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Climate Change Regulation, Preemption, and the Dormant Commerce Clause

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As climate change regulation from the federal level becomes increasingly unlikely, states and local governments emerge as the last stand against climate change in the United States. This tension ushers in questions of separation of powers and federalism, with which the courts have wrestled since the country's founding. The doctrine of preemption is one of the federal government's strongest tools to limit states' authority to regulate climate change. Preemption challenges have been increasing lately and have largely succeeded under judicial deference to the executive branch. However, recent changes to the Supreme Court signal that the Court may be less willing to grant to the executive branch the same deference that it once gave. There may now be more of an opportunity for legislators to enact regulation at the state and local level.

If preemption is out of the question, there are other constitutional considerations that state and local lawmakers should keep in mind, most notably the dormant Commerce Clause. States such as California and Oregon, in their regulation of carbon emissions from automobiles, have already faced these challenges. But if preemption claims become less successful, dormant Commerce Clause challenges will likely increase. Recent Ninth Circuit decisions shed light on what state legislatures should consider when enacting similar environmentally protective statutes. Specifically, the principles of extraterritoriality and virtual representation guide how a state should frame its regulatory program.

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INTRODUCTION

The Intergovernmental Panel on Climate Change has stated that human activities are affecting the Earth's energy budget by changing emissions and atmospheric concentrations of important gases and by changing land surface properties.[1] The result is, to name a few, rising greenhouse gas concentrations, increased global temperature, extreme weather and climate events, sea level rise, ocean acidification, and diminishing sea ice.[2] If humanity continues to pollute and release greenhouse gases into the atmosphere at this rate, the Earth will reach a "point of no return," whereby a reduction is ineffective in halting climate change.[3] A call for immediate action to avoid reaching this point has erupted across the globe. Within the United States, the fight against anthropogenic climate change has incited arguments among industries, activists, and governments.[4]

Some argue that climate change regulation from the federal level—as opposed to the state level—is preferable.[5] One reason is that the federal government is in a unique position to prevent the migration of pollution across state lines.[6] Another reason is the so-called "race-to-the-bottom" theory, where

1. IPCC, CLIMATE CHANGE 2013: THE PHYSICAL SCIENCE BASIS, WORKING GROUP I CONTRIBUTION TO THE FIFTH ASSESSMENT REPORT OF THE INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE 121 (Thomas F. Stocker et al. eds., 2013), https://www.ipcc.ch/site/assets/uploads/2018/02/WG1AR5_all_final.pdf [hereinafter IPCC, CLIMATE CHANGE 2013]; *see also* IPCC, *2007: Summary for Policymakers*, *in* CLIMATE CHANGE 2007: THE PHYSICAL SCIENCE BASIS, WORKING GROUP I TO THE FOURTH ASSESSMENT REPORT OF THE INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE 10 (Susan Solomon et al. eds., 2007), http://www.ipcc.ch/pdf/assessment-report/ar4/wg1/ar4-wg1-spm.pdf; 1 U.S. GLOBAL CHANGE RSCH. PROGRAM, CLIMATE SCIENCE SPECIAL REPORT: FOURTH NATIONAL CLIMATE ASSESSMENT 35 (Donald J. Wuebbles et al. eds., 2017), https://science2017.globalchange.gov/downloads/CSSR2017_FullReport.pdf ("[I]t is *extremely likely* that human influence has been the dominant cause of the observed warming since the mid-20th century."); *Scientific Consensus: Earth's Climate Is Warming*, NASA: GLOBAL CLIMATE CHANGE, https://climate.nasa.gov/scientific-consensus/ (last visited Apr. 19, 2021) (providing support for scientific certainty of anthropogenic climate change).

2. IPCC, CLIMATE CHANGE 2013, *supra* note 1, at 121–37; *see also* NAT'L RSCH. COUNCIL, ADVANCING THE SCIENCE OF CLIMATE CHANGE 27–28 (2010), http://www.nap.edu/catalog.php?record_id=12782; *Climate Change Indicators in the United States*, U.S. ENV'T PROT. AGENCY, https://www.epa.gov/climate-indicators (last visited Apr. 19, 2021); *The Causes of Climate Change*, NASA: GLOBAL CLIMATE CHANGE, http://climate.nasa.gov/causes/ (last visited Apr. 19, 2021) (explaining that humans expand "'greenhouse effect'—warming that results when the atmosphere traps heat radiating from Earth toward space" (footnote omitted)).

3. NAT'L RSCH. COUNCIL, UNDERSTANDING EARTH'S DEEP PAST: LESSONS FOR OUR CLIMATE FUTURE 63–64 (2011); *see also* Timothy M. Lenton & Hans Joachim Schellnhuber, Commentary, *Tipping the Scales*, 1 NATURE REPS. CLIMATE CHANGE 97, 97 (2007) (explaining that the "tipping point" occurs when a small change in forcing triggers a response resulting in a qualitative change to the future state).

4. For an overview of "cooperative federalism" and the history of the interaction between federal and state government regarding environmental regulation, see Jonathan H. Adler, *Judicial Federalism and the Future of Federal Environmental Regulation*, 90 IOWA L. REV. 377, 381–88 (2005).

5. *See* Patrick Zomer, Note, *The Carbon Border War: Minnesota, North Dakota, and the Dormant Commerce Clause*, 8 U. ST. THOMAS L.J. 60, 95–99 (2010) (arguing that the federal government needs to be the one to enact legislation which combats climate change after a comparative analysis of two states' attempts similar to California's).

6. J.R. DeShazo & Jody Freeman, *Timing and Form of Federal Regulation: The Case of Climate Change*, 155 U. PA. L. REV. 1499, 1503 (2007).

the fear is that each individual state will regulate at the lowest possible environmental standard in order to attract industry to that state.[7] Thus, a nationalized standard prevents the incentive for states to decrease or even eliminate environmentally protective regulation. Another goal is to standardize regulations across the entire country—the rationale being that industries have expressed difficulty in complying with a variety of regulations from all the different jurisdictions in which the industry operates.[8]

However, the likelihood of federal regulation seems to be decreasing.[9] As the political climate in the United States continues to polarize, chronic congressional inaction persists.[10] Executive action taken in favor of climate change regulation has been dismantled upon the next administration's induction into office.[11] The Trump Administration seemed especially inclined to dismantle the federal protections enacted by predecessors.[12]

As federal inaction becomes more and more unreliable, states and local governments have stepped in.[13] In fact, the Environmental Protection Agency (EPA) under the Trump Administration clearly signaled a desire to shift environmental regulation back to the states.[14] Today, most states have renewable energy portfolio standards, which are policies intended to increase production of renewable energy.[15] For example, Minnesota plans to reduce greenhouse gas

7. *Id.*; *see also* William W. Buzbee, *Asymmetrical Regulation: Risk, Preemption, and the Floor/Ceiling Distinction*, 82 N.Y.U. L. REV. 1547, 1551–52 (2007).

8. Buzbee, *supra* note 7, at 1551, 1570.

9. *See* George Cahlink, *Trump Proposes Deep Energy, Environmental Cuts*, E&E NEWS: BUDGET (Feb. 10, 2020), https://www.eenews.net/stories/1062316287 (highlighting the Trump Administration's restructuring of the national budget in which "EPA would be reduced by 27%, the Army Corps of Engineers would drop 22% and the Interior Department would fall by 13%.").

10. For an overview of the attacks against the EPA during the Obama Administration, see Brigham Daniels, *Addressing Climate Change in an Age of Political Climate Change*, 2011 BYU L. REV. 1899 (2011). The Trump Administration and the Republican-controlled Senate in the past decade have done quite a bit to dismantle climate change policy that existed at the beginning of its term. *See infra* note 12.

11. *A Running List of How President Trump Is Changing Environmental Policy*, NAT'L GEOGRAPHIC, https://www.nationalgeographic.com/news/2017/03/how-trump-is-changing-science-environment (May 3, 2019).

12. One decision by President Trump that garnered the most attention was his withdrawal from the Paris Climate Change Agreement. *See* Press Release, Michael R. Pompeo, U.S. Sec'y of State, On the U.S. Withdrawal from the Paris Agreement (Nov. 4, 2019), https://2017-2021.state.gov/on-the-u-s-withdrawal-from-the-paris-agreement/index.html. The United States has since rejoined the Paris Climate Agreement, with President Biden signing an executive order to rejoin only hours after his inauguration. H.J. Mai, *U.S. Officially Rejoins Paris Agreement on Climate Change*, NPR (Feb. 19, 2021, 10:29 AM), https://www.npr.org/2021/02/19/969387323/u-s-officially-rejoins-paris-agreement-on-climate-change.

13. *State Climate Policy Map*, CTR. FOR CLIMATE & ENERGY SOLS., https://www.c2es.org/content/state-climate-policy/ (last visited Apr. 19, 2021); Brady Dennis & Juliet Eilperin, *States Aren't Waiting for the Trump Administration on Environmental Protections*, WASH. POST (May 19, 2019, 4:14 PM), https://www.washingtonpost.com/national/health-science/states-arent-waiting-for-the-trump-administration-on-environmental-protections/2019/05/19/5dc853fc-7722-11e9-b3f5-5673edf2d127_story.html.

14. David M. Konisky & Neal D. Woods, *Environmental Federalism and the Trump Presidency: A Preliminary Assessment*, 48 PUBLIUS 345, 347 (2018).

15. *See Today in Energy*, U.S. ENERGY INFO. ADMIN. (Feb. 3, 2012), https://www.eia.gov/todayinenergy/detail.php?id=4850.

emissions by 30% by 2025 compared to 2005 levels and by 80% by 2050.[16] In an ambitious goal, California plans to be carbon neutral by 2045.[17] Over 1,000 mayors across the country have joined the U.S. Conference of Mayors' Climate Protection Agreement, "vowing to reduce carbon emissions in their cities below 1990 levels, in line with the Kyoto Protocol."[18]

Unsurprisingly, many of these state and local regulations have faced a host of legal challenges from parties—including industries and the federal government itself—that have been impacted by the national desire to divest from fossil fuel consumption. This Note addresses the obstacles state and local lawmakers face when enacting environmentally protective regulations and provides important considerations under current jurisprudence. This Note's analysis is twofold. First, this Note argues that the recent changes to the U.S. Supreme Court will likely lead to the decrease in one main constitutional challenge—the doctrine of preemption. Second, because of that change, state and local lawmakers should consider extraterritoriality and virtual representation when drafting climate change legislation to avoid potential violation of the dormant Commerce Clause.

Assertions of federal preemption, particularly through the administrative rulemaking process, have been very effective.[19] In the past, courts have largely deferred to the executive branch when it asserts federal preemption.[20] However, as discussed below, recent changes to the Supreme Court have put the future of deference to the executive branch, such as the *Chevron*, *BrandX*, and non-delegation doctrines, in jeopardy. Justice Thomas has written that such doctrines have brought the court "to the precipice of administrative absolutism."[21]

While the future of executive deference is on shaky ground, the risk of a court overturning a state or local law on preemption grounds may well become less likely. Therefore, state and local governments should take this opportunity to enact their own environmentally protective legislation in the likely event that the Court will reject the federal government's assertion that a less protective federal statute preempts state and local law. In doing so, there are still a few factors which must be taken into consideration. Particularly, state lawmakers should be wary of the other sword challengers to climate change regulations often wield—the dormant Commerce Clause. Because of California's contentious climate change history and Oregon's newly similar path, recent

16. MINN. STAT. § 216H.02 subd. 1 (2021).

17. CAL. PUB. UTIL. CODE §§ 399.11, 399.15, 399.30, 454.53 (West 2021).

18. *Mayors Climate Protection Center*, U.S. CONF. OF MAYORS (Nov. 13, 2019), https://www.usmayors.org/mayors-climate-protection-center/.

