외교학 석사학위논문

Uncooperative Federalism:
The Role of State Attorneys General in State Noncompliance with the Clean Air Act

비협력적 연방주의: 미국 주(州)법무장관의 대(對)EPA 소송행위 분석

2017년 8월

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이은영의 외교학 석사학위논문을 인준함

2017년 8월

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Abstract

The challenge of keeping a balance between state autonomy and federal oversight has been a long-standing interest in the literature of federalism. This is especially pertinent in the area of environmental regulation with the 2007 landmark case of *Massachusetts v. EPA,* when the greenhouse gases became subject to federal regulation under the Clean Air Act. While state governments have implemented policies in pursuance of the EPA's enforcement measures, they have also filed numerous lawsuits challenging the EPA's authority. What is surprising is the lack of attempts to explain the variance in states' noncompliance, compared to the series of recent research on state governments' cooperation and policy innovations. This thesis attempts to bridge the discrepancy in the literature by analyzing the actor filing the litigation on behalf of the state government against the EPA: the state attorney general. This thesis analyzes an original dataset of state attorneys general participation in state litigation against the EPA's Clean Air Act from 2009 to 2015.

This thesis brought the analysis of state attorneys general behavior into the discussion of federalism. The study explains the legal fight between state attorneys general and the EPA, driven by the ongoing struggle between federal and state governments over the right division of power. Chapter 2 demonstrated that current series of lawsuits bombarding the federal government was an outcome of a long history of gradual federal expansion and state responses. By looking at the leading case of Texas, Chapter 3 identified electoral and political factors which enable AGs to mobilize their formal powers to influence federal agency rules. As expected, the finding from Chapter 4 suggests state-level variables and interest groups influence AG's decision to sue the EPA. However, this study's novel finding

is that state government actors and state government ideology also influences AG's decision. This is likely to be the outcome of vertical polarization – between federal and state governments, or more specifically the Executive branch and state governments.

Most federal-state relationships are continually open for renegotiation and contestation, with the result that the policymaking realm itself is the source of the most settled understandings at any given time of the respective levels of state and federal authority in making social policy, economic policy, and environmental policy. As a unique actor that stands on the crossroad between legal and political arena, state attorneys general play an interesting role in bringing political and policy discussion into the courtroom. The findings illustrate that the state attorneys general, motivated their electoral goals, are influenced by interest groups and other state actors in their decision to sue the federal government.

The thesis suggests that the increasingly partisan behavior of the AGs is not only the outcome of political polarization, but can also be a force of further polarization. The implications from this study warns against continued dependence on "uncooperative" legal measures against the federal government to raise partisan opposition. The state attorneys general may bring policy debate into the courtroom, but the legal precedents made in the courtroom will not be easy to overturn, causing serious ramifications for the future policymaking arena.

Keywords: federalism, state attorney general, political safeguard, climate change, environmental regulation, polarization
Student Number: 2014-22283

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I. Introduction

1. Introducing the Research Question

The United States receives a lot of attention in the international climate change agreements. As one of the largest per capita carbon dioxide emitter in the world,[1] an international climate change regime would not be feasible without its participation. At the same time, the US has history of backing out of the international agreement.[2] Thus, attention was focused on the position of the United States as the date neared the 2015 United Nations Climate Change Conference convened to adapt a new legally-binding international agreement on climate change. As the past failure with the Kyoto Protocol showed, how the domestic arena feels about the international agreement significantly influences the US position in the international negotiation.

Since his re-election, President Obama has expressed his intention to actively seek a path to institute a federal climate change initiative. Although combating climate change was one of his major promises during his presidential campaign, efforts to pass a federal bill had repeatedly failed. To bypass the Congressional gridlock this time, President Obama issued executive orders to introduce climate change related regulations via the Environmental Protection Agency (EPA).[3] How this circumvention is

[1] The World Bank, "CO2 Emissions (metric tons per capita)," 2013. http://data.worldbank.org/indicator/EN.ATM.CO2E.PC?year_high_desc=true (Last accessed May 12, 2017).

[2] Barry Rabe, "Environmental Policy and the Bush Era: The Collision Between the Administrative Presidency and State Experimentation," *Publius: The Journal of Federalism,* Vol. 37, No. 3 (2007), p. 9.

[3] Executive Order (EO) No. 13653, 78 FR 66819 (2013); EO No. 13677, 79 FR 58231 (2014); EO No. 13693, 80 FR 15871 (2015).

received by the states will significantly influence the federal government's position in future international negotiations. Thus, climate change policy in the United States should be analyzed as an issue of federalism and multilevel governance.

While many state governments have implemented policies in pursuance of these EPA's enforcement measures, they have also filed numerous lawsuits challenging the EPA's authority. Notably, West Virginia and 25 other states have filed suit challenging the Clean Power Plan that requires all states to significantly curb carbon emissions from stationary power plants.[4] Patrick Morrisey, West Virginia's Attorney General, has openly admitted that his legal strategy is to file lawsuits to "gum up the courts enough over the course of next four years to be able to slow down the Obama administration on these regulations."[5] These lawsuits are effective in garnering media attention and increasing the political profiles of the attorneys general. Whether the state is challenging the EPA alone or in a multi-state litigation, however, there is a significant variance in state governments' noncompliant behavior across the nation.

What is surprising is the lack of attempts to explain the variance in state noncompliance, compared to the series of recent research on state governments' compliance, cooperation, and policy innovations.[6] Filling this

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[4] West Virginia et al. v. EPA, No. 15-1363, (D.C. Cir. Oct. 23, 2015).

[5] Patrick Morrisey, "Their View: West Virginia Must Win its Fight against Overreach," *West Virginia Record,* Aug. 23, 2013. http://wvrecord.com/stories/510605685-their-view-west-virginia-must-win-its-fight-against-overreach (Accessed Sept. 23, 2015).

[6] Nicholas Lutsey and Daniel Sperling, "America's Bottom-up Climate Change Mitigation Policy," *Energy Policy,* Vol. 36 (2008), pp. 673-685; Daniel C. Matisoff, "The Adoption of State Climate Change Policies and Renewable Portfolio Standards: Regional Diffusion or Internal Determinants?" *Review of Policy Research,* Vol. 25, No. 6 (2008), pp.527-546; Dana R. Fisher, "Understanding the Relationship between Subnational and National Climate Change Politics in the United States: Toward a Theory of Boomerang

gap in the literature is crucial to understand the ongoing battle over the balance of federal-state authority that is constantly being readjusted. Thus, this study proposes to answer "why are some states more active litigators against the federal government?" To do so, the research narrows down the focus of the study to the state attorney general (AG), as AG is the actor who files the litigation on behalf of the state government.

This study aims to explain the litigation behavior of state attorneys general in the context of federalism literature, more specifically through the lens of political safeguards of federalism theory. The federal government tapped into the reserved power of the states over environmental policy, and continued to expand following the footstep of each precedent. States began to feel threatened by the increasing encroachment and the ever-growing size of the federal government, and began fighting back. State attorneys general began utilizing the litigation tool popularized by the tobacco litigation from the 1990s to regain state authority and limit federal transgression.

State governments' individual and collective efforts at various stages of the policymaking process is part of an ongoing tug-of-war against federal encroachment. The federal-state conflict over the balance of power is continually open for renegotiation and contestation, and the demarcation is continuously being readjusted through the process of policymaking. What is notable is that the state attorney general who act through the courts have increasingly sought political and policy issues after gaining national prestige and visibility in the late 20th Century. This is exacerbated by political polarization that paralyzed the federal policy arena, and continue to polarize the states and now the courts.

Federalism," *Environmental and Planning C: Government and Policy,* Vol. 31, No. 5 (2013), pp.769-784.

The federal-state relations explored in this thesis add to and revise our current understanding of the US federalism. I believe it has become more pertinent to study how AGs increasingly utilize the legal process to dictate national policies, in the broader context of the political polarization and executive unilateralism. The thesis suggests that the increasingly partisan behavior of the AGs is not only the outcome of political polarization, but can also be a force of further polarization.

2. Reviewing Extant Literature

The behaviors of state attorneys general gained scholarly attention fairly recently, following the success of tobacco litigation in the 1990s.[7] Thus, there is considerably limited literature on their litigation behavior, not to mention works dedicated to developing and applying different theoretical models to explain AG behavior. Most works are from the legal literature, where the focus is whether state attorneys general are violating the principal of separation of power and the proper level of duties.[8] For political science literature, they focus solely on multi-state litigation against

[7] Rorie L. Spill, Michael J. Licari, and Leonard Ray, "Taking on Tobacco: Policy Entrepreneurship and the Tobacco Litigation," *Political Research Quarterly,* Vol. 54, No. 3 (September 2001), pp. 605-622; For a more general summary of the tobacco litigation, *see* Lynn Mather, "Theorizing about Trial Courts: Lawyers, Policymaking, and Tobacco Litigation," *Law and Social Inquiry,* Vol. 23 (1998), pp. 1101-1145.

[8] Jason Lynch, "Federalism, Separation of Powers, and the Role of the State Attorneys General in Multistate Litigation," *Columbia Law Review,* Vol. 101, No. 8 (2001), pp. 1998-2032; Timothy Meyer, "Federalism and Accountability: State Attorneys General, Regulatory Litigation, and the New Federalism," *California Law Review,* Vol. 95, No. 3 (2007), pp. 885-914; Richard A. Posner, "Federalism and Enforcement of Antitrust Laws by State Attorneys General," *Georgia Journal of Law and Public Policy,* Vol. 2 (2004), pp. 5-15.

private corporations.[9] In short, previous works conclude that state attorneys general respond to the needs and wants of the electorate, sometimes even acting independently from the governor or the state legislature. At the same time, the resources available to the state attorney general can encourage or restrain them from pursuing multi-state litigation against corporations. Valuable as these studies are, they cannot aptly demonstrate what drives AG litigation against a federal agency.

Mainly two limitations arise from the current understanding of AG behavior. First, the nature of the lawsuits against the EPA differs significantly from the past research. Most research on AG litigation behavior focus on multi-state litigation against large corporations. These lawsuits fall under the category of "policy-creating" or "policy-[en]forcing"[10] in a largely decentralized regulatory regime. State attorneys general were able to sue large corporations for not complying with federal regulations, under the name of public policy. However, the lawsuits of interest in this paper are "policy-blocking" in nature. This means that motivations identified in the current literature, such as large settlement sums or publicity, would not operate in the same manner in this case. I believe a different logic is needed to explain these policy-blocking lawsuits against federal agencies. Another key difference is the time period. Under conservative administrations that have favored deregulation, many studies concluded that having Democratic AGs and more liberal citizen base were correlated with active AG lawsuits. However, the current situation with large

[9] Colin Provost, "An Integrated Model of U.S. State Attorney General Behavior in Multi-State Litigation," *State Politics and Policy Quarterly,* Vol. 10, No. 1 (2010a), pp. 1-24; Colin Provost, "State Attorneys General, Entrepreneurship, and Consumer Protection in the New Federalism," *Publius: The Journal of Federalism,* Vol. 33, No. 2 (2003), pp. 37-53.

[10] Paul Nolette, *Federalism on Trial: State Attorneys General and National Policymaking in Contemporary America*, (Lawrence: University Press of Kansas, 2015), pp. 23-32.

opposition to the Obama Administration requires a new lens to analyze the rise of conservative AG litigation. These gaps highlight the fact that relatively little is known about the AG's litigation behavior against the federal government as a form of resistance and noncompliance. In this context, this study draws from a broader literature on federalism and federal-state relations.

Although numerous works have been published about federalism and federal-state relations, legal scholars and political scientists have once again pursued the same topic on separate tracks. Legal scholarship has focused on elucidating the right balance between state and federal governments, often arguing about the merits of the constitutional and legal issues that arose from Supreme Court decisions.[11] Herberg Wechsler's seminal article echoed Madison's arguments in essays 45 and 46 of *The Federalist* and argued that the constitutional system "is intrinsically well adapted to retarding or restraining new intrusions by the center on the domain of the states."[12] Jesse Choper developed this line of logic further to what became known as the "political safeguards of federalism" theory, which maintains that federal courts should leave constitutional questions on federal-state relations to the political process, and this perspective was explicitly endorsed in *Garcia v. San Antonio Metropolitan Transit Authority*.[13] There seemed to be a stark divide between the legal scholars who view judicial safeguard as unwarranted and those who do not, but the narrow view of the political

[11] Frank B. Cross, "Realism about Federalism," *New York University Law Review* Vol. 74 (November 1999), pp. 1304-1335.; Andrzej Rapaczynski, "From Sovereignty to Process: The Jurisprudence of Federalism after *Garcia*," *Supreme Court Review* Vol. 8 (1985), pp. 341-419.

[12] Herbert Wechsler, "The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government," *Columbia Law Review* Vol. 54 (1954), p. 558.

[13] Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985).

safeguard theory seems to have lost much support today.[14]

Much of political science scholarship has focused on the historical development of federalism and its policy implications. The American federalism has evolved from dual federalism that separated jurisdiction of state and federal governments, cooperative federalism put forward by Grodzins and Elazar that stressed shared responsibility over a wide range of policy arena,[15] to the shift in emphasis to intergovernmental relations that underscored joint efforts from all levels of government in policymaking.[16] Much more scholarship followed, each coining a different term to emphasize a characteristic of the evolving US federalism: "devolution evolution,"[17] "competitive federalism," "permissive federalism,"[18] "new federalism," "coercive federalism," and more.

It is only in recent works where political scientists have tried to bridge the two tracks to advance a coherent and normative theory of federalism. Kyle Scott used principles derived from philosophers to advance a

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[14] John C. Yoo, "The Judicial Safeguards of Federalism," *Southern California Law Review* Vol. 70 (July 1997), pp. 1311-1405.

[15] Morton Grodzins, *The American System: A New View of Government in the United States*. Edited by Daniel J. Elazar (Chicago: Rand McNally, 1966); Daniel J. Elazar, *The American Partnership: Intergovernmental Co-operation in the Nineteenth-Century United States* (Chicago: University of Chicago Press, 1962).

[16] Deil S.Wright, *Understanding Intergovernmental Relations*, 2rd ed. (Monterey, CA: Brooks/Cole, 1982); Michael Reagan, *The New Federalism* (New York: Oxford University Press, 1972).

[17] Sheryl Gay Stolberg, "The Revolution that Wasn't," *New York Times*, February 13, 2005 http://www.nytimes.com/2005/02/13/weekinreview/the-nation-cut-short-the-evolution-that-wasnt.html (Accessed May 12, 2017); Paul E. Peterson, "Changing Politics of Federalism," in *Evolving Federalisms: The Intergovernmental Balance of power in American and Europe* (Syracuse, NY: Maxwell School of Citizenship and Public Affairs, 2003), pp. 25-41.

[18] Permissive federalism argues that "there is a sharing of power and authority between the national and state governments, but the state's share rests upon the permission and permissiveness of the national government." Michael Reagan, *The New Federalism* (New York: Oxford University Press, 1972), p. 163.

normative theory of federalism.[19] Bednar's develops the theory of opportunisms and safeguards and provides criteria for a federation to be robust.[20] Nugent emphasizes the informal safeguards of federalism and fills the gap of how specific state officials use their implementation powers to promote their interests vis-à-vis the federal government.[21]

While these recent works try to advance a theory that would explain federalism as a whole, few delve into the specific process in which federalism operates in the real world. Nugent explores the governors' role in influencing national policymaking in various stages of the policymaking process.[22] I draw from these recent works that synthesize the constitutional and policymaking approaches to provide an explanation of how state attorneys general opportunistically perform a constitutional function as check and balance against the federal government.

3. Designing Research on State Attorneys General Litigation Behavior

This thesis analyzes state attorneys general participation in state litigation against the Environmental Protection Agency's regulations for the Clean Air Act from 2009 to 2015. By narrowing down the research subject to state attorneys general, it will be clearer to see what role state attorneys general play in the federal-state relations and in the ongoing national environmental policymaking process. Since these lawsuits are

[19] Scott, Kyle. 2011. *Federalism: A Normative Theory and its Practical Relevance.* New York: The Continuum International Publishing Group.

[20] Jenna Bednar, *The Robust Federation: Principles of Design* (Cambridge: Cambridge University Press, 2009).

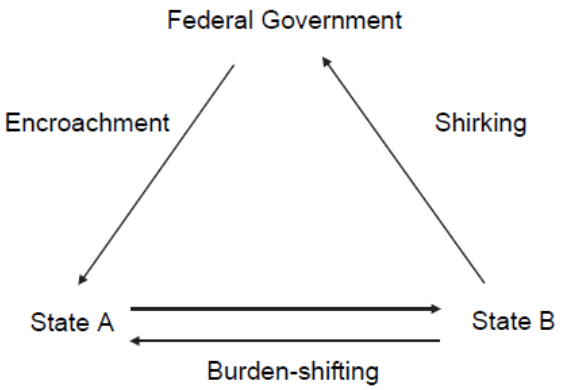
[21] John D. Nugent, *Safeguarding Federalism* (Norman: University of Oklaho ma Press, 2009), p. 11.

[22] Nugent, 2009.

noncompliant actions against regulations set by the Obama administration, the research period begins with President Obama's inauguration. By narrowing down the scope of the research to one federal regulation, the Clean Air Act, I will be able to control the state-level variables and properly compare the institutional variables that influence the behavior of the AGs.

In order to explain the AG litigation behavior as a form of state resistance, it is necessary to examine the broader literature on federalism in order to understand the role of state attorneys general in the national environmental policymaking arena. This study draws heavily from Bednar (2009)'s theory on opportunism and safeguard of federalism. This is because her work demonstrates the inherent nature of federalism for the state and federal governments to be in constant struggle and provides rather intuitive mechanism by which the entities in a federation operate.

Figure 1. Types of Opportunism: The Triangle of Federalism



Source: Bednar, 2009, p. 68.

Bednar regards all acts of deviation from the assigned division of authority as opportunism.[23] "The federal government may *encroach* on the

[23] The definition of opportunism is adapted from Bednar, 2009, p. 63. She also

authority of the states; states may *shirk* on their responsibilities to the union; and state may *burden-shift*, imposing externalities on other states in the federation."[24] For the federation to survive and maintain its robustness, the federal system is equipped with mechanisms called safeguards to either prevent or redress the different types of opportunistic behavior. Each has a role to play in the recovery from another's failures, in bolstering another's powers, and through their diversity, to provide a space for policy experimentation.

The structural safeguards of federalism restrain the national government to prevent encroachment. Structural safeguards emphasize how each entity serving their own interest naturally creates veto players so that no singular interest would dominate the federal government. In the democratic federation, these safeguards are responsive to the people, but each one is responsible to a different set or aggregation of people. Thus, to the extent that the structural safeguards depend on conflict generated by distinct interests, the multilevel electoral system strengthens the likelihood of separate interests in any one government or component of government.[25] When the national government's powers are fragmented and each serves a slightly different set of constituents, internally competitive, with distinct interests and each a desire to please its constituents.[26]

This perspective of viewing the Constitution and federalism as an ongoing struggle is based on the theory of nonjudicial interpretation or constitutional construction. This view argues that the political branches (Congress and executive) participate over time in the interpretation and

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uses transgressions and opportunistic behaviors interchangeably with opportunism.

