Climate Policy Havens:

State Resistance to Anti-Environmental Presidents

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Abstract. Anti-environmental Presidents have occupied the White House for half of the past twenty-four years, opposing climate action and boosting fossil fuels. Pro-environmental states fought back and launched their own climate policies. With Donald Trump's return to the White House, we are entering another round of this struggle. This article reviews past state efforts and examines the strategies available to states for resisting Trump and continuing their own climate programs. These strategies cover a broad range. The article discusses the prospects for litigation against anti-environmental agency actions, potential alliances between green states and the private sector, state support for innovation in both the technological and policy domains, ways that states can remove permitting barriers to expansion of clean energy, and tit-for-tat litigation against anti-environmental initiatives in conservative states. The success of these strategies will determine the fate of climate policy over the next four years and beyond.

I. Introduction

The history of climate change mitigation in the United States contains what seems to be a paradox. Because it is a global problem, climate change seems an unlikely subject for state and local activism. Yet in the United States, state and local governments were the first to enter the field. They have remained active, often in conscious opposition to Republican presidents who oppose climate action.[2]

Today, with Donald Trump's return to office, the states' role will be more important than ever. During the campaign, Trump promised to repeal federal limits on greenhouse gas emissions. His press secretary announced that he would "cancel Joe Biden's radical mandates, terminate the Green New Scam, and make America energy independent again"[3] – the latter promise dovetailing with Trump's view that America's oil is "liquid gold" that needs to be exploited to the utmost.[4]

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[1] Sho Sato Professor of Law and Director of the Center for Law, Energy, and the Environment at the University of California, Berkeley.

[2] See Vicki Arroyo, *From Paris to Pittsburgh: U.S. State and Local Leadership in an Era of Trump*, 31 GEO. ENV. L. REV. 433 (2019).

[3] Brad Plumer and Lisa Friedman, *What Trump 2.0 Could Mean for the Environment*, NY TIMES (July 16, 2024), https://www.nytimes.com/2024/07/16/climate/trump-epa-regulation.html.

[4] Michael Copley, *Trump's Victory Promises to Shake up U.S. Energy and Climate Policy, Analysts and Activists Say*, NPR (Nov. 6, 2024), https://www.npr.org/2024/11/06/nx-s1-5181891/trump-win-climate-change-fossil-fuels-clean-energy. In his victory speech, Trump conveyed his excitement about expanding use of fossil fuels, exclaiming, "We have more liquid gold than any country in the world. More than Saudi Arabia. We have more than Russia." *Id*.

These promises must be taken seriously in light of Trump's first term, when he applied what a leading historian of environmental law has called a "meat ax" to environmental regulation.[5]

States favoring climate action are girding for battle to limit the damage to federal climate policy and to protect their abilities to move forward on their own climate policies. For instance, the Governor of California called a special session of the legislature to make plans for opposing Trump.[6] Even before the election, the state attorney general's office had begun drafting briefs for use in key litigation the state anticipated after a possible Trump win.[7]

We know from previous experience that state resistance to Trump's climate policies will be heated. State climate policies have developed against the background of an erratic federal response, with the incoming Trump Administration as only one example. The Bush Administration failed to address climate change either through administrative action or legislation.[8] Indeed, when the federal government finally did begin to regulate carbon emissions under the Clean Air Act, it did so only because of lawsuits supported by state governments.[9] During the Obama Administration, it seemed that EPA might finally be catching up to the leading states.[10] The Trump Administration reversed course completely,[11] leaving the Biden Administration to try to pick up the pieces,[12] only to be followed by another likely onslaught of regulatory rollbacks when Trump regained power.

In the past twenty years, we have seen that states with commitments to climate change ("green States") have not taken federal backsliding sitting down. Instead, illustrating the complexity of modern American federalism, [13] climate policy has been an area of sharp conflict between states

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[5] "Swinging the Meat Ax" is the subtitle of the chapter on Trump in Richard J. Lazarus, THE MAKING OF ENVIRONMENTAL LAW 263 (2nd ed. 2023). As a leading energy law expert observed during the first Trump administration,

> Unlike other policy areas, such as immigration and international trade, where the administration was often at war with itself, in the environmental and energy realm, there was a clear focus to support fossil fuel development, withdraw from the Paris climate accords, reduce regulations on industry, slow-walk renewable energy development, limit the role of science in policymaking, and impede access to government information. Moreover, not only was the policy focus clear, the implementation was swift, with immediate actions to stay or reverse existing regulations and replace them with new ones.

Alexandra B. Klass, *Energy Transitions in the Trump Administration and Beyond,* 51 ENVTL. L. 241, 242 (2020).

[6] Wes Venteicher, *'We Won't Sit Idle': Newsom Goes on Offensive against Trump*, POLITICO (Nov. 7, 2024), https://www.politico.com/news/2024/11/07/newsom-california-legislative-session-trump-resistance-00188119

[7] *Id.*

[8] See Part II(A) for an analysis of the Bush Administration's actions and the state response.

[9] See Massachusetts v. EPA, 549 U.S. 497 (2007) (holding that the state had standing and that EPA had jurisdiction to regulate greenhouse gases and must do so if it determines they harm human health or welfare).

[10] See Lazarus, supra note 5, at 237-262.

[11] See Part II(B) for an analysis of the Trump Administration's actions and the state response.

[12] See Lazarus, supra note 5, at 4, 190-193, 290-291, 348-349.

[13] See Heather K. Gerken, *Federalism 3.0*, 105 CALIF. L. REV. 1695 (2017); ERIN RYAN, FEDERALISM AND THE TUG OF WAR WITHIN (2011); Abbe R. Gluck, *Federalism from Federal Statutes: Health Reform, Medicaid, and the Old-Fashioned Federalists' Gamble*, 81 FORDHAM L. REV. 1749 (2013); Cristina M. Rodriguez, *The Significance of the Local in Immigration Regulation,* 106 MICH. L. REV. 567 (2008); Jessica Bulman-Pozen, *From Sovereignty and Process to Administration and Politics: The Afterlife of American Federalism*, 123 YALE L.J. 1920 (2014); Gillian E.

and the federal government. [14] Developments in this area mirror Dean Heather Gerken's observation that, in today's America: "States are not sites where groups can shield themselves from national policy, national politics, or national norms. Instead, they are the sites where we battle over--and forge--national policy, national politics, and national norms."[15] That will be true in spades over the next four years.

The next section of this article will survey the history of green state responses to anti-environmental presidents. That will set the stage for an assessment of the strategies available to states in Trump's second term. These strategies cover a broad range. We will discuss the prospects for litigation against anti-environmental agency actions, potential alliances with the private sector, means of supporting innovation in both the technological and policy domains, ways that states can remove permitting barriers to expansion of clean energy within their own boundaries, and some potential strategies that green states could use against their pro-fossil fuel counterparts ("brown states").

Trump enters this struggle in a stronger position than in his first term because of his improved political showing in the 2024 election. But states have gained advantages, too. Most importantly, they have some powerful economic forces at their back. The cost of solar power has fallen by roughly half since the last time Trump took the oath of office.[16] This is part of a long-term trend. In little over a decade, U.S. wind generation tripled and solar capacity increased by a factor of seventy-three.[17] By late 2023, combined U.S. sales of new battery vehicles (hybrids, plug-in hybrids, and EVs) had reached seventeen percent of sales, and automakers had invested more than $210 billion in EV-related manufacturing.[18] These trends will complicate federal rollbacks and give states a better foundation for their own climate initiatives.

II. State Law as Historical Counterpoints to Presidential Policy Retreats

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Metzger, *Administrative Law as the New Federalism*, 57 DUKE L.J. 2023, 2089 (2008).

[14] Although the focus of this essay is on climate change, states have played a distinctive role in environmental policy more broadly. See Shannon Roesler, *Competitive Federalism as a Zero-Sum Game*, 49 ENV. L. REP. 10858 (2019) Sarah Fox, *Localizing Environmental Federalism,* 54 U.C. DAVIS L. REV. 133 (2020); William W. Buzbee, *Contextual Environmental Federalism*, 14 N.Y.U. ENV. L.J. 108, 108 (2005); Robert L. Glicksman, *From Cooperative to Inoperative Federalism: The Perverse Mutation of Environmental Law and Policy*, 41 WAKE FOREST L. REV. 719, 781–82 (2006); Denise A. Grab & Michael A. Livermore, *Environmental Federalism in a Dark Time,* 79 OHIO ST. L.J. 667 (2018).

[15] Gerken, *supra* note 13, at 1696. As she explains:

> In our tightly integrated system, the states and federal government now regulate shoulder-to-shoulder. Sometimes they lean on one another, and sometimes they deliberately jostle one another, but neither reigns supreme. . .. National movements, be they red or blue, begin at the local and state level and move their way up. National actors depend on states and localities to carry out national policies, which means that they need buy-in from state and local officials to get things done.

Id.

[16] See Fig. 1 in BloombergNEF, Cost of New Renewables Temporarily Rises as Inflation Starts to Bite. (June 30, 2022), https://about.bnef.com/blog/cost-of-new-renewables-temporarily-rises-as-inflation-starts-to-bite.

[17] International Energy Agency, *Global Electric Car Sales by Key Markets, 2010-2020*, https://www.iea.org/data-and-statistics/charts/global-electric-car-sales-by-key-markets-2015-2020 (interactive graph).

[18] Robert Walton, *EV Sales Climb and Are On Track to be 9% of US New Car Purchases in 2023*, UTILITY DIVE (Nov, 28, 293), https://www.utilitydive.com/news/electric-vehicles-EVs-new-car-sales-2023/700799/.