19. Lisa Heinzerling, *Climate, Preemption, and the Executive Branches*, 50 ARIZ. L. REV. 925, 926–28 (2008).

20. *Id.* at 927.

21. Baldwin v. United States, 140 S. Ct. 690, 695 (2020) (mem.) (Thomas, J., dissenting).

Ninth Circuit decisions addressing these two states' programs provide some guidance as to what lawmakers should keep in mind.[22]

Part I of this Note will discuss the doctrine of preemption and how it has been used to invalidate state climate change regulation. Part II will address how deference to the executive branch has played a crucial role in the success of preemption challenges to state regulations. It will also analyze how recent changes to the Supreme Court suggest that this type of deference is unlikely to continue with the same strength it once had. Part III will discuss current dormant Commerce Clause jurisprudence and explain why these challenges should be accounted for when drafting state regulation. Finally, Part IV will explain the lessons that states should take from these challenges and additional considerations states should examine when enacting climate change legislation. There are two important lessons. First, it is critical for states to make abundantly clear that the purpose of its program is to protect its own resources from the adverse effects of climate change. Second, the program should equally affect the interests of both in-state and out-of-state firms.

I. PREEMPTION AND PREEMPTION CHALLENGES IN COURT

The Supremacy Clause of the United States Constitution mandates that the laws of the federal government shall reign supreme over state and local laws.[23] Although the Constitution vests in the federal government exclusive power in certain areas, the states also retain authority over most of the same areas.[24] Grounded in the Supremacy Clause, the doctrine of preemption allows the federal government to displace—or preempt—such state and local law in a number of ways. "Express" preemption occurs when Congress states such preemption in express terms in the statute itself.[25] Although these express terms grant authority to displace state and local regulation in that area, the Supreme Court has encouraged narrowly construing express preemption provisions.[26] This is especially true when they concern states' traditional authority to regulate health, safety, and welfare.[27] Moreover, even if there is an express preemption

22. *See infra* Part IV.B.

23. U.S. CONST. art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land . . . .").

24. Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 225 (2000).

25. *See* Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n, 461 U.S. 190, 203 (1983); *see, e.g.*, 15 U.S.C. § 2075(a) (2018) (providing the express preemption provision in the Consumer Protection Safety Act by stating "no State or political subdivision of a State shall have any authority either to establish or to continue in effect any provision"); 49 U.S.C. § 30103(b) (2018) (providing the express preemption provision in the Motor Vehicle Safety Act by stating "a State or political subdivision of a State may prescribe or continue in effect a standard applicable to the same aspect of performance of a motor vehicle or motor vehicle equipment only if the standard is identical to the standard prescribed under this chapter").

26. Nelson, s*upra* note 24, at 227.

27. *See* Amelia Raether, Note, *Commandeering, Preemption, and Vehicle Emissions Regulation Post-*Murphy v. NCAA, 114 NW. U. L. REV. 1015, 1027 (2020) (citing Cipollone v. Liggett Grp., Inc., 505 U.S. 504, 518 (1992)).

provision, statutes may contain a "savings clause," which signals Congress's intent to reserve for the states the right to regulate in that area.[28]

When an express preemption provision is absent from a federal statute, courts may still find that a state or local law is impliedly preempted in one of two ways. First, a court may find "field" preemption. Field preemption exists when Congress's intent to supersede state law may be inferred because the "scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it."[29]

> "[T]he Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject," or because "the object sought to be obtained by federal law and the character of obligations imposed by it may reveal the same purpose."[30]

In other words, a local government cannot regulate in a field which the federal program is so pervasive so as to retain control over that entire field.[31]

Second, "conflict" preemption exists when "compliance with both federal and state regulations is a physical impossibility,"[32] or when the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[33] In other words, conflict—also known as "obstacle"—preemption exists where the state and federal laws contradict one another or when the state or local law obstructs the purposes of the federal law.[34]

Such preemptive federal regulatory schemes can also take a couple different characteristics. Some are regarded as a "floor," where the federal statute sets a minimum level and states are free to regulate above that level.[35] For example, in the Clean Water Act, the Environmental Protection Agency (EPA) is directed to establish a minimum pollutant level and states are free to regulate at a higher standard.[36] Conversely, the federal scheme may be deemed

28. *See, e.g.*, Federal Insecticide, Fungicide, and Rodenticide Act § 24, 7 U.S.C. § 136v(a) (2018) ("A State may regulate the sale or use of any federally registered pesticide or device in the State, but only if and to the extent the regulation does not permit any sale or use prohibited by this subchapter."); Frank R. Lautenberg Chemical Safety for the 21st Century Act § 13, 15 U.S.C. § 2617(e)(1) (2018) (providing that states may regulate chemical substances with certain limitations).

29. Fidelity Fed. Sav. & Loan Ass'n v. Cuesta, 458 U.S. 141, 153 (1982) (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)).

30. *Id.* (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)).

31. *See, e.g.*, Arizona v. United States, 567 U.S. 387, 403 (2012).

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

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

34. Nelson, *supra* note 24, at 228–29.

35. Buzbee, *supra* note 7, at 1551 (explaining that a regulatory floor is "where federal law allows states to increase the stringency of regulation but prohibits more lenient state regulation").

36. *See* 33 U.S.C. §§ 1342(o)(3), 1370 (2018). The Resource Conservation and Recovery Act of 1976 is another example. 42 U.S.C. § 6929 (2018) (providing states with the authority to impose solid waste disposal requirements more stringent than the federal standard).

a "ceiling," which establishes a maximum.[37] In this regulatory framework, states are free to regulate below that maximum but cannot regulate at a higher standard.[38] Ceiling preemption is common in the drug industry, where the federal standard is particularly important so that companies need only comply with one standard.[39]

Preemption in the climate change context is governed by *American Electric Power Company v. Connecticut*, where the Supreme Court considered congressional displacement of federal, not state, law.[40] In this context, although it is a different issue than preemption of state and local law, the Court again stressed the importance of clear guidance from Congress.[41] Addressing plaintiffs' argument that defendants' carbon dioxide emissions violated the federal common law of interstate nuisance, the Court held that "the Clean Air Act and the EPA actions it authorizes displace any federal common-law right to seek abatement of carbon-dioxide emissions from fossil-fuel fired powerplants."[42] Relying on *Mobil Oil Corp. v. Higginbotham*, which found that federal common law is displaced when the statute "speak[s] directly to [the] question," the Court found the Clean Air Act spoke directly to the question of carbon dioxide emissions.[43] Therefore, the Clean Air Act, and thus EPA actions authorized under the Act, preempted plaintiffs' federal common law claim of interstate nuisance.[44] The Court noted that the Clean Air Act contained several avenues of enforcement, such as criminal penalties and private civil suits.[45] It found that this was the same relief sought through federal common law, and there was "no room for a parallel track."[46] Notably, the Court rejected the plaintiffs' argument that federal common law is not displaced until the EPA exercises its authority, for example, when it establishes standards through rulemaking.[47] It stressed the importance of *Congress's* decision to occupy the entire field rather than allowing the agency to decide to occupy the entire field.[48]

Although preemption normally comes legislatively, in recent years federal executive agencies have invoked the doctrine of preemption to supplant state

37. Buzbee, *supra* note 7, at 1552, 1568–69 (explaining that a ceiling is where "federal action would preclude any more protective legal requirements or incentives created by other actors, be they state political actors or even common law regimes").

38. *Id.*

39. *See id.* at 1552–53, 1572–73.

40. *See* Am. Elec. Power Co. v. Connecticut, 564 U.S. 410, 418 (2011).

41. *See id.* at 426.

42. *Id.* at 418, 424.

43. *Id.* at 424 (alterations in original) (quoting Mobil Oil Corp. v. Higginbotham, 436 U.S. 618, 625 (1978)).

44. *Id.*

45. *Id.* at 425 (citing EPA authority to delegate enforcement, 42 U.S.C. § 7411(c)(1), (d)(1); possibility of criminal penalties, 42 U.S.C. § 7411; and citizen suit provision, 42 U.S.C. § 7604(a)).

46. *Id.*

47. *Id.* at 425–26.

48. *Id.* at 426.

and local environmental regulation on their own accord.[49] This shift has been met with speculation.[50] In August 1999, President Bill Clinton issued Executive Order 13132, which outlined requirements agencies must consider when taking action that preempts state law.[51] In May 2009, President Barack Obama issued a presidential memorandum, which directed agencies to follow strict guidelines when asserting preemptive power through administrative rulemaking. [52] Specifically, the memorandum indicated that "preemption of State law by executive departments and agencies should be undertaken only with full consideration of the legitimate prerogatives of the States and with a sufficient legal basis for preemption."[53] However, compliance with these directions have been inconsistent and often difficult to enforce across administrations.[54]

Since this shift, the federal government has become increasingly aggressive in asserting that federal environmental laws preempt state law.[55] For example, in July 2019, the Washington state senate enacted a law which prohibited importation of "crude oil into or from a rail tank car unless the oil has a vapor pressure of less than nine pounds per square inch."[56] North Dakota and Montana are currently seeking administrative determination that the federal Hazardous Material Transportation Act (HMTA) preempts Washington's law.[57] The Public Notice and Invitation of Comment states that the Pipeline and Hazardous Materials Safety Administration (PHMSA) and the Department of Transportation have the authority to preempt under the HMTA.[58] The future of this type of agency action is uncertain and likely to be challenged.

The Clean Air Act's contentious history, which continues today, illuminates the constant struggle between the federal and state governments and among successive presidential administrations. The Clean Air Act contains an express preemption provision prohibiting the states from regulating at a different level from the federal standard.[59] Under the statute, California is the only state that may invoke a "waiver," which allows it to establish a more stringent

49. Nina A. Mendelson, *A Presumption Against Agency Preemption*, 102 NW. U. L. REV. 695, 697–98 (2008).

50. *Id.*

51. Exec. Order No. 13,132, 3 C.F.R. § 206 (2000).

52. Memorandum on Preemption, 2009 DAILY COMP. PRES. DOC. 1 (May 20, 2009).

53. *Id.*

54. *See* Catherine M. Sharkey, *Inside Agency Preemption*, 110 MICH. L. REV. 521, 531–70 (2012).

55. Heinzerling, *supra* note 19, at 927; *see also* Memorandum on Preemption, *supra* note 52, at 1 ("In recent years . . . executive departments and agencies have sometimes announced that their regulations preempt State law, including State common law, without explicit preemption by the Congress or an otherwise sufficient basis under applicable legal principles.").

56. WASH. REV. CODE § 90.56.580(1)(a) (2021).

57. Hazardous Materials: The State of Washington Crude Oil by Rail—Vapor Pressure Requirements, 84 Fed. Reg. 35,707, 35,707 (July 24, 2019); *see also* 49 U.S.C. §§ 5101–28 (2018).