[24] Bednar, 2009, p. 9.

[25] Bednar, 2009, p. 109.

[26] Bednar, 2009, p. 105.

clarification of ambiguities in the Constitution's text.[27] Because the Constitution provides little guidance in dividing the authority between state and federal government, the dimensions of many other federal powers have been clarified through a combination of political and judicial construction.

This study also rests on the premise that state governments have identifiable institutional interests concerning the federal government. Scholarship on state autonomy agree that the state itself may formulate and pursue goals that are not simply reflective of the demands or interests of social groups, classes, or society.[28] Similarly, scholarship on institutional theory holds that employees or officials within institutions generally act on the preferences of the institution rather than solely on their personal preferences. Moreover, "institutions do not simply constrain or channel the actions of self-interested individuals, they prescribe actions, construct motives, and assert legitimacy."[29] This institutional perspective is also consistent with theories of political ambition because ambitious officials within institutions generally recognize that the way to advance within the institution is to learn and internalize the interests of the institution and to promote them effectively.

When combining the models of Bednar and Nugent, it is clear that Nugent actually provides a more specific model of categorizing opportunisms. Nugent identifies three types of state interests: "legalistic," "fiscal," and "administrative."[30] He explains that state officials typically want legally decisive decision-making authority that can't be easily trumped

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[27] Nugent, 2009, p. 11.

[28] Theda Skocpol, "Brining the State Back In: Strategies of Analysis in Curr ent Research," in Bringing the State Back In, edited by Peter B. Evans, Dietrich Rueschemeyer, and Theda Skocpol (New York: Cambridge Uni versity Press, 1985), p. 9.

[29] Stephen Skowronek, "Order and Change," *Polity* Vol. 28 (Fall 1995), p. 9 4.

[30] Nugent, 2009, p. 22-23.

by Washington, sufficient and predictable federal funds to cover costs states incur from federal programs, and flexibility to implement and enforce federal programs. Thus, when the federal government infringes upon those interests, the federal government would be encroaching on states' rights and vice versa.

Nugent also identifies a more specified model of safeguards. He actually elaborates on the ways in which states can advance and protect their rights vis-à-vis the federal government. State governments have indeed succeeded tremendously in resisting, delaying, or altering the implementation and enforcement of federal policies at the state level. Federal-state relations today are typically marked by various forms of negotiation, bargaining, and compromise.[31] Nugent actually employs the policy process models, and talks about different strategies states can utilize to influence federal policies in pre-legislative, legislative, and post-legislative process. However, since this study solely focuses on state noncompliance with an already enacted law, we will focus on the strategies for the post-legislative process.

The strategies range from "state resistance," "coordinate governance," "participation," to "exhortation."[32] These safeguards are not as extreme as anti-federal actions – interposition, nullification, or secession – that were used or advocated in the past.[33] The strongest political safeguards of federalism today involve state officials telling or signaling to their federal counterparts that they will not implement federal laws or policies in their existing form. The noncompliant behavior that this study focuses on is part

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[31] Louis Fisher, *Politics of Shared Power*, p. ix.
[32] Nugent, 2009, p. 58.
[33] Whittington, *Constitutional Construction*, Chap. 3; Kyle Scott, *Federalism: A Normative Theory and its Practical Relevance* (New York: The Conti nuum International Publishing Group, 2011), P. 95.

of this category. States can also simply refuse or neglect to comply with the requirements or mandates of federal law and take their chances in terms of consequences.[34] States can also enact laws and policies independent of or parallel to those proposed by the federal government. This authority can be used strategically by states to thwart encroaching federal policies before they are passed or, alternatively, to affect the implementation of federal policies at the state level.[35] When all else fails, state officials can complain loudly about what they perceive to be encroaching or misguided federal law and policies.[36] The prestige and visibility of state attorneys general give them a bully pulpit for communicating with their federal counterparts as well as their constituents. Multi-state lawsuits specifically draw a lot of media attention. Other ways of exhortation include issuing press releases, meeting with members of Congress and executive branch officials, sending letters to federal officials on the association's letterhead stationery, testifying before congressional committees, holding press conferences, writing op-ed pieces for national newspapers, commissioning studies and publishing the findings, and developing positions on federal policy matters.

Bednar devotes more of her time explaining the design of safeguards in a federal system, thus missing the discussion of how federal and state governments actually interact and what kind of dynamics are present in the interactions. Nugent focuses on the states' interests and strategies to approach the federal government in order to protect state authority. This study blends the two to understand the motivations behind a state actor's action and capture the federal-state dynamics with nation-wide

[34] See, e.g., Watson, "EPA is Slammed on Dirty Water"; Meredith, "Tennessee Governor Talks of Revolt on E.P.A. Smog Rules"; Cushman, "Virginia Seen as Undercutting U.S. Environmental Rules."

[35] Nugent, 2009, p. 67.

[36] Nugent, 2009, pp. 74-75.

ramifications.

4. Outlining Subsequent Chapters

This thesis is divided into the following sections. Chapter 2 re-contextualizes the history of environmental policymaking in terms of series of opportunisms and safeguards. It establishes the historical tug-of-war between the federal and state government and highlights how each round builds upon precedents to act in more opportunistic behavior. Chapter 2 serves as a theoretical frame to view the state attorneys general litigation behavior discussed in the following chapter.

Chapter 3 specifically investigates the responsibilities of state attorneys general and the avenues available for them to resist the EPA regulations. Next, Case study of Texas attorney general provides abundant anecdotes and evidence to demystify the elusive process of AG regulatory litigation, from which hypotheses are extrapolated for empirical testing.

Chapter 4 is dedicated to conducting an empirical analysis to test the conclusions drawn from the case study and explain the variance among the AGs from 50 states. The data, variables, and the models are introduced and elaborated. Results are interpreted to see if they confirm the hypotheses and further implications are discussed.

As the concluding chapter, Chapter 5 provides a brief summary of the overall study. More importantly, it steps back from the analysis of AG lawsuits to provide the bigger picture of federalism. The chapter ultimately warns against the danger of uncooperative federalism by emphasizing several implications for growing polarization, judicial policymaking, and intergovernmental relations.

II. Climate Tug of War: Opportunisms and Safeguards in Environmental Policymaking

This chapter aims to re-contextualize the history of environmental policymaking in the United States as a series of opportunisms and safeguards at play.[37] Government behavior can be viewed as the combined outcome of its internal motivations and the external forces that affect its ability to actualize its goals.[38] Similarly, the progress of environmental policymaking was the combined outcome of the internal motivation that drove opportunisms and the external safeguards that operated to mitigate the transgressions. More specifically, it will show that the executive overreach we see today is an outcome of gradual expansion of federal authority built on precedents. This depiction provides essential context for the next chapter which analyzes the opportunistic litigation behavior of state attorneys general that aim to "resist and frustrate the measures" [39] proposed or enacted by the federal government in the environmental policy arena.

Bednar (2009) explains that opportunisms are inherent in a federal system because elected officials at all levels of government are expected to serve the interests of a particular electorate.[40] Because these officials – almost exclusively – pursue the interests of their own constituents, they aim

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[37] For more elaboration on the development of positive and normative theories of environmental regulation, *see* Imad A. Moosa and Vikash Ramiah, *The Costs and Benefits of Environmental Regulation* (Northampton, MA: Edward Elgar Publishing, 2015), pp.32-58.

[38] Bednar, 2009, p. 66.

[39] James Madison, *The Federalist 46* (New York: J. and A. McLean, 1788).

[40] Bednar, 2009, p. 67.

to create policies that are beneficial to their voters. Here in lies the opportunism: one actor's pursuit of their own interest may shift the balance of authority and harm others. She identifies three types of opportunisms:

> State governments may try to *shirk* on their responsibilities to the federation: they may fail to implement national policy or may take it upon themselves to enact policy that is normally in the national domain rather than respect the division of powers. States may also *shift the burden* of making the union work onto the shoulders (and economies) of other states, for example by creating barriers to trade between the states, or affecting the mobility of citizens across state borders. National governments may centralize, *encroaching* upon the jurisdiction of the states, or decentralize to shift burdens away from the center.[41]

Maintaining the distribution of authority between federal and state government is essential in a federation. Bednar particularly stresses the need for firm constraints that can act as a safeguard to "recover from error, and a way to deliberate, experiment, and ultimately adjust the distribution of authority."[42] Structural, popular, political, and judicial safeguards of federalism act to prevent and punish various opportunisms inherent in the federal structure. This chapter will follow the process of transgressions and safeguards employed by state and federal governments. This chapter employs the theoretical perspective on safeguards in federal system and traces the introduction and the evolution of the cooperative federalism framework.

[41] Bednar, 2009, pp. 68-69.
[42] Bednar, 2009, p. 16.

1. Round One: States' Race to the Bottom

In the first round of the climate tug of war, the policymaking authority remained with the state governments. The Constitution reserved the right of the states in the area of environmental protection, and the states enjoyed this authority until their opportunistic behavior ultimately prompted the federal government to step in.

In the United States, federal government's powers are few and limited. Structurally, the Constitution has guaranteed division of powers by enumerating the powers granted to the federal government and reserving the rest to the state governments.[43] As environmental protection was not one of the few powers specifically granted to the federal government, it was within the state jurisdiction for a long time. Several court rulings have been landmark cases in determining whether the federal government has the right to intervene in issues previously within state jurisdiction. In *New York v. United States*, the Supreme Court ruled that the Congress does not have the power to force states to implement federal programs enacted under the Interstate Commerce Clause.[44] Not only was state sovereignty upheld, it was celebrated as one of the "happy incidents of the federal system that a…State may…serve as a laboratory and try novel social and economic experiments without risk to the rest of the country."[45] In the realm of environmental policies, the federal government has been highly involved in resource development policy, but that was due to its vast holdings of public lands and the federal responsibility did not extend to environmental protection. It also helped that the federal land development policy was in

[43] U.S. Const. amend. X.
[44] New York v. United States, 505 U.S. 144 (1992)
[45] New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

alignment with states' pro-developmental interests.[46]

The federal environmental programs of the 1950s and 1960s remained premised on the notion that environmental problems were the responsibility of state and local governments. Early environmental policies enacted on a federal level mainly targeted federal agencies' resource management decisions, rather than private industries.[47] Even in the early version of the Clean Air Act, the Congress still expressly acknowledged the state and local jurisdiction over air pollution.[48] Under this free reign, states were free to enact regulations as they saw fit. The federal government's role in environmental protection was just providing federal financial aid, in the form of grants-in-aid, to encourage states to address their environmental problems. Each state dealt with its own level of pollution, natural resources, and constituent interests.

The problem was, the states were not doing a proper job of enacting and implementing environmental regulations. Late 1960s marked the height of nation-wide pollution with the rise of industrial development after World War II. Rivers caught on fire, smog killed people, and waterways were saturated with industrial sewage.[49] This is where opportunism occurred.

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[46] A. Dan Tarlock, "Biodiversity Federalism," *Maryland Law Review* Vol.54, No. 4 (1995), p. 1341.

[47] Percival, 1995, p. 1158.

[48] Percival, 1995, p. 1157.

[49] "America's Sewage System and the Price of Optimism," *TIME*, August 1, 1969. http://content.time.com/time/subscriber/article/0,33009,901182-1,00.html; Lily Rothman, "Here's Why the Environmental Protection Agency W as Created," *TIME,* March 22, 2017. http://time.com/4696104/environmental-protection-agency-1970-history/; Richard L. Revesz and Jack Lienke, "N ixon's 'environmental bandwagon': Richard Nixon signed the land Clean Air Act of 1970 – but not because he had any great concern about the environment," *Salon* January 3, 2016. http://www.salon.com/2016/01/02/nixons_environmental_bandwagon_richard_nixon_signed_the_landmark_clean_air_act_of_1970_but_not_because_he_had_any_great_concern_about_the_environment/. (Accessed May 3, 2017).

The states essentially shirked on their responsibility to enact and implement adequate environmental regulations. Pollutants know no bounds. Thus, it was easy for states to shift their burden of properly disposing waste from their industries by dumping it in other states' backyards or letting air pollution travel downwind. The politicians had incentive not to incur additional political costs by raising the cost of waste disposal for the companies in their states. At the time, states faced significant external pressure from large companies and industries to keep the environmental regulations lax, or they would relocate to another state that would provide more favorable environment for them.[50] The state governments shirked on their responsibility, which inherently meant shifting their burden onto other states and created a race-to-the-bottom situation.[51]

Since there were no federal laws that governed interstate pollution, states sued each other over interstate pollution under public nuisance laws, but in many cases, it was difficult to litigate the injury.[52] The only recourse the Supreme Court provided was greater cooperation among states, since there was no federal agency to oversee interstate or national pollution control.[53] After a history of unsuccessful federal efforts to encourage states to address environmental problems on their own, the federal government enacted a series of federal environmental legislations and shifted the balance of federal-state authority.

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[50] Engel, 2015, p. 461; Fred R. Bleakley, "Many Firms Press States for Concessions," *Wall Street Journal,* March 8, 1995, p. A2.

[51] For criticism of the race-to-the-bottom rationale for federal environmental legislations, *see* Richard L. Revesz, "Rehabilitating Interstate Competition: Rethinking the 'Race-to-the-Bottom' Rationale for Federal Environmental Regulation," *NYU Law Review* Vol. 67 (1992), p.1210.

[52] Missouri v. Illinois, 200 U.S. 496 (1906); New Jersey v. City of New York, 256 U.S. 296, 309 (1921); Illinois v. City of Milwaukee, 406 U.S. 91 (1972); Percival, 1995, pp. 1152-1153.

[53] Percival, 1995, p. 1154.

President Nixon created a specialized environmental agency, the EPA, by executive order in 1970 with bipartisan support.[54] The Congress then charged the new agency with implementing the national regulatory legislation that followed. During the 1970s alone, more than twenty major federal environmental laws, including the Clean Air Act, were enacted or substantially amended, giving EPA and other federal agencies enormous regulatory responsibilities.[55] This is where the idea of cooperative federalism was formally introduced to the US system. The essence of cooperative federalism in the environmental field is the breakdown of responsibilities between the federal government and states, allocating the role of minimum standard-setter and overseer to the federal government and the role of implementers and first-line enforcers to the states. Under the environmental context, EPA standards preempt those state standards considered less stringent than the federal standards.

The federal government's first action to guard against the states' transgression is notable because of the active involvement of the Executive branch. While public concern about the environment reached a new height in the 1960s[56] and a series of Congressional hearings had built momentum towards serious environmental regulations,[57] enactment of major federal environmental legislations would not have been possible without the

[54] "Reorganization Plan No. 3," 35 FR 15623, 84 Stat. 2086 (1970).

[55] DeWitt John, Alex Halley, and R. Scott Fosler, "Remapping Federalism: The Rediscovery of Civic Governance in the United States," in Jong S. Jun and Deil S. Wright, *Globalization and Decentralization: Institutional Contexts, Policy Issues, and Intergovernmental Relations in Japan and the United States* (Washington D.C.: Georgetown University Press, 1996), p. 94.

[56] Charles O. Jones, *Clean Air: The Politics and Politics of Pollution Control* (Pittsburgh: University of Pittsburgh Press, 1978), pp. 152-154.

[57] Bill Kovarik, "Essay: A green Nixon doesn't wash," *The Daily Climate*, January 9, 2013. http://www.dailyclimate.org/tdc-newsroom/2013/01/nixon-at-100 (Accessed May 8, 2017).

vigorous endorsement from President Nixon. His State of the Union in 1970 highlights the issue of environment protection:

> "The great question of the seventies is, shall we surrender to our surroundings, or shall we make our peace with nature and begin to make reparations for the damage we have done to our air, to our land, and to our water? Restoring nature to its natural state is a cause beyond party and beyond factions… Clean air, clean water, open spaces – these should once again be the birthright of every American. If we act now, they can be. We still think of air as free. But clean air is not free, and neither is clean water. The price tag on pollution control is high. Through our years of past carelessness, we incurred a debt to nature, and now that debt is being called."[58]

Nixon did not stop at just mentioning the environment in his speech, he delivered a 37-point program, consisting of 23 major legislative proposals and 14 new measures of administrative action or Executive Order.[59] This could be seen as a reaction to the prolonged state inaction, but there is evidence that suggests that Nixon's establishment of the federal agency was an outcome of various calculations unrelated to righting the wrong committed by the states.

First, there was a stark difference between Nixon's public rhetoric and his private beliefs. In fact, his private views on the EPA has been caught on tape. In a meeting with automotive executives, Nixon said "the new agency represented not a single new penny in federal spending for the environment. It did, however, newly concentrate bureaucracies previously scattered through vast federal bureaucracy under a single administrator

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[58] Richard Nixon, *Annual Message to the Congress on the State of the Union,* Jan.22, 1970. http://www.presidency.ucsb.edu/ws/?pid=2921 (Accessed May 8, 2017).

[59] Richard Nixon, *Special Message to the Congress on Environmental Quality,* Feb. 10, 1970. http://www.presidency.ucsb.edu/ws/?pid=2757 (Accessed May 8, 2017).

loyal to the White House."[60] Nixon was able to claim credit for establishing a federal agency dedicated to protecting the environment, when all he did was consolidate the different offices in the government. Moreover, his administration supported other projects such as the controversial Everglades Jetport that ran contrary to his pro-environmental rhetoric. There is evidence that Nixon used this as a political strategy as well. Scott Lang, chairman of Harvard Environmental Law Society at the time, explains Nixon's action in the context of the Vietnam War and the anti-war movement. He says Nixon's active endorsement of environmental protection was to redirect the youth activism away from the anti-war movement, essentially draining the resources from them.[61] On a personal level, Nixon was very concerned about his reelection campaign against the expected opponent, a Democratic Senator Edmund Muskie from Maine. Senator Edmund Muskie, who came to be known as "Mr. Clean," led many Congressional hearings on pollution as Chair of the Senate Subcommittee on Air and Water Pollution, leading the momentum for serious environmental regulations. Muskie was a clear frontrunner of the Democratic Party and had outpolled Nixon by 1971.[62] In order to outshine his liberal rival, Nixon had to look more protective of the environment, [63] which may explain why the beforementioned 37-point program was very ambitious but lacked specific and practical steps for implementation. This is in line with other revelations from the Watergate Scandal, in which it was found that many "dirty tricks" were employed to discredit Muskie, Nixon's strongest

[60] Frontline, "Nixon & Detroit: Inside the Oval Office," *PBS*, February 21, 200 2. http://www.pbs.org/wgbh/pages/frontline/shows/rollover/nixon/ (Accessed May 8, 2017).