Over the past half century, environmental law has had considerable accomplishments, but commanding a national consensus has not been one of them. Federal climate policy did not become an issue until around the turn of this century, and it too proved controversial. From 2001-2009 under George W. Bush and from 2017-2021 under Donald Trump, the federal government opposed limitations on fossil fuel use of all kinds, including limits on carbon emissions. This section examines their policies and the resistance they encountered from state governments.

A. The G.W. Bush Administration

States began taking an assertive role in climate policy in response to President George W. Bush's turns against international and domestic efforts to reduce carbon emissions.[19] During the 2000 campaign, President George W. Bush had taken a pragmatic approach to environmental issues, even endorsing the idea of controlling carbon emissions.[20] After his razor-thin victory in 2000, his main political advisor concluded that turnout among conservatives was more important than appealing to moderates.[21] This strategic insight led to a sharp turn to the right from Bush's positions during the campaign.[22] Although Bush's initial EPA administrator and other cabinet officials favored regulation of greenhouse gases, Bush repudiated his pledge under the influence of Vice President Cheney.[23] Following an unsuccessful effort to replace existing air pollution laws with a multipollutant cap-and-trade system, Bush turned toward regulatory retrenchment through budgetary and administrative actions.[24] His effort to build a durable coalition proved unsuccessful. "[B]y trying to do too much--to mobilize the right at the same time he was trying to build support in the center--he ended up alienating both parts of the center-right alliance he was trying to build."[25]

California began to pursue its own climate policies in response to Bush's refusal to reduce greenhouse gas emissions and his effort to expand the production and use of fossil fuels.[26]

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[19] See Hari M. Osofsky & Janet Koven Levit, *The Scale of Networks: Local Climate Change Coalitions*, 9 CHI. J. INT'L L. 409, 410 (2008) (recounting formation of coalitions of state and local governments). In Professor Arroyo's words, "[s]ubnational climate action began in earnest in the early days of the George W. Bush Administration when governors and state legislators began to fill the gap in climate action after the U.S. pulled out of Kyoto Protocol negotiations." Arroyo, *supra* note , at 434.

[20] He abandoned the pledge not long after the election. Elizabeth Shogren, *Bush Drops Pledge to Curb Emissions*, L.A. Times (Mar. 14, 2001), http://articles.latimes.com/2001/mar/14/news/mn-37556

[21] *See* E.J. Dionne, Jr., WHY THE RIGHT WENT WRONG: CONSERVATISM FROM GOLDWATER TO THE TEA PARTY AND BEYOND 3 (2016). A poll commissioned by Karl Rove found that "the true swing, independent part of the electorate ... had shrunk from roughly a quarter of the electorate in the Reagan years to a mere 6 percent in 2000." Dionne, *supra* note, at 187.

[22] *Id.*

[23] Lazarus, *supra* note 5, at 218-219. Lazarus calls Bush's change of position tragic, given that he widened domestic polarization over climate change while scientists were reaching an increasingly strong consensus about its dangers. Id. at 219.

[24] *See generally* Christopher M. Klyza & David J. Sousa, AMERICAN ENVIRONMENTAL POLICY: BEYOND Gridlock 4 (Rev. ed., 2013).

[25] *See* Dionne, *supra* note 21, at 222

[26] See Arroyo, *supra* note 2, at 434 ("Subnational climate action began in earnest in the early days of the George W. Bush Administration when governors and state legislators began to fill the gap in climate action after the U.S. pulled out of Kyoto Protocol negotiations.").

California was not writing on a blank slate. California had taken the first step toward climate action in 1988, when the legislature ordered an inventory of California greenhouse gas emissions.[27] But it was only during Bush's presidency that California undertook climate action in earnest.

California's opening salvo targeted greenhouse gas emissions from vehicles. The year after Bush took office, the state took advantage of an exception to federal preemption of emissions standards for new cars by enacting legislation requiring reduction of CO_2 emissions.[28] Four years later, moderate Republican Governor Arnold Schwarzenegger signed the California Global Warming Solutions Act, usually called AB 32.[29] After Bush abandoned the Kyoto Protocol, which would have required the United States to reduce emissions to their 1990 level by 2020,[30] California set a similar target for its own emissions. As discussed in subsection B, this expression of support for international action paralleled the responses of California and other states when Trump later abandoned the Paris Agreement. The California Air Resources Board, which was charged with implementing AB 32, established an emission trading program for carbon dioxide.[31]

Negotiated during the Bush Administration and launched just afterwards,[32] the Regional Greenhouse Gas Initiative (RGGI) created a multistate trading system for power plant emissions with the goal of achieving a 10 percent reduction by 2019.[33] While California was the poster child for state climate action, it did not stand alone.

B. The First Trump Administration

As a candidate in 2016, Trump promised to virtually eliminate EPA and called for a "deconstruction of the administrative state."[34] He made repudiation of the Paris Agreement and Obama's climate regulations central planks of his campaign,[35] saying it was time to "put Pittsburgh ahead of Paris."[36] Within a few days of taking office, he began a vigorous campaign to expand the

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[27] A.B. 4420, 1987-88 Leg. Reg. Sess. (Cal. 1988).

[28] See MICHAEL R. PEEVEY & DIANNE O. WITTENBERG, CALIFORNIA GOES GREEN, A ROADMAP TO CLIMATE LEADERSHIP 106–09 (2017). The preemption issues are discussed in Part III(B) below.

[29] A.B. 32, 2005-2006 Leg. Reg. Session (Cal. 2006), codified at CAL. HEALTH & SAFETY CODE § 38500 *et seq*.

[30] See Lazarus, *supra* note 5, at 220.

[31] Detailed information about the program can be found on the California Air Resources Board's website, CAL. ENV'T PROTECTION AGENCY, AIR RES. BOARD, https://ww2.arb.ca.gov/sites/default/files/classic//cc/capandtrade/guidance/cap_trade_overview.pdf). An emissions trading program sets a ceiling on the amount of total amount of emissions (the "cap") and establishes a market in which firms can trade the right to emit specified amounts (the "trade").

[32] The formation of RGGI is recounted on the program's website, https://www.rggi.org/program-overview-and-design/design-archive

[33] REGIONAL GREENHOUSE GAS INITIATIVE, *The Regional Greenhouse Gas Initiative*, (Mar. 21, 2020), https://www.rggi.org/. The declining cap during this period is itemized at https://www.rggi.org/program-overview-and-design/elements.

[34] Lazarus, *supra* note 5, at 263.

[35] *Id.* at 265.

[36] *Id.* at 267.

use of fossil fuels and eliminate regulatory restraints on their use.[37] EPA responded with a wave of regulatory rollbacks spanning nearly all restrictions on carbon emissions.[38]

Resistance to these efforts began to organize even before Trump took office. As Professor Lazarus puts it, "[t]he upshot was a well-resourced and skillful coalition of state attorneys general, environmental public interest groups, former federal environmental government appointees, community organizations, and major business interests fully aligned in opposition to the hundreds of environmental rollbacks the Trump administration had initiated."[39] But state governments did more than push back against Trump. They redoubled their own climate efforts and organized coalitions of likeminded jurisdictions to keep climate policy moving forward.

As soon as Trump announced his intent to withdraw from the Paris Agreement in 2017, the governors of New York and California announced the formation of the U.S. Climate Alliance along with their intentions to comply with the U.S.'s emissions reduction commitment.[40] Ultimately, twenty-three governors joined this group,[41] "pledging a shared commitment to helping the U.S. meet the Paris Agreement goals."[42] Along with Virginia, 146 cities and over a thousand companies, Washington and California expressed their opposition to Trump's plans as part of the *America Is All In* coalition, which supported halving U.S. emissions by 2030 and reaching net zero emissions by 2050.[43]

By 2018, there were clear signs of a state backlash in favor of climate action,[44] including an increasing number of states adopting California's Zero Emission Vehicle mandate.[45] California directed that all new homes have solar energy[46] and mandated that the electricity supply be entirely carbon-free by 2045.[47] To take another example, Connecticut adopted new laws requiring utilities to get forty percent of their power from renewable sources by 2030, mandating that the state cut greenhouse gases forty-five percent below 2001 levels by 2030, and requiring that government-

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[37] *Id.* at 269.

[38] *Id.* at 271.

[39] *Id.* at 276.

[40] Arroyo, *supra* note 2, at 435.

[41] *Id.*

[42] *Id.* at 436.

[43] *See* https://www.americaisallin.com/.

[44] See Daniel A. Farber, *States Rally Around Renewables: States have Ignored Trump to Promote Clean Energy within Their Borders*, LEGAL PLANET (Oct. 25, 2018), http://legal-planet.org/2018/10/25/despite-trump-energy-policy-moves-forward/ (listing actions in multiple states.)

[45] Kirsten Engel, *Climate Federalism in the Time of COVID-19: Can the States "Save" American Climate Policy?,* 47 N. KENTUCKY L. REV. 116, 134 (2020).

[46] Ivan Penn, *California Will Require Solar Power for New Homes*, N.Y. TIMES (May 9, 2019), https://www.nytimes.com/2018/05/09/business/energy-environment/california-solar-power.html.