58. Hazardous Materials: The State of Washington Crude Oil by Rail—Vapor Pressure Requirements, 84 Fed. Reg. at 35,708.

59. 42 U.S.C. § 7543(a) (2018).

emissions standard.[60] If California does this, other states may elect to follow either the California or the federal standard.[61] In 2009, under the Obama Administration, the EPA granted California's waiver.[62] A decade later, in September 2019, under the Trump Administration, the EPA and NHTSA jointly published in the *Federal Register* the Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule, which proposed to amend greenhouse gas and Corporate Average Fuel Economy (CAFE) standards.[63] The SAFE Rule also proposed to withdraw the waiver under section 209 of the Clean Air Act, and to establish national fuel economy standards, specifically preempting state programs.[64] This withdrawal would put California's Zero-Emission Vehicle mandate in jeopardy as potentially preempted by the SAFE Rule.[65] One study showed that if the SAFE Rule goes into effect, oil consumption would increase by 320 billion gallons, greenhouse-gas emissions would increase by the equivalent of two years of emissions from the entire transportation sector, auto safety would decrease, and Americans would lose $460 billion of the expected $660 billion in savings from the current fuel-economy standards.[66] For these reasons, California and twenty-two other states have filed suit to challenge this proposed rule.[67] In his first day in office, President Biden issued an executive order directing the agencies to immediately review environmental actions under the Trump Administration, including the SAFE Rule.[68]

In these examples, the executive branch decides that a duly enacted federal statute preempts state law through administrative rulemaking. Other agencies do

60. *See id.* §§ 7543(b)–(e), 7507.

61. *See id.*

62. California State Motor Vehicle Pollution Control Standards; Notice of Decision Granting a Waiver of Clean Air Act Preemption for California's 2009 and Subsequent Model Year Greenhouse Gas Emission Standards for New Motor Vehicles, 74 Fed. Reg. 32,744, 32,744 (July 8, 2009).

63. The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule Part One: One National Program, 84 Fed. Reg. 51,310, 51,310–11 (Sept. 27, 2019) (to be codified at 40 C.F.R. pt. 85, 86; 49 C.F.R. pt. 531, 533).

64. *Id.* at 51,311–14.

65. Peter Whitfield & Aaron L. Flyer, *SAFE Rule: Federal-State Tension in Auto Emission Regulation*, 51 TRENDS, Jan.–Feb. 2020, at 4, 6.

66. CHRIS HARTO, SHANNON BAKER-BRANSTETTER & JAMIE HALL, THE UN-SAFE RULE: HOW A FUEL-ECONOMY ROLLBACK COSTS AMERICANS BILLIONS IN FUEL SAVINGS AND DOES NOT IMPROVE SAFETY 2–3 (2019), https://advocacy.consumerreports.org/wp-content/uploads/2019/08/The-Un-SAFE-Rule-How-a-Fuel-Economy-Rollback-Costs-Americans-Billions-in-Fuel-Savings-and-Does-Not-Improve-Safety-2.pdf.

67. Press Release, State of Cal., Dep't of Just., Attorney General Becerra Files Lawsuit Challenging Trump Administration's Attempt to Trample California's Authority to Maintain Longstanding Clean Car Standards (Sept. 20, 2019), https://oag.ca.gov/news/press-releases/attorney-general-becerra-files-lawsuit-challenging-trump-administration%E2%80%99s. The content and validity of those challenges are beyond the scope of this Note. For a summary and discussion of the legal issues, see Trish McCubbin, *The Trump Administration's Withdrawal of California's Clean Air Act Preemption Waiver in the SAFE Rule*, 51 TRENDS, Mar.–Apr. 2020, at 4, 6–7. It should also be noted that many expect the Biden Administration to reverse the SAFE Rule. Cynthia A. Faur, Marian LaLonde, George Marek & Pilar M. Thomas, *What to Expect from the Biden Administration: Key Environmental and Natural Resource Issues to Watch*, QUARLES & BRADY LLP (Nov. 17, 2020), https://www.quarles.com/publications/what-to-expect-from-the-biden-administration-key-environmental-and-natural-resource-issues-to-watch/.

68. Exec. Order No. 13990, 86 Fed. Reg. 7037, 7037–38 (Jan. 20, 2021).

this as well.[69] Perhaps the most widely known is the Food and Drug Administration's assertion of preemption over state law.[70] Some agencies even assert that their regulation, promulgated in the *Federal Register*, supplants common law.[71] Under several doctrines of executive deference—discussed below—courts have largely deferred to the agency's decision that its program preempts state and local law.[72] This deference is likely the main reason for the increase in assertions of preemption by the executive branch.[73] The next Part will discuss how the future of this type of executive deference is standing on shaky ground.

II. THE SUPREME COURT'S DEFERENCE TO THE EXECUTIVE BRANCH'S ASSERTIONS OF PREEMPTION

The Supreme Court's deference to the executive branch, specifically when it comes to assertions of preemption, is likely to change in the near future in light of the current Justices expressing distaste for such deference. Several doctrines developed over the years—namely, *Chevron*, *Auer*, and *BrandX*—have granted very permissive decisionmaking authority to administrative agencies. For a variety of reasons discussed below, current Justices have signaled their dislike for how these doctrines have progressed and have called for reconsideration. This Part will briefly explain these doctrines, address how they have inhibited local climate change regulation, and highlight specific comments made by current Justices signaling their impending demise.

A. OVERVIEW OF EXECUTIVE DEFERENCE

Over time, the federal rulemaking process has been developed to allow the executive and legislative branches to work in tandem.[74] When Congress passes a statute which either requires or authorizes an executive agency to issue regulations, the agency may do so through a process which involves proposed rules, public comments, review, and publication of the final rule.[75] As previously noted, executive agencies have become increasingly aggressive in using this

69. David A. Kessler & David C. Vladeck, *A Critical Examination of the FDA's Efforts to Preempt Failure-to-Warn Claims*, 96 GEO. L.J. 461, 462 (2008); *see also* Final Rule: Standard for the Flammability (Open Flame) of Mattress Sets, 71 Fed. Reg. 13,472, 13,496–97 (Mar. 15, 2006) (to be codified at 16 C.F.R. pt. 1633).

70. *See* Kessler & Vladeck, *supra* note 69, at 462–63.

71. *See, e.g.*, Requirements on Content and Format of Labeling for Human Prescription Drug and Biological Products, 71 Fed. Reg. 3922, 3933–36 (Jan. 24, 2006) (to be codified at 21 C.F.R. pt. 201, 314, 601). In *Riegel v. MedTronic*, the Supreme Court held that the FDCA expressly preempted state tort failure to warn claims. Although the Supreme Court discussed that it did not need to defer to the agency's position because the statutory language was clear, it noted that the FDA did agree with its position. Riegel v. MedTronic, 552 U.S. 312, 321, 330 (2008).

72. *See infra* Part III.

73. *See* Mendelson, *supra* note 49, at 697–98.

74. MAEVE P. CAREY, CONG. RSCH. SERV., RL32240, THE FEDERAL RULEMAKING PROCESS: AN OVERVIEW (2013), https://fas.org/sgp/crs/misc/RL32240.pdf.

75. *Id.* at 2–3.

tactic to preempt and displace a state or local government's attempt to regulate in the same area, particularly in the area of environmental regulation.[76]

After publication, the final rule may be challenged in court.[77] The courts have developed several doctrines which have encouraged judges to defer to an executive agency's expertise in a certain arena. In *Skidmore v. Swift & Co.*, for example, Justice Jackson stated that the "Court has long given considerable and in some cases decisive weight" to agency decisions.[78] The rationale for this is that the executive agencies—with their expertise in a certain arena—are in a better position than the courts to make the right call with respect to their subject areas.[79]

The most famous—some would say infamous—of these is the *Chevron* doctrine. In *Chevron v. Natural Resources Defense Council*, the Supreme Court held that when a "statute is silent or ambiguous with respect to the specific issue," the court should defer to the agency's interpretation.[80] The only limitation on this is that the court must determine "whether the agency's answer is based on a permissible construction of the statute."[81] In other words, when a congressionally enacted statute is ambiguous, and an executive agency interpreted the vague language, the court will defer to that interpretation.

After *Chevron* came *Auer* deference, which requires a court to defer to an agency's interpretation of its own promulgated rule if found to be ambiguous, "unless 'plainly erroneous or inconsistent.'"[82] This means that when an agency interprets a vague statute—normally through the rulemaking process—and the language of its own interpretation is also vague, the courts will defer to the agency's interpretation of its own interpretation of the statute.

The *BrandX* doctrine took this one step further. This decision, arising in the net neutrality context, held that the ambiguity in the applicable statute (the Telecommunications Act of 1996) left interpretation up to the responsible agency (the Federal Communications Commission).[83] The practical result of the decision is that an agency is free to change its previous interpretation of an ambiguous statute so long as it provides a reasonable explanation for the new interpretation.[84] Under *BrandX*, every time there is an administration change, an agency is free to change the previous administration's policy.[85] Critics of the doctrine argue that it does away with stare decisis because a court may hold an

76. Heinzerling, *supra* note 19, at 927.

77. *See* CAREY, *supra* note 74, at 6.

78. Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944).

79. *See* Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 865 (1984).

80. *Id.* at 843–44.

81. *Id.*

82. Auer v. Robbins, 519 U.S. 452, 461 (1997) (quoting Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 359 (1989)).

83. Nat'l Cable & Telecomm. Ass'n v. BrandX Internet Servs., 545 U.S. 967, 996 (2005).

84. Heidi Marie Werntz, *Counting on* Chevron*?*, 38 ENERGY L.J. 297, 329 (2017) (citing *BrandX*, 545 U.S. at 982–85); Aaron L. Nielson, *Sticky Regulations*, 85 U. CHI. L. REV. 85, 127 (2018).

85. For a discussion on this back-and-forth dilemma, see Nielson, *supra* note 84, at 86–93.

agency's previous interpretation as valid.[86] However, if the agency later changes its mind and provides a new interpretation, then the previous judicially decided interpretation is no longer valid.[87] Thus, the executive branch supplants a court's decision.[88]

The non-delegation doctrine is related, yet different. The Constitution vests "[a]ll legislative Powers herein granted . . . in a Congress of the United States."[89] However, Congress may pass its constitutionally delegated authority to create law to an executive agency so long as it does so using an "intelligible principle."[90] The Supreme Court has been quite lenient with this practice, only having struck down two statutes for failing to provide an intelligible principle, both in 1935.[91] Through this lenient standard, executive agencies have enjoyed a regulatory field day for almost a decade. Some thought that this permissive doctrine would come to an end in *Whitman v. American Trucking*.[92] There, the Supreme Court addressed a provision of the Clean Air Act, which required the EPA to set National Ambient Air Quality Standards "requisite to protect the public health."[93] Writing for the majority, Justice Scalia held that the word "requisite" was the intelligible principle, because it meant "sufficient, but not more than necessary."[94] Thus, the EPA was free to regulate as it pleased under the statutory authority granted by Congress.

Overall, when legal challenges to federal executive action are brought, courts rely on the *Chevron*, *Auer*, *BrandX*, and non-delegation doctrines to defer to the agency's expertise and largely uphold the action. As discussed below, this permissive precedent will likely not last much longer since enough Justices on the Supreme Court have expressed dislike for this permissive deference.

B. INDICATORS OF THE LIKELY FUTURE DECREASE IN DEFERENCE TO THE EXECUTIVE BRANCH'S ASSERTIONS OF PREEMPTION

Current Justices on the Supreme Court have signaled their desire to revisit such permissive deference to administrative agencies. Although Justice Scalia suggested "*Chevron* will endure and be given its full scope . . . because it more accurately reflects the reality of government, and thus more adequately serves

86. *See* Baldwin v. United States, 140 S. Ct. 690, 694 (2020) (mem.) (Thomas, J., dissenting).