[61] Jones, 2009, p. 154.

[62] Theodore H. White, *The Making of the President 1972* (New York: Harper Perennial, 2010), P.89

[63] Revesz and Lienke, 2016.

challenger.[64]

While putting a stop to the race-to-the-bottom was credited as the reason for the federal involvement in the traditional domain of the states, President Nixon's personally-motivated actions set an important precedent for future environmental policymaking.

2. Round Two: Federal Encroachment and Delegation

In the second round of the climate tug of war, the federal government now had authority to legislate environmental policy that partially preempts state laws. However, the ever-expanding list of federal mandates put a serious strain on the states. Many federal-state conflicts arose in the implementation of the Clean Air Act, and states ultimately pushed back against the federal transgression.

The modern-day version of the Clean Air Act was adopted in December 1970.[65] The Clean Air Act directed EPA to identify air pollutants that threatened public health or welfare and to establish minimum, national regulatory standards to be attained by the states. While the Clean Air Act required EPA to establish national ambient air quality standards(NAAQS), it gave states considerable flexibility in determining how to achieve these standards through the sate implementation plan (SIP) process.[66] In states that choose not to apply for program delegation, the federal programs are operated and enforced by federal authorities. Essentially, it offers states a

[64] White, 2010, p. 337, 355.

[65] Pub. L. No. 91-604, 84 Stat. 1705 (1970) (codified as amended at 42 U.S.C. §§7401-7642 (1988 & Supp. V 1993)).

[66] Percival, 1995, pp. 1160-1161.

choice of regulating an activity "according to federal standards or having state law pre-empted by federal regulation."[67]

Claims that the Clean Air Act itself interfered with state sovereignty were rejected in court on the ground that the federal regulation represented "a valid adaptation of federalism principles to the need for increased federal involvement."[68] Even though they often require states to meet minimum national standards, the federal environmental laws generally have been designed to avoid preemption of state law.[69] Preemption was reserved for regulation of products that are distributed nationally, so only the provisions of the Clean Air Act that govern vehicle emissions preempted the inconsistent state standards.

As Justice O'Connor stated, "Congress may not simply 'commandeer the states' legislative processes by directly compelling them to enact and enforce a federal regulatory program.'"[70] He outlined alternative means by which Congress can encourage states to implement federal programs. He stated that the Congress may use its spending power and attach conditions on the receipt of federal funds if the conditions "bear some relationship to the purposes of the federal spending."[71] However, the act of attaching conditions on these revenue transfers itself has a substantial influence on state expenditure,[72] and the federal government strategically used this tool to push states. The federal government used federal funds as a bargaining chip to enforce federal standards, and a withdrawal of federal funds or a

[67] *New York. v. United states*, 1992, p. 2424.
[68] *Pennsylvania v. EPA*, 500 F.2d at 262.
[69] Percival, 1995, p. 1142.
[70] New York v. United States, 1992, p. 2425 (quoting *Hodel*, 452 U.S. at 288).
[71] New York v. United States, 1992, p. 2427.
[72] Bednar, 2009, p. 71.

federal takeover of state environmental programs have added even more aggravation to the federal-state conflict.[73]

The 1990 amendment to the Clean Air Act, specifically addressing acid rain, urban air pollution, and airborne toxic pollutants, passed with large bipartisan support under President George H. W. Bush's reign.[74] While the federal government increasingly had delegated responsibility for the operation of environmental programs to the states under the cooperative federalism framework, federal financial assistance for administering these programs has been reduced sharply and most states have failed to replace lost federal funds for environmental programs with funds of their own.

While some states were still genuinely working hard to implement the federal environmental policies, the unfunded mandates became severely burdensome for the rest of the states to implement the mandated policies. And they realized that cooperative federalism essentially gave them a choice: whether to cooperate or not. In the earlier stage when the withdrawal of federal funds was a possibility, the states may not have dared to be uncooperative, but with unfunded mandates, they did not have any more reason to abide. "The state governments have acquired something in the nature of an added check upon the national administration."[75] Moreover, the states learned that they were not at the mercy of the federal agency anymore. While EPA has the authority to withdraw a delegation of program authority to any state that is not meeting federal standards, this sanction was too blunt an instrument to be very effective. States understood that EPA has little incentive to assume programs that would add to the agency's own responsibilities at a time when it is having difficulty finding funds to

[73] Percival, 1995, p. 1144-1145.

[74] Read, 2016, p. 349.

[75] Wright, 1982, pp. 35-36 (quoting William Anderson).

implement its existing programs.[76] What was understood as a means to incentivize states to abide became the structural safeguard that states could utilize to push back on the overbearing federal mandates.

Slowly, other safeguards also worked to protect the shift in federal-state balance of power. In March 1995, Congress overwhelmingly approved legislation making it more difficult to impose federal mandates on state and local governments. The legislation, known as the Unfunded Mandate Reform Act of 1995, requires that more detailed cost estimates be provided for federal mandates and makes it easier for opponents of such provisions to defeat them in Congress. Also, it imposes new requirements on agencies issuing regulations that impose federal mandates.[77] When President Clinton issued an Executive Order[78] that expanded the federal government's power over state and local agencies, the Order was quickly suspended[79] after vehement opposition from states, conservative activists, and constitutional scholars. On the instance where political safeguards had failed to work, the courts have reigned in the federal government.[80]

The federal government had slowly relinquished its strong grip on environmental protection. The more prescriptive standards that were introduced in the Reagan Administration continued the trend of decentralization throughout the 1990s and early 2000s. The Bush Administration also promised to continue the trend, but in actuality significantly expanded federal – and more specifically executive branch – authority. Bush introduced industry-friendly initiatives that essentially maximized federal authority over the states. A particularly troubling

[76] Percival, 1995, p. 1175.
[77] Percival, 1995, p. 1168.
[78] EO No. 13083, 63 FR 27651 (1998).
[79] EO No. 13095, 63 FR 42565 (1998).
[80] United States v. Lopez, 115 S. Ct. (1995)

example was the Clear Sky Initiative, which reinterpreted the landmark 1990 Clean Air Act Amendments achieved under the George H. W. Bush administration. The initiative would lead to less emissions reduction than the existing regulation and would be vulnerable to many regulatory loopholes.[81] The proposed bill died in committee after significant criticism from the Democrats and states, but Bush enacted a version of the initiative through the EPA, called the Clean Air Interstate Rule.[82]

The federal encroachment under the Bush administration took the form of preemption like others before him, but he engaged in opportunistic delegation as well. Governments may violate the constitutional division's term by what they fail to do, or by what they let another government do. Opportunistic delegation implies a certain level of control, as the delegator can choose what to delegate based on its own interests and when to delegate based when it is most able to control state decision making.[83] While the Bush administration maintained a tight grip over industry-friendly environmental regulations, it evaded the responsibility to deal with the growing threat of climate change. In 2001, President Bush formally withdrew from the Kyoto Protocol which was signed by President Clinton in 1997. Instead, he emphasized the need for additional climate change research and voluntary measures. With the lack of strict environmental regulations, we might expect a similar race-to-the-bottom phenomenon witnessed up to the 1960s, but what followed was a surprising response from the states.

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[81] Rabe, 2007, pp. 7-8.

[82] "Clear Skies, R.I.P.," *The New York Times*, March 7, 2005. http://www.nytimes.com/ 2005/03/07/opinion/clear-skies-rip.html (Accessed May 13, 2017).

[83] Bednar, 2009, p. 71.

As Robert Stoker states, "if state or local interests are not compatible with federal program goals, states and localities may use their autonomy to develop and pursue strategic responses to the federal initiative, undermining or circumventing the intentions of federal policy."[84] The states have responded with a range of innovative policies and cooperative actions against federal inaction.[85] Understandably, coastal states have enacted policies to combat climate change, responding to the growing concern from the public. But other states, such as Arizona, Colorado, Texas, and Wisconsin among many, have acknowledged the benefits they can gain from climate change policies. Moreover, states have joined forces to fight the federal inaction. States have used multi-state organizations like the National Conference of State Legislatures to coordinate and collaborate in greenhouse gas and mercury emission reduction policies.[86] But state litigation has become much more popular and effective in challenging federal policies or the lack thereof. State coalitions have initially challenged federal policy interpretations in court to respond to Bush administration's policies, but have also embraced litigating against to prod the government to do something it does not want to do.

In 2007, California, Connecticut, Illinois, Massachusetts, New Jersey, Maine, New Mexico, New York, Oregon, Rhode Island, Vermont, and Washington came together to change the course of environmental regulations. *Massachusetts v. EPA* was a landmark case in the history of environmental regulations. The U.S. Supreme Court established that greenhouse gases are subject to federal regulations by the Environmental

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[84] Nugent, 2009, p. 169 (quoting Robert Stoker).

[85] For a comprehensive list of specific policies instituted on state level, *see* Center for Climate and Energy Solutions, "All State Initiatives," Feb. 27, 2014. http://www.c2es.org/docUploads/all-state-initiatives-feb-2014.pdf (Accessed May 17, 2015).

[86] Rabe, 2007, pp. 14-15.

Protection Agency (EPA), if greenhouse gases endanger public health.[87] It meant the federal government became legally authorized to regulate greenhouse gases, the main causes of climate change, without a federal legislation passed in the Congress. Since the court decision, EPA has implemented various regulations including the "tailpipe rule,"[88] the "timing rule,"[89] and most recently the Clean Power Plan.[90]

Responding to the increasingly preemptive federal government, states have employed political and judicial means to regain authority over environmental policymaking. This round witnessed the establishment of very important precedents in the history of environmental policies. Nixon, Reagan, and Bush administrations created and explored the depths of administrative presidency. The states, on the other hand, ventured out to experiment with various policies on their own and found a successful legal strategy to shape national policymaking. These precedents will drive environmental policymaking to a new era.

3. Round Three: Executive Overreach

In the third round of the climate tug of war, we see the continued era of administrative presidency. This round, however, coincided with severe polarization on the federal level, which also trickled down into state level.

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[87] Massachusetts v. EPA, 549 US 497 (2007).

[88] "Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards," 75 FR 25,324 (May 7, 2010).

[89] "Reconsideration of Interpretation of Regulations That Determine Pollutants Covered by Clean Air Act Permitting Programs," 75 FR 17,004 (Apr. 2, 2010).

[90] "Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units," 80 FR 64,662 (October 23, 2015); For a more comprehensive list of EPA's regulations, *see* Robert Meltz, "Federal Agency Actions Following the Supreme Court's Climate Change Decision in Massachusetts v. EPA: A Chronology," *Congressional Research Service*, 2014.

This section will illustrate the fervent state resistance to the blatant act of executive overreach.

EPA was able to propose and enact several regulations to combat climate change, but President Obama had bigger things in his mind. He wanted to pass a federal law that will specifically target climate change. American Clean Energy and Security Act of 2009 (also known as Waxman-Markey Bill) aimed to establish a cap and trade system similar to that of the European Union Emission Trading Scheme[91] passed the U.S. House under Democratic control, but failed to pass in the Senate. In 2014, the Electricity and it passed in the House but ultimately died in the Senate. In 2014, the Republican-controlled House passed HR 3826, the Electricity Security and Affordability Act, which would have overturned the Environmental Protection Agency's decision issued during Obama's presidency, to regulate greenhouse gas emissions as pollutants under the existing Clean Air Act. That bill failed in the Democratic-led Senate. In a Congress marked by deep partisan divide, no significant action either to regulate greenhouse gases or decisively to block such regulation has been enacted, and thus the political power and policy initiative have shifted to the executive branch, the courts, and the states.[92]

Stagnation maybe an evidence that separation of powers is working according to theory,[93] but the seemingly unmovable Congressional gridlock in addressing health care, education, immigration, and also climate change

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[91] Committee on Energy and Commerce, "Chairman Waxman and Markey Introduce 'The American Clean Energy and Security Act,'" May 15, 2009, https://web.archive.org/web/20090525083534/http://energycommerce.house.gov/index.php?option=com_content&view=article&id=1622:chairmen-waxman-and-markey-introduce-the-american-clean-energy-and-security-act&catid=155:statements&Itemid=55 (Accessed April 12, 2017).

[92] Engel, 2015, p. 454.

[93] Bednar, 2009, p.101.

has pushed President Obama to state that he would "direct [his] cabinet to come up with executive actions we can take, now and in the future, to reduce pollution, prepare our communities for the consequences of climate change, and speed the transition to more sustainable sources of energy" in the 2013 State of the Union address.[94] The timeline of his executive orders corresponds to the political opposition President Obama has faced in advancing this agenda.[95] His first climate change executive order was issued in October 2009, urging all parts of the federal government to improve energy efficiency, use sustainable materials, and to promote environmental-friendly principles.[96] After the Democratic Party lost the 2010 midterm election, and President Obama was on shaky grounds facing his reelection, he did not push for his climate change agenda. Rather, he issued three executive orders that focus on decreasing energy reliance and increasing investment for industrial energy efficiency. He did not completely abandon the climate change agenda, but focused on energy independence which can garner more votes from the median voters than just focusing on combating climate change.

After the aforementioned State of the Union address, President Obama issued executive orders that specifically address preparation for the changing climate.[97] All of these policy orders are significantly longer than regular orders, with 9.25 pages in average, and go into very specific details. The content of the orders indicate that these are more than routine

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[94] The White House, "Remarks by the President in the State of the Union Address," February 13, 2013. https://obamawhitehouse.archives.gov/the-press-office/2013/02/ 12/remarks-president-state-union-address (Accessed April 12, 2017).

[95] *See* Appendix A for the full list of President Obama's executive orders on environmental policies (2009-2015).

[96] EO No. 13514, 74 FR 52117 (2009).

[97] EO No. 13653, 78 FR 66819 (2013); EO No. 13677, 79 FR 58231 (2014); EO No. 13693, 80 FR 15871 (2015).

directives. They are noticeably specific and aim to coordinate many agencies and organizations to establish effective climate change policies. By the specificity of these orders, it can be inferred that President Obama wanted to shape these climate policies in a very particular manner. This is consistent with his Climate Action Plan that was announced in June 2013,[98] a comprehensive plan for cutting carbon pollution and preparing for the impacts of climate change. The Clean Power Plan, the most recent incarnation of President Obama's climate change efforts, essentially calls for emissions reductions from new, modified, and existing sources of greenhouse gases, which would significantly impact the electricity sector.[99]

The Clean Power Plan followed previous presidents' footsteps in utilizing executive power to establish federal policies. However, it deviated from the traditional cooperative federalism framework in several ways. President Obama had learned that having the usual minimum floor for the whole country had not been successful. Thus, this Plan calculated emissions reduction target for 2020 on a state-by-state basis. More importantly, the emissions reduction burdens varied not by the usual measure of the size of the state's contribution of polluting emissions, but instead by the state's capacity to reduce the most greenhouse gas emissions by mapping the best state practices into the state implementation plan.[100] This unusual state capacity approach would require the least reductions from the heavily coal reliant states.[101] For example, West Virginia, which is 96 percent reliant on coal for electricity production, would be required to reduce emissions by 20

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[98] The White House, "FACT SHEET: President Obama's Climate Action Plan," June 25, 2013. https://obamawhitehouse.archives.gov/the-press-office/2013/06/25/fact-sheet-president-obama-s-climate-action-plan (Accessed April 12, 2017).

[99] Engel, 2015, p. 457.

[100] Engel, 2015, p. 462.

[101] Although this "state capacity" approach is unusual, it is not unprecedented. *See* "Cross-State Air Pollution Rule," 76 FR 48208 (2011).

percent. Whereas, Washington, which is 3 percent reliant on coal for electricity production, would be required to reduce 71 percent in its carbon dioxide emissions rate.[102] While the Clean Power Plan have instituted innovative ways to encourage state participation, it received staunch opposition.

Cooperative federalism is double-edged: to depend on a state's cooperation means that the state can exercise power by refusing to cooperate. The structures of cooperative federalism create opportunities for states to engage in "uncooperative federalism" – using the "regulatory power conferred by the federal government to tweak, challenge, and even dissent from federal law."[103] Like the case of Nixon and Bush administrations, structural, political, and judicial safeguards would be expected to operate. The difference was that the Clean Power Plan came about during a time of growing polarization. Shifting political initiative from paralyzed national institutions to state and local governments has not diminished polarization but instead has channeled it in new venues and new directions.[104] Indeed, the US Senate majority leader Mitch McConnell (R-KY) encouraged states to resist "the excessive and arbitrary mandates imposed by [the Clean Power Plan] under the guise of protecting the climate" by refusing to submit state compliance plans.[105] As of June 30, 2015,

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[102] Philip Wallach and Alex Abdun-Nabi, "The EPA's carbon plan asks the least from state that pollute the most," *Washington Post*, July 16, 2014. https://www.washingtonpost.com/news/wonk/wp/2014/07/16/the-epas-carbon-plan-asks-the-least-from-states-that-pollute-the-most/?utm_term=.1fe42749670d (Accessed July 19, 2016).

[103] Jessica Bulman-Pozen and Heather K. Gerken, "Uncooperative Federalism," *The Yale Law Journal*, Vol. 118, No. 7 (2009), p. 1258-1259.

[104] Shor and McCarty, 2011, pp. 549-550.

[105] Mitch McConnell, "States Should Reject Obama Mandate for Clean-Power Regulations (Op-ed column)," *Lexington (KY) Herald-Leader*, March 3, 2015. http://www.kentucky.com/opinion/op-ed/article44558769.html (Accessed May 10, 2017).

seven states had enacted legislation designed to block or delay the EPA's Clean Power Plan and nine states passed resolutions urging the EPA to withdraw the Clean Power Plan.[106] The national pattern of high and growing polarization also manifested in courtrooms. Following the footsteps of *Massachusetts v. EPA*, coal-reliant states and the coal industry have filed numerous lawsuits against EPA hoping to taking aim at the Plan's legal basis.[107] This time, however, the other side of the partisan line also joined forces in support of EPA.[108]

Unlike his predecessor, the Obama administration made use of the precedents to expand and strengthen environmental regulations. With the Congressional gridlock along partisan lines, President Obama employed his executive powers to launch an ambitious climate change policy, the Clean Power Plan. The executive overreach was met with severe criticism from the states, specifically the Republican states. The precedent of *Massachusetts v. EPA* provided an alternative policymaking arena, and EPA was bombarded by legal challenges. The next chapter highlights the role state attorneys general play in invoking the structural and judicial safeguard against the federal government and discusses the and why it may be

[106] National Conference of State Legislatures, *States Reactions to Proposed EPA Greenhouse Gas Emissions Standards*, June 30, 2015. http://www.ncsl.org/research/energy/states-reactions-to-proposed-epa-greenhouse-gas-emissions-stadnards635333237.aspx (Accessed May 10, 2017); Implementing the strategy recommended by McConnell, Oklahoma Governor Mary Fallin issued an executive order barring the state's Department of Environmental Quality from developing an implementation plan related to carbon emissions, on the grounds that the EPA's Clean Power Plan was unauthorized by the Clean Air Act and threatened the rights and freedoms of the people of Oklahoma. Oklahoma, *Governor Mary Fallin, Executive Order 2015-22, April 28,* 2015. https://www.sos.ok.gov/documents/executive/978.pdf

[107] West Virginia v. EPA, No. 14-1146 (D.C. Cir. Docketed Aug. 1, 2014); The rest of the lawsuits will be elaborated in the next chapter.