[47] Marianne Lavelle, *California Ups Its Clean Energy Game: Gov. Brown Signs 100% Zero-Carbon Electricity Bill*, INSIDE CLIMATE NEWS (Sept. 20, 2018), https://insideclimatenews.org/news/28082018/california-100-percent-clean-energy-electricity-vote-climate-change-leadership-zero-carbon-electric-vehicles.

funded coastal projects plan for a 2050 sea-level rise of two feet.[48] And as a third example, New Jersey's governor began the process of rejoining the RGGI regional carbon trading system after an earlier Republican governor had exited RGGI.[49] He also signed new legislation increasing the renewable energy mandate to thirty-five percent by 2025 and fifty percent by 2030, with special provisions to encourage solar and offshore wind.[50]

State efforts accelerated in the final two years of Trump's first term in office.[51] Climate policies were widespread and thriving by the time he left office. Before the 2016 election, only Hawaii had a net-zero goal.[52] Between Trump's election and the end of 2018, six states, including California and New York, made binding commitments to entirely renewable or carbon-free power by 2050 or even earlier.[53] Washington State set goals of zero reliance on coal by 2025, a carbon-neutral grid by 2030, and 100 percent renewable energy by 2050.[54] In the end, ten states, Puerto Rico, and the District of Columbia had adopted zero-carbon targets of some kind during the Trump Administration.[55]

One effect of these state policies was to undermine a Trump energy priority: halting if not reversing the decline of coal. Despite the Administration's struggles to boost coal, coal use fell during Trump's first term.[56] The problem was that states and energy economics, not the federal government, play the dominant role in determining the fuel mix for the electricity sector, and states were pushing hard in the opposite direction.[57]

All of this is now history. Part III turns to the present and considers how states may be able to respond to Trump's return to power. Based on history, we can expect vigorous resistance to rollbacks, while states will also be likely to defend their climate policies from attack and strengthen those policies. But history never fully repeats itself, and both sides will attempt to take advantage of the changes that have taken place since Trump left office in January of 2021.

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[48] Bill Cummings, *Malloy Signs Clean Energy and Climate Bills*, CT POST (June 20, 2018), https://www.ctpost.com/news/article/Malloy-signs-clean-energy-and-climate-bills-13010842.php?utm_source=Federal+State+Policy+Updates+June+2018&utm_campaign=State.

[49] Peter Maloney, *New Jersey to Rejoin RGGI in New Executive Order*, UTILITY DIVE (Jan. 29, 2018), https://www.utilitydive.com/news/new-jersey-to-rejoin-rggi-in-new-executive-order/515802/.

[50] David Roberts, *The Latest State to Get Serious about Climate Change Is ... New Jersey?*, VOX (May 24, 2018), https://www.vox.com/energy-and-environment/2018/4/20/17255872/new-jersey-nuclear-renewable-energy-phil-murphy.

[51] Developments in state climate policy under Trump are discussed in detail in Arroyo, *supra* note 2, at 438-454.

[52] See the table at https://www.cesa.org/projects/100-clean-energy-collaborative/guide/table-of-100-clean-energy-states/

[53] Elizabeth Dunbar, *Minnesota pledges 100 percent carbon-free energy. Is it possible?*, MPR NEWS (Mar. 7, 2019), https://www.mprnews.org/story/2019/03/07/minnesota-pledges-100-percent-carbon-free-energy-is-it-possible.

[54] Catherine Morehouse, *Washington clean energy proposal would phase out coal by 2025*, UTILITY DIVE (Dec. 11, 2018), https://www.utilitydive.com/news/washington-clean-energy-proposal-would-phase-out-coal-by-2025/544047/.

[55] See https://www.cesa.org/projects/100-clean-energy-collaborative/guide/table-of-100-clean-energy-states/.

[56] Klass, *supra* note 5, at 248-250.

[57] I*d.* at 249 ("state policies, energy economics, and technological developments are, in this context, far more powerful forces than federal energy policy").

III. Prospects for State Resistance Under the Second Trump Administration

With Biden's election in 2020, the federal government resumed its commitment to climate action. Biden made a commitment on Day One to reverse Trump's regulatory rollbacks,[58] and he quickly rejoined the Paris Agreement.[59] Trump had disrupted what had been a largely stable body of environmental law, while setting back progress under Obama in addressing climate change.[60] In addition, Trump had weakened the federal government's reservoir of expertise as scientists and engineers fled the Administration, while also cutting budgets for environmental research and shifting the federal judiciary markedly to the right.[61] The Biden Administration took aggressive action to reverse the damage done by Trump and was hailed for the most ambitious program of environmental protection since the 1970s and an unparalleled commitment to environmental justice.[62] There was ground for hope, then, that the Trump Administration was an aberration that would be followed by a period of environmental progress.

The 2024 election shattered that hope. What had appeared to be a full recovery from Trumpism turned out to be only a temporary remission. Trump was returned to office once again pledging massive deregulation and aspiring to an unprecedented expansion in the use of fossil fuels. We can expect to see renewed state efforts to resist federal rollbacks and double down on their own climate policies. The precise form of those efforts is only now emerging and will undoubtedly evolve over the next four years, and their ultimate success may depend on larger political and economic forces.

This section explores the major strategies that will figure in the state response and some of the circumstances that will shape their success. We begin by examining the prospects for state litigation against the Trump Administration, then turn to possible strategies that the Trump Administration could adopt to undermine state climate policies, and finally consider some innovative approaches states may want to consider.

A. State Litigation Against the Federal Government

Litigation against the federal government has become a core strategy for states opposed to federal policy.[63] Driven by the increased politicization of their offices,[64] state attorneys general

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[58] Lazarus, *supra* note 5, at 4

[59] *Id.* at 291

[60] *Id.* at 284-85,

[61] *Id*. at 294-287.

[62] *Id*. at 293.

[63] See Albert C. Lin, *Uncooperative Environmental Federalism: State Suits Against the Federal Government in an Age of Political Polarization*, 88 GEO. WASH. L. REV. 890 (2020).

[64] As Roesler observes,

> Historically, these offices have been most concerned with enforcing state laws, rather than setting national policy. But as the state challenges to the Obama Administration's rules make clear, the role of the state attorney general is undergoing a profound change. State attorneys general are more likely now to pursue partisan political agendas in coordinated fashion. Recent studies link this development to the increasing polarization of politics and the influence of organized interests seeking to shape the national regulatory agenda

Roesler, *supra* note 14. at 10866. Indeed, more multi-state lawsuits were filed against the Trump Administration in its

form coalitions and formulate policy agendas rather than reacting on an ad hoc basis to new developments impacting individual states.[65] This behavior emerged during the Obama Administration, when conservative state attorneys general mounted barrages of lawsuits against environmental regulation.[66] During the first Trump Administration, the trend continued apace.[67] For instance, California filed 123 separate lawsuits during those four years, approximately one every twelve days.[68] In this section, we consider the past success of such litigation and the likelihood for future success.

1. Past Litigation Experiences and Present Prospects

Litigation to block rollbacks was notably successful during Trump's first term.[69] To be blunt, the Administration's litigation record would have been terrible for a private litigant, let alone one with all the advantages enjoyed by the federal government.[70]

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first two years than the total number of such suits filed during the respective presidencies of either Barack Obama or George W. Bush.

[65] *Id.* at 10859. Federal litigation has become core to the role of the state attorney general. As the Texas Attorney General put it, "I go into the office, I sue the federal government, and I go home." Lin, *supra* note, at 892. Lin explains the dynamics of this process:

> State-federal litigation indeed reflects an expanded role for state AGs beyond their traditional functions in representing the states. [A] decision to litigate may be based on partisan opposition or an attorney general's personal aspirations. State suits are sometimes coordinated with--and, on occasion, instigated by--industry groups or nongovernmental organizations. And as state AGs have challenged more national policies, state AG races have attracted more out-of-state funding, attention, and partisan involvement. Ultimately, critics fear, partisan state litigation could undermine the credibility of state AGs and aggravate partisan divides.

Id. at 936-937.

[66] As Roesler describes it, this converted environmental governance into a form of lawfare:

> Along with industry, states routinely filed lawsuits challenging new environmental regulations as abuses of federal power. Instead of thinking seriously about shared governance, the political default in many red states was to litigate with the hope of invalidating the federal rule. This turns environmental governance into a zero-sum jurisdictional game; if the federal rule is invalidated, the state wins, and if the rule stands, the state loses.

Roesler, *supra* note 14, at 10858. Roesler reports that "the state of Texas sued the Obama Administration at least 48 times. In over one-half of these cases, Texas challenged EPA action regarding air and water quality standards. A sizeable subset of these lawsuits (eight) involved climate change regulation. The total bill for these challenges added up to more than $1.8 million." *Id.* at 10859.

[67] Lin, *supra* note 63, at 914. Lin recounts then-Governor Jerry Brown saying that "[w]e've got the scientists, we've got the lawyers, and we're ready to fight." Indeed, more multi-state lawsuits were filed against the Trump Administration in its first two years than the total number of such suits filed during the respective presidencies of either Barack Obama or George W. Bush." *Id.* at 892. This process has been accompanied by a split of state attorney generals from a unified national organization into two partisan groups. *Id.* at 942.

[68] Ana B. Ibarra And Nigel Duara, *California Beat Trump in Court His First Term. It's Preparing New Cases for His Second*, CALMATTERS (Nov. 7, 2024), https://calmatters.org/justice/2024/11/california-vs-trump-lawsuits/.

[69] See Lazarus, *supra* note 5, at 278-281.

[70] Bethany A. Davis Noll, *"Tired of Winning": Judicial Review of Regulatory Policy in the Trump ERA*, 73 ADMIN. L. REV. 353, 356 (date) ("Using data gathered since the beginning of the term, it finds that rather than winning most legal challenges to agency actions, as was the historical norm, the Trump Administration's win rate was 23% on aggregate.") Under previous precedents, the agency win rate was about 75%, three times as high. *Id.* at 378-379.

One reason was that Trump appointees to environmental positions often lacked expertise in the field and were reluctant to trust staff expertise given their fears of the "deep state."[71] As a result, the records produced to support rollbacks tended to be weak, increasing the chances of reversal under judicial review.[72] Due to either haste or lack of legal expertise, agencies were also prone to skip basic procedural requirements, making their new regulations especially vulnerable to reversal.[73] Notably, the Administration's record did not improve much despite increased experience on the part of agency heads or the replacement of some initial appointees with more experienced administrators.[74] Moreover, although the Administration did better in front of judges who were Republican appointees, it still lost over half of those cases.[75] The reasons for this sustained lack of success are unclear. Perhaps Trump appointees operated within a bubble that made it difficult for them to take challenges to their actions seriously. Or perhaps they (and their boss) were as interested in the "shock and awe" effect of massive deregulatory efforts as in

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[71] Lazarus, *supra* note 5, at 278.