87. *See id.*

88. *See id.*

89. U.S. CONST. art. I, § 1.

90. Whitman v. American Trucking Ass'ns, 531 U.S. 457, 472 (2001).

91. A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 550 (1935); Panama Refin. Co. v. Ryan, 293 U.S. 388, 430, 432–33 (1935).

92. *See, e.g.*, Sandra B. Zellmer, *The Nondelegation Doctrine: Fledgling Phoenix or Ill-Fated Albatross?*, 31 ENVTL. L. REP. NEWS & ANALYSIS 11151, 11151 (2001) (arguing the Supreme Court "could have declared the doctrine utterly defunct . . . . Conversely, it could have clarified its test . . . . Instead, the Court stuck with the long-standing but frustratingly opaque 'intelligible principles' test . . . .").

93. *Whitman*, 531 U.S. at 472 (quoting 42 U.S.C. § 7409(b)(1) (2018)).

94. *Id.* at 473.

its needs,"[95] recent jurisprudence suggests otherwise. Specifically, current members of the Supreme Court have expressed their desire to revisit deference to the executive branch under *Chevron*, *BrandX*, *Auer*, and the non-delegation doctrine. Although the main argument in favor of executive deference is that the executive branch has expertise in that area, the argument against is that the executive agencies lack expertise in the area of separating power between the federal and state governments.[96] Additionally, many commenters, including the Justices themselves, have noted that deference to the executive branch is especially inappropriate in the area of climate change regulation.

In then-Tenth Circuit Judge Gorsuch's famous concurrence to *Gutierrez-Brizuela v. Lynch*, he signaled his desire to divest power that has been granted to the executive branch under *Chevron*.[97] Principally, his main concerns were grounded in separation of powers and judicial dereliction of duty.[98] According to Justice Gorsuch, the *Chevron* doctrine permits the courts to abandon their constitutionally mandated duty to interpret the law.[99] As such, the courts are abdicating their duty by allowing the executive branch to do the courts' job.[100]

In *Gutierrez-Brizuela*, Justice Gorsuch also foreshadowed a desire to revisit the non-delegation doctrine. He stated that "[t]he Supreme Court has long recognized that under the Constitution 'congress cannot delegate legislative power to the president' and that this 'principle [is] universally recognized as vital to the integrity and maintenance of the system of government ordained by the constitution.'"[101] Justice Gorsuch had that opportunity in *Gundy v. United States*, but, with only a minority of votes on his side, he resorted to detailing his distaste in a dissenting opinion.[102] To him, the framers of the Constitution believed it would frustrate the system of government if Congress could vaguely assign to others its legislative duty.[103] Essentially, the vesting clauses would make no sense if "Congress could pass off its legislative power to the executive branch."[104] He then outlined the history of the non-delegation doctrine—including the intelligible principle standard—and called for a stricter

95. Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 521 (1989).

96. *See* Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 865 (1984); Mendelson, *supra* note 49, at 698.

97. Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1149–58 (10th Cir. 2016) (Gorsuch, J., concurring) ("[T]he fact is *Chevron* . . . permit[s] executive bureaucracies to swallow huge amounts of core judicial and legislative power and concentrate federal power in a way that seems more than a little difficult to square with the Constitution of the framers' design.").

98. *Id.* at 1153–54.

99. *Id.* at 1153 ("[T]he problem remains that *courts* are not fulfilling their duty to interpret the law and declare invalid agency actions inconsistent with those interpretations in the cases and controversies that come before them.").

100. *Id.*

101. *Id.* (second alteration in original) (quoting Marshall Field & Co. v. Clark, 143 U.S. 649, 692 (1892)).

102. *See* Gundy v. United States, 139 S. Ct. 2116, 2131 (2019) (Gorsuch, J., dissenting).

103. *Id.* at 2133.

104. *Id.* at 2134–35.

construction in order to avoid this constitutionally impermissible delegation of power from the legislative to the executive branch.[105]

Specifically noteworthy in *Gundy* is the fact that it was just a plurality which disagreed with Justice Gorsuch, indicating the Court was one vote short of adopting Justice Gorsuch's view and revisiting the non-delegation doctrine. Justice Gorsuch likely would have won had it not been for Justice Alito joining the plurality with hesitation.[106] Justice Alito stated in his concurrence that if "a majority of this Court were willing to reconsider the approach we have taken for the past 84 years, I would support that effort. But because a majority is not willing to do that, it would be freakish to single out the provision at issue here for special treatment."[107] In other words, he would have been ready to revisit the non-delegation doctrine if he had enough votes to support it.

Justice Alito will have that chance with Justice Kavanaugh now on the bench. Although Justice Kavanaugh had been appointed, he did not participate in the decision in *Gundy*.[108] But later that term, Justice Kavanaugh noted his agreement with Justice Gorsuch during a discussion in a denial of certiorari.[109] He stated that Justice Gorsuch's "opinion raised points that may warrant further consideration in future cases."[110] In the same term, Justice Gorsuch stated that the Court should "say goodbye" to *Auer* deference in a concurring opinion joined by Justices Thomas, Kavanaugh, and Alito. [111]

In February 2020, Justice Thomas also signaled his desire to revisit the Court's deference to the executive branch. Justice Thomas wrote a strong dissent to the majority's denial of certiorari on a Ninth Circuit decision which deferred to the IRS under *BrandX*.[112] Justice Thomas noted, "Although I authored *Brand X*, 'it is never too late to surrende[r] former views to a better considered position.'"[113] In his discussion, Justice Thomas wrote that the *Chevron* doctrine precludes judges from exercising judicial power, gives federal agencies unconstitutional power, and undermines the Judiciary's ability to check the other branches.[114] Justice Thomas also noted that *Chevron* offends the Administrative Procedures Act, which the *Chevron* decision improperly failed to discuss.[115] He was even more convinced that *BrandX* conflicted with Article III of the

105. *Id.* at 2135–42.
106. *See id.* at 2130–31 (Alito, J., concurring).
107. *Id.* at 2131.
108. *Id.* at 2130.
109. Paul v. United States, 140 S. Ct. 342, 342 (2019) (mem).
110. *Id.*
111. Kisor v. Wilkie, 139 S. Ct. 2400, 2425 (2019) (Gorsuch, J., concurring).
112. Baldwin v. United States, 140 S. Ct. 690, 690 (2020) (mem.) (Thomas, J., dissenting).
113. *Id.* at 690 (alteration in original) (quoting South Dakota v. Wayfair, Inc., 138 S. Ct. 2080, 2100 (2018) (Thomas, J., concurring)).
114. *Id.* at 692.
115. *Id.*

Constitution because it "directs courts to give effect to the will of the Executive by depriving judges of the ability to follow their own precedent."[116]

Moreover, the future of executive deference in the realm of climate change regulation is significant because it often invokes the major questions doctrine.[117] The major questions doctrine assumes that "Congress [will] speak clearly if it wishes to assign to an agency decisions of vast 'economic and political significance.'"[118] Thus, when dealing with a question of major significance, the Court will not defer to the agency out of an assumption that Congress would not delegate to the executive branch the authority to decide it.[119] In another dissenting opinion, then-D.C. Circuit Judge Kavanaugh wrote, "[i]f an agency wants to exercise expansive regulatory authority over some major social or economic activity— . . . greenhouse gas emitters, for example—an *ambiguous* grant of statutory authority is not enough. Congress must *clearly* authorize an agency to take such a major regulatory action."[120] This is yet another indication that this Supreme Court prefers a clear indication of preemption from Congress, not the administrative agency.

The Clean Air Act provides a clear example. In 2009, the EPA issued what came to be known as the Endangerment Finding, stating that "emissions of well-mixed greenhouse gases . . . contribute to the total greenhouse gas air pollution, and thus to the climate change problem, which is reasonably anticipated to endanger public health and welfare."[121] As a result of this finding, greenhouse gases were added to the list of air pollutants that the EPA was required to regulate under the Clean Air Act.[122] Then, in *Coalition for Responsible Regulation, Inc. v. EPA*, the D.C. Circuit upheld the Endangerment Finding.[123] If the EPA promulgates a regulation holding that greenhouse gas emissions do not pose a danger to the environment, a challenge to that rule could come before the D.C. Circuit. The *Chevron* doctrine would require the D.C. Circuit to defer to the new stance. This is the executive branch forcing the judicial branch to overturn its own precedent and is the exact type of usurpation of constitutional authority of which Justice Thomas disapproves.[124]

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116. *Id.* at 694–95 ("*Brand X* takes on the constitutional deficiencies of *Chevron* and exacerbates them. . . . Even if the Court is not willing to question *Chevron* itself, at the very least, we should consider taking a step away from the abyss by revisiting *Brand X*.").

117. Jonathan H. Adler, *Justice Kavanaugh on Delegation and Major Questions (Updated)*, REASON (Nov. 25, 2019, 9:45 AM), https://reason.com/2019/11/25/justice-kavanaugh-on-delegation-and-major-questions.

118. Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014) (quoting Food & Drug Admin. v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 160 (2000)).

119. Marla D. Tortorice, *Nondelegation and the Major Questions Doctrine: Displacing Interpretive Power*, 67 BUFF. L. REV. 1075, 1102 (2019).

120. U.S. Telecom Ass'n v. Fed. Commc'ns Comm'n, 855 F.3d 381, 421 (D.C. Cir. 2017) (Kavanaugh, J., dissenting).

121. Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66,496, 66,499 (Dec. 15, 2009) (to be codified at 40 C.F.R.).

122. *Id.*

123. Coal. for Responsible Regul., Inc. v. EPA, 684 F.3d 102, 116 (D.C. Cir. 2012).

124. *See* Baldwin v. United States, 140 S. Ct. 690, 694 (2020) (mem.) (Thomas, J., dissenting).

Lastly, this increasingly conservative Court poses a unique issue to the future of climate change regulation. Historically, conservative Courts have vehemently pushed for federalism, by favoring the transfer of power from the federal government to the state and local governments.[125] This would further support the notion that now is the time for state and local governments to vigorously enact environmentally protective legislation. However, conservatives tend to dislike both climate change regulation and granting administrative agencies broad authority in the absence of clear Congressional direction.[126] Therefore, when it comes to administrative agencies attempting to preempt state and local law in an effort to decrease climate change regulation, it is currently unclear which is the lesser of these two evils in the Justices' eyes. This is especially true in light of the recent passing of Justice Ruth Bader Ginsburg. Commentators' fears about Justice Amy Coney Barrett's recent confirmation express this exact dilemma.[127]

The point is that the current Justices, if they are to adhere to their loud foreshadowing, will have to find a clearer indication from Congress that the statute explicitly allows an agency to preempt state and local law in a certain arena. Further, it is entirely possible that the Court will not allow an executive agency to preempt state law via administrative rulemaking. If the Justices wish to require Congress to perform its constitutionally mandated duty to create law, they may likely instruct Congress to issue the explicit preemption itself. If so, current Supreme Court precedent requires narrowly construing express preemption provisions.[128] This simply creates a higher bar for the Court to find preemption outside of the rulemaking process. Only then will Justice Gorsuch, and those that agree with him, address their clear concern that: (1) Congress has been neglecting its duty to create law; (2) the courts have been in dereliction of their duty to say what the law is; and (3) the executive branch is free to manage the operations of all three branches of government.