[108] Most states for and against EPA fall along partisan lines, but there are a few exceptions. *See* Table 9.1 in Nolette, 2015, p. 184.

dangerous to move policy debate to the courts.

III. Safeguarding Federalism?
State Attorneys General vs. EPA

The previous chapter established the theoretical foundation to view the noncompliant behavior of the states in today's environmental policymaking arena. This chapter builds upon this context to illustrate the role of state attorneys general as a key player in the ongoing federal-state conflict. The key claim of this chapter is that the state attorneys general are utilizing the litigation tool at their disposal to advance their personal and partisan goal at the same time. The newfound prestige of the office of AG coincided with the increasingly politicized arena of environmental policy, creating an ideal condition for AGs to act upon their unique role in influencing national policymaking through the courts.

1. Rise of the State Attorneys General

The attorney general holds a unique position in the state government. The office of state attorney general is part of the executive branch, and AGs provide legal services to the governor, state officials and state agencies as the state's "chief legal officer."[109] In all 50 states, AGs are granted a significant level of discretion and autonomy to pursue policies that they believe are in the public interest, to check gubernatorial power, and diffuse executive authority among elected state officials.[110] As much as they are the

[109] Manchin v. Browning, 296 S.E.2d 909 (1982).

[110] Patrick C. McGinley, "Separation of Powers, State Constitutions & the Attorney General: Who Represents the State?" *West Virginia Law Review,* Vol. 99 (1996), pp. 755-756.

legal representative of the state, however, most AGs are elected and thus owe their positions and allegiance to the electorate rather than another executive officer, the legislature, or the judiciary. AGs from about 40 states are granted common law powers,[111] in which they can sue in *parens patriae* for public interest. Common law powers of the AGs are described more specifically in the ruling of *Florida* ex rel. *Shevin v. Exxon Corporation* (5th Cir., 1976):

> "Their duties and powers typically are not exhaustively defined by either constitution or statue but include all those exercised at common law. There is and has been no doubt that the legislature may deprive the attorney general of specific powers; but in the absence of such legislative action, he typically may exercise all such authority as the public interest requires. And the attorney general has wide discretion in making determination as to the public interest."[112]

While this ruling affirmed the discretionary power of the AGs to act in the interest of the public, their public advocacy roles did not become "entrepreneurial" until almost 20 years later.[113]

The multi-state litigation against the tobacco companies in the late 1990s opened a new avenue for attorneys general to pursue. Previous lawsuits seeking damages against the tobacco companies failed because individual petitioners were up against the whole group of tobacco companies. What Mississippi Attorney General Michael Moore did was

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[111] Arizona, Colorado, Indiana, Iowa, Louisiana, Maryland, New Mexico, South Dakota, and West Virginia AGs all lack common law authority. Lynne M. Ross, ed., *State Attorneys General: Powers and Responsibilities* (Washington: National Association of Attorneys General), p.38, 59.

[112] *Florida* ex rel. *Shevin v. Exxon Corporation,* 529 F.2d 523 (5th Cir. 1976).

[113] For more information on the expansion of the office of state attorneys general, *see* Scott M. Matheson, Jr., "Constitutional Status and Role of the State Attorney General," *University of Florida Journal of Law and Public Policy,* Vol. 6 (1993), pp. 3-4.

reframing the debate as a public interest issue by focusing on the cost incurred to the state for treating smoking-related illnesses. What started as a single suit brought by Mississippi in 1994 grew to a 41-state suit by the end of 1998. By pooling their resources together, 46 states, 5 commonwealths and territories, and the District of Columbia won a landmark settlement of $206 billion dollars over 25 years.[114] This success received significant limelight as it demonstrated the potential impact state attorneys general can make as policy entrepreneurs, and AGs continued to expand their policymaking authority under *parens patriate*.

It is not surprising that this newfound prestige in the office began attracting more politicians than legal scholars.[115] AGs brought numerous lawsuits that can shape national regulatory dialogues[116] and establish themselves as a powerful player in national policymaking sphere. The office is often seen as a springboard into higher political offices,[117] and many famous politicians, such as Bill Clinton, Joseph Lieberman, and John Cornyn all served as attorney general for their state at some point in their political careers. Therefore, AGs not only have to act in the best interest of the state, but particularly in the interest of the median voters in order to continue their political careers. However, there is inherently an imperfect monitoring system because AGs can represent different clients at the same time and unlike private litigation, there is no immediate means of replacing the attorney general as their legal representative when the clients are not

[114] Spill, Licari, and Ray, 2001, p. 607.

[115] Colin Provost, "When is AG Short for Aspiring Governor? Ambition and Policy Making Dynamics in the Office of the State Attorney General," *Publius: The Journal of Federalism,* Vol 40 (2010b), pp. 597-616; Meyer, 2007; Nolette, 2015.

[116] Cornell W. Clayton, "Law, Politics, and the New Federalism: State Attorney General as National Policymakers," *The Review of Politics,* Vol. 56, No. 3 (1994).

[117] Clayton, 1994; Provost, 2003; Provost, 2010a.

satisfied with his work.[118] The lack of monitoring system by the electorate makes it possible for ambitious AGs to pursue broader policy goals.

Essentially, AGs are politicians who are driven by electoral goals. AGs aim to achieve their electoral objectives by maximizing and mobilizing the resources at their disposal. The next section introduces and elaborates on the resources available to the state attorneys general in dealing with the EPA.

2. State Attorneys General vs. EPA

A key aspect in explaining Clean Air Act litigation is the intergovernmental relationship between state and federal governments. As sovereign entities, states have delegated their authority to establish a limited government. In the context of greenhouse gas regulations, many states are upset that the federal government has ultimately overreached its authority originally delegated in their agreement. The lawsuits argue that the EPA has acted outside its statutory authority to make those decisions, or are making "arbitrary and capricious" determinations, essentially arguing that the agent has violated the original agreement they have made. Just as the president's influence peaks when his political resources are at their height, attorney general's influence would heighten when he has more political resources at his disposal.[119] The next section will elaborate on the specific legal provisions that allows attorneys general to file these lawsuits.

Under the provisions of the Clean Air Act, state governments can

[118] Margaret H. Lemos, "Aggregate Litigation Goes Public: Representative Suits by State Attorneys General," *Harvard Law Review,* Vol. 126 (2012), pp. 512-518, 518-522.

[119] Lee Sigelman and Nelson C. Dometrius, "The Linkage Between Formal Powers and Informal Influence," *American Politics Quarterly,* Vol. 16, No. 2 (April 1988), p.159.

participate in the rulemaking process and safeguard possible transgressions in mainly two ways: commenting or suing. State governments, along with the public, participate in the comment period of a proposed rule and EPA takes these comments into account before publishing the final rule.[120] State governments can also seek judicial review over EPA's actions or challenge that its determinations are "arbitrary or capricious" under the Administrative Procedures Act.[121] The Clean Air Act requires states to file their complaints in the D.C. Circuit of the Court of Appeals,[122] no later than 60 days after the rule is published in the Federal Register, and no earlier than the publication date.

State attorneys general utilize various tools available to resist and frustrate the measures proposed by the EPA. Collaboration and coordination has become easier with the establishment of Democratic Attorneys General Association (DAGA) and Republican Attorneys General Association (RAGA). States are pooling resources and collaborating to bring multi-state action because it would involve little expertise or effort by most participating states.[123] So even small states with limited resources can participate in large multi-state actions. Many non-legal actions are taken by AGs as well. In December 2016, the attorneys general of 24 states signed a letter to the EPA asserting that the Clean Power Plan was unlawful.[124] States

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[120] 42 U.S.C. §1857h-5(b).

[121] 5 U.S.C. §706(2)(A) (2000); 42 U.S.C. §1857h-5(b).

[122] The D.C. Circuit has the exclusive jurisdiction over the Clean Air Act as these regulations are nationally applicable. Attempts to litigate other clean air rules outside of the D.C. Circuit have been unsuccessful (Oklahoma et al. v. McCarthy et al., No. 15-CV-0369 (July 1, 2015).

[123] Amy Widman and Prentiss Cox, "State Attorneys General's Use of Conc urrent Public Enforcement Authority in Federal Consumer Protection Law s," *Cardozo Law Review* Vol. 33, No. 1, p. 75.

[124] Patrick Morrisey, "A Communication from 24 States and State Agencies Regarding Withdrawal of the Unlawful Clean Power Plan," Dec. 14, 2016. http://www.ago.wv.gov/Documents/2016.12.14%20CPP%20Letter%20M0142296.

can also petition the EPA to change a certain part of its provision.[125]

Other than the letters and comments AGs can make, one opportunistic trend has received attention. Following the trend that AGs are using their position to garner national attention with consumer protection lawsuits to advance their careers, federal officials have shown "concern that such enforcement provisions 'would tempt some [attorneys general] to file frivolous lawsuits that could ultimately undermine the effectiveness of the [Consumer Product Safety Commission].'"[126] This concern has been proven to be true. Even with the explicit guideline for judicial review, AGs have filed litigation against the Clean Air Act in non-D.C. Circuit, or before the final rule is announced in the Federal Register. Patrick Morrisey, West Virginia's Attorney General, has openly admitted that his legal strategy is to file lawsuits to "gum up the courts enough over the course of next four years to be able to slow down the Obama administration on these regulations."[127] These lawsuits maybe procedurally defective, but they are effective in garnering media attention and increasing the political profiles of the AGs.

In the face of "ambitious encroachment of the federal government on the authority of State governments" like the Clean Power Plan is perceived to be, however, Madison warns that the encroachment "would not excite the opposition of the single State, or of a few States only… Every government

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PDF (Accessed Mar. 20, 2017).

[125] Connecticut et al, "Petition to the United States Environmental Protection Agency for the Addition of Illinois, Indiana, Kentucky, Michigan, North Carolina, Ohio, Tennessee, Virginia, and West Virginia to the Ozone Transport Region Established Pursuant to Section 184 of the Federal Clean Air Act as Permitted by Section 176A of the Federal Clean Air Act," Oct. 6, 2016. http://www.dec.ny.gov/docs/air_pdf/otrpetition1213.pdf (Accessed Mar. 20, 2017).

[126] 154 Congressional Record S7871 (daily ed. July 31, 2008) (statement of Senator Kyl).

[127] Morrisey, 2013.

would espouse the common cause."[128] But that is not the case. If federal encroachment is as severe as some states say, why are only certain states litigating against this transgression? As elected officials that can garner national attention, AGs are driven by both electoral and personal goals. Ambition, political ideology, pecuniary and nonpecuniary rewards, and fame may be some examples of relevant variables. The next section explores the different conditions that helped Texas attorney general to utilize various means to be the lead litigator against the EPA and influence national environmental policymaking.

3. Lead Litigator: Case Study of Texas Attorney General

Since President Obama's inauguration in January 2009, Greg Abbott, the ex- Attorney General and the current governor of Texas, has sued the federal government 31 times,[129] 23 of which were against the EPA. If that is not enough to illustrate how Texas AGs feel about the federal government, Greg Abbott have famously stated that his day in office boils down to these simple things: "I go to the office. I sue the federal government. And then I go home."[130] Texas is a well-known "red state" and the high number of lawsuits against the federal agency under the "blue" federal government may not be surprising. However, one should wonder how Greg Abbott and his successor Ken Paxton could stay so vocal about opposing the federal

[128] James Madison, *The Federalist Papers* 45 (New York: J. and A. McLean, 1788).

[129] Lauren McGaughy, "After Spending Millions Suing Obama 39 Times, Has Texas Seen a Return on Investment?" Governing. November 23, 2015. (Accessed: May 6, 2016) http://www.governing.com/topics/finance/tns-texas-lawsuits-federal.html

[130] Sue Owen, "Greg Abbott says he has sued Obama administration 25 times," *Polifact*, May 10, 2013, http://www.politifact.com/texas/statements/2013/may/10/greg-abbott_/greg_-abbott-says-he-has-sued-obama-administration-/ (Accessed: Dec. 20, 2015).

government and to use their discretion to stop them legally when they enjoy the same level of discretion as AGs from other states. Formal powers gave state attorneys general the opportunity to wield influence on a national level, but that opportunity would only become a reality under certain conditions.[131]

Texas is chosen for the case study because its attributes make it an interesting case to study.[132] Because of its active litigation behavior, it should reveal the operating variables more clearly. This following case study examines which variables are relevant to the Texas AG in litigating against the EPA. The first part examines the office of the Texas attorney general itself to see if there is a special trait to the office itself. Next, the study investigates energy portfolio of Texas as well as relevant stakeholders in this policy arena to determine whether they influence the electoral and personal interest of the AG.

1) Office of Texas Attorney General

Just like other states, the Texas Constitution establishes office of the attorney general under the executive branch. The Constitution enumerates the status and the authority of attorney general, in which it states that:

> "The Attorney General shall represent the State in all suits and pleas in the Supreme Court of the State in which the State may be a party, and shall especially inquire into the charter rights of all private corporations… He shall, whenever sufficient cause exists, seek a judicial forfeiture of such charters, unless otherwise

[131] Lee Sigelman and Nelson C. Dometrius, "The Linkage Between Formal Powers and Informal Influence," *American Politics Quarterly,* Vol. 16, No. 2 (April 1988), p.159.

[132] Even though it is the most litigious state in the nation, the findings fro m the next chapter demonstrates that the model remains robust withou t Texas, showing that Texas is not an anomaly in this class of events.

> expressly directed by law, and give legal advice in writing to the Governor and other executive officers, when requested by them, and perform such other duties as may be required by law."[133]

A few of the Texas AGs have been surveyed in the past on the appropriate limits of an AG's duty and authority. Most of the surveyed AGs agree that the role of AGs is limited to law enforcement and strictly following the clients' wishes, even when they are wrong.[134] Former Texas attorney general turned governor Mark White states that "A lot of people misinterpret the attorney general's office. They think he's the lawyer for the people, but that's not true in a direct sense. His job as a constitutional officeholder is to represent the State of Texas, so he becomes the lawyer for the governor, the lieutenant governor, and so on."[135]

Jim Mattox, serving from 1983 to 1990, however, argued that "the attorney general has the obligation to step between the government and the citizen to keep the government from abusing the citizen."[136] Texas AGs since the turn of the century would agree with Mattox and others who have cited common law to assert broader authority. Moreover, there have been controversies surrounding the "general-like" behavior of the Texas AG in the past.

The office of the attorney general also enjoys significantly larger budget than other states. The Office spent about $5.9 million as of mid-2016 suing the federal government in various policy areas. So far, Texas has won

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[133] Texas Constitution, Article IV, Section 22.

[134] The author, however, focuses on whether the attorneys general of Texas have the right to go against the wishes of their clients. Bill Aleshire, "The Texas Attorney General: Attorney or General?" *The Review of Litigation*, Vol. 20, No. 1 (Winter 2001), pp.201-202.

[135] Brian D. Sweany, "The Overcomer," *Texas Monthly*, October 2013, http://www.texasmonthly.com/politics/the-overcomer/ (Accessed: May 11, 2016).

[136] Eskenazi in Aleshire, 2001, p.201.

7 cases, lost 12, withdrew 9, and is waiting for 20 pending rulings.[137] Greg Abbott, the current governor and ex-AG, expanded the law enforcement division of the AG's office from about thirty people to more than one hundred.[138]

Texas attorney general enjoys structural independence within the state government and financial stability, free to pursue litigation in the name of the state and, in a broader sense, the public interest. While they are bound by constitutional and statutory constraints, the previous section illustrates that the interpretation of their duties has been fairly fluid through time. In order to understand Texas's active opposition to EPA's regulation, the following sections explores Texas AG's electoral and institutional interests.

2) Texas's Energy Profile and the Clean Air Act

Greg Abbott's oft-cited reason for resisting the EPA's regulation was the critical impact the new regulations would have on the Texas economy. He argued that the new regulations will hinder job creation, damage energy independence, and slow economic recovery.[139] As Texas has very large presence of fossil fuel based industries, Texas AG's electoral interest should align with the energy sector. This section delves into the energy profile of Texas to see whether EPA regulations have a detrimental impact on the energy sector.

Texas is the second-largest state after Alaska, with the second-largest

[137] Neena Satija, "Texas vs. the Feds – A Look at the Lawsuits," *The Texas Tribune,* Jan. 17, 2017. https://www.texastribune.org/2017/01/17/texas-federal-government-lawsuits/ (Accessed May 12, 2017).

[138] Sweany, 2013.

[139] Becca Aaronson, "Texas vs. the Federal Government," *The Texas Tribune,* July 17, 2013. https://www.texastribune.org/library/about/texas-versus-federal-government -lawsuits-interactive/#the-endangerment-finding (Accessed May 10, 2016).

population[140] and second-largest economy after California. But Texas leads the nation in oil and natural gas production,[141] accounting for 36.7% and 29.1% respectively of the total amount produced in the U.S. Natural gas production has actually been steadily declining since its peak in the 1970s, but production began to rise again as hydraulic fracturing or "fracking" technology was introduced and embraced.[142] Texas ranks first in consuming natural gas as well. The industrial sector dominates the in-state natural gas demand, amounting up to 80% of the state consumption. Texas produces and consumes more electricity than any other state, and the industry consumes a significant portion of this energy. Texas's share of the nation's net electricity generation surpassed 10% in 2016, of which over half is generated by natural gas, 23.8% by coal, and 10.3% by nuclear.

Though Texas leads the nation in fossil fuel usage, Texas also boasts abundant renewable energy resources, particularly wind power. In 2014, Texas produced about 9% of its net generation from wind and more than 20% of the nation's wind-powered electrical power.[143] "Texas's relentless pursuit of wind power responds to the state's isolated electric grid, to the state's relatively high demand for electrical power, and to Texans' demand for a reliable, secure, and relatively clean source of homegrown electrical power." Texas's success with reducing energy-related carbon dioxide emission is likely due to its increased use of natural gas and wind. Knowing

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[140] U.S. Census Bureau, "Population Estimates, State Totals: Vintage 2014, Tables, Annual Estimates of the Resident Population for the Unites States, Regions, States, and Puerto Rico: April 1, 2010 to July 1, 2014." 2014.

[141] U.S. Energy Information Administration, State Energy Data System, Table P2, Energy Production Estimates in Trillion Btu, 2013, http://www.eia.gov/state/print.cfm?sid=TX (Accessed May 11, 2016).