[72] *Id.*

[73] *Id*. at 279. Another study concluded that:

> [E]ven when the Trump Administration was fortunate enough to argue a case [involving a major regulation] before a judge appointed by a Republican president, the Administration won only 36% (4/11) of those judicial decisions. Thus, a key insight from the IPI [an NYU institute] database is that the administrators, general counsels of the regulatory agencies, and OIRA need to do a much better job of building an appropriate administrative record for deregulatory decisions--buttressing the preambles to the rules, and strictly following proper administrative procedures under the APA.

Keith B. Belton and John D. Graham, *Trump's Deregulation Record: Is It Working*?, 71 ADMIN. L. REV. 803, 851 (2019).

[74] According to an empirical study,

> [T]he win-loss rate did not get progressively better as agencies issued rules. Instead, when looking at the date each rule came out compared to the success rate in court, the data shows that after climbing to 25% in the spring of 2019, the aggregate win rate had dropped down again by the end of the term to 23%. Moreover, if rushed decisionmaking usually involves rules issued without taking the time to go through notice-and-comment or develop a reasoned explanation for the decision, you would expect that those types of violations would drop off as the Administration had more time to issue the rules. But those violations continued throughout the term, suggesting that even now that agencies have had time to prepare rules, agencies were not doing significantly better.

Davis Noll, *supra* note 70, at 391. Despite the increased conservative bent of the courts, the Biden Administration did somewhat better than the first Trump Administration in litigation over rules, with complete losses in 44% of cases compared with 57% for Trump. See Institute for Policy Integrity, *Biden Rules through 2023*, https://policyintegrity.org/tracking-major-rules/biden-rules-to-date. The analysts note that this could be in part due to a greater tendency toward forum shopping by challengers. *Id.*

[75] The Administration's performance was startlingly worse than prior administrations under similar circumstances:

> Prior studies showed a high agency validation rate when the agency decision matches the judge's partisan affiliation: more than 70% in one study finding an overall validation rate of 64%,more than 80% in another study, and 68% in yet another study.[247]
>
> But with the Trump Administration dataset, that validation rate was much lower: 45% (measured by looking at all cases regardless of how many parallel courts ruled on the same rule or action). No study has ever found that a presidential administration loses at this high of a rate in front of judges that are partisan-aligned with the president.

Davis Noll, supra note 70, at 393.

successful deregulation. Whatever the reason, failure in the courts did not seem to spark greater care in crafting regulations.

Whether litigation against the Trump Administration will be equally successful during his second term is unclear. The large number of conservative judges whom Trump installed on the federal bench, particularly at the Supreme Court level, will create headwinds against those challenging deregulatory actions. Still, while this shift favors the Administration, it may not be decisive. Conservative judges may not be willing to jettison core precepts of administrative law even when they approve of the results on policy grounds. Officials may also misjudge the extent of the rightward shift, inducing overconfidence that could lead them into riskier legal positions that even the more conservative bench will be unwilling to support.

It is also unclear whether the Trump Administration has absorbed a desire for greater care and expertise from its experiences in the first term. Many of Trump's cabinet appointees, including the choice of Leo Zeldin to head EPA,[76] share a conspicuous lack of expertise and experience, both in terms of subject matter and management ability. The second Trump Administration seems at least as hostile as the first to the agency staff who could help build evidentiary records to support regulations and strengthen legal arguments on arcane statutory issues.[77] These factors could cancel out whatever value the first term may have had a learning experience.

2. The Impact of Doctrinal Changes on Agencies and Litigation

There have also been some doctrinal changes, in large part due to Trump's Supreme Court appointees, but these may not end up improving the Administration's win rate. During the Biden years, the Supreme Court made two major changes in federal administrative law that complicate federal regulation but could also turn out to create problems for Trump agencies' efforts to deregulate.

The first doctrinal innovation is known as the major questions doctrine. As the Court articulated the doctrine in *West Virginia v. EPA*,[78] in certain "extraordinary cases," "separation of powers principles and a practical understanding of legislative intent" create a presumption against agency authority that can only be rebutted by "clear congressional authorization."[79] As to what constitutes a major question, the Court has referred to "the 'history and the breadth of the authority that [the agency] has asserted,' and the ''economic and political significance' of that assertion."[80] Those terms are hardly self-explanatory.[81] There is considerable uncertainty about the parameters

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[76] See David Jordan, Zeldin, Trump's Pick as EPA Head, Was a Bit Player on Environment, Roll Call (Nov. 12, 2024), https://rollcall.com/2024/11/12/zeldin-trumps-pick-as-epa-head-was-a-bit-player-on-environment/ ("Former New York Rep. Lee Zeldin, President-elect Donald Trump's intended nominee for EPA administrator, brings scant experience on environmental issues to the job but strong ties to Trump").

[77] See Agenda 47: President Trump's Plan to Dismantle the Deep State and Return Power to the American People (March 21, 2023), https://www.donaldjtrump.com/agenda47/agenda47-president-trumps-plan-to-dismantle-the-deep-state-and-return-power-to-the-american-people (""I will shatter the Deep State, and restore government that is controlled by the People.")

[78] 142 S. Ct. 2587 (2022).

[79] *Id.* at 2609.

[80] *Id*. at 2608.

[81] The decision and its articulation of the major questions doctrine were sharply criticized. See, e.g., Louis J. Capozzi III, *The Past and Future of the Major Questions Doctrine*, 84 OHIO ST. L.J. 191, 194 (2023); Daniel T. Deacon and

of the major question doctrine as shown by the confusion in the lower courts on the subject.[82] There is an obvious risk that its application will turn on the degree to which a regulation cuts against a judge's policy orientation. That would not be good news for environmental regulators given the conservative supermajority on the Supreme Court. Lower courts have adopted a variety of approaches but have found difficulty in applying their own approaches.[83]

Until the Court provides more clarification,[84] the parameters of the doctrine will remain unclear. In the *West Virginia* case, the Court did point to several salient features of the regulation. First, EPA was relying on a "newfound power" it claimed derived from "the vague language of an 'ancillary provision[]' of the statute," one that "had rarely been used in the preceding decades."[85] Second, EPA had adopted a "regulatory program that Congress had conspicuously repeatedly declined to enact itself."[86] Third, EPA lacked expertise in the functioning of the electric power system, which was not generally part of its regulatory domain.[87] These observation seem to point toward a nuanced, limited doctrine.

Nuance and limits are not likely to characterize the Trump Administration's interpretation of the doctrine. Blunderbuss use of the major questions doctrine is likely to be an appealing strategy for agencies seeking to repeal Biden-era rules. The reason is that this strategy allows rapid action

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Leah Litman, *The New Major Question Doctrine*, 109 VA. L. REV. 1009 (2023); Jody Freeman, Matthew C. Stephenson, *The Anti-Democratic Major Questions Doctrine*, 2022 SUP. CT. REV. 1 (2022); Mila Sohoni, *The Major Questions Quartet*, 136 HARV. L. REV. 262 (2022)..

[82] See Natasha Brunstein, *Major Questions in Lower Courts, 75* ADMIN. L. REV. 661, 663 (2023) ("There is no one major questions doctrine in the lower courts. Judges have taken vastly different approaches to defining and applying the doctrine both within and across circuits.")

[83] After canvassing the lower court opinions, Natasha Brumstein concluded that:

> [M]any judges may view the doctrine as a little more than a grab bag of factors, which they seem to be choosing from at their discretion. Lower court judges do not appear to be constrained in how they apply the doctrine. In a majority of cases concerning Biden Administration agency actions and executive orders, judges applied the doctrine to reach outcomes that aligned with the political party of their appointing President.

Id. at 663. Brumstein found that judges differed in what factors they considered to be triggers for the doctrine, how to define those factors, what metrics to apply in assessing the strength of those factors, and even whether they relied on the majority opinion in *West Virginia* or a concurring opinion. *Id.* at 663-665. Sohoni also emphasizes the doctrine's vagueness, quoting Brett Kavanaugh as a circuit judge saying that "determining whether a rule constitutes a major rule sometimes has a bit of a 'know it when you see it' quality." Sohoni, *supra* note 81, at 287-288. Justice Gorsuch's concurrence provides a list of factors to consider, but Sohoni concludes that "[t]aken together, these clusters of 'triggers' and 'telling clues' invite courts to perform exactly the kind of all-things considered, open-ended inquiry that textualism was meant to teach courts to avoid like the plague." *Id.* at 288.

[84] Deacon and Litman argue that the trend at the Supreme Court level is to emphasize three factors:

> First, the Court has indicated that politically significant or controversial policies are more likely to be major and thus require clear authorization. Second, the Court has signaled that the novelty of a policy … is a reason to think that the policy is a major one. Finally, the Court has considered the majorness of other, theoretically possible agency policies not actually before the Court but that might be supported by the agency's broader rationale.

Deacon and Litman, *supra* note, at 1013.

[85] *Id*. at 2610.

[86] *Id*. The Court repeated this point later in the opinion. See *id.* at 2614.

[87] *Id*. at 2612-2613.

and economizes on the need for agency expertise. It may be difficult for the Administration to deploy policy-based arguments because such arguments require deep engagement with complex factual records and sophisticated expertise – and hence heavy involvement by the agency staff the Administration reviles. In addition, the evidence simply may not exist to justify a rollback. In contrast, broadly invoking the major questions doctrine requires little or no expertise, a great advantage in an Administration in which that may be in short supply.