125. Richard H. Fallon, Jr., *The "Conservative" Paths of the Rehnquist Court's Federalism Decisions*, 69 U. CHI. L. REV. 429, 429–30 (2002).

126. For a thorough discussion on how this dilemma is playing out in the Trump Administration, see Jonathan H. Adler, *Uncooperative Federalism 2.0*, 71 HASTINGS L.J. 1101 (2020); Jonathan H. Adler, *The Conservative Record on Environmental Policy*, 39 NEW ATLANTIS 133 (2013).

127. *See, e.g.*, Jeff Brady, *How Nomination of Amy Coney Barrett to Supreme Court Might Affect U.S. Climate Action*, NPR (Oct. 7, 2020, 4:52 PM), https://www.npr.org/2020/10/07/921322803/how-nomination-of-amy-coney-barrett-to-supreme-court-might-affect-u-s-climate-ac ("Barrett is skeptical of federal agencies stretching their authority under laws where Congress hasn't given them clear direction."); Beth Gardiner, *With Justice Barrett, a Tectonic Court Shift on the Environment*, YALE ENV'T 360 (Oct. 26, 2020), https://e360.yale.edu/features/with-justice-barrett-a-tectonic-court-shift-on-the-environment (indicating Justice Barrett has used "the same language Republican politicians use" with respect to climate change). Further complicating a prediction regarding future climate change decisions with this predominantly conservative Court, Justice Barrett has expressed a desire to adhere to *stare decisis* and avoid overturning precedent. *See* Jim Saksa, *Barrett, with Scalia as a Model, May Be a Moderate on Regulation*, ROLL CALL (Oct. 8, 2020, 6:00 AM), https://www.rollcall.com/2020/10/08/barrett-with-scalia-as-model-may-be-a-moderate-on-regulation/.

128. *See* Raether, *supra* note 27, at 1027 (citing Cipollone v. Liggett Grp., Inc., 505 U.S. 504, 518 (1992)).

If the current Supreme Court stays true to its desire to distance itself from deferring to executive agencies' assertion of preemption through administrative rulemaking, states should exercise their authority to cooperate in environmental regulation. Of course, challengers to environmentally protective laws from a state and local level will likely wield every sword they can.[129] As discussed below, assertions of dormant Commerce Clause violations will likely increase, and enacting governments should keep these potential constitutional challenges in mind as they proceed.

III. THE DORMANT COMMERCE CLAUSE AND CHALLENGES

If preemption is of no—or at least less—concern, another major concern for states and local governments attempting to regulate climate change on their own is the dormant Commerce Clause. This Part discusses the dormant Commerce Clause doctrine's development over the years, its challenges in court, and how these challenges reshaped the doctrine. It also emphasizes several important lessons, such as the problem of virtual representation and extraterritoriality, which state and local law makers should examine as they enact environmentally protective laws.

A. THE DORMANT COMMERCE CLAUSE DOCTRINE

The Commerce Clause vests in Congress the power to regulate "Commerce . . . among the several States."[130] The Commerce Clause has long been understood to have a "negative" aspect which denies the States the power to discriminate against or burden interstate commerce.[131] This is often called the dormant Commerce Clause doctrine, which prohibits "economic protectionism," or "regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors."[132] That is, the Commerce Clause assumes that Congress does not want any burden on interstate commerce, and a state or local action that does place such a burden would be considered a constitutional violation under the dormant Commerce Clause.

There are two main goals that the dormant Commerce Clause doctrine is meant to achieve. The first is to preserve the states' right to act as laboratories,

129. For example, in *Rocky Mountain Farmers Union v. Goldstene*, the plaintiffs argued the California regulatory program violated the Commerce Clause and was preempted by federal law. Rocky Mountain Farmers Union v. Goldstene, 843 F. Supp. 2d 1071, 1078 (E.D. Cal. 2011).

130. U.S. CONST. art. I, § 8, cl. 3.

131. Or. Waste Sys., Inc. v. Dep't of Env't Quality of Or., 511 U.S. 93, 98 (1994).

132. Dep't of Revenue of Ky. v. Davis, 553 U.S. 328, 337–38 (2008) (quoting New Energy Co. of Ind. v. Limbach, 486 U.S. 269, 273–74 (1988)). The often-cited Justice Cardozo stated that the Constitution was "framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division." Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511, 523 (1935).

whereby the states may try new social and economic experiments.[133] The second goal is to protect against "economic Balkanization," which is defined as "political fragmentation," or the separation of regulatory jurisdictions into smaller, individual, and often hostile bodies.[134] The Supreme Court has expressed that the Constitution's drafters intended to "avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation."[135] Over the years, a number of Supreme Court decisions have gradually created a test that courts will apply when deciding whether a state or local law or regulation unconstitutionally burdens interstate commerce.[136]

In the first step of the test, a court must determine whether the state or local law discriminates against interstate commerce.[137] There are three ways in which a state or local law may be found discriminatory. The regulation may be facially discriminatory, in which the state or local action specifically discriminates against interstate commerce.[138] For example, a state law which specifically prohibits importation of items from out of state is facially discriminatory.[139] A facially neutral regulation, however, may be discriminatory based on either its effects[140] or its purpose.[141]

If the state regulation is found to be discriminatory in one of these three ways, the court applies the strict scrutiny test. Under this test, the discriminatory regulation is presumed unconstitutional unless the state can show "that it advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives."[142] Only one local regulation in the history of dormant Commerce Clause jurisprudence has been upheld under this test.[143] If, however, the state or local statute is found not to be discriminatory, the court will apply the *Pike* balancing test.[144] Under this test there is no

133. New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous State may . . . serve as a laboratory; and try novel social and economic experiments . . . .").

134. Steve A. Radom, Note, *Balkanization of Securities Regulation: The Case for Federal Preemption*, 39 TEX. J. BUS. L. 295, 304 (2003).

135. Hughes v. Oklahoma, 441 U.S. 322, 325–26 (1979).

136. Interstate commerce is the "buying, selling, or moving of products, services, or money across state borders." *Interstate Commerce*, NOLO, https://www.nolo.com/dictionary/interstate-commerce-term.html (last visited Apr. 19, 2021).

137. City of Philadelphia v. New Jersey, 437 U.S. 617, 626–27 (1978) (explaining that a state law may not discriminate "against articles of commerce coming from outside the State unless there is some reason, apart from their origin, to treat them differently").

138. *Id.* at 628.

139. *Id*.

140. *See* Waste Sys. Corp. v. Cnty. of Martin, 985 F.2d 1381, 1386 (1993).

141. *See* Hunt v. Wash. State Apple Advert. Comm'n, 432 U.S. 333, 350, 352–53 (1977).

142. New Energy Co. of Ind. v. Limbach, 486 U.S. 269, 278 (1988).

143. Maine v. Taylor, 477 U.S. 131, 151 (1986) (upholding a patently discriminatory law since it served a legitimate purpose which could not be achieved through less discriminatory means).

144. *See* Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970).

presumption of invalidity as there is under the strict scrutiny test.[145] Instead, a non-discriminatory state or local regulation is presumed to be constitutional so long as the burdens on interstate commerce are not "clearly excessive" in relation to the local benefits.[146]

The extraterritoriality principle is a corollary to the dormant Commerce Clause. Strictly speaking, extraterritoriality is the prohibition against state legislation which: (1) has the "practical effect of establishing a 'scale of prices for use in other states'";[147] (2) has the practical effect of controlling conduct beyond the state's boundaries; and (3) requiring an out-of-state merchant to seek regulatory approval in one state before undertaking a transaction in another.[148] The courts will ask whether the "practical effect of the regulation is to control conduct beyond the boundaries of the State."[149] In other words, the dormant Commerce Clause prohibits a state from regulating conduct that "takes place wholly outside of the State's borders."[150] Even when states regulate in the areas of public health and safety rather than economic interests, courts may still invoke the extraterritoriality principle if the regulation imposes requirements on out-of-state transactions or risks conflicting regulations between the states in a way that would result in an undue burden on interstate commerce.[151] As will be discussed in Part V, the extraterritoriality principle has been invoked to challenge state and local environmental regulations and should be considered when drafting legislation.

Another corollary to the dormant Commerce Clause, and a factor that can decrease the likelihood of finding discrimination, is the principle of virtual representation.[152] The virtual representation problem arises when a law burdens both out-of-state and in-state businesses.[153] The question the courts will ask is whether the interests of the out-of-state firms can be adequately represented in the state legislative process.[154] If the burdened in-state businesses can represent the likely similar interests of the burdened out-of-state businesses in the state legislature, it is unnecessary for a court to step in and protect the out-of-state businesses.[155]

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145. *Id.*

146. *Id.*

147. Healy v. Beer Inst. Inc., 491 U.S. 324, 336 (1989) (quoting Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511, 528 (1935)).

148. *See id.* at 336–37; Brannon P. Denning, *Extraterritoriality and the Dormant Commerce Clause: A Doctrinal Post-Mortem*, 73 LA. L. REV. 979, 988–89 (2013).

149. *Healy*, 491 U.S. at 336 (citing Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth., 476 U.S. 573, 579 (1986)).

150. *Id.* (quoting Edgar v. MITE Corp., 457 U.S. 624, 642–43 (1982)).

151. Alexandra B. Klass & Elizabeth Henley, *Energy Policy, Extraterritoriality, and the Dormant Commerce Clause*, 5 SAN DIEGO J. CLIMATE & ENERGY L. 127, 145 (2013).

152. Daniel K. Lee & Timothy P. Duane, *Putting the Dormant Commerce Clause Back to Sleep: Adapting the Doctrine to Support State Renewable Energy Portfolio Standards*, 43 ENV'T L. 295, 307 (2013).

153. *Id.*

154. *Id.*

155. *Id.*

However, virtual representation crumbles—and thus results in a finding of discrimination against interstate commerce—when something impedes the in-state businesses from adequately and properly representing those out of state. The prime example of this occurred in *West Lynn Creamery v. Healey*, where the state of Massachusetts imposed a fee on all dairy producers.[156] The Supreme Court stated, "[n]ondiscriminatory measures, like the evenhanded tax at issue here, are generally upheld, in spite of any adverse effects on interstate commerce, in part because '[t]he existence of major in-state interests adversely affected . . . is a powerful safeguard against legislative abuse.'"[157] In other words, some sort of burden which applies to both in-state and out-of-state producers is fine since the out-of-state producers are represented by the in-state producers.

The problem in *West Lynn Creamery* was that the fees collected from *all* producers were deposited into a fund which was distributed to *only in-state* producers.[158] Although a subsidy by itself may have been perfectly acceptable, the combination of the two resulted in an unconstitutional burden on interstate commerce.[159] The Supreme Court reasoned that the state's "political processes can no longer be relied upon to prevent legislative abuse, because one of the in-state interests which would otherwise lobby against the tax has been mollified by the subsidy."[160] This is the problem of virtual representation. If a state program burdens both in-state and out-of-state producers equally, then the program is constitutional under the dormant Commerce Clause. However, when some sort of inequality exists, such as the burden on interstate commerce in *West Lynn Creamery* which served the benefit of in-state interests but to the detriment of out-of-state interests, such a program is the paradigmatic violation of the dormant Commerce Clause.[161]

This test guides the courts' analysis when faced with a dormant Commerce Clause challenge to state and local regulations as allegedly burdensome on interstate commerce. Unsurprisingly, those unsupportive of climate change regulation have attacked local laws under this doctrine. The next Subpart will discuss a few prime examples of how these challenges have shaped out.