[142] U.S. Energy Information Administration, *Texas Natural Gas Marketed Production (Million Cubic Feet), 1967-2014*, November 30, 2014 (Accessed May 12, 2016).

[143] U.S. Energy Information Administration, *Electric Power Monthly*, February 2015, Table 1.14.B.

that Texas now boasts the greatest wind generation capacity than any other state with more than 32,000 gigawatthours (GWh) through October of 2014,[144] it is not surprising that Texas has pushed for aggressive Renewable Portfolio Standard(RPS) which requires an increased production of energy from renewable energy sources.

Linking Texas's energy profile with its policy level, Texas is often categorized not as a passive state, but as a "surprise" state.[145] This means that Texas has been more aggressive than expected, considering its fossil fuel dependence and its geographic environment. "Active" states with high policy activity share traits of low dependence on fossil fuels for electricity production, presence of energy shocks, high electricity prices, and low energy consumption per capita. On the other hand, "passive" states with low policy activity share the traits of high dependence on fossil fuels of energy production, absence of energy shocks, low electricity prices, and high energy consumption per capita. Texas definitely is highly dependent on fossil fuels for electricity production, as electricity generated by hydroelectric and other renewable sources makes up 13.4%. As of 2013, Texas ranks sixth in energy consumption per capita and while not as low as other states, Texas enjoys lower than average electricity prices in residential, commercial, and industrial sectors.[146] Following Thomson's logic, Texas should be very reluctant to implement environmental and energy policies

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[144] American Wind Energy Association, "Texas Wind Energy," 2015 (Accessed May 13, 2016).

[145] Vivian E. Thomson, *Sophisticated Interdependence in Climate Policy: Federalism in the United States, Brazil, and Germany* (London: Anthem Press, 2014), p.13.

[146] Electricity price for residential sector is 10.95 cents/kWh, with the U.S. average price being 12.01 cents/kWh. For the commercial sector, the price is 7.60 cents/kWh, with the U.S. average being 9.98 cents/kWh. Industrial sector enjoys the lowest price at 5.09 cents/kWh, and the U.S. average is at 6.42 cents/kWh.

and most of the time it is, but at the same time it has also been very active in implementing energy policies that maximizes its wind potential. Because of this discrepancy, it is difficult to establish a simple correlative relationship between a state's energy profile and policy implementation. The only conclusion that can be drawn so far is that energy policies can have significant consequences in Texas. Then, what kind of consequences can the new additions to the Clean Air Act bring for Texas?

In-depth analysis of the proposed Clean Power Plan concludes that, in fact, the plan is not as damaging as some states make it out to be. More specifically, the shale revolution has brought major changes in emission reduction efforts. The analysts argue that compliance costs are relatively cheaper with energy efficiency measures and regional cooperation can further lower costs. Moreover, states that were originally opposed to the plan can actually benefit economically, further reducing negative economic impact.[147] As the largest wind energy producer in the nation, Texas can comply with the EPA's regulations without suffering the alleged billions of dollars worth damage. With this mixed conclusion in the energy profile and consequences of the new changes, why has Texas been consistently maintained its antiregulatory stance against climate change agenda? If some are to lose, and some will win, from an overall perspective, the state of Texas may not have a strong reason to oppose these regulations.

Keeping in mind that Texas has sued the Obama Administration incessantly during the President's tenure, it is important to note that Texas's

[147] John Larsen, Sarah O. Ladislaw, Whitney Ketchum, Michelle Melton, Shashank Mohna, and Trevor Houser, "Remaking American Power: Potential Energy Market Impacts of EPA's Proposed GHG Emission Performance Standards for Existing Electric Power Plants," *Center for Strategic and International Studies*, Nov. 2014. http://rhg.com/wp-content/uploads/2014/11/RemakingAmericanPower.pdf (Accessed May 12, 2016).

litigious behavior was prompted by an outside force. Eric Groten, an attorney at Vinson & Elkins who represented Texas-based Coalition for Responsible Regulation and many of the nation's biggest polluters, approached Texas Commission on Environmental Quality in 2009 via email. From the email exchange, it can be inferred that the TCEQ did not originally have any intention of initiating the lawsuit challenging the EPA on its endangerment findings, the foundation of EPA's subsequent regulations.[148]Coalition for Responsible Regulation is linked with Quintana Minerals Corporation, which is owned by the Robertson family, the owner of the largest private coal reserve in the nation. Moreover, Corbin Robertson Jr. is a known contributor to then-Governor Rick Perry and then-AG Greg Abbott, along with other Texas politicians.[149] Abbott filed the lawsuit challenging the climate science behind the finding. Interestingly, the office of AG accepted the help from outside counsel named David Rivkin, the same attorney leading the multi-state AG litigation against Affordable Care Act.[150]

Since the watershed moment in 2010, Office of the AG went on to initiate numerous lawsuits against the EPA, often along with industry coalitions consisting of coal and power companies. But wind potential and wind generation works in favor for Texas. It balances out the short-term

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[148] Jim Marston, Testimony before the Energy and Power Subcommittee of the House Energy and Commerce Committee. Dec. 30, 2010. http://blogs.edf.org/texasclean airmatters/files/2014/12/J-Marston-Testimony-3-24-11.pdf (Accessed May 10, 2016).

[149] Vickie Patton, "Attacks on EPA Led by Group that is Linked to Owner of Largest Private U.S. Coal Reserves," *Environmental Defense* Fund, December 21, 2010, http://blogs.edf.org/climate411/2010/12/21/attacks-on-epa-led-by-group-that-is-linked-to-owner-of-largest-private-u-s-coal-reserves/ (Accessed: May 10, 2016).

[150] Asher Price, "Lawyer representing Texas in environment and health suits has ties to industries," *Statesman*, February 27, 2011, http://www.statesman.com/news/ news/local/lawyer-representing-texas-in-environment-and-hea-1/nRXxC/ (Accessed May 10, 2016).

costs traditional energy companies would bear. The state as a whole is not going to suffer significant economic shock by complying with the new additions to the Clean Air Act.

Texas, housing the largest energy corporations in the nation, is well-known for being business-friendly. Is this the core reason for Texas being decisively antiregulatory? It may be the other way around. If you look at other documents, it states that Texas is using its large industrial base to resist EPA's regulations. According to some documents,[151] the major companies in Texas have had settlement negotiations with the EPA directly, or have officially announced that they are planning to apply for permits. If the industry has shown that they are willing to comply with the federal regulations, what base does the state attorney general have for arguing that the regulations harm the economy? In other words, electoral interest does not wholly explain Texas AG's consistently aggressive litigation strategy against the EPA. The next section looks at possible sources of influence from various state government actors.

3) Texas Government and Texas Attorney General

A state attorney general operates within the executive branch, of which the governor is the chief executive. The AG provides legal services and opinions to the governor, state officials, and state agencies, but at the same time AG is granted autonomy to check gubernatorial power and diffuse executive authority among elected state officials. This section delves into the various state actors of Texas state government to see if they influence the electoral or personal interest of the Texas AG.

The Governor of Texas is relatively weaker than that of the US President

[151] Marston, 2014, p. 7.

or other governors because the Texas Constitution has instituted plural executive system.[152] Scholars have reached mixed conclusions about gubernatorial influence on state policies. Some argue that elected agency heads can act independently from the governor's policy goals (*see,* for example, Schlesinger 1965; Beyle 1995). Others point out that the governors have the power to adjust all budgetary requests, including that of the AG's office, before making the recommendation to the legislature.[153] While the conclusion is not clear, what Texas governors have in mind for Texas is simple and it has remained consistent over the years: "to provide a low-tax, low-regulation business environment to encourage economic growth."[154]

Looking at the state legislature, the state government ideology[155] has remained consistently conservative over the years as well. In the data collected for Chapter 4, Texas's state government ideology was already very skewed, staring at 15.6639 and steadily declining. After two years, it drops down to single digit, 8.6608, and further drops to 6.9723 in the next election. This implies that the Texas legislature consistently becomes closer to the extreme conservative end of the political ideology spectrum.

In the state litigation against EPA, there are other state actors involved in many cases. As shown in *Figure 2,* 17 of the 24 lawsuits have included another state actor as the petitioner in the filed lawsuits. Texas Commission

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[152] *The Book of the States* (Lexington, Kentucky: The Council of State Gov ernments, 2002), pp.150-151.

[153] Clark, 1997.

[154] Nealey, 2013.

[155] The state citizen ideology measure is compiled from the observed voting patterns of states' congressional delegations. utilizes the interest group scores for members of Congress, ideological estimates of electoral challengers an d vote weights by district. The range of the measure is from 0 to 100, co nservative to liberal respectively.; William D. Berry, Evan J. Ringquist, Ric hard C. Fording, Russell L. Hanson, "Measuring Citizen and Government I deology in the American States, 1960-93," *American Journal of Political Scie nce* Vol. 42, No. 1 (1998).

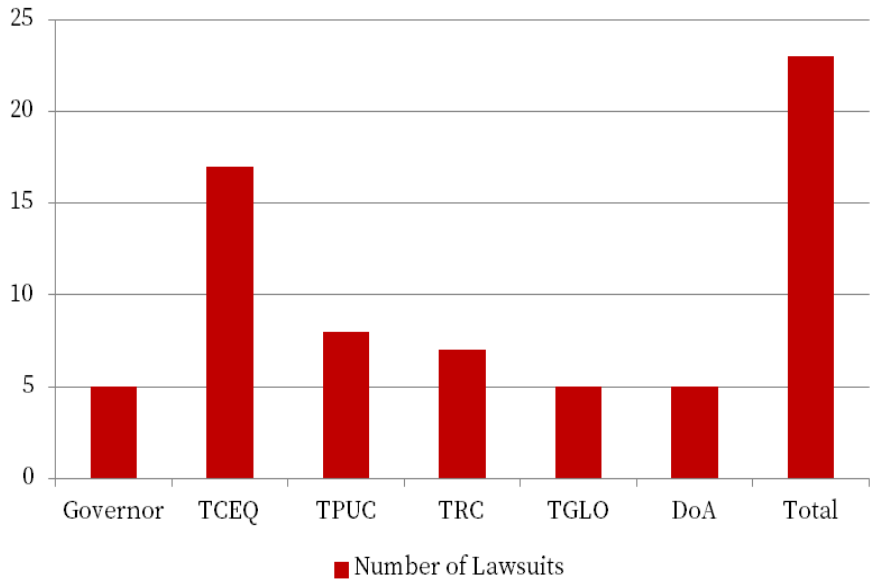
on Environmental Quality was the most frequent co-petitioner, participating in 17 lawsuits. TCEQ is the state environmental agency in charge of implementing and enforcing environmental regulations. The governor appoints three full-time commissioners to six-year terms who are then confirmed by the Texas Senate.[156] Of the three commissioners, the governor also names the chairman. They are in charge of the agency and make final decisions on contested permitting and enforcement matters.[157] It is known to be critical of the EPA's efforts to implement federal initiatives. When greenhouse gases were first incorporated into the Clean Air Act, Texas state officials have declared their disdain for the EPA's regulation, stating that they "have no intention of implementing this portion of the federal air permitting program." So it is not surprising that Texas has even been officially criticized by the EPA for its "renegade behavior."[158]

[156] Texas Constitution, Article 4, Section 12.

[157] Texas Commission on Environmental Quality, "Office of the Commissioners," Oct. 30, 2015. https://www.tceq.texas.gov/about/organization/commissioner.html (Accessed May 15, 2016).

[158] Asher Price, 2011.

Figure 2. Number of Texas AG Lawsuits involving other State Actors



Acronyms: TCEQ (Texas Commission on Environmental Quality),
TPUC (Texas Public Utility Commission)[159],
TRC (Railroad Commission of Texas)[160],
TGLO (Texas General Land Office),
DoA (Texas Department of Agriculture)

Source: Author's calculations based on the original dataset.

The Commissioner of the General Land Office and the Commissioner of Agriculture are not appointed by the governor, and are elected to a four-year term. The three commissioners of the Texas Railroad Commission are elected to six-year staggered terms,[161] and the chairperson is chosen by

[159] For suits 10-1222, 10-60961, 10-1425, 11-1038, and 11-1063, Texas Public Utility Commissioners Barry Smitherman, Donna Nelson, and Kenneth Anderson are individually named among petitioners. I have counted their involvements as on behalf of the Texas Public Utility Commission, once per lawsuit. In lawsuit 10-1281, Barry Smitherman is included among petitioners as the chairman of Texas Public Utility Commission.

[160] For the lawsuit 11-1063, Railroad Commission of Texas is named as Texas Railroad Commission.

[161] Texas Railroad Commission, "Commissioners," July 20, 2015. http://www.rrc.

fellow commissioners. The Railroad Commission had traditionally been one of the most powerful bodies in the state government. It regulates state and interstate railroads, but it is also authorized to regulate the oil and gas, trucking, and mining industry. Given the historic importance of oil and gas to the Texas economy, regulatory duties related to this industry have been the commission's most important responsibility.[162]

From the governor, state legislature, to relevant state agencies, Texas remains consistent in its stance on political ideology and economic development. As a state official, Texas attorney general is highly likely to represent the unified voice of the state. The previous conclusion in the energy portfolio may have been inconclusive, but the clear stance from the state government provides Texas AG enough electoral and personal incentive to follow suit.

Following the state stance would be beneficial in garnering party support in state primaries and fundraising. Moreover, attorneys general of Texas have gone on to become the governor, or seat in higher political offices. Thus, assisting and representing the voice of other state actors would help establish himself in the same line of rhetoric that is effective in Texas. Previous governor Rick Perry was a staunch opponent of the federal government. And Abbott was his trusted general, fighting the fight. In the interview with Texas Monthly, now-Governor Abbott maintained his aggressive attitude against the federal government. "We need to push back against unprecedented intrusion by the federal government. And so it's a natural transition of going from being a general on the battlefield to

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state.tx. us/about-us/commissioners/ (Accessed May 15, 2016).

[162] University of Texas, "Texas Politics – The Executive Branch," *The Texas Politics Project*, 2005, http://www.laits.utexas.edu/txp_media/html/exec/0908.html (Accessed May 15, 2016); *See* David Prindle, *Petroleum Politics and the Texas Railroad Commission, Austin: University of Texas Press*, 1981.

pursuing the position of the commander in chief while waging that same war."[163]

This case study has so far investigated the electoral and personal incentive for the Texas AG to file vigorous lawsuits against the EPA. After examining the energy portfolio of Texas, it was clear that Texas was better situated to comply with EPA's proposed regulations than it depicts itself. However, the consistent conservative and industry-friendly rhetoric from the state government actors as well as the coordination with the fossil fuel industry denote a strong incentive for the AG to represent those interests. Moreover, Texas is financially ready to file as many suits as it can, priding itself in the number of lawsuits against the federal government.[164] In short, Texas attorney general mobilizes all of the resources available to his office to aggressively pursue the anti-regulation interests pervasive in all levels of state government.

3. Extrapolating Hypotheses

The above case study has highlighted several variables that may explain the vigor with which AGs litigate against EPA and the Clean Air Act. The next chapter of this thesis tests the conclusions drawn from the previous section. Here I aim to organize the conclusions into testable hypotheses.

State governments have indeed succeeded tremendously in resisting, delaying, or altering the implementation and enforcement of federal policies at the state level. Federal-state relations today are typically marked by various forms of negotiation, bargaining, and compromise.[165] The

[163] Sweany, 2013.
[164] Satija, 2017.
[165] Louis Fisher, *Politics of Shared Power,* p. ix.

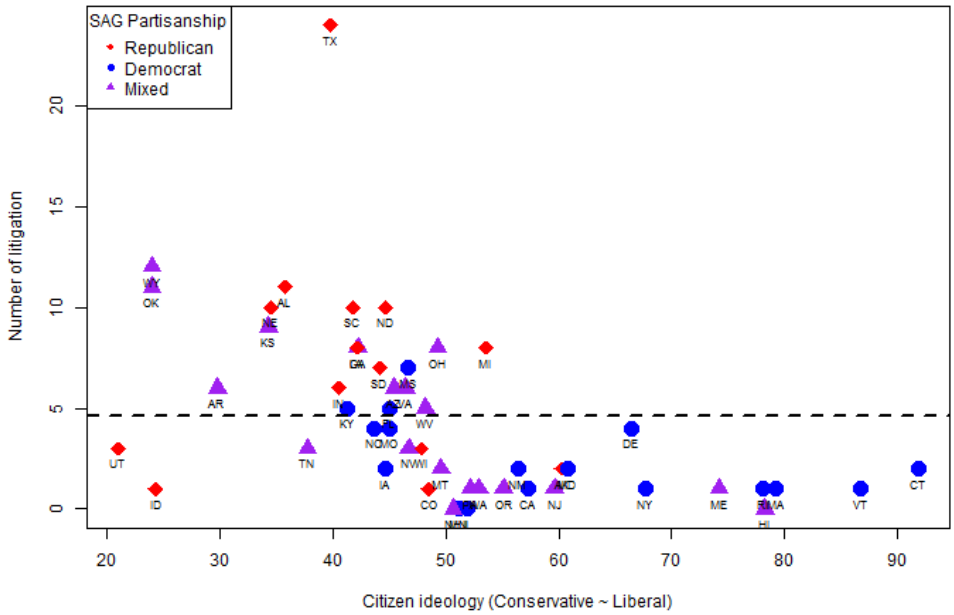
strongest political safeguards of federalism today involve state officials telling or signaling to their federal counterparts that they will not implement federal laws or policies in their existing form. The noncompliant behavior that this study focuses on is part of this category. States can also simply refuse or neglect to comply with the requirements or mandates of federal law and take their chances in terms of consequences.[166] States can also enact laws and policies independent of or parallel to those proposed by the federal government. This authority can be used strategically by states to thwart encroaching federal policies before they are passed or, alternatively, to affect the implementation of federal policies at the state level.[167] When all else fails, state officials can complain loudly about what they perceive to be encroaching or misguided federal law and policies.[168] The prestige and visibility of state attorneys general give them a bully pulpit for communicating with their federal counterparts as well as their constituents. Multi-state lawsuits specifically draw a lot of media attention. Other ways of exhortation include issuing press releases, meeting with members of Congress and executive branch officials, sending letters to federal officials on the association's letterhead stationery, testifying before congressional committees, holding press conferences, writing op-ed pieces for national newspapers, commissioning studies and publishing the findings, and developing positions on federal policy matters.

The research is framed within the political safeguards of federalism and it draws from the works on multi-state litigation, but complements it with policy analysis of environmental regulations. The multilevel electoral

[166] See, e.g., Watson, "EPA is Slammed on Dirty Water"; Meredith, "Tennes see Governor Talks of Revolt on E.P.A. Smog Rules"; Cushman, "Virgini a Seen as Undercutting U.S. Environmental Rules."
[167] Nugent, 2009, p. 67.
[168] Nugent, 2009, pp. 74-75.

system strengthens the likelihood of separate interests being represented in any one government or component of government.[169] The national government's powers are fragmented and each serves a slightly different set of constituents, internally competitive, with distinct interests and each a desire to please its constituents.[170] In order to fulfill their electoral goals, AGs must decide how best to achieve their policy objectives and to which group they will be most responsive. In this section, I evaluate the possibilities of AGs being responsive to interest groups, the general electorate, and actors in the state government.