There's an old legal adage to the effect that "if you don't have the facts, argue the law, and if you don't have the law, pound on the table." Today, that might be amended to say, "pound on the table and cite the major questions doctrine." States should resist this misuse of the doctrine and insist that it be limited, as the Supreme Court has said, to extraordinary cases.[88] That would force Trump agencies to do the hard work of mastering statutory intricacies and complex technical material to justify deregulation.

The other administrative law innovation was the overruling of the *Chevron* doctrine, under which courts deferred to reasonable statutory interpretations of ambiguous statutes.[89] Under an older doctrine called *Skidmore* deference, judicial deference to an agency interpretation is based upon "all those factors which give it power to persuade, if lacking power to control."[90] In overruling *Chevron*, the Supreme Court continued to cite *Skidmore* with approval.[91] The Court also made it clear that, when a statute like the Clean Air Act delegates power to an agency, a court's role involves "recognizing constitutional delegations, 'fix[ing] the boundaries of [the] delegated authority,' and ensuring the agency has engaged in 'reasoned decisionmaking' within those boundaries."[92] Thus, in considering the scope of EPA's regulatory powers over greenhouse gases, a court's role would be limited to determining two things. The first is whether an EPA regulation is outside the bounds of any reasonable application of the statute (and therefore beyond its delegated authority). The second determination is whether the agency has engaged in reasoned decision making.

Just how to apply these post-*Chevron* standards is unclear, but they seem to require a more granular and less deferential review of the validity of an agency's interpretation of the statute. Although the most obvious effect of this doctrinal shift could be to hamper agency regulation of greenhouse gases, the same standards apply to judicial review of regulatory rollbacks. In that setting, they may at least impose some restraints on extravagant effort to eliminate federal regulations.

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[88] Green states themselves may be able to use the major questions doctrine to challenge especially egregious deregulatory overreaches by Trump agencies. The doctrine seemingly applies to deregulation as well as regulation. One of the foundational cases involved an effort to deregulate telephone rates. MCI Telecommunications Corp. v. AT&T Co., 512 US 218 (1994). A more recent case involved an effort to cancel student loans, lifting what would otherwise be an obligation to repay. Biden v. Nebraska, S. Ct. 2355 (2023). These cases suggest that efforts to radically reduce burdens on the private sector could also run afoul of the doctrine. Whether this argument will be useful in litigation depends on the extent to which the Administration limits itself to rolling back recent regulations or instead attempts to eviscerate the regulatory system through executive action.

[89] Chevron U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984).

[90] *Id.* at 2259.

[91] *Id.*

[92] *Id*. at 2263.

In short, the litigation terrain has shifted in important ways. The bench has shifted ideologically in the direction of the Trump Administration. This is undoubtedly an important advantage for the Administration, but it may not lead to a corresponding improvement in agency success rates in court compared with the first Trump Administration. Overconfidence could tempt agencies into taking bolder positions that even the more conservative bench may not accept. The agencies may also be tempted to rely far too much on the major questions doctrine as a short cut to justifying rollbacks, hoping to avoid the need for deep expertise on a regulatory issue. This could result in pushing the doctrine beyond what the courts will allow: Surely not every question can be "major." And finally, the Administration will no longer have the benefit of the *Chevron* doctrine.

During Trump's first term, he had a terrible win rate in front of Democratic judges. But even in front of judges that he himself had appointed, his agencies won only half the time.[93] Unless the Trump Administration makes a surprising leap in the professionalism, care, and sophistication with which it approaches rulemaking, there is little reason to expect a better judicial reception. Litigation remains a powerful strategy for green states and one that could result in considerable success in opposing changes to federal policy that favor fossil fuels and hinder the growth of renewables.

B. Defending the California Car Waiver

Besides challenging Trump Administration regulations, green states will also have to defend their own regulations from legal attack. California, alone among the states, has the power to regulate emissions from vehicles, but needs an EPA waiver to do so. Because transportation is such an important source of emissions, defending the waiver is crucial.

Some background is needed to understand the issue. Because the Clean Air Act is the basic federal statute regulating emissions into the air (including greenhouse gases), it is the obvious starting point in thinking about possible preemption of state climate regulations. The Clean Air Act, like almost all contemporary federal environmental laws, generally uses a basic "floor" preemption strategy. Federal law sets minimum required levels of environmental protection (the "floor"), but the states are expressly authorized to go further and adopt more stringent environmental requirements. Like many other statutes, the Clean Air Act contains an explicit savings clause to limit preemption. The language of the Clean Air Act's savings clause is quite sweeping. Section 116 provides that "nothing in the chapter shall preclude or deny the right of any State or political subdivision thereof to adopt or enforce (1) any standard or limitation respecting emissions of air pollutants or (2) any requirement respecting control or abatement of air pollution."[94] Thus, states seem to be free to impose stricter limits on carbon emissions than the federal government.

There is an important exception to floor preemption in section 209 of the statute, which applies to regulations of emissions from new vehicles. The Clean Air Act directs EPA to issue federal standards for tailpipe emissions from vehicles. When the statute was under consideration, the automobile industry was alarmed at the risk that it would have to produce multiple models of cars to meet emissions standards in different states. Section 209 responds to that concern. Subsection

[93] Davis Noll, *supra* note 70, at 395.

[94] Section 116, 42 U.S.C. § 7416.

(a) of section 209 prohibits states and their subdivisions from adopting or enforcing standards relating to emissions controls from new vehicles.[95]

Taken alone, section 209(a) would seem to completely preempt state regulation. But section 209(b) creates an important exception from its preemption rule. (Lay readers can be forgiven for confusion about this nesting of exceptions.) Although it does not mention California by name, section 209(b) is drafted in a way that allows only California to qualify. It permits California to obtain a preemption waiver for stricter standards based on "compelling and extraordinary" circumstances.[96] The rationale was that Southern California's severe air pollution problems were likely to be unsolvable unless the state could vigorously regulate pollution from cars and trucks.

California has applied for a series of waivers to enable it to regulate greenhouse gas emissions by vehicles.[97] The most notable is for California's Clean Car program, which has increasingly stricter limits on emissions from conventional vehicles and mandates a growing number of zero-emission vehicles (primarily EVs).[98] The waivers are crucial to California's climate efforts since transportation is the largest source of carbon emissions in the state.[99]

By itself, section 209(b) would allow only California to impose such regulations. But given that manufacturers would have to set up production runs to supply the California market, it was relatively feasible for them to supply similar vehicles to other states. For that reason, Congress

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[95] This section reads:

> No State or any political subdivision thereof shall adopt or attempt to enforce any standard relating to the control of emissions from new motor vehicles or new motor vehicle engines subject to this part. No State shall require certification, inspection, or any other approval relating to the control of emissions from any new motor vehicle or new motor vehicle engine as condition precedent to the initial retail sale, titling (if any), or registration of such motor vehicle, motor vehicle engine, or equipment.

[96] Section 209(b) provides in relevant part:

> 1) The Administrator shall, after notice and opportunity for public hearing, waive application of this section to any State which has adopted standards (other than crankcase emission standards) for the control of emissions from new motor vehicles or new motor vehicle engines prior to March 30, 1966 [only California had done so], if the State determines that the State standards will be, in the aggregate, at least as protective of public health and welfare as applicable Federal standards. No such waiver shall be granted if the Administrator finds that—
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> > (A) the determination of the State is arbitrary and capricious,
> >
> > (B) such State does not need such State standards to meet compelling and extraordinary conditions, or
> >
> > (C) such State standards and accompanying enforcement procedures are not consistent with section 7521(a) of this title.

[97] For a listing of California's waiver requests, see EPA, Vehicle Emissions California Waivers and Authorizations, https://www.epa.gov/state-and-local-transportation/vehicle-emissions-california-waivers-and-authorizations. For a detailed discussion of the waiver process and of California's most recent requests, see Congressional Research Service, California and the Clean Air Act (CAA) Waiver: Frequently Asked Questions (Aug. 30, 2024),

[98] California Air Resources Board, Advanced Clean Cars Program, https://ww2.arb.ca.gov/our-work/programs/advanced-clean-cars-program.

[99] California Air Resources Board, GHGs Descriptions & Sources in California, https://ww2.arb.ca.gov/ghg-descriptions-sources#:~:text=Transportation%20is%20the%20single%20largest,CO2%20emissions%20in%20California.

later decided to allow other states to piggyback on the California standards. Under section 177, other states have the option of adopting standards identical to California's, with no deviations allowed.[100] The upshot is that car manufacturers can produce a "national car" complying only with the federal standards and a "California car" meeting that state's higher standards.

The legality of the California waiver for greenhouse gases has been attacked on three grounds.[101] The first is constitutional. In recent litigation, Republican states have argued that allowing California, but not other states, to set its own standards violates the constitutional principle of equal state sovereignty. The D.C. Circuit convincingly rejected that argument in *Ohio v. EPA*.[102] First, the court said, that principle had never been applied to limit Congress's powers under the Commerce Clause or any other power under Article I of the Constitution. [103] Second, if it applied at all, that principle would not be an absolute bar but would require only that Congress have some justification for distinguishing between states – and the court considered even that doubtful because the only case supporting that view involved an extraordinary intrusion into state sovereignty under a different portion of the Constitution.[104]

A second argument is that California does not qualify for a waiver because, given that climate change impacts every state, California does not face "compelling and extraordinary conditions" in terms of greenhouse gases.[105] California has a strong counterargument here. Moving away from diesel and gas vehicles would not only help reduce greenhouse gas emissions but also emissions of conventional pollutants. As the *Ohio* court observed, "In recent decades, California has continued to face significant pollution and climate challenges," including over half of the worst ten areas in the country for ozone and particulate pollution.[106] It also faces major risks from climate change, and the court noted that "pollution and climate change have particularly harmful impacts on California due to its large agriculture and ocean-based economies, dependence on an over-stressed water supply, long coastlines, and susceptibility to wildfires."[107] It would be helpful if California were to frame its electric vehicle requirements as a way to reduce all pollutants, not just greenhouse gases. That would strengthen the case for the legality of the waiver.

