPA to run roughshod over congressional—and truly, the people’s—prerogative. This blind deference runs the risk of transmogrifying the country’s political culture from that of a series of checks and balances of decisions made by

175. *Chevron*, 467 U.S. at 837.

176. Elliot, *supra* note 7, at 11–12.

177. *Skidmore*, 323 U.S. at 140; *Chevron*, 467 U.S. 837 (1984); Eskridge & Baer, *supra* note 86, at 1098.

the people vis-à-vis their elected officials to a trickle-down bureaucracy; that is, the high Court giving the authority to non-elected officials to make decisions.

The true problem lies not with a bad idea on the part of the EPA; its expertise in tackling this difficult problem should not be marginalized. The true problem is that even if its promulgations are effective, the EPA is missing a statutory anchor allowing it to rule-make as it sees fit; “[r]egardless of how serious the problem an administrative agency seeks to address, . . . it may not exercise its authority in a manner that is inconsistent with the administrative structure that Congress enacted into law.”¹⁷⁸

The CAA has not been amended since 1990 and the technology available since then has increased at an exponential rate. Thus, as written, the Good Neighbor Provision is time-stamped in 1990; it fails to reflect the up-to-date progress on cross-state air contamination—that is, the language fails to grant the authority best suited to solve the amorphous problem. It seems clear that a less sophomoric amendment to the Good Neighbor Provision within the CAA might be the key to allowing the EPA to use its expertise and regulate according to the intelligence and technology currently available. A statute that can provide the authority for a cap and trade system or an unprecedented superfund allows for the flexibility that the EPA needs to effectively regulate the spaghetti-like matrix that is air pollution, rather than being tethered to the congressional province of twenty-five years ago. Unfortunately, as it stays, like the pollutant particles crossing state lines and creating growing problems downwind, the EPA has also crossed its line; the Court erred when it upheld the EPA’s interpretation of the CAA and the Transport Rule.

178. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 125 (2000) (internal citations omitted).