Figure 3. Number of Litigation, Citizen Ideology, and AG Partisanship



*The dotted-line represents the average number of filed lawsuits, which is 4.6.

Source: Authors calculations based on compiled litigation data, Berry et al.(1998)'s citizen ideology index, and each AG website

[169] Bednar, 2009, p. 109.
[170] Bednar, 2009, p. 105.

Figure 3 illustrates that point clearly. As previously stated, Republican states are more likely to oppose federal regulations, and "more litigious" states in the figure lean toward the conservative end of the spectrum, with Texas being the most prominent example. Previous literature affirms this "entrepreneurial" behavior AGs have adapted in areas of consumer protection and antitrust laws.[171]

1) Responsiveness to Organized Interest

Responsiveness is usually defined by salience and complexity of an issue. "Salience and complexity shape the contours of regulatory politics. They affect incentives to participate, the choice of tactics, the selection of a forum, and the kinds of criteria that are invoked."[172] Environmental regulation is a salient issue because everyone is affected by changes in their surrounding environment. Citizens' health and well-being are directly affected by severe environmental degradation. Moreover, the provisions in the Clean Air Act call for states to reform the current structure of energy generation, which will affect the increase the production cost of manufactured goods, not to mention the cost of electricity itself. Regular consumers would have to bear the increased cost of majority of items. Recent works have reached conflicting conclusions on the power of big business to influence policymaking, and some find that business groups would opt to influence AG with election funds, rather than trying to influence their individual projects and activities.[173] However, scholars more

[171] Spill, Licari, and Ray, 2001; Gifford, 2008; Provost, 2003; Meyer, 2007; Posner, 2004.

[172] William T. Gormley Jr.,"Regulatory Issue Networks in a Federal System," *Polity,* Vol. 18 (1986), p.603.

[173] Virginia Gray et al., "Public Opinion, Public Policy, and Organized Interests in the American States," *Political Research Quarterly,* Vol. 57 (2004), pp.411-420; Christopher Witko and Adam J. Newmark, "Business Mobilization and Public

or less agree that business interests strive to influence regulators when the issue is complex or when the benefits of regulation are narrowly concentrated on particular industries.[174] This can certainly be applied in the area of environmental regulations as these regulations are highly technical and complex in nature. Thus, I expect states and AGs to be responsive to carbon-intensive industries, such as those that deal with power plants, construction, and transportation.

Hypothesis 1: *As the state becomes more sensitive to environmental regulations, the AG is more likely to file litigation against EPA.*

2) Responsiveness to the Electorate

State attorneys general may also be responsive to the general electorate when filing litigation against federal environmental regulations. Research at the state level has reached the same intuitive conclusion that policymakers are responsive to the needs and wants of the electorate.[175] This finding suggests that state attorneys general, who are elected officials, will be influenced by the electorate's ideology. Research on other public officials also provides similar conclusions. Whitford (2002) finds that U.S. attorneys in liberal districts pursue more regulation cases, indicating higher responsiveness to their local constituents.[176] Similarly, scholars that research climate change policy adoption at state level also find state citizen ideology to be a significant factor.[177]

Policy in the U.S. States," *Social Science Quarterly,* Vol. 86 (2005), pp.356-367.

[174] Gormley, 1986; Provost, 2010.

[175] Gray et. al, 2004.

[176] Whitford, 2002.

[177] Matisoff, 2008.

However, I expect that AGs would not be as responsive to the general voters as they would be when dealing with consumer protection or antitrust laws. This is because AG litigation against EPA does not have the same effect as litigation against corporations. The previously stated works deal with AG litigation that has regulatory impact, essentially creating and enforcing regulations. However, these lawsuits against EPA are acts of judicial review. Some of the issues raised in the lawsuits include EPA's partial disapproval of a state's regional haze implementation plan for nitrogen oxides, disapproval of state BART (Best Available Retrofit Technology) determinations, and arbitrary and capricious modification of National Emissions Standards for Hazardous Air Pollutants for backup generators.[178] The issues in question for these lawsuits are generally far too technical and complex to the voters. Thus, I expect state citizen ideology to be relevant only when issue salience is high. The higher the issue salience is, the more sensitive the citizens will be to stricter environmental regulations proposed by the EPA and thus will voice stronger opposition. In such states, the AG will accordingly file more litigation against EPA.

Hypothesis 2*: If environmental regulation is a salient issue, and as the state's citizen ideology becomes more conservative, then the AG is more likely to file litigation against EPA.*

3) Responsiveness to state government

As previously stated, many scholars agree that AGs can exercise independence from other branches of the state government,[179] but I expect a slightly different dynamic for this specific context. Under the

[178] Oklahoma v. EPA (10th Cir. 2012); Nebraska v. EPA et al. (8th Cir. 2012); Delaware et al., v. EPA (D.C. Cir. 2013).
[179] McGinley, 1996; Matheson, 1993.

constitutional mechanism, there are not many ways AGs are constrained by other actors in the state government. Even though it may vary between states, it is possible for the governor to check AG's policy discretion judicially or politically.[180] Also, there have been cases where the legislature effectively constrained the behavior of AGs. For instance, the North Carolina legislature passed a statute that forbade the AG from filing suit against the tobacco companies during the 1990s.[181]

Moreover, AGs can be constrained by the partisan primary. Because AGs need to attract the a particular party's median voters during primary election, they have to curry favor with party leaders and other party loyalists to avoid a primary challenge and maximize fundraising for the general election.[182] In that sense, AGs may be beholden to other members of the government.

Because litigation against EPA is essentially a form of noncompliance with the federal government, AGs would not be able to act as independently as they normally could. Resisting the federal government was decided by AGs without consensus or even consultation with the state government they represent, serious problems will arise. Thus, I expect the AGs to be more responsive to the ideology and opinions of other actors in the state government.

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[180] Some states make it clear that the governor cannot interfere with the state's litigation strategy. Courts have also ruled that attorney general possesses ultimate authority over litigation. See *e.g.*, *Feeney v. Commonwealth*, 366 N.E.2d 1262 (1977).

[181] Mark D. Samuels. Illinois – gave General Assembly power to set aside certain consent decrees negotiated by the Attorney General) Bob Van Voris, Utah Strips AG's Office of Power, National Law Journal April 12, 1999 bill giving the Governor final authority over civil litigation passed in Utah's Legislature in reaction to settlement by the Attorney General of tobacco litigation. (Meyer 2007; Derthick 2011)

[182] Meyer, 2007.

Hypothesis 3: *As the state government's ideology becomes more conservative, the AG is more likely to file litigation against EPA.*

IV. To Sue or Not to Sue? Empirical Analysis of State Attorneys General Litigation Behavior against the Clean Air Act

Previous chapter illustrated that decisions of the state attorneys general are not as independent as traditionally perceived. In fact, state attorneys general are significantly bound by their electoral interests and other state government actors when suing the federal government. This chapter aims to investigate whether the same trend can be witnessed in the rest of the nation and whether these factors can explain the variance among 50 state attorneys general on Clean Air Act, the federal regulation in charge of regulating air pollutants including greenhouse gases.

1. Model, Data, and Method

1) Dependent Variable

The data of the state litigation come from 3 legal databases, *Nexis-Lexis*, *WestLaw*, and *Justia*, and the U.S. Government Publishing Office (GPO).[183] Relevant information was obtained through searching for cases with "Environmental Protection Agency" as the respondent, and the cases were further narrowed down by those with the state government or the state attorney general as the plaintiffs. Additional information to cross-reference and verify the content and the relevance of the lawsuit was obtained from

[183] The list of all state litigation against the EPA used in this research is attached in Appendix A: Data Collection.

the Federal Registrar, legal literature, and media coverage. Through this process, I narrowed down the dataset to litigation on the Clean Air Act filed between 2009 and 2015. Collected information includes the case number, the plaintiff, the defendant, when and where the lawsuit was filed, and the claim of the complaint. Cases are further categorized into those involving more than one state, and those filed outside the D.C. Circuit.

Table 1. Descriptive Statistics for U.S. State-level Variables

Variable	Mean	Standard Deviation	Range
Dependent Variable			
Number of AG litigation	4.6	4.468	0-24
Independent Variables			
State citizen ideology	49.874	15.644	0-100 (Conservative to Liberal)
State government ideology	41.228	31.492	0-100 (Conservative to Liberal)
Party of attorney general	0.540	0.503	1=AG is Democrat 0=AG is Republican
Method of selection	0.860	0.351	1=AG is elected 0=AG is appointed
Budget for AG office (millions of dollars)	47.636	75.752	3.324-484.148
Issue salience (total energy consumption + carbon intensity)/(Number of climate policies)	5.325	1.003	3.798-7.630
Carbon intensity	471.360	341.438	128.400-1,914.600
Total energy consumption (per capita)	354.780	168.270	184-918
Number of climate policies	3.08	1.947	0-6
State median four-person family income (1000s of dollars)	80.920	13.414	60.477-111.463
State population density (population in millions divided by land area)	198.274	264.090	1.300-1,210.100

N=50

The total number of lawsuits filed against EPA's Clean Air Act during 2009 and 2015 is 230, meaning the average number of litigation is 4.6. Variable summaries and descriptive statistics can be found in Table 1.

2) Independent Variables

Previous researches in environmental policy adoption use various indicators to measure the strength of state environmental programs. They demonstrated that political, economic, and geographical resources are the significant motivators. I believe that the same variables that account for the adoption of environmental policies can illustrate which variables are salient in environmental regulatory decisions. Thus, I measure salience of environmental regulation in a state by creating a composite variable, consisting of total energy consumption, carbon intensity of the state economy, and the number of enacted climate change policies. States with greater energy consumption and higher carbon intensity value indicate a strong presence of industrial interests in the state. The provisions in the Clean Air Act call for states to reform the current structure of energy generation, which will increase the production cost of manufactured goods, not to mention the cost of electricity itself. Thus, industrial interests groups are opposed to expanding the current regulatory scheme. However, the presence of strong industrial interests alone cannot account for the variations in the state resistance against the Clean Air Act. This number is then divided by the number of currently enacted climate change policies. This indicator is a proxy for policy stringency. States that have already enacted many climate change policies are more likely to welcome more regulations. This composite variable will be able to show in which states expansion of environmental regulation will be salient issue. The information is gathered from the U.S. Energy Information Agency, EPA, and

the Center for Climate and Energy Solutions.

Additionally, as cases become salient, I expect AGs to be more responsive to the ideology of the electorate. The higher the issue salience is, the more sensitive the citizens will be to stricter environmental regulations proposed by the EPA and thus will voice stronger opposition. In such states, the AG will accordingly file more litigation against EPA. The ideology of the electorate is measured by the citizen ideology measure developed by Berry et al. (1998).[184] This measure captures the inter-year variations and also captures the differences within parties across all 50 states. I expect this measure to have a significant effect when the issue salience variable is statistically significant. Thus, an interaction term is created to capture the conditional effect of citizen ideology on issue salience.

Next, I expect AGs to be influenced by the ideology of the state government. Even though AGs are known to be structurally independent from other state actors, I expect them to be influenced by state politics when deciding to act against the federal government. Thus, the states with Republican governor, or the Republican majority in the state legislature may influence the AG to pursue litigation against the federal government. In such states, the AG will file more litigation against EPA. I also utilize Berry et al.'s (1998) measure for state government ideology.

3) Control Variables

I include a measure for state government budget levels to control for the resources available to each office of the attorney general. The AG needs considerable resources at hand to be able to bring lawsuits (Meyer 2007;

[184] The state citizen ideology measure is compiled from the observed voting patterns of states' congressional delegations. utilizes the interest group scores for members of Congress, ideological estimates of electoral challengers and vote weights by district. The range of the measure is from 0 to 100, conservative to liberal respectively.

Gleason 2013), especially knowing that they will be rejected in court.[185] Previous researches on multi-state litigation show that budget is not a strong influence in AG behavior,[186] but I include the variable to see if it has any influence in AG's decision to file suit against a federal agency, where a large settlement is not expected. States with limited resources would either be unable to file lawsuits, or would opt to join multi-state litigations. Budget allotted to the office of AG office is in 1999 dollars in millions.[187]

Previous works demonstrated that socioeconomic variables are important causes of policy change at the state level.[188] In the context of state energy politics, studies have found that income characteristics of a state's population indicate the presence of middle-class values, and that those characteristics are related to adoption of climate change-related policies.[189] For this paper, I incorporate each state's median four-person family income to represent each state's overall preference of federal environmental regulations. I also expect that a state's urban population

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[185] The Clean Air Act requires states to file their complaints in the D.C. Circuit of the Court of Appeals, no later than 60 days after the rule is published in the Federal Register, and no earlier than the publication date (42 U.S.C. § 7607). The D.C. Circuit has the exclusive jurisdiction over the Clean Air Act as these regulations are nationally applicable. Attempts to litigate other clean air rules outside of the D.C. Circuit have been unsuccessful. (*Oklahoma v. McCarthy,* 2015 WL 4414384 (D. Okla., dismissed, July 17, 2015); *Texas v. EPA,* WL 710598 (5th Cir. Feb. 24, 2011)).

[186] Provost, 2010a.

[187] Rorie Spill Solberg and Leonard Ray, "Capacity, Attitudes, and Case Attributes: The Differential Success of the States before the United States Courts of Appeals," *State Politics & Policy Quarterly* Vol. 5, No. 2 (2005), pp. 147-167.

[188] Ringquist and Garand, 1999.

[189] Economic and demographic factors were often found to be influential factors in state regulations. *See* Kemp (1981) for relationship between state income and state power plant siting regulations; economic activity of regulated industries with SO2 and NO2 regulations(Rinquist 1993); For greenhouse gases and climate change-related policies, *see* Rabe(2008b) and Matisoff (2008).

should relate to the propensity of each state in terms of environmental regulations. This is because urban population level is related to each state's pollution level as well as energy consumption behavior.[190] Higher density in population and thus higher energy consumption density may indicate more sensitivity to the EPA regulations that raises the cost of utilities. Income and annual population density figures were collected from the U.S. Census Bureau.

4) Method

I utilize an event count model to estimate the independent effect of the eight variables on the number of lawsuits a state attorney general has filed against EPA's Clean Air Act between 2009 and 2015. I do not conduct a panel analysis to account for the variations through time. This is because the paper does not aims to see when AGs file lawsuits, but why some AGs file more lawsuits than others. Moreover, the independent variables, such as state citizen ideology, budget, energy consumption density, or income, do not vary significantly through time. Thus, I use the 2013 data for all of the independent variables to account for the variations among states.

This model should be estimated as a negative binomial count model. The aggregate number of state litigation is 230, which ranges from 0 to 24 per state. Given the mean (4.6) and the variance (19.959) of the dependent variable, Poisson model cannot account for the overdispersed data and negative-binomial model is the most adequate[191]. Because Texas, with 24 lawsuits, definitely stands out in the overall distribution, there is a

[190] David E. Adelman, "Environmental Federalism: When Numbers Matter More than Size," *UCLA Journal of Environmental Law and Policy,* Vol. 32, No. 2 (2014), pp. 238-328; Provost, 2010a.

[191] Even without Texas, the variance (12.374) is far greater than the mean (4.204) and thus negative-binomial regression is more adequate.

possibility that this anomaly wields too much influence in the analysis. To check the robustness of the model, I estimate one model with Texas and one without Texas.

3. Interpreting the Results

Table 2 presents the results of modeling AG litigation behavior against the EPA in terms of state-level variables. As denoted, Columns 1 and 2 are estimated with all 50 states, and Columns 3 and 4 are estimated without Texas, the most active litigator of the nation. The purpose of eliminating Texas from the model was to see if the model is still robust without Texas. While the effect size may have become smaller, the coefficients are more or less consistent without Texas. This suggests that while Texas may be a particularly active litigator in this model, the Texas attorney general's litigious behavior is not an anomaly that strays too far from the main model. Columns 2 and 4 are models with the interaction term, and looking at the AIC, they are slightly better fitted than their counterparts.

Table 2. Negative-Binomial Model of U.S. States' Propensity to File Litigation against the EPA's Clean Air Act

	Dependent variable: Number of lawsuits against the CAA			
	(1) Without interaction	(2) With interaction	(3) Without Texas Without interaction	(4) Without Texas With interaction
State citizen ideology	-0.002	0.101***	-0.002	0.087**
	(0.010)	(0.037)	(0.009)	(0.036)
State government ideology	-0.016***	-0.019***	-0.015***	-0.017***
	(0.005)	(0.005)	(0.004)	(0.005)
Issue salience	0.467***	1.256***	0.445***	1.137***
	(0.099)	(0.299)	(0.091)	(0.292)
Party of AG	-0.168	-0.289	-0.103	-0.206
	(0.217)	(0.216)	(0.203)	(0.214)
Budget available to AG	0.002*	0.003***	-0.0002	0.0004
	(0.001)	(0.001)	(0.002)	(0.001)
Method of selection	0.216	0.323	0.262	0.374
	(0.329)	(0.335)	(0.308)	(0.328)
Population	0.143*	0.110	0.113	0.093
	(0.079)	(0.077)	(0.074)	(0.076)
Income	-0.370	-1.048	-0.323	-0.880
	(0.726)	(0.736)	(0.677)	(0.724)
State citizen ideology * Issue salience		-0.019***		-0.016**
		(0.007)		(0.006)
Constant	2.811	6.039	2.493	4.832
	(8.273)	(7.955)	(7.725)	(7.846)
Observations	50	50	49	49
Log Likelihood	-99.179	-95.638	-92.274	-89.306
theta	28.622	140.097	39,624.260	58,241.160
	(31.235)	(563.341)	(940,819.600)	(1,066,765.000)
Akaike Inf. Crit.	216.358	211.276	202.548	198.612

Note: *p<0.1; **p<0.05; ***p<0.01; Standard errors are given in parentheses.