The final argument is that requirements to use electric vehicles are effectively fuel efficiency standards because they essentially require the use of vehicles that use zero gallons of gas per mile. As fuel efficiency standards, the argument continues, they are preempted by the federal statute

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[100]Section 177, 42 U.S.C. § 7507.

[101] For more extensive discussion of these issues, see Chiara Pappalardo, *What a Difference a State Makes: California's Authority to Regulate Motor Vehicle Emissions under the Clean Air Act and the Future of State Autonomy*, 10 MICH. J. ENVTL. & ADMIN. L. 169 (2020); Ann E. Carlson*, Federalism, Preemption, and Greenhouse Gas Emissions*, 37 U.C. Davis L. Rev. 281 (2003); Justine Huang, *Shelby County to Clean Air Act: Evaluating the Constitutionality of California's Clean Air Act Waiver under the Equal Sovereignty Principle*, 97 S. CAL. L. REV. 165 (2024).

[102] 98 F.4th 288 (D.C. Cir. 2024).

[103] *Id*. at 308.

[104] *Id*. at 309-314.

[105] EPA has followed a general practice of evaluating California's standards in the aggregate rather than considering each waiver request that the state has proposed in isolation. See *Ohio*, 98 F. 4th at 296.

[106] *Id*. at 297.

[107] *Id.*

establishing federal fuel efficiency ("CAFÉ") standards for vehicles.[108] The argument seems a bit contrived. It is meaningless to ask how efficiently a car uses fuel when it does not use fuel at all, like asking the GPA of someone who has never gone to school. In any event, the argument that greenhouse gas standards essentially required vehicles to use less fuel, and were therefore the same as fuel efficiency standards, was rejected by the Supreme Court in *Massachusetts v. EPA* and seems no more viable in the preemption context.

While the arguments against denying California's waiver for greenhouse gases seem solid, the conservative, anti-regulatory slant of the Supreme Court could make it sympathetic to a waiver denial by the Trump Administration. On the other hand, as discussed in the next section, several of the conservative Justices also seem to be partial to upholding state authority, which could favor California. A Supreme Court ruling against the waiver would be a serious blow to the ability of states to reduce carbon emissions and reach their carbon neutrality targets, although there is some reason to think that carmakers would continue to move toward electric vehicles independently.[109]

C. Defending Against Commerce Clause Attacks on State Climate Policies

Besides preemption claims, states must also be prepared to defend their regulations against claims based on the federal commerce clause. Under a judicial doctrine known as the dormant commerce clause, the courts police state regulations that interfere with interstate commerce.[110] The Supreme Court has distinguished between regulations that merely burden interstate commerce and those that discriminate against it. Discriminatory regulations face more stringent scrutiny. Regulations that merely burden interstate commerce also face scrutiny, however, although in a less rigorous mode. Under the balancing test of *Pike v. Bruce Church, Inc.*,[111] state laws burdening commerce are invalid if the burden on interstate commerce is "clearly excessive in relation to the putative local benefits."[112]

The potential problems raised by the dormant clause are illustrated by *Rocky Mountain Farmers Union v. Goldstene*,[113] in which a federal district court struck down California's low carbon fuel standard (LCFS). The LCFS regulates the carbon intensity of vehicle fuels based on a lifecycle analysis from production to combustion. Corn ethanol provides a useful example of lifecycle analysis: growing corn uses fertilizer that requires energy to produce, often involving carbon emissions; the plant removes carbon dioxide from the atmosphere; processing and transporting the biofuel takes additional energy which may involve emissions; and then the fuel is

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[108] 98 F.4th at 298.

[109] See Lilly M. Pickett, *Why Pushback to California's Advanced Clean Cars Policy Won't Stop the Electric Car Revolution*, 56 CONN. L. REV. 573 (2024).

[110] For recent commentary about dormant commerce clause doctrine, see Jack Goldsmith and Alan Sykes, *The California Effect, Process-Based Regulation, and the Future of Pike Balancing*, 2023 SUP. CT. REV. (2023); Tyler Runsten, *Climate Change Regulation, Preemption, and The Dormant Commerce Clause,* 72 HASTINGS L.J. 1313 (2021); Kevin Todd, *The Dormant Commerce Clause and State Clean Energy Legislation*, 9 MICH. J. ENV'T. & ADMIN. L. 189 (2020).

[111] 397 U.S. 137 (1970).

[112] *Id*. at 142.

[113] 843 F.Supp.2d 1071 (ED CA 2011).

burned, releasing carbon dioxide.[114] The question is whether the net amount of carbon emissions involved in corn ethanol is less than the emissions from burning gasoline.

The court found the standard to be discriminatory because it included geographic factors such as transportation distances and the carbon-intensity of the electricity used for production from the local grid.[115] These factors disfavored some out-of-state producers, especially from the Midwest where coal is a favored fuel for generating the electricity used to process corn into ethanol. The court also found that the standard was impermissibly extraterritorial because it considered carbon emissions that occurred outside of the state.[116] In effect, the district court thought, California was trying to regulate emissions outside of its own borders that were beyond its jurisdiction.

The Ninth Circuit overturned the district court in *Rocky Mountain Farmers Union v. Corey*.[117] Unlike the district court, the court of appeals found the LCFS nondiscriminatory. The Ninth Circuit faulted the trial judge for "ignoring GHG emissions related to: (1) the electricity used to power the conversion process, (2) the efficiency of the ethanol plant, and (3) the transportation of the feedstock, ethanol, and co-products," because "those factors contribute to the actual GHG emissions from every ethanol pathway, even if the size of their contribution is correlated with their location."[118] According to the appellate court, "California, if it is to have any chance to curtail GHG emissions, must be able to consider all factors that cause those emissions when it assesses alternative fuels."[119] Thus, the court added, "[t]hese factors are not discriminatory because they reflect the reality of assessing and attempting to limit GHG emissions from ethanol production."[120]

In addition to the argument that the LCFS discriminated against interstate commerce, industry also argued that it was unconstitutionally extraterritorial because it penalized producers for carbon emitted outside of California. As mentioned earlier, the district court had accepted this argument. The Ninth Circuit rejected that claim.[121] In *National Pork Producers Council v. Ross*, the Supreme Court later rejected the entire idea that extraterritoriality is a separate basis for commerce clause challenges to state activities[122]

Besides rejecting the extraterritoriality argument, the Supreme Court also threw shade on another ground for attacking state regulations, the *Pike* balancing test.[123] Under this test, even if a

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[114] A further complication is that dedicating cropland to corn for ethanol could impact global agricultural markets, indirectly leading to destruction of tropical forests. For a fuller explanation of the issue, see Daniel A. Farber, *Indirect Land Use Change, Uncertainty, and Biofuels Policy*, 2011 U. ILL. L. REV. 381 (2011).

[115] *Id*. at 1086–1089.

[116] *Id*. at 1090–1093.

[117] 730 F.3d 1070, 1077 (9th Cir. 2013) cert. denied, 573 U.S. 946 (2014)

[118] *Id.* at 1088.

[119] *Id.* at 1090.

[120] *Id.* at 1092-1093.

[121] *Id.* at 1104-1106.

[122] 598 U.S. 356, 143 S. Ct. 1142 (2023). For commentary on the case, see Goldsmith and Sykes, *supra* note ; Bradley W. Joondeph, *The "Horizontal Separation Of Powers" after National Pork Producers Council v. Ross*, 61 SAN DIEGO L. REV. 45 (2024); Note, *The Dormant Commerce Clause and Moral Complicity in a National Marketplace*, 137 HARV. L. REV. 980 (2024).

[123] This test is derived from Pike v. Bruce Church, Inc., 397 U.S. 137 (1970).

law does not discriminate against interstate commerce, it will be ruled invalid if its burden on interstate commerce clearly outweighs the state's regulatory interest. Although the Court was badly fractured in terms of how to apply this test to the facts in *Pork Producers*, the five-Justice majority did issue some cautionary notes about the *Pike* test. The industry conceded that the California law in question placed the same burden on in-state and out-of-state firms.[124] According to the Court, "if some of our cases focus on whether a state law discriminates on its face, the *Pike* line serves as an important reminder that a law's practical effects may also disclose the presence of a discriminatory purpose."[125] Because no trace of discrimination was involved, the Court said, the case before it "falls well outside *Pike*'s heartland."[126] In its closing section, the majority opinion stressed that courts should exercise "extreme caution" in applying the dormant commerce clause: "Preventing state officials from enforcing a democratically adopted state law in the name of the dormant Commerce Clause is a matter of 'extreme delicacy', something courts should do only 'where the infraction is clear.'"[127]

D. Interstate and Transnational Cooperation

States can pool resources and achieve compliance more cheaply if they work together. The section considers possible constitutional challenges to such cooperation. We begin with the need for congressional consent to certain kinds of agreements and then consider the special problems posed by transnational cooperation.

1. Is Congressional Consent Needed?

Despite their advantages, regional agreements may encounter constitutional challenges. The main issue is whether congressional consent to a regional agreement is required under the compact clause.[128] The caselaw is reassuring on this issue, suggesting that the compact clause should not be a major problem for states pursuing linkages with other jurisdictions.