B. DORMANT COMMERCE CLAUSE CHALLENGES AS TOOLS TO COMBAT STATE AND LOCAL ACTION

Opponents to state and local climate change regulation argue that the regulation places an undue burden on interstate commerce in violation of the

156. W. Lynn Creamery, Inc. v. Healy, 512 U.S. 186, 200 (1994).

157. *Id.* (second alteration in original) (omission in original) (quoting Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 473 n.17 (1981)).

158. *Id.*

159. *Id.* at 199–200 ("By conjoining a tax and a subsidy, Massachusetts has created a program more dangerous to interstate commerce than either part alone.").

160. *Id.* at 200.

161. *Id.*

dormant Commerce Clause. One illustrative example is the Clean Air Act. Since the Act's inception, the interaction between federal and local actors has been replete with conflict. States often challenge federal regulations in court.[162] And despite the federal government's challenges to the state regulations, states do maintain a tremendous amount of autonomy under the Clean Air Act.[163]

California specifically has a rich history with the Clean Air Act. With its air quality being shockingly low, it has responded by enacting some of the most restrictive air quality regulations in the country.[164] Given the recent dramatic increase in wildfires, and the federal government's clear resistance to assist, California has and likely will continue to do whatever it can to decrease the havoc that climate change-motivated wildfires have wreaked across the state.[165]

Other states have followed a similar path. For example, Oregon's efforts also exemplify a state's attempt to combat climate change, only to be challenged in court as unconstitutional. Its wet climate has often been thought resistant to major effects of wildfires; however, the state's recent and drastic increase in wildfires suggests that impending destruction from climate change has and will continue to affect not just California or the West Coast, but the entire country.[166]

This Subpart will discuss dormant Commerce Clause challenges to California's and Oregon's clean air programs. As more and more states begin to follow suit, California's jurisprudential history—one that has followed to Oregon[167]—serves as a proper example to illustrate considerations for states as they consider taking on a similar challenge.

1. Dormant Commerce Clause Challenges to California's Air Pollution Program

Because other states have followed California's approach to its battle against climate change, legal challenges to California's program reveal the points of contention that other states must examine. In 2006, the California Legislature enacted Assembly Bill 32 (A.B. 32), which directed the California Air Resources Board (CARB) to ensure California reached 1990 greenhouse gas

162. For a list of decisions which address state challenges to federal regulations in court, see Jonathan H. Adler & Nathaniel Stewart, *Is the Clean Air Act Unconstitutional? Coercion, Cooperative Federalism and Conditional Spending After* NFIB v. Sebelius, 43 ECOLOGY L.Q. 671, 672 n.2 (2016).

163. *See* John P. Dwyer, *The Practice of Federalism Under the Clean Air Act*, 54 MD. L. REV. 1183, 1190–93 (1995).

164. *See* California Global Warming Solutions Act of 2006, CAL. HEALTH & SAFETY CODE §§ 38500–99 (West 2021).

165. *See* Colby Bermel, Carla Marinucci & Alex Guillén, *Newsom Bans New Gas Cars—and Begs Trump for a Fight*, POLITICO (Sept. 23, 2020, 9:05 PM), https://www.politico.com/states/california/story/2020/09/23/newsom-bans-new-gas-cars-and-begs-trump-for-a-fight-1317947.

166. *See* Christopher Flavelle & Henry Fountain, *In Oregon, a New Climate Menace: Fires Raging Where They Don't Usually Burn*, N.Y. TIMES, https://www.nytimes.com/2020/09/12/climate/oregon-wildfires.html (Sept. 17, 2020).

167. *See infra* note 202 and accompanying text.

emissions levels by 2020.[168] Later, Assembly Bill 1493 (A.B. 1493) directed CARB to enact regulations which "achieve the maximum feasible and cost-effective reduction of greenhouse gas emissions from motor vehicles."[169] In 2009, CARB enacted the Low Carbon Fuel Standard (LCFS), which was "designed to encourage the use of cleaner low-carbon transportation fuels in California."[170] The LCFS standards are measured in terms of the Carbon Intensity (CI) score, which calculates the greenhouse gas emissions throughout the fuel's lifecycle.[171] The LCFS program also creates a credit market because suppliers generate credits for exceeding the CI reduction required that year.[172] Suppliers then trade the credits with other suppliers in the market.[173] A.B. 1493 was enacted under the special Clean Air Act provision which preempts all states other than California from regulating mobile source emissions.[174]

Rather than sticking with simple tailpipe emissions, CARB regulates emissions via a "fuel pathway" calculator, which consists of the sum of the greenhouse gases emitted throughout the fuel's lifecycle, including production, refining, and transportation.[175] Since the calculation takes transportation into consideration, it can assign a higher CI score to fuels transferred from greater distances.

Because of California's large economy and importance in the energy industry, it is no surprise that this ambitious goal has come under attack.[176] In *Rocky Mountain I*, several plaintiffs challenged the LCFS as violative of the dormant Commerce Clause for placing an improper burden on interstate commerce. The district court found that the LCFS facially discriminated against out-of-state commerce, applied the strict scrutiny test, and held it violated the dormant Commerce Clause.[177]

The Ninth Circuit reversed, finding no facial discrimination.[178] The court reasoned that the dormant Commerce Clause normally does not allow for distinctions which benefit in-state producers based on state boundaries alone.[179]

168. A.B. 32, 2005–2006 Leg., Reg. Sess. (Cal. 2006) (enacted). Although facing challenges from car and truck transportation, California reached its 2020 goal four years early. Tony Barboza & Julian H. Lange, *California Hit Its Climate Goal Early—But Its Biggest Source of Pollution Keeps Rising*, L.A. TIMES (July 23, 2018, 4:50 PM), https://www.latimes.com/local/lanow/la-me-adv-california-climate-pollution-20180722-story.html.

169. CAL. HEALTH & SAFETY CODE § 43018.5(a) (West 2021).

170. *Low Carbon Fuel Standard*, CAL. AIR RES. BD., https://ww2.arb.ca.gov/our-work/programs/low-carbon-fuel-standard/about (last visited Apr. 19, 2021).

171. *See id.*

172. Klass & Henley, *supra* note 151, at 158–59.

173. *Id.*

174. 42 U.S.C. § 7543(b)(1), 7543(e)(2)(A) (2018).

175. *See* CAL. CODE REGS. tit. 17, § 95486.1 (2021); *see also Apply for LCFS Fuel Pathway*, CAL. AIR RES. BD., https://ww2.arb.ca.gov/resources/documents/apply-lcfs-fuel-pathway (last visited Apr. 19, 2021).

176. Lee & Duane, *supra* note 152, at 299–300.

177. Rocky Mountain Farmers Union v. Goldstene, 843 F. Supp. 2d 1071, 1086–87, 1094 (E.D. Cal. 2011), *rev'd sub nom.* Rocky Mountain Farmers Union v. Corey (*Rocky Mountain I*), 730 F.3d 1070 (9th Cir. 2013).

178. *Rocky Mountain I*, 730 F.3d at 1089.

179. *Id.*

Nevertheless, a regulation is not facially discriminatory "simply because it affects in-state and out-of-state interests unequally."[180] There must be "some reason, apart from their origin, to treat them differently."[181] The court found the CI score to be that other reason.[182] In fact, the court noted that the lowest CI scores in ethanol had come from the Midwest and Brazil.[183] The court held that the LCFS did not discriminate against interstate commerce because CI score, not location of origin, ran the program.[184] As a result, the Ninth Circuit reversed and remanded for the district court to apply the *Pike* balancing test.[185]

The Ninth Circuit also addressed plaintiffs' extraterritoriality claim. The district court had found the LCFS violated the doctrine of extraterritoriality,[186] because it feared that if every state adopted a lifecycle analysis of fuels, "the ethanol market would become Balkanized," and inconsistent regulation would "cause significant problems to the ethanol market."[187] On appeal, the Ninth Circuit reversed, noting that the Fuel Standard does not require all firms or jurisdictions around the country to adopt the same standard; rather, anyone is free to enter the market in California so long as they meet the standard.[188] Moreover, the Ninth Circuit emphasized that California was not acting with a protectionist purpose because there was no special economic benefit to California.[189]

The Ninth Circuit did go further by suggesting that it was paying special attention to the climate change context. The court recognized California's interest in combating the effects of climate change—namely, the disappearance of its coastline, the difficulty on its labor force from rising temperatures, and the devastation of its farms from severe droughts.[190] An effective regulatory program "must not be so complicated and costly as to be unworkable."[191]

Moreover, the court stated that its decision was reinforced by the need for states to act as laboratories.[192] Rejecting the plaintiffs' concern that the LCFS would encourage other states to adopt similar but different legislation thus creating an unworkable mix and burden on interstate commerce, the Ninth Circuit said, "[i]f we were to invalidate [a] regulation every time another state considered a complementary statute, we would destroy the states' ability to

180. *Id.*
181. *Id.* (quoting City of Philadelphia v. New Jersey, 437 U.S. 617, 627 (1978)).
182. *Id.* at 1090.
183. *Id.*
184. *Id.* at 1089–90 (citing Chem. Waste v. Hunt, 504 U.S. 334, 344 (1992)).
185. *Id.* at 1100–01.
186. Rocky Mountain Farmers Union v. Goldstene, 843 F. Supp. 2d 1071, 1092–93 (E.D. Cal. 2011), *rev'd sub nom. Rocky Mountain I*, 730 F.3d 1070 (9th Cir. 2013).
187. *Id.*
188. *Rocky Mountain I*, 730 F.3d at 1101.
189. *Id.* at 1098–99.
190. *Id.* at 1097.
191. *Id.*
192. *Id.*

experiment with regulation."[193] Addressing preemption, the court noted that "Congress of course can act at any time to displace state laws that seek to regulate the carbon intensity of fuels."[194] But since "Congress has expressly empowered California to take a leadership role as to air quality," it seems that Congress has specifically endorsed California's right to act as an experimental regulatory laboratory.[195]

After remand, in *Rocky Mountain II*, the Ninth Circuit considered the plaintiffs' renewed claims that the LCFS violated the dormant Commerce Clause.[196] Although the LCFS had undergone changes in the interim, the court found it contained the same core structure.[197] Overall, the court held that the plaintiffs' claims were largely precluded by *Rocky Mountain I*.[198] Regarding extraterritoriality, the court again held that California is justifiably protecting its own resources from the onslaught of climate change.[199] Specifically, it noted that the Commerce Clause does not prohibit regulations that "have upstream effects" on how out-of-state sellers who sell to in-state buyers produce their goods as extraterritorial regulation.[200]

Since Oregon has followed suit, the next Subpart addresses how opponents sought a similar challenge to Oregon's program and resulted in a similar outcome.