Examining Column 1, we see that AGs are more likely to file suit when environmental regulation is a salient issue in the state, meaning the state has high levels of energy consumption and carbon intensity, as well as fewer environmental regulations in place. This confirms the phenomenon where states in which fossil fuel industries wield more influence show more resistance to stricter EPA regulations. State government ideology has a

significant, yet small influence on AG's decision to file litigation. As the state government becomes more liberal, state AGs are less likely to file lawsuits. In other words, as more states become "red," more resistance to EPA regulations can be expected. On the other hand, state citizen ideology has no significant impact, indicating that AGs may be more responsive to industry interests (indicated via energy consumption levels and carbon intensity) and state actors than to the general electorate. AG budget has a slight impact at the level of $p<0.10$, meaning that having more resources do allow AGs to pursue more lawsuits. Among the other state-level factors, only population density is significant, but also at the lowest level. This is in line with the idea that urban population level is positively correlated with pollution level and energy consumption behavior.[192]

In Column 2, the effect of issue salience, state government ideology, and budget on AG litigation is also significant and with larger impact than Column 1. The coefficient for state citizen ideology becomes significant with the interaction term, concordant with the previously proposed hypothesis. To examine the mediating effect of issue salience, I add the issue salience coefficient (1.256) to the interaction term coefficient (-0.019), which produces a coefficient estimate of 1.237. Calculating the coefficient estimate's standard error (0.334) reveals that the variable is significant. This provides support for the hypothesis that AGs pursue electoral goals by showing responsiveness to the general electorate when they are likely to be rewarded for doing so.

Columns 3 and 4 yield similar results with Columns 1 and 2. In Column 3, budget and population density are no longer significant and issue salience and state government ideology are significant. This illustrates the impact Texas has on the first model. Without the large budget of Texas and

[192] Adelman 2014; Provost, 2010a.

its population, they no longer have positive influence in AG litigation behavior. Similarly, the budget variable is no longer significant under Column 4 as well. The effect of significant variables is slightly lesser than that of Column 2. Adding the issue salience coefficient (1.137) and the interaction term (-0.016) produces a coefficient estimate of 1.121. The calculated standard error is 0.326, and the calculation reveals that the variable is also statistically significant. When environmental regulation is a salient issue, AGs are more responsive to the voices of the electorate as well as other government actors and show this responsiveness by filing more lawsuits against the EPA.

Party of the AG, method of selection, and income are all statistically insignificant across four models, but some inferences can be made. The coefficients for the AG's party all have negative signs, and thus consistent with the intuitive conclusion that Republican AGs would sue the Democratic federal government more. Moreover, the statistical insignificant effect of AG party also supports the idea that AGs are influenced more by their state political environments, and less by their own parties. The coefficients for the method of selection all have positive signs, also consistent with the idea that elected AGs are more motivated to fulfill their electoral goals and thereby litigate more actively. Lastly, the coefficients for income level all have negative signs, concordant with the idea that states with higher income levels are likely to have more liberal citizens, who have been favorable to environmental regulations.

4. Discussing the Implications and Limitations

The results of this analysis present two major findings. First, AGs litigation behavior against the EPA's Clean Air Act is highly influenced by

state-level variables. This is consistent with other works in public policy literature on policy adoption.[193] Just as state governments adopt climate change policies according to each state's geographical, economic, and political circumstances, state attorneys general have to consider the state's vulnerability to expansion of the state's current regulatory framework. By incorporating the interaction term, the paper's findings confirm that state citizen ideology is relevant only when issue salience is high[194]. The higher the issue salience is, the more sensitive the citizens are to stricter environmental regulations proposed by the EPA and thus will voice stronger opposition.

The findings also provide an interesting conclusion on the role of interest groups. Issue salience, which served as an indicator for the presence of pro-industrial interest[195] and sensitivity to environmental regulations, was a strong predictor for active AG litigation behavior. Business interests strive to influence regulators when the issue is complex or when the benefits of regulation are narrowly concentrated on particular industries,[196] and the findings of this research suggest that AGs have been

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[193] Matisoff, 2008; Magali Delmas and Maria J. Montes-Sancho, "U.S. State Policies for Renewable Energy: Context and Effectiveness," *Energy Policy,* Vol. 39, No. 5 (2011), pp. 2273-2288.

[194] I have also run models to test the interaction effect between party of the AG and state government ideology with issue salience. I include the results of the model in the Appendix.

[195] I acknowledge that there are other interest groups at play here. In order to capture the presence of pro-industrial and pro-environmental interest groups, I have run another model that incorporates the number of members to the Sierra Club, the nation's most prominent pro-environmental interest group. Other researchers have incorporated Sierra Club membership as proxy for environmental preferences (*see* Cordano et al. 2004; Delmas and Montes-Sancho 2011; Maxwell et al. 2000). The results did not change in any significant way, so I infer that pro-industrial interests have a stronger influence than pro-environmental groups in the decision-making process and have only incorporated a measure for pro-industrial interests.

[196] Gormley, 1986; Provost, 2010.

highly responsive to the state's industrial interests. Utilizing the data from National Institute on Money in State Politics, it will be meaningful to explore if business groups actually opt to influence AG with election funds, rather than trying to influence their individual projects and activities.[197] It will be pertinent to pursue the sources of election funds in major state elections to further this line of inquiry.

Second, other state government actors influence AGs litigation decision against a federal agency. As many studies have demonstrated, AGs are structurally granted independence and use this discretion to actively pursue lawsuits under *parens patriae* authority.[198] As such, other state actors, such as the governor or the state legislature, were not seen as a significant variable in their analyses. This paper departs from the extant literature in viewing the impact of state government actors. As the United States suffers from an increasingly polarized Congress and subsequent policy gridlock, polarization has trickled down into state politics. After the 2012 election, the United States had 37 trifectas[199], the first time in more than 50 years (NCSL 2013). Currently, there are 30 trifectas – 23 Republican and 7 Democratic – out of 50 states. This means that one party can essentially control policy agendas and outcomes. State attorneys general have been known to be somewhat immune to the pressure from governors or the state legislatures. However, when the opinions from other government actors have a single partisan voice, it would be more difficult for AGs, the legal

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[197] Gray et al., 2004; Witko and Newmark, 2005.

[198] Gifford, 2008.

[199] Trifecta refers to when one political party holds the governorship, a majority in the state senate, and a majority in a state house. For more information on partisan trifectas and its impact on U.S. politics, *see* George Pallay, *Who Runs the States? Part 1: Partisanship of the 50 States between 1992-2013.* May 2013. Ballotpedia. Lucy Burns Institute. https://ballotpedia.org/wiki/images/c/ca/WhoRunstheStates_Part1_Partisanship.pdf (Accessed Nov. 16, 2015).

representative of the state government, to go completely against the state government.

State litigation, under this context, plays a highly important role. State litigation employed by state attorneys general against EPA is a form of judicial review. Under the provisions in the Clean Air Act and the Administrative Procedure Act, state governments can seek judicial review over EPA's actions or challenge that its determinations are "arbitrary or capricious."[200] In the legal literature,[201] judicial review of administrative actions is deemed necessary to ensure that regulatory agencies comply with congressional commands. Also, judicial review is supposed to serve as a corrective measure in which regulatory agencies have pursued undertakings where benefits are exceeded or dwarfed by their real-world costs.[202]

However, over the past few decades, AGs have become much more active in creating and enforcing federal regulations that have had significant ramification for the nation. Because the outcomes of these lawsuits create legal precedents, the AGs have been essentially dictating the direction of regulatory policies. Essentially, the AGs from the 23 Republican trifecta states and other conservative states will work towards shaping the federal policies in line with Republican stances, with legal repercussions. The findings from this paper provide support for this phenomenon and highlight the implications of state litigation for federalism. Under the Obama Administration, conservative AGs have been highly active in

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[200] 42 U.S.C. § 1857h-5 (b).

[201] Cass R. Sunstein, "On the Costs and Benefits of Aggressive Judicial Review of Agency Action," *Duke Law Journal,* Vol 38, No. 3 (1989), pp. 522-537; Glen Robinson, *American Bureaucracy: Public Choice and Public Law.* (Ann Arbor: University of Michigan Press, 1991), p. 181; Martha Anne Humphries and Donald R. Songer, "Law and Politics in Judicial Oversight of Federal Administrative Agencies," *The Journal of Politics,* Vol. 61, No. 1 (1999), p. 208.

[202] Sunstein, 1989.

bringing lawsuits against federal agendas, such as national health care and climate change initiatives. I believe this new phenomenon has created another dimension to political polarization. The horizontal polarization of the two levels of government has in fact contributed to polarization across the two levels, creating a vertical polarization.

Both findings suggest that the office of state attorney general has become a particularly attractive subject for lobbying. AG behavior shows that they are responsive to industrial interest groups, and they are also in a position to semi-permanently shape national regulatory policies. Lobbying can heighten the level of polarization,[203] and the office of AG will not be immune to such partisan lobbying. As the federal ground for policy discussion stays more or less paralyzed, states will be the main battleground for political contestation, the state attorney general being one of the key fighters.

Mainly two limitations to this empirical analysis deserve note and offer direction for future research. First, multiple regression used in this paper may not be the best empirical tool to analyze AG litigation behavior. Using a multiple regression approach, the paper was able to determine the direct effects of each predictor on the dependent variable, but it does not fully illustrate, for instance, how state government ideology affects AGs to make partisan decisions. Drawing from the recent literature on the effect of polarization upon state politics, it may be possible to connect the dots from the partisan trifectas to AGs' partisan litigation behaviors. I plan on conducting a case analysis of Texas to explore the relationship between their AGs and the other state actors, mainly the governor.

Moreover, for a more in-depth analysis of when AGs file lawsuits, it would be more appropriate to use an event history analysis. As AGs

[203] Garlick, 2016.

rigorously pursue electoral goals, number of lawsuits may vary according to election seasons. On a similar note, Gleason (2013) finds that newly elected AGs refrain from filing *amicus curiae* briefs in their first year of office. As litigation requires more time and money to execute, it can be expected that new AGs would also refrain from initiating new lawsuits against the federal government.

Furthermore, if one of the main purposes of these lawsuits is to garner publicity for the AGs for their future careers (Provost 2010b), it will be meaningful to analyze whether the number of lawsuits correlate with the amount of media attention they received, along with the subsequent political careers of the judicially active AGs.

The second limitation comes from the data itself. While the original dataset provides a useful starting point for analysis, several problems can arise. First, with only 50 states and 9 regressors, the assumption for the maximum likelihood regression may not stand. Acknowledging the limitation in the data, it would be preferable to improve the model by utilizing bootstrapped negative binomial regression, or changing the scope of the research to acquire a larger sample of data. Bootstrapping is a recommended resampling technique for remedying a small sample size because it can treat a small sample as a virtual population and generates a large enough of observations from it, making it possible to draw robust estimates of inferences (Zhang et al. 2006).

In line with the previous point, the next logical step in this study would be to expand the scope of the research to all state lawsuits against EPA's federal regulations. Then, the nature of the regulation can be another independent variable, and it would be meaningful to see which issues out of the various environmental regulations are the most salient issues to the state governments.

Lastly, a further research that follows the results of these lawsuits is needed. Many of these claims against the EPA and the federal government are consolidated, or settled outside of court behind closed doors. As such, it is difficult to track the outcomes of all the suits brought to the court, except for those published in the Federal Register as consent decrees. Knowing the outcome and the success rate of these lawsuits can significantly aid in the analysis of AG behavior (Meyer 2007; Provost 2010a). Considering the time and money required to file a lawsuit, only certain AGs would decide to file a lawsuit knowing it will be dismissed or rejected. The variable that can explain this financially bold behavior may be the answer to the variations of litigation behavior among the conservative AGs.

V. Uncooperative Federalism in the Era of Polarization

This thesis brought the analysis of state attorneys general behavior into the discussion of federalism. The study aimed to explain the legal fight between state attorneys general and the EPA, driven by the ongoing struggle between federal and state governments over the right division of power. Chapter 2 demonstrated that current series of lawsuits bombarding the federal government was an outcome of a long history of gradual federal expansion and state responses. By looking at the leading case of Texas, Chapter 3 identified electoral and political factors which enable AGs to mobilize their formal powers to influence federal agency rules. As expected, the finding from Chapter 4 suggests state-level variables and interest groups influence AG's decision to sue the EPA. However, this study's novel finding is that state government actors and state government ideology also influences AG's decision. This is likely to be the outcome of vertical polarization – between federal and state governments, or more specifically the Executive branch and state governments.

The thesis faces several limitations.[204] First, the conclusions drawn in the study is essentially exploratory. While the single case study of Texas was supported by the statistical analysis that it was not an anomaly, the empirical model still needs to be fine-tuned. Using a multiple regression approach, the paper was able to determine the direct effects of each predictor on the dependent variable, but it does not fully illustrate, for instance, how state government ideology affects AGs to make partisan

[204] Specific limitations on the empirical model and directions for future research is included at the end of Chapter 4.

decisions. Drawing from the recent literature on the effect of polarization upon state politics, it may be possible to connect the dots from the partisan trifectas to AGs' partisan litigation behaviors.

Second, a further research that follows the results of these lawsuits is needed. Many of these claims against the EPA and the federal government are consolidated, or settled outside of court behind closed doors. As such, it is difficult to track the outcomes of all the suits brought to the court, except for those published in the Federal Register as consent decrees. Knowing the outcome and the success rate of these lawsuits can significantly aid in the analysis of AG behavior.[205] Considering the time and money required to file a lawsuit, only certain AGs would decide to file a lawsuit knowing it will be dismissed or rejected. The variable that can explain this financially bold behavior may be the answer to the variations of litigation behavior among the conservative AGs.

Nonetheless, this study was able to demonstrate the need for more research on state attorneys general in the context of federalism and growing polarization. Most federal-state relationships are continually open for renegotiation and contestation, with the result that the policymaking realm itself is the source of the most settled understandings at any given time of the respective levels of state and federal authority in making social policy, economic policy, and environmental policy. As a unique actor that stands on the crossroad between legal and political arena, state attorneys general play an interesting role in bringing political and policy discussion into the courtroom. The implications from this study also warns against continued dependence on "uncooperative" legal measures against the federal government to raise partisan opposition. The state attorneys general may bring policy debate into the courtroom, but the legal precedents made

[205] Meyer, 2007; Provost, 2010a.

in the courtroom will not be easy to overturn, causing serious ramifications for the future policymaking arena.

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Appendix A: Data Collection

The data of the state litigation come from 3 legal databases, *Nexis-Lexis, WestLaw,* and *Justia,* and the U.S. Government Publishing Office (GPO). Relevant information was obtained through searching for cases with "Environmental Protection Agency" as the respondent, and the cases were further narrowed down by those with the state government or the state attorney general as the plaintiffs. Additional information to cross-reference and verify the content and the relevance of the lawsuit was obtained from the Federal Registrar, legal literature, and media coverage. Through this process, I narrowed down the dataset to litigation on the Clean Air Act filed between 2009 and 2015. Collected information includes the case number, the petitioner, the defendant, when and where the lawsuit was filed, and the claim of the complaint. Cases are further categorized into those involving more than one state, and those filed outside the D.C. Circuit. The total number of lawsuits filed against EPA's Clean Air Act during 2009 and 2015 is 230, meaning the average number of litigation is 4.6. The following is the list of court cases collected from the database in reverse order from the most recent back to 2009. Since the defendant remains consistent (the US EPA and the then-EPA Administrator Lisa P. Jackson), the following list will include information of the case number, the petitioner, and when and where the lawsuit was filed. There are a few cases in which there was no record of the lawsuit, but the EPA received a letter of Intent to Sue from the state attorney general. Those were included in the calculation.

Case Number	Filed	Petitioner	Court
15-1409	2015-11-05	Mississippi Department of Environmental Quality	U.S. Court of Appeals,

			D.C. Circuit
15-1399	2015-11-03	West Virginia, Alabama, Arizona Corporation Commission, Arkansas, Florida, Georgia, Indiana, Kansas, Kentucky, Louisiana, Louisiana Department of Environmental Quality, AG Bill Schuette (People of Michigan), Missouri, Montana, Nebraska, North Carolina Department of Environmental Quality, Ohio, Oklahoma, South Carolina, South Dakota, Texas, Utah, Wisconsin, and Wyoming	U.S. Court of Appeals, D.C. Circuit
15-1392	2015-10-27	Arizona, Arkansas, New Mexico Environment Department, North Dakota, Oklahoma	U.S. Court of Appeals, D.C. Circuit
15-1381	2015-10-23	State of North Dakota	U.S. Court of Appeals, D.C. Circuit
15-1363	2015-10-23	West Virginia, Texas, Alabama, Arizona Corporation Commission, Arkansas, Colorado, Florida, Georgia, Indiana, Kansas, Kentucky, Louisiana, Louisiana Department of Environmental Quality, Michigan, Missouri, Montana, Nebraska, New Jersey, North Carolina Department of Environmental Quality, Ohio, South Carolina, South Dakota, Utah, Wisconsin, Wyoming	U.S. Court of Appeals, D.C. Circuit
15-1380	2015-10-23	State of North Dakota	U.S. Court of Appeals, D.C. Circuit
15-1364	2015-10-23	State of Oklahoma, ex rel. Scott Pruitt, in his official capacity as AG of Oklahoma and Oklahoma Department of Environmental	U.S. Court of Appeals, D.C. Circuit

		Quality	
15-1308	2015-08-31	State of Texas and Texas Commission on Environmental Quality	U.S. Court of Appeals, D.C. Circuit
15-1271	2015-08-11	State of Tennessee	U.S. Court of Appeals, D.C. Circuit
15-1267	2015-08-11	Florida, Alabama, Arizona, Arkansas, Delaware, Georgia, Kansas, Louisiana, Mississippi, Missouri, Ohio, Oklahoma, South Carolina, South Dakota, West Virginia, Kentucky, North Carolina Department of Environment and Natural Resources	U.S. Court of Appeals, D.C. Circuit
3:2015cv00396	2015-07-31	Nevada Department of Conservation and Natural Resources and State of Nevada	Nevada District court
15-5066	2015-07-21	State of Oklahoma ex rel. e. Scott Pruitt, in his official and capacity as Attorney General of Oklahoma and Oklahoma Department of Environmental Quality	U.S. Court of Appeals, Tenth Circuit
Intent to Sue	2015-07-02	North Carolina Department of Environment and Natural Resources	
15-9536	2015-04-16	State of Wyoming	U.S. Court of Appeals, Tenth Circuit
14-1268	2014-12-05	State of Kansas, State of Nebraska, Energy Future Coalition and Urban Air Initiative, Inc.	U.S. Court of Appeals, D.C. Circuit
14-1146	2014-08-01	State of West Virginia, Alabama, Indiana, Kansas, Kentucky, Louisiana, Nebraska, Ohio, Oklahoma, South Carolina, South Dakota, and Wyoming	U.S. Court of Appeals, D.C. Circuit
14-9529	2014-03-28	State of Wyoming	U.S. Court

			of Appeals, Tenth Circuit
14-1710	2014-03-21	State of Michigan	U.S. Court of Appeals, Eighth Circuit
Intent to Sue	2014-04-17	State of Wyoming	
2:2014cv00042	2014-02-25	State of Wyoming	Wyoming District Court
4:14-cv-3006	2014-01-15	State of Nebraska	Nebraska District Court
13-1312	2013-12-26	State of North Carolina	U.S. Court of Appeals, D.C. Circuit
Intent to Sue	2013-11-27	State of Wyoming	
1:13-cv-1553	2013-10-09	State of New York, Connecticut, Maryland, Oregon, Rhode Island, and Vermont, Massachusetts, and Puget Sound Clean Air Agency	District of Columbia District Court
04-15490	2013-10-01	State of Georgia	U.S. Court of Appeals, Eleventh Circuit
13-73393	2013-09-27	State of Arizona, ex rel. Henry R. Darwin, Director of Arizona Department of Environmental Quality	U.S. Court of Appeals, Ninth Circuit
1:13-cv-00109	2013-09-12	State of North Dakota, South Dakota, Nevada, and Texas	North Dakota District Court
5:13-cv-710	2013-09-10	State of North Carolina	North Carolina District Court, Eastern District