The Supreme Court has not construed the clause to reach all agreements between states, but only those that are "directed to the formation of any combination tending to the increase of political power in the States, which may encroach upon or interfere with the just supremacy of the United States."[129] On this basis, the Court upheld the formation of a multistate tax commission formed to develop tax policies that would then be adopted separately by each member state.[130] Similarly, in *Northeast Bancorp, Inc. v. Bd. of Governors of the Federal Res. Sys.*,[131] the Court found that no compact existed despite informal agreements and adoption of identical laws and governing acquisition of local banks by out-of-state banks. Although those state laws were adopted in concert,

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[124] *Pork Producers*, 143 S. Ct. at 1153.

[125] *Id*. at 1154.

[126] *Id.* at 1159.

[127] *Id.* at 1165. The quotations in the text are all from portions of the opinion joined by five Justices. Other parts of the opinion had only plurality support.

[128] The compact clause provides that "[n]o State shall, without the Consent of Congress, … enter into any Agreement or Compact with another State, or with a foreign Power." U.S. Const., Art. I § 10 cl. 3.

[129] Virginia v. Tennessee, 148 U.S. 503, 519 (1893).

[130] United States Steel Corp. v. Multistate Tax Comm'n, 434 U.S. 452 (1978). The commission had the power to conduct audits using subpoenas in any of the member states' courts, including audits of multinational corporations.

[131] 472 U.S. 159 (1985).

the Court found it more important that no joint regulatory body was established, the statutes were not conditional on each other, and states were not legally bound.[132] The Court held that the statutes did not "either enhance the political power of the New England States at the expense of other States or have an 'impact on our federal structure.'"[133]

In designing trading systems, states have been careful to follow these guidelines. For instance, RGGI, the multistate trading system discussed earlier,[134] was based on a Memorandum of Understanding (MOU) between governors, which ultimately led to the creation of a model rule for adoption by individual states. States then individually adopted regulations based on the model rule. At no point were the states as sovereign entities legally bound to take any action, nor did they delegate regulatory power to an interstate entity. In fact, states have moved in and out of the agreement depending on local politics. All of this is in line with the Supreme Court's rulings upholding the multi-state tax commission and bank acquisition agreements.

Section 102 of the Clean Air Act, which is entitled "cooperative activities,"[135] provides additional support for agreements like RGGI. Subsection (a) calls upon EPA to encourage "cooperative activities by the States and local government" and foster the passage of uniform state laws. Subsection (c) is even more clearly on point. It provides congressional consent for states to enter agreements for control of air pollutants, including establishing joint agencies to make the agreements effective. States retain the right to withdraw from the agreements unless Congress has approved a legally binding contract.[136]

This provision seems to fit RGGI-like interstate agreements given that the Supreme Court has held that greenhouse gases are a form of air pollution under the statute. Congressional consent is needed only to make an agreement about greenhouse gases legally binding on the states. Thus, although states may retain the right to withdraw, an interstate trading agreement seems permissible even if it goes beyond the safe harbor provided by the Supreme Court opinions.[137]

2. Transnational Agreements.

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[132] *Id*. at 175.

[133] *Id*. at 176. Note that the text of the Compact Clause does not distinguish between other states and other countries, so the reasoning of *Northeast Bancorp* would seemingly apply in both contexts.

[134] See Part II(A) *supra*.

[135] CAA § 102, 42 U.S.C. § 7402.

[136] Subsection (c) provides:

> The consent of the Congress is hereby given to two or more States to negotiate and enter into agreements or compacts . . . for (1) cooperative effort and mutual assistance for the prevention and control of air pollution and the enforcement of their respective laws relating thereto, and (2) the establishment of such agencies, joint or otherwise, as they may deem desirable for making effective such agreements or compacts. No such agreement or compact shall be binding or obligatory upon any State a party thereto unless and until it has been approved by Congress.

CAA § 102(c), 42 U.S.C. § 7402(c). A concluding sentence provides that a compact relating to "control and abatement of air pollution in any air quality control region" can only include states in that region. That sentence seems to have no application to climate change, which does not relate to a specific air quality control region.

[137] Section 102 could also be relevant to certain kinds of discrimination claims by firms in nonmember states. States outside the agreement (and their firms) can hardly complain that they fail to receive the benefits of an agreement that they have decided not to enter.

California has linked its emissions trading scheme with the Canadian province of Quebec. The Trump Administration filed a lawsuit challenging this linkage. California's action was attacked for being inconsistent with the Trump Administration's withdrawal from the Paris Agreement. The court rejected this argument. It found no evidence that the agreement interfered with President Trump's supposed efforts to obtain a better deal than the Paris Agreement—perhaps, though the court was too tactful to say so—because no such efforts existed.[138]

Transnational climate agreements, such as the linkage between Quebec and California's emission trading system, raise additional issues.[139] The Trump Administration filed suit to invalidate this linkage. The district court ruled in favor of California, holding that the linkage agreement did not violate the compact clause or the treaty clause.[140] It did not involve sufficiently weighty matters to constitute a treaty, and was not a compact given California's unilateral right to withdraw. In a separate opinion, the court also held that foreign affairs preemption did not apply because California's linkage was not primarily designed to control conduct outside its borders and did not directly conflict with U.S. foreign policy.[141] Although they have lower profiles than the Quebec linkage, California has also entered into several memorandums of understanding with China, and there seems to be a good chance that those will be challenged, given the Trump Administration's likely hostility toward that country.[142] Given the lack of clarity in this area of law, the results may be unpredictable even though the state has some strong arguments on its side.

E. Possible Innovative Strategies

Litigating against the federal government and creating state climate regulations are well-established strategies for resisting anti-environmental presidents. This section will consider some less conventional strategies that states may also find useful.

1. Regulation by Contract.

When faced with a threat of federal preemption of its carbon emission standards for new vehicles, California adopted a novel approach to reducing emissions. The state reached a preliminary agreement with four major carmakers who wished to avoid the uncertainty of prolonged litigation.[143] The Trump Administration threatened an antitrust investigation into the

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[138] The court's opinion on foreign affairs preemption can be found at United States v. California et al., No. 2:19-cv-02142 WBS EFB (N.D. Cal. 2020), https://www.courtlistener.com/recap/gov.uscourts.caed.363317/gov.uscourts.caed.363317.129.0.pdf.

[139] See Ryan M. Scoville, *The International Commitments of the Fifty States*, 70 UCLA L. REV. 310 (2023); Sharmila L. Murthya, *The Constitutionality of State and Local "Norm Sustaining" Actions on Global Climate Change: The Foreign Affairs Federalism Grey Zone*, 5 U. PA. J. L. & PUB. AFF. 447 (2020).

[140] United States v. California, 444 F. Supp. 3d 1181 (E.D. Cal. 2020). The treaty clause provides that "[n]o State shall enter into any Treaty, Alliance, or Confederation." Article 6 § 10 cl. 1.

[141] United States v. California, No. 219CV02142WBSEFB, 2020 WL 4043034, at *2 (E.D. Cal. July 17, 2020), appeal dismissed, No. 20-16789, 2021 WL 4240403 (9th Cir. Apr. 22, 2021)

[142] For a description of California's cooperative effort with national and subnational governments in China on climate issues, see *U.S., China Cities and States Strengthen Ties to Advance Climate Action U.S.-China High-Level Event on Subnational Climate Action Spurs New Initiatives*, CALIFORNIA CHINA CLIMATE INSTITUTE (May 29, 2024), https://ccci.berkeley.edu/news/2024/05/us-china-cities-and-states-strengthen-ties-advance-climate-action.

[143] Juliet Eilperin & Brady Dennis, *Major Automakers Strike Climate Deal with California, Rebuffing Trump on Proposed Mileage Freeze*, WASH. POST (July 25, 2019), https://www.washingtonpost.com/climate-environment/2019/07/25/major-automakers-strike-climate-deal-with-california-rebuffing-trump-proposed-mileage-

agreement, which was later dropped.[144] When the deal was finalized, it included an additional carmaker and set a stricter emission standard than the Trump Administration's.[145]

Earlier, when environmental regulations came under heavy fire during the Clinton Administration, one response was to deploy a series of cooperative arrangements with the private sector. The Clinton initiatives suggest the possibility of making larger use of such agreements in the climate arena. A series of initiatives fell into three categories: firm-initiated plans proposing creative solutions to environmental problems, bilateral negotiations between firms and regulators, and multilateral processes involving negotiation between multiple stakeholders. The Clinton experience had some successes but also revealed some pitfalls to avoid if we try to restart the process of "reinventing regulation."[146]

Green banks provide a newer mechanism for states to expand the growth of green technologies. For instance, California's green bank funds a wide range of programs, including investing in bonds that "finance green projects, financing for clean air and water projects, and incentives for energy efficiency and renewable energy technology companies."[147] By 2023, sixteen states and the District of Columbia had established green banks, which had leveraged $2 billion in

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freeze/. The car industry had not supported Trump's rollback of federal standards. As Klass has observed, one might wonder why the Trump Administration would insist on a regulatory change opposed by the industry; the likely answer is that the change benefitted the oil industry, a close ally of the administration. See Klass, *supra* note 5, at 255.

[144] Nicholas Iovinno, *White House Drops Antitrust Probe of California Emissions Deal with Automakers*, COURT 5HOUSE NEWS (Feb. 7, 2020), https://www.courthousenews.com/white-house-drops-antitrust-probe-of-california-emissions-deal-with-automakers/#:~:text=The%20deal%20reached%20between%20California,attempting%20to%20revoke%20that%20authority.

[145] The upshot of the agreement is that these carmakers committed to achieving 51 mpg by 2026 as opposed to the 40 mpg required by the Trump Administration:

> Under the California agreement, the automakers, which together make up about 30 percent of the United States auto market, will be required to increase their average fuel economy from about 38 miles per gallon today to about 51 miles per gallon by 2026. By comparison, the Trump administration's national rule on auto emissions, which was completed this spring, rolled back a 2012 rule that required automakers' fleets to average about 54 miles per gallon by 2025. Instead, the fleets now must only average about 40 miles per gallon.