2. Dormant Commerce Clause Challenge to Oregon's Air Pollution Programs

In 2007, the Oregon Legislature created the Oregon Clean Fuels Program because "[g]lobal warming poses a serious threat to the economic well-being, public health, natural resources and environment of Oregon."[201] The program aimed to decrease lifecycle greenhouse gas emissions from transportation fuels to at least ten percent lower than 2010 levels by 2025.[202] A lifecycle emissions analysis—dubbed "well-to-wheels"—includes emissions from all stages of fuel production as well as direct and indirect effects such as those from crops to produce biofuels.[203] Similar to California, the program established CI scores to fuels used in Oregon.[204]

193. *Id.* at 1105.
194. *Id.* at 1097.
195. *Id.*
196. Rocky Mountain Farmers Union v. Corey (*Rocky Mountain II*), 913 F.3d 940, 948–49 (9th Cir. 2019).
197. *Id.* at 944–45.
198. *Id.* at 945.
199. *Id.* at 951, 953.
200. *Id.* at 952 (citing Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 472 (1981)).
201. OR. REV. STAT. §§ 468A.200(3), 468A.266–.268 (2020).
202. *Id.* §§ 468A.266–.268; *see* OR. ADMIN. R. 340-253-0000(2) (2021).
203. BRENT D. YACOBUCCI & KELSI BRACMORT, CONG. RSCH. SERV., R40460, CALCULATION OF LIFECYCLE GREENHOUSE GAS EMISSIONS FOR THE RENEWABLE FUEL STANDARD (RFS) (2010), https://crsreports.congress.gov/product/pdf/R/R40460/9.
204. *See* OR. ADMIN. R. 340-253-0100(6), 340-253-8010, 340-253-8020.

In *American Fuels and Petrochemical Manufacturers v. O'Keefe*, industry plaintiffs challenged Oregon's program as violative of the dormant Commerce Clause because it impermissibly burdened interstate commerce.[205] The Ninth Circuit again followed the standard dormant Commerce Clause analysis. First, it addressed whether the program exhibited characteristics of facial discrimination. It held that the plaintiffs' claims of facial discrimination were controlled by *Rocky Mountain I* because the Oregon program distinguished among fuels based on carbon intensity, not on origin.[206] In fact, the court found that when the complaint was filed, twelve Midwest ethanols actually had lower CI scores than Oregon biofuels.[207]

The court next addressed whether the program was discriminatory in purpose. It ultimately rejected plaintiffs' argument that statements made by the former Governor of Oregon and various state legislatures proved that the state intended to "foster Oregon biofuels production at the expense of existing out-of-state fuel producers."[208] The court reasoned that none of the statements cited suggested that the intent was anything other than the well-settled principle that states have a legitimate interest in combating the adverse effects of climate change to its residents.[209] The court rejected plaintiffs' argument that the program's credit and deficit system impermissibly burdened Midwest ethanols because, again, the fuels were based on CI score, not location.[210] Moreover, there were out-of-state producers that fared better than in-state producers.[211]

After finding no discrimination against interstate commerce, the court applied the *Pike* balancing test. The court noted that the plaintiffs did allege the program imposed "economic and administrative burdens on regulated parties" since importers of certain fuels either had to change the composition of the fuel they imported or purchase credits.[212] However, the plaintiffs failed to plausibly allege that the burden was "'clearly excessive' in light of the substantial state interest" to decrease the environmental impacts of greenhouse gas emissions from transportation fuels.[213] This further shows that even though there might be some sort of burden on out-of-state firms, that burden must be *clearly excessive* in relation to a state's legitimate interest in combating the impacts of fossil fuels to that state.

The court also found plaintiffs' extraterritoriality claim barred by *Rocky Mountain I* because the Oregon program did not require any other jurisdiction

205. Am. Fuels & Petrochemical Mfrs. v. O'Keeffe, 903 F.3d 903, 911 (9th Cir. 2018).
206. *Id.*
207. *Id.*
208. *Id.* at 912.
209. *Id.* at 912–13 (citing Massachusetts v. EPA, 549 U.S. 497, 522–23 (2007)).
210. *Id.* at 913.
211. *Id.* at 913–14 ("Under the Oregon program, producers of higher carbon-intensity fuels are disfavored relative to *all* lower carbon-intensity fuels, including those produced outside of Oregon.").
212. *Id.* at 916 (quoting Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 473 (1981)).
213. *Id.* (quoting *Clover Leaf Creamery Co.*, 449 U.S. at 473).

to adopt a particular standard for its producers to gain access in Oregon.[214] Furthermore, as in *Rocky Mountain I*, out-of-state producers needed only respond to the incentives of the program if they wished to gain market share in Oregon.[215]

The dissent, however, would have found the plaintiffs had plausibly alleged discrimination in effects.[216] Judge Smith distinguished this case from *Rocky Mountain I* because, in *Rocky Mountain I*, the decision went to the Ninth Circuit on a motion for summary judgment.[217] *American Fuels*, in contrast, came to the Ninth Circuit on a motion to dismiss. Taking the facts alleged as true, Judge Smith indicated that in *Rocky Mountain I* the court found there was no virtual representation issue since in-state producers were potentially burdened more than out-of-state producers.[218] Judge Smith was not entirely convinced that was the case under the Oregon program. Instead, he felt that Oregon's CI program had managed to allow only in-state producers to generate a credit while only out-of-state producers would generate deficits.[219] He felt this was analogous to the virtual representation problem in *West Lynn Creamery* in that even though all producers were affected by the program, only out-of-state producers were burdened because of the deficits and their interests were not adequately represented by in-state producers because they received the credit.[220]

As discussed in the next Part, these challenges to the California and Oregon programs act as lessons for state and local law makers seeking to enact environmental legislation.

IV. CONSIDERATIONS FOR STATE AND LOCAL LAWMAKERS

Because of California's longstanding contentious history in air pollution regulation, the following efforts in Oregon (once thought to be in less danger of the impacts of climate change),[221] and the likelihood that other states will follow a similar path, the lessons learned from these cases are essential to the success of future state and local regulation.

The *Rocky Mountain I* holding instructs state and local lawmakers to regulate in a similar way so that they may avoid invalidation for violation of the dormant Commerce Clause.[222] Namely, there must be some reason, other than the mere fact that a fuel comes from another state for example, to show that the program does not discriminate against interstate commerce.[223] Additionally, so

214. *Id.* at 916–17.
215. *Id.*
216. *Id.* at 919 (Smith, J., dissenting).
217. *Id.* at 918.
218. *Id.* at 919.
219. *Id.*
220. *Id.*
221. Flavelle & Fountain, *supra* note 166.
222. *See Rocky Mountain I*, 730 F.3d 1070, 1089 (9th Cir. 2013).
223. *Id.*

long as the program does not require another state to adopt a similar regulatory scheme, but rather requires out-of-state producers to comply with in-state regulations in order to obtain market share inside, such a result does not violate the doctrine of extraterritoriality.[224]

One main lesson from *American Fuels* is that states should ensure that in-state and out-of-state interests are sufficiently similar such that the in-state firms may effectively represent the out-of-state firms in the state legislative process.[225] As discussed in *Rocky Mountain I*, shaping a regulatory program which treats fuels differently depending on factors not entirely dependent on location of origin (for example, an all-encompassing lifecycle analysis like the CI score), may well be found to serve in-state and out-of-state producers equally.[226]

It should be noted at the start that the state or local regulation should not outwardly discriminate against other states. The program should not be enacted for the purpose of protecting or to exclusively benefit the in-state economy. Doing so would subject the program to strict scrutiny, which is a sure-fire way for the program to be struck down as unconstitutional.[227] To avoid this, the states should structure their program around something other than origin. For example, the Ninth Circuit found that because the fuel pathway in the California and Oregon programs were based on CI score instead of place of origin, the programs did not discriminate against interstate commerce.[228]

So long as there is no outright discrimination against interstate commerce, the courts will apply the *Pike* balancing test.[229] To pass that test, the lessons from *Rocky Mountain I* and *American Fuels* can be distilled to the following: (1) states have a right to act as a laboratory; (2) the program should not violate the principle of extraterritoriality by not requiring other jurisdictions to adopt the same program; and (3) the problem of virtual representation suggests the interests of out-of-state producers should be represented by in-state firms. This Part addresses these lessons.

A. STATE AND LOCAL LAWMAKERS HAVE THE RIGHT TO ACT AS REGULATORY LABORATORIES

States and local governments should rest assured that they have the judicially and congressionally confirmed right to act as a laboratory.[230] So long as the programs do not result in economic Balkanization, states are free to do

224. *Id.* at 1101.

225. *See Am. Fuels & Petrochemical Mfrs.*, 903 F.3d at 916.

226. *See Rocky Mountain I*, 730 F.3d at 1089–90.

227. *See supra* note 143 and accompanying text.

228. *Am. Fuels & Petrochemical Mfrs.*, 903 F.3d at 911; *Rocky Mountain I*, 730 F.3d at 1089–90.

229. *See* Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970).

230. New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous State may . . . serve as a laboratory; and try novel social and economic experiments . . . .").

their part to try novel experiments in an effort to protect themselves from the negative impacts of climate change.[231]

Within the context of the Clean Air Act, Congress has encouraged California to "expand its pioneering efforts at adopting and enforcing motor vehicle emission standards different from and in large measure more advanced than the corresponding federal program; in short, to act as a kind of laboratory for innovation."[232] This is a congressional endorsement that states try new regulatory programs. If successful, Congress may follow suit. Therefore, the local government does have the right—endorsed by Congress and the courts—to protect its own resources and at the same time hope to provide an example for others.

That being said, the courts have confirmed that this freedom comes with limitations.[233] Plaintiffs challenging state and local environmentally protective statutes have used and likely will continue to use the extraterritoriality principle as a tool. While the line between extraterritorial regulation and acting as a laboratory for regulatory innovation is a thin one, the courts and Congress have specifically encouraged states to operate under the latter. The next Subpart will address how state and local lawmakers can walk this thin line.

B. THE EXTRATERRITORIALITY PRINCIPLE REQUIRES STATES TO PROTECT THEIR *OWN* RESOURCES

The extraterritoriality principle is likely the most important lesson from these cases. In short, state and local lawmakers should avoid a program which essentially forces any out-of-state jurisdiction to adopt the same regulatory framework. There are two primary ways to avoid this. First, the lawmakers should structure their program as an open door to welcome out-of-state firms to participate in the state economy but with the condition that they satisfy certain requirements if they wish to do so.[234] Second, the statute should clarify that the purpose of the program is to protect its *own* resources, not the environment as a whole.[235]

One important lesson from the California and Oregon cases is that requiring out-of-state firms to conform to in-state standards is an entirely different beast than requiring other jurisdictions to adopt the same program.[236] California Governor Gavin Newsom's recent decision to ban the sale of new gas cars in the next fifteen years is a prime example of a program with an open door to out-of-state producers.[237] As in *Rocky Mountain I*, opponents will likely argue

231. *See* Radom, *supra* note 134, at 312–13.
232. Motor & Equip. Mfrs. Ass'n v. EPA, 627 F.2d 1095, 1109–11 (D.C. Cir. 1979).
233. *See* Radom, *supra* note 134.
234. *Rocky Mountain I*, 730 F.3d 1070, 1101 (9th Cir. 2013).
235. *Id.* at 1097.
236. *See id.*
237. Bermel et al., *supra* note 165.

that this restriction would require other states to adopt the same standard.[238] However, this goal does not require other states to adopt the same program. Rather, it is a signal to car manufacturers, for example, that they must conform to California's requirements if they wish to sell cars in California.