Intent to Sue	2013-06-11	State of Oregon	
13-1179	2013-05-10	State of Texas and Texas Commission on Environmental Quality	U.S. Court of Appeals, D.C. Circuit
13-3403	2013-04-05	State of Michigan	U.S. Court of Appeals, Sixth Circuit
13-1093	2013-04-01	State of Delaware, Delaware Department of Natural Resources and Environmental Control	U.S. Court of Appeals, D.C. Circuit
13-1077	2013-03-25	Mississippi Department of Environmental Quality	U.S. Court of Appeals, D.C. Circuit
13-9535	2013-03-21	State of Utah, on behalf of the Utah Department of Environmental Quality Division of Air Quality	U.S. Court of Appeals, Tenth Circuit
13-1070	2013-03-15	State of Maryland, Connecticut, Delaware, and District of Columbia	U.S. Court of Appeals, D.C. Circuit
13-1061	2013-03-08	State of Tennessee	U.S. Court of Appeals, D.C. Circuit
13-1053	2013-03-07	State of Texas and Texas Commission on Environmental Quality	U.S. Court of Appeals, D.C. Circuit
13-70366	2013-01-31	State of Arizona, ex rel. Henry R. Darwin, Director of Arizona Department of Environmental Quality	U.S. Court of Appeals, Ninth Circuit
12-1417	2012-10-15	State of Texas and Texas Commission on Environmental Quality	U.S. Court of Appeals, D.C. Circuit
12-3084	2012-09-04	State of Nebraska	U.S. Court of Appeals, Eighth Circuit
12-1344	2012-08-06	State of Texas and Texas Commission on Environmental	U.S. Court of Appeals,

		Quality	D.C. Circuit
12-1923	2012-07-27	State of Maine	U.S. Court of Appeals, First Circuit
12-1315	2012-07-24	State of Indiana	U.S. Court of Appeals, D.C. Circuit
12-1314	2012-07-19	State of Tennessee	U.S. Court of Appeals, D.C. Circuit
12-1316	2012-07-19	State of Texas and Texas Commission on Environmental Quality	U.S. Court of Appeals, D.C. Circuit
12-1310	2012-07-19	Delaware Department of Natural Resources and Environmental Control	U.S. Court of Appeals, D.C. Circuit
12-60482	2012-06-22	Louisiana Department of Environmental Quality	U.S. Court of Appeals, Fifth Circuit
12-1196	2012-04-16	State of Michigan, Alabama, Alaska, Arizona, Florida, Idaho, Indiana, Kansas, Mississippi, Missouri, Nebraska, North Dakota, Ohio, Oklahoma, Pennsylvania, South Carolina, Utah, Virginia, West Virginia, Wyoming; Terry E. Branstad, Governor of Iowa, and Jack Conway, Attorney Gen. of Kentucky	U.S. Court of Appeals, D.C. Circuit
12-1185	2012-04-16	State of Texas, Texas Commission on Environmental Quality, Texas Public Utility Commission and Railroad Commission of Texas	U.S. Court of Appeals, D.C. Circuit
12-1190	2012-04-16	State of Arkansas, ex rel. Dustin McDaniel Attorney General	U.S. Court of Appeals, D.C. Circuit
12-1844	2012-04-09	State of North Dakota	US. Court of Appeals,

			Eighth Circuit
12-1116	2012-02-27	State of Kansas	U.S. Court of Appeals, D.C. Circuit
12-9526	2012-02-24	State of Oklahoma and Oklahoma Industrial Energy Consumers, an unincorporated association	U.S. Court of Appeals, Tenth Circuit
12-60128	2012-02-23	State of Texas and Texas Commission on Environmental Quality	U.S. Court of Appeals, Fifth Circuit
12-1109	2012-02-21	State of Oklahoma	U.S. Court of Appeals, D.C. Circuit
1:12-cv-01064	2012-02-10	State of New York, Connecticut, Delaware, Maryland, Massachusetts, New Mexico, Oregon, Rhode Island, Vermont, Washington, California	New York Southern District Court
12-1019	2012-01-10	State of Kansas	U.S. Court of Appeals, D.C. Circuit
11-1427	2011-11-03	State of Georgia	U.S. Court of Appeals, D.C. Circuit
11-1393	2011-10-07	State of Wisconsin	U.S. Court of Appeals, D.C. Circuit
11-1386	2011-10-07	State of Michigan and Mississippi Public Service Commission	U.S. Court of Appeals, D.C. Circuit
11-1392	2011-10-07	State of Ohio	U.S. Court of Appeals, D.C. Circuit
11-1372	2011-10-07	State of Indiana	U.S. Court of Appeals, D.C. Circuit
11-1364	2011-10-06	State of Louisiana, Louisiana	U.S. Court

		Department of Environmental Quality and Louisiana Public Service Commission	of Appeals, D.C. Circuit
11-1367	2011-10-06	State of Georgia	U.S. Court of Appeals, D.C. Circuit
11-1340	2011-09-23	State of Nebraska, Alabama, Florida, Oklahoma, South Carolina, Texas, and Virginia	U.S. Court of Appeals, D.C. Circuit
11-1338	2011-09-20	State of Texas, Texas Commission on Environmental Quality, Public Utility Commission of Texas, Railroad Commission of Texas and Texas General Land Office	U.S. Court of Appeals, D.C. Circuit
11-1329	2011-09-19	State of Kansas	U.S. Court of Appeals, D.C. Circuit
11-3988	2011-09-19	State of Ohio	U.S. Court of Appeals, Sixth Circuit
11-14273	2011-09-16	State of Georgia	U.S. Court of Appeals, Eleventh Circuit
11-1289	2011-08-17	State of Wyoming	U.S. Court of Appeals, D.C. Circuit
11-1288	2011-08-17	State of Wyoming	U.S. Court of Appeals, D.C. Circuit
11-1287	2011-08-17	State of Wyoming	U.S. Court of Appeals, D.C. Circuit
11-1169	2011-05-20	State of Arkansas, Dustin McDaniel, Attorney General, State of Alabama Luther Strange, Attorney General, State of Georgia and Sam Olens, Attorney General	U.S. Court of Appeals, D.C. Circuit

11-1092	2011-03-28	State of North Dakota, Nevada, Louisiana, and Louisiana Department of Environmental Quality	U.S. Court of Appeals, D.C. Circuit
11-1063	2011-03-01	State of Texas, Rick Perry, Governor of Texas, Greg Abbott, Attorney General of Texas, Texas Commission on Environmental Quality, Texas Department of Agriculture, Texas Railroad Commission, Texas General Land Office, Barry Smitherman, Texas Public Utility Commissioner, Donna Nelson, Texas Public Utility Commissioner, and Kenneth Anderson, Texas Public Utility Commissioner	U.S. Court of Appeals, D.C. Circuit
11-1038	2011-02-11	State of Texas, Rick Perry, Gregory Wayne Abbott, Attorney General of Texas, Texas Commission on Environmental Quality, Texas Department of Agriculture, Texas Railroad Commission, Texas General Land Office, Barry Smitherman, Texas Public Utility Commissioner, Donna Nelson, Texas Public Utility Commissioner and Kenneth Anderson, Texas Public Utility Commissioner	U.S. Court of Appeals, D.C. Circuit
11-9504	2011-02-10	State of Wyoming	U.S. Court of Appeals, Tenth Circuit
11-9506	2011-02-10	State of Wyoming	U.S. Court of Appeals, Tenth Circuit
11-9505	2011-02-10	State of Wyoming	U.S. Court of Appeals,

			Tenth Circuit
10-1425	2010-12-30	State of Texas, Rick Perry, Governor of Texas, Greg Abbott, Attorney General of Texas, Texas Commission on Environmental Quality, Texas Department of Agriculture, Texas Railroad Commission, Texas General Land Office, Barry Smitherman, Texas Public Utility Commissioner, Donna Nelson, Texas Public Utility Commissioner, and Kenneth Anderson, Texas Public Utility Commissioner	U.S. Court of Appeals, D.C. Circuit
10-15949	2010-12-30	State of Florida Department of Environmental Protection	U.S. Court of Appeals, Eleventh Circuit
10-1415	2010-12-20	State of Texas and Texas Commission on Environmental Quality	U.S. Court of Appeals, D.C. Circuit
10-60961	2010-12-15	State of Texas, Rick Perry, Governor of Texas, Greg Abbott, Attorney General of Texas, Texas Commission on Environmental Quality, Texas Department of Agriculture, Texas Railroad Commission, Texas General Land Office, Barry Smitherman, Donna Nelson, and Kenneth Anderson	U.S. Court of Appeals, Fifth Circuit
10-1319	2010-10-08	Commonwealth of Virginia, ex rel. Kenneth T. Cuccinelli, II, in his official capacity as Attorney General of Virginia	U.S. Court of Appeals, D.C. Circuit
10-72729	2010-09-08	California Department of Parks and Recreation	U.S. Court of Appeals, Ninth Circuit
10-1281	2010-09-07	State of Texas, Rick Perry,	U.S. Court

		Governor of Texas, Greg Abbott, Attorney General of Texas, Texas Commission on Environmental Quality, Texas Agriculture Commission and Barry Smitherman, Chairman of the Texas Public Utilities Commission	of Appeals, D.C. Circuit
10-1258	2010-08-23	State of North Dakota	U.S. Court of Appeals, D.C. Circuit
10-1259	2010-08-23	State of Texas and Texas Commission on Environmental Quality	U.S. Court of Appeals, D.C. Circuit
10-1222	2010-08-02	Rick Perry, Governor of Texas, Greg Abbott, Attorney General of Texas, Texas Commission on Environmental Quality, Texas Department of Agriculture, Texas Railroad Commission, Texas General Land Office, Barry Smitherman, Donna Nelson, and Kenneth Anderson and State of Texas	U.S. Court of Appeals, D.C. Circuit
10-1207	2010-08-02	South Carolina Public Service	U.S. Court of Appeals, D.C. Circuit
10-1211	2010-07-30	State of Alabama, North Dakota, South Dakota, Haley Barbour, Governor of Mississippi, South Carolina, Nebraska	U.S. Court of Appeals, D.C. Circuit
10-60614	2010-07-26	State of Texas	U.S. Court of Appeals, Fifth Circuit
10-1039	2010-02-16	State of Alabama	U.S. Court of Appeals, D.C. Circuit
09-1088	2009-03-02	People of the State of California, ex rel. Edmund G. Brown, Jr., Attorney General	U.S. Court of Appeals, D.C. Circuit

Appendix B: President Obama's Executive Orders for Environmental Policy

Order	Date Signed	Title/Description
13499	2009-02-05	**Further Amendments to Executive Order 12835, Establishment of the National Economic Council**
13500	2009-02-05	**Further Amendments to Executive Order 12859, Establishment of the Domestic Policy Council**
13508	2009-05-12	**Chesapeake Bay Protection and Restoration**
13514	2009-10-05	**Federal Leadership in Environmental, Energy, and Economic Performance**
13543	2010-05-21	National Commission on the BP Deepwater Horizon Oil Spill and Offshore Drilling
13547	2010-07-19	**Stewardship of the Ocean, Our Coasts, and the Great Lakes**
13554	2010-10-05	**Establishing the Gulf Coast Ecosystem Restoration Task Force**
13569	2011-04-05	**Amendments to Executive Orders 12824, 12835, 12859, and 13532, Reestablishment Pursuant to Executive Order 13498, and Revocation of Executive Order 13507**
13580	2011-07-12	Interagency Working Group on Coordination of Domestic Energy Development and Permitting in Alaska
13605	2012-04-13	Supporting Safe and Responsible Development of Unconventional Domestic Natural Gas Resources
13614	2012-05-21	Providing an Order of Succession Within the Environmental Protection Agency
13624	2012-08-30	Accelerating Investment in Industrial Energy Efficiency
13626	2012-09-10	Gulf Coast Ecosystem Restoration

13632	2012-12-07	Establishing the Hurricane Sandy Rebuilding Task Force
13638	2013-03-15	Amendments to Executive Order 12777
13648	2013-07-01	Combating Wildlife Trafficking
13653	2013-11-01	**Preparing the United States for the Impacts of Climate Change**
13677	2014-09-23	**Climate-Resilient International Development**
13689	2015-01-21	**Enhancing Coordination of National Efforts in the Arctic**
13690	2015-01-30	**Establishing a Federal Flood Risk Management Standard and a Process for Further Soliciting and Considering Stakeholder Input**
13693	2015-03-19	**Planning for Federal Sustainability in the Next Decade**
13705	2015-09-03	Designating the International Renewable Energy Agency as a Public International Organization Entitled to Enjoy Certain Privileges, Exemptions, and Immunities
13708	2015-09-30	Continuance or Reestablishment of Certain Federal Advisory Committees

Note: The light gray rows indicate positive (pro-environmental) tone and the dark gray rows indicate negative (pro-developmental) tones in the executive orders. The titles in bold indicate orders, in which the phrase “climate change” was explicitly mentioned.

국문 초록

오바마 대통령이 취임과 함께 추진했던 청정에너지안보 법안이 실패하고 2010 년과 2014 년 중간 선거에서 민주당이 패배하며 상하원을 다 공화당이 장악한 상태에서 오바마 대통령은 의회를 통해서 불가능하다면 행정부의 여러 조직, 특히 환경보호국(EPA)을 통해 기후변화 문제에 대처하겠다고 표명해 많은 주목을 받았다. 이러한 우회적인 규제 도입 행위에 대한 주 정부의 반응에 따라 미국의 대외 정책이 변화할 것이고, 이는 더 이상 미국 연방 정부의 움직임만 주시할 것이 아니라, 지방 정부의 행위를 분석할 필요가 있다는 것을 의미한다. 이런 필요에 따라 최근 연구들은 제정된 EPA 의 규제에 협조적 이행 행위를 분석하였으며, 주 정부 차원의 정책적 혁신과 그 편차를 설명하고자 했다. 하지만 반대로 EPA 의 규제에 대한 비협조적 행위, 특히 소송이라는 강력한 저항 행위를 분석하는 연구는 결여되어 있다. 실제로 EPA 를 상대로 제소 결정을 하는 것은 주지사도, 주 의회도 아닌 주 법무장관이라는 점에 주목해 **"주 법무장관은 어떤 조건에서 환경보호국(EPA)을 상대로 활발하게 제소를 하는가?"**라는 연구 질문에 답을 하고자 했다.

이 논문에서 주장하고자 하는 것은 관례적으로 주 정부에게 양도되었던 환경 영역에 연방 정부가 침범하였고, 이에 주들은 소송 행위를 통해 조직적인 반발을 표현하고 있다는 것이다. 논문의 2 장은 미국의 환경 규제 발전 과정을 연방정부와 주정부 간에 발생한 편의주의적 도발과 가동된 안전장치의 일련으로 재구성하였다. 환경 규제 관할권을 두고 발생한 연방-

주 정부간 관계 내 편의주의적 도발은 당파적 대립과 결부되어 주 법무장관이 소송이란 기제를 연방정부를 저항하는 방법으로 활용할 수 있게 된 것이다. 3 장에서는 가장 활발하게 소송하는 텍사스 주법무장관의 사례를 통해 주 법무장관의 행위에 어떤 변수들이 인센티브로 작용하는지 알아보았다. 3 장의 결론을 바탕으로 도출한 가설에 따라 일반화 가능성을 검증하는 통계분석을 실시하였고, 4 장의 통계 분석 결과를 통해 크게 두 가지 결론을 내렸다.

첫 번째는 대 EPA 소송행위가 주 차원의 변수에 크게 영향을 받는다는 것이다. 이는 정책학 연구 결과들과 일치하는 부분이다. 주 정부가 기후변화 관련 정책들을 도입할 때 주의 지리적, 경제적, 정치적 상황을 고려하는 것처럼, 주 법무장관도 현재 규제체제 확대에 대한 주의 취약성을 고려한다는 것이다. 주 유권자들의 정치적 이념은 환경 규제가 중요한 이슈일 때만 유의미하다는 것을 알 수 있었고, 또한 이슈중요성 변수를 통해 주 법무장관이 산업적 이익에 강하게 반응을 한다는 것을 알 수 있었다.

두 번째 결론은 다른 주 정부 행위자들이 주 법무장관의 행위에 영향을 미친다는 것이다. 주 법무장관의 행위에 관한 선행 연구에서는 주 법무장관의 구조적 독립성으로 인해 다른 주 정부 행위자들을 중요한 변수로 포함하지 않았다. 하지만 이 논문은 선행연구들과 달리 주 정부 행위자들의 중요성을 강조하고자 한다. 정치 양극화로 인한 미국 연방의회 내 교착상태는 주 정치에도 양극화를 불러일으켰다. 2012 년 지방선거 결과, 미국은 50 년 만에 처음으로 37 개 주에서 주지사와 주의 상하원의 다수당이 일치하는 경우를 맞이하였고, 이렇게 주 정부의 다양한 행위자들이 하나의

당파적인 목소리를 낼수록 주 법무장관은 주 정부의 대변인으로서 이들의 의견과 달리하기 어려워 질 것이다.

이런 상황에서 주 법무장관들의 역할은 더욱 더 중요하다. 주 법무장관들의 제기하는 사법심사 소송들은 EPA 와 같은 연방 기관에서 제시한 규제가 의회의 요구를 반영하는지 혹은 제안한 규제가 비용 효율이 높은 지 등 기관의 잘못된 판단을 교정하는 역할을 해야 한다. 하지만 주 법무장관들이 점점 더 당파적인 입장을 바탕으로 한 정책적 논의를 법정에서 벌이고 있고, 이로 인한 법적 선례들이 쌓이게 된다면 주 행위자가 연방 규제 정책의 방향을 좌우하게 될 뿐만 아니라 정치양극화를 더욱 경직되고 고착되게 만드는 역할을 할 것이다. 이 연구는 주 법무장관이라는 행위자를 통해 환경 문제가 어떻게 연방-주 정부간 관계 재설정에 활용되고 있는지 살펴보았고, 정부 단계간 비협력적인 경쟁이 지속된다면 궁극적으로 강건한 연방 체제를 위협할 수 있다는 경고를 하고 있다.

주요어: 연방주의, 주법무장관, 정치적 안전장치, 기후변화, 환경규제, 정치양극화

학번: 2014-22283