The other important lesson from the Ninth Circuit decisions is that lawmakers should make it painfully clear that the point of the climate change regulation is to protect the state's *own* resources. The drafters of the Constitution indicated that the protection of its citizens is a right specifically reserved for the states.[239] California acquired title to lands and waterways upon admission to the union as trustee of such lands.[240] Since it is well settled that states have a legitimate interest in combating the effects of climate change,[241] the state also has a legitimate interest in protecting its lands from the effects of climate change. After all, part of the initial motivation for the California waiver in the Clean Air Act was to allow Southern California to address its own poor air quality by regulating at a higher standard.[242]

As the Ninth Circuit indicated in *Rocky Mountain I*, "[i]f GHG emissions continue to increase, California may see its coastline crumble under rising seas, its labor force imperiled by rising temperatures, and its farms devastated by severe droughts."[243] In *Rocky Mountain II*, the Ninth Circuit stated that the California legislature is rightly concerned about its citizens because they may be subjected to "crumbling or swamped coastlines, rising water, or more intense forest fires caused by higher temperatures and related droughts."[244] Drawing on this right, states and local governments must clarify that the regulation is meant to protect its own resources and not those outside its jurisdiction.

The Ninth Circuit suggested that stating that the regulation is meant to protect the state's own resources in the legislation itself may be enough to satisfy this requirement. The "Legislative Findings and Declarations" section of the LCFS states that "[g]lobal warming poses a serious threat to the economic well-being, public health, natural resources, and the environment of *California*."[245] Relying on that language, the Ninth Circuit held that "California did not enact

238. *See Rocky Mountain I*, 730 F.3d at 1101.

239. *See, e.g.*, THE FEDERALIST NO. 45, at 289 (James Madison) (Clinton Rossiter ed., 2003) ("The powers reserved to the several States will extend to all the objects, which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State.")

240. City of Berkeley v. Superior Ct. of Alameda Cnty., 606 P.2d 362, 364–65 (Cal. 1980).

241. Massachusetts v. EPA, 549 U.S. 497, 522–23 (2007). Although this decision may soon be ripe for reconsideration, any change would likely turn on the holding that greenhouse gas emissions can be regulated as pollutants. *See* Jennifer Hijazi, *Ginsburg's Death Could Reawaken* Mass. v. EPA, E&E NEWS (Sept. 22, 2020), https://www.eenews.net/stories/1063714329 (implying that the holding in *Massachusetts v. EPA* establishing a state's interest in protecting its own resources will likely stand because conservative justices prefer states to regulate on their own).

242. *See* Clarence M. Ditlow, *Federal Regulation of Motor Vehicle Emissions Under the Clean Air Amendments of 1970*, 4 ECOLOGY L.Q. 495, 501 n.21 (1975).

243. *Rocky Mountain I*, 730 F.3d 1070, 1097 (9th Cir. 2013).

244. *Rocky Mountain II*, 913 F.3d 940, 945 (9th Cir. 2019).

245. CAL. HEALTH & SAFETY CODE § 38501(a) (West 2021) (emphasis added).

the LCFS because it thinks that it is the state that knows how best to protect Iowa's farms, Maine's fisheries, or Michigan's lakes."[246] Rather, the court found that California had enacted the statute for the purpose of protecting its "own air quality, snowpack, and coastline."[247] To follow this direction from the court, states must make it clear that the regulations they enact are done for the purpose of protecting their *own* resources and not to encourage—or worse, require—other states to adopt similar regulations to protect national resources.

There is, however, a danger to this argument because the cause and effect of climate change is so attenuated.[248] Opponents often argue that by "leading the way" on a national scale, the state or local government is attempting to regulate activities occurring entirely out of state in an effort to protect resources both inside and outside of its jurisdiction.[249] The opponents' argument is that simply stating its purpose is a mere pretext and therefore insufficient to withstand a dormant Commerce Clause challenge. However, courts have relied on the state legislature's factual findings.[250] In the case of California and Oregon, both are facing destruction from wildfires.[251] The federal government has been increasingly ignoring California's cries for help, at least under the Trump Administration, despite the fact that nearly sixty percent of its forests is federal land.[252] Since the fires have resulted in burnt structures and lost lives,[253] legislators should highlight these very real and drastic impacts in the legislative purpose. Because the states are attempting to protect their own citizens and resources, the regulatory programs will likely be upheld as constitutionally permissible.

Since protecting its own resources is a substantial government interest, any sort of burden the regulatory program places on interstate commerce simply

246. *Rocky Mountain II*, 913 F.3d at 953.

247. *Id.*

248. This was a major point of contention during the constitutional standing inquiry in *Massachusetts v. EPA*, 549 U.S. 497, 523–26. The EPA had argued that any remedy would be pointless since greenhouse gas emissions from other countries would likely "offset any marginal domestic decrease." *Id.* at 523–24. The Court disagreed, holding a small incremental step is sufficient to establish standing in federal court. *Id.* at 524–26. For a detailed description of the petitioners' strategy to address causation under constitutional standing, see Lisa Heinzerling, *Climate Change in the Supreme Court*, 38 ENV'T L. 1, 13–16 (2008). Nevertheless, *Massachusetts v. EPA* was decided by a divided Court, and Chief Justice Roberts believed that this was incorrectly decided—that causation and redressability are simply not met when the relief sought would only minutely address an issue of such global magnitude. *Massachusetts*, 549 U.S. at 542–50 (Roberts, C.J., dissenting). Instead, he felt the Court had no role in such a political debate. *Id.* at 547.

249. *See, e.g.*, Rocky Mountain Farmers Union v. Goldstene, 843 F. Supp. 2d 1071, 1093 (E.D. Cal. 2011) ("Plaintiffs submit . . . . that the purported goal is to combat *global* climate change . . . ."), *rev'd sub nom. Rocky Mountain I*, 730 F.3d 1070 (9th Cir. 2013).

250. *See, e.g.*, *Rocky Mountain II*, 913 F.3d at 953.

251. *California and Oregon 2020 Wildfires in Maps, Graphics and Images*, BBC NEWS (Sept. 18, 2020), https://www.bbc.com/news/world-us-canada-54180049.

252. Jim Lyons, *Trump Blames California for Fires. He Should Check to See Whose Land They're On.*, POLITICO (Sept. 15, 2020, 5:15 PM), https://www.politico.com/news/agenda/2020/09/15/trump-fires-california-federal-land-415431.

253. *California and Oregon 2020 Wildfires in Maps, Graphics and Images*, *supra* note 251.

must not be *clearly excessive* in relation to that interest.[254] By highlighting the already drastic destruction of climate change in their own states, lawmakers will likely prove to a reviewing court that its program is meant to further a substantial government purpose.[255] To ensure that this purpose does not place a clearly excessive burden on interstate commerce, the program would benefit from adequately representing out-of-state producers in the in-state legislative process. The next Subpart addresses how state and local lawmakers can achieve this by solving the problem of virtual representation.

C. THE PROBLEM OF VIRTUAL REPRESENTATION REQUIRES OUT-OF-STATE PRODUCERS TO BE ADEQUATELY REPRESENTED BY IN-STATE PRODUCERS

States should ensure that the program burdens out-of-state and in-state producers equally—or at least sufficiently similar such that the interests of the out-of-state firms are adequately represented by the in-state firms—in order to satisfy the principle of virtual representation. This puts the out-of-state firms' remedy not in the courts, which would put the local regulatory program at risk of a court overturning it, but in the state legislative process.[256] Moreover, to provide extra protection, states should clarify that the state (including in-state firms) is not reaping any financial benefit from the program. This will help to demonstrate that the state is not acting with a protectionist purpose.[257]

Although the Supreme Court has shown some ambivalence to this principle, [258] courts have suggested that they may treat virtual representation differently in the climate change context.[259] The *Rocky Mountain I* court at least found that the LCFS provided no economic benefit to the State of California.[260] In fact, it noted that evidence suggested the program ended up burdening one in-state source at a higher percentage than benefiting it.[261] The court reasoned that this burden on major in-state interests is exactly the type of safeguard against legislative abuse that the problem of virtual representation seeks to address.[262]

Therefore, a state or local program would benefit greatly from ensuring that its program in one way or another burdens an in-state firm or product. This way the program is not acting with a protectionist purpose, which is the prime example of discrimination. Additionally, the in-state and out-of-state firms would be in the same boat, such that the in-state firm could also represent the

254. Am. Fuels & Petrochemical Mfrs. v. O'Keeffe, 903 F.3d 903, 916 (9th Cir. 2018).
255. *See id.*
256. *See* Lee & Duane, *supra* note 152, at 307–08.
257. *See* Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970).
258. Lee & Duane, *supra* note 152, at 307–08.
259. *See supra* notes 182–183 and accompanying text.
260. *Rocky Mountain I*, 730 F.3d 1070, 1098 (9th Cir. 2013).
261. *Id.* at 1099.
262. *Id.* (citing W. Lynn Creamery, Inc. v. Healy, 512 U.S. 186, 200 (1994)).

out-of-state firm's interests.[263] In that case, the out-of-state firm's remedy would be in the state legislature instead of the courts.[264]

Ultimately, the future of climate change regulation in the United States is uncertain. Judge Gould in the Ninth Circuit stated that the question of whether anthropogenic climate change exists is one for scientists to ponder; whether the world can fight it is one for economists and politicians to decide; and whether a state has the constitutional authority to do so is one for the courts to decide.[265] Nevertheless, the major questions doctrine and Chief Justice Roberts's dissent in *Massachusetts v. EPA* signal that the courts may remain completely removed. At least four Justices—Alito, Thomas, Gorsuch, and Kavanaugh—have strongly signaled that the issue, at least in the context of federal preemption, should fall squarely in the hands of Congress.[266] As the scientific community comes closer and closer to agreeing that irreversible climate change persists at the hand of human activity,[267] something has to give. So long as Congress fails to act, states and local lawmakers do have the constitutional authority to take a stand if they bear in mind the doctrines of extraterritoriality and virtual representation.

CONCLUSION

Chronic federal inaction to address the effects of climate change persists. States have invoked their constitutionally granted authority to provide for the general welfare of its citizens and stepped up to the plate. Parties negatively affected by the desire to divest from industries that perpetuate the problem have challenged these programs. Under the doctrine of preemption, such constitutional challenges have largely been successful.

This Note argues that this success is attributed to two phenomena which in combination have proven difficult for the states to address. First, executive agencies tend to assert their authority to preempt state and local laws through administrative rulemaking. Second, the Supreme Court, through a series of doctrines, have consistently deferred to that executive agency's decision. The probable demise of the latter will likely decrease prevalence of the former. Recent jurisprudence suggests that the new makeup of the Supreme Court puts those doctrines in jeopardy.[268] Such change may well lead to the Supreme Court's disinclination to defer to an agency's preemption through administrative rulemaking, thus putting the onus back on Congress to decide whether or not a state or local law is preempted.

If preemption becomes less of a concern, the states and local governments have an opportunity to enact more environmentally protective programs in their

263. *See W. Lynn Creamery, Inc.*, 512 U.S. at 200.
264. *See id.*
265. *Rocky Mountain I*, 730 F.3d at 1077.
266. *See supra* Part II.B.
267. *See supra* note 1 and accompanying text.
268. *See supra* Part III.

desire to combat the effects of climate change. However, challenges under the dormant Commerce Clause will likely increase, and states must carefully draft environmental legislation to avoid the potential pitfalls of the doctrine. This Note suggests that, through analysis of two recent cases in the Ninth Circuit, the doctrines of extraterritoriality and virtual representation are likely to present the main difficulties. So long as states make it abundantly clear that the program is enacted to protect their own resources and that the program burdens in-state and out-of-state producers equally, the states should be in the clear to regulate climate change constitutionally.