Davenport, *Defying Trump, 5 Automakers Lock in a Deal on Greenhouse Gas Pollution,* N.Y. TIMES (Aug. 20, 2020), https://www.nytimes.com/2020/08/17/climate/california-automakers-pollution.html. The carmakers who took part in the deal represent about one-third of the U.S. market. *Id.*

[146] For further discussion of the Clinton-era experience and its three approaches to regulatory innovation, see Daniel A. Farber, *Triangulating the Future of Reinvention: Three Emerging Models of Environmental Protection*, 2000 U. ILL. L. REV. 61 (2000). The article ends by offering cautious support for the bargaining model, which strikes a middle ground between deep suspicion of corporate motives and credulity about firm's good intentions; provides a more manageable, largely bilateral process with fewer pitfalls than multilateral negotiation, and can potentially (but not inevitably) "produce improved outcomes by drawing on the creativity and goodwill of the parties." *Id.* at 80. For a discussion of the use of regulatory bargains in a non-environmental setting, see Steven M. Davidoff and David Zaring, *Regulation By Deal: The Government's Response to the Financial Crisis*, 61 ADMIN. L. REV. 463, 468 (2009) (finding that, in responding to the crisis, "[t]ime and again, the government structured deals that pushed its legal authority to the very edge and beyond in pursuit of, and bound by, its own political, economic, and, perhaps, sociological interests").

[147] California State Treasurer, California's Green Bank, https://www.treasurer.ca.gov/greenbank/index.asp.

state investment into $9 billion in green finance.[148] Lending programs of various kinds received a $20 billion infusion of cash from the Inflation Reduction Act, some of which will inure to state and local programs.[149] Additional state funding could make these programs even more successful.

2. Promoting Clean Tech Innovation

A step beyond green banks would involve green state equity investment in clean technology startups. This pathway has already been forged by states and state universities.[150] The California Clean Energy Fund (CALcef), with help from a federal grant, makes equity funding in promising clean energy startups to help them surmount the "valley of death" that many firms face between a completed invention and successful commercialization.[151] Federal funding makes launching such funds more feasible, but the possibility of leveraging private investment may make them attractive ways of promoting innovation without the added boost of federal funding.

Depending on the severity of federal cuts in climate research, states may also find it necessary to provide direct support for basic research on climate and energy issues. Given tight state budgets, this may require innovative funding mechanisms. Funding "big science"—research requiring large research teams and expensive equipment – may be beyond state capabilities. Research by economists and other social scientists is much cheaper than massive technical projects (not to mention the comparatively low cost of research by law professors!). This form of research is likely to be particularly vulnerable to attack at the federal level since it cuts against the grain of Trump climate and energy policy. States could obtain important benefits at low cost from financing research on numerous dimensions of climate policy: improvements in emission reduction policies, improving financial market utilization of information about climate risks, improving public

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[148] National Caucus of Environmental Legislators, Issue Area: Green Banks, https://www.ncelenviro.org/issue/green-bnks/. About a quarter of the funds invested by the green bank consortium went to low-income and disadvantaged communities. *Id.*

[149] John St. John, *EPA's New $20B 'Green Bank' Will Benefit Disadvantaged Communities Most*, CANARY MEDIA, (April 4, 2024), https://www.canarymedia.com/articles/climatetech-finance/epas-new-20b-green-bank-will-benefit-disadvantaged-communities-most. The Inflation Reduction Act reserved $7 billion for state, local, and other eligible recipients. As one observer noted:

> With the launch of the GGRF, we have an enormous new pool of financial capital in institutions carrying public missions to close the gap between "financeable theoretically" and "financing in reality" for the clean energy economy. This capital will work for underserved communities where bankable clean energy projects are overlooked because of historic injustice, and it should work to bring near-frontier clean technologies to adoption.

Ilma Granoff, *The End of the Beginning for U.S. Green Banks*, Roosevelt Institute (April 5, 2024), https://rooseveltinstitute.org/2024/04/05/the-end-of-the-beginning-for-us-green-banks/

[150] For instance, the University of California policy allows the universities to take an equity stake as part of a technology licensing agreement. See University of California, *University of California Policy Accepting Equity When Licensing University Technology*, https://www.ucop.edu/innovation-transfer-operations/_files/Accepting%20Equity/UC%20RG-12-0019%20Accepting%20Equity%20When%20Licensing%20University%20Technology.pdf.

[151] Under a 2016 grant, the CALcef launched "a $30-million-cluster-based seed fund to invest in clean energy startups with a potential for high growth," with the aim of providing "critical funding for entrepreneurs to prove the feasibility of new energy concepts at a stage of development that is typically ignored by investors" U.S. Economic Development Fund, *California Clean Energy Fund*, https://www.eda.gov/funding/programs/build-to-scale/past-grantees/2016-capital-challenge/California-Clean-Energy-Fund. More recently, CALcef seems to have evolved into a cluster of related funding networks. https://buildmomentum.io/project/new-energy-nexus/.

communications and dialogue about climate issues, better estimation of climate risks to local populations, more effective climate adaptation policy, and incentives for improved land use to increase carbon storage.

3. Achieving Clean Energy Goals

Setting goals can involve considerable political struggle and may represent an important step forward. But goals mean little in and of themselves. Having set ambitious goals, green states must overcome major hurdles if they are to achieve them. This will require rapid expansion of clean energy, which in turn will require overcoming frictions that threaten to slow the process to a crawl.

Permitting delays and denials are a major drag on climate progress. This seems obvious enough, but if there were any doubt, modeling of the impact of the Inflation Reduction Act shows the extent of the possible effects. A modeling effort by researchers at the International Monetary Fund considered two scenarios: one where investment projects take four-and-a-half years to come online, and one where projects take only a year and a half.[152] The IMF forecasted a reduction of 710 million tons of carbon emissions due to the IRA, but the longer delays could derail a third of the reductions.[153] This result is consistent with other modeling of permitting delays.[154] But permitting delays are a result of human institutions, not the laws of nature. Just as ignoring permitting delays is unrealistic, assuming that they are completely immune from reform is also unrealistic.[155]

Clearly there is a risk of allowing unnecessary harm to local environments in the rush to expand green energy. But there is also a risk that green states could be their own worst enemies in undermining their climate goals unless they find ways to make permitting decisions more streamlined.

Finding ways to accommodate important environmental concerns without creating a drag on clean energy will not be easy. We should not lose sight of the fact, however, that climate change itself is the single biggest threat to our environment. Recognizing this fact inevitably leads to the understanding that obsessive protection for local environments could unintentionally foster global environmental harm. Thus, there are environmental interests on both sides of the balance.

If green states are serious about the energy transition, they need to find ways of building green infrastructure more quickly. Creative solutions to this problem can provide models for national policy when the political regime turns in favor of climate policy again. There are already some promising state efforts to streamline permitting while minimizing collateral environmental

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[152] Simon Voigts and Anne-Charlotte Paret, *Emissions Reduction, Fiscal Costs, and Macro Effects: A Model-based Assessment of IRA Climate Measures and Complementary Policies* 12 (Feb. 2024).

[153] *Id.* at 4.

[154] See Adam D. Orford, *Overselling BIL and IRA,* at [25] (2024), https://ssrn.com/abstract=4617527.

[155] For more on permitting issues, see J.B. Ruhl and James Salzman, *The Greens' Dilemma: Building Tomorrow's Climate Infrastructure Today*, 73 EMORY L.J. 1 (2023); James W. Coleman, *Permitting the Energy Transition* (Feb. 29, 2024), https://ssrn.com/abstract=4742076.

damage.[156] State are already seeking ways to streamline transmission planning.[157] There is also significant potential to expand transmission capacity without constructing new lines through technological upgrades to existing lines.[158] States have also been working on solutions to interconnection delays, which result from the sometime laborious process of obtaining permission to attach new generators to the transmission system.[159]

The effect of these reforms may be incremental but still significant, and they are likely to be followed by others. Although it may involve knotty issues, reducing the expense and delay of project approval is essential if states are going to meet ambitious climate targets – and especially crucial during a time when states can count on precious little help from Washington.

4. Tit-for-Tat Litigation

Green state litigation strategies have generally been defensive, aimed at fending off federal deregulation or deflecting lawsuits against state policies. But many of the legal theories that have been deployed against green states could also be reversed in litigation against brown states. Here is a rather incomplete list of examples.

As discussed earlier, California's regulations requiring increased use of electric vehicles has been attacked on the theory that the regulation essentially amounts to a regulation of vehicle fuel efficiency, which is preempted by federal law. This legal theory seems dubious, as discussed earlier. But it may be worth preparing lawsuits against states with laws disfavoring electric vehicles. If California loses on that issue, the same argument might be turned against brown states. The preemption provision relating to fuel efficiency is symmetrical. It applies to state regulations "related to" fuel efficiency, which includes both laws that increase fuel efficiency and those that decrease it.[160] What is sauce for the goose is sauce for the gander: if a law requiring EVs is a mandate for greater fuel efficiency, one explicitly disfavoring EVs reduces fuel efficiency in pursuit of other goals and should likewise be preempted. Until the validity of California's waiver

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[156] See Adam Aton, *Josh Shapiro Leans into Permitting Overhaul after Pa. Swings Red: The Democratic Governor's Moves to Speed Up Environmental Review have Raised Some Red Flags among Greens,* CLIMATE WIRE (Nov. 25, 2024), https://www.eenews.net/articles/josh-shapiro-leans-into-permitting-overhaul-after-pa-swings-red/ (suggesting that the streamlining effort may be unduly favorable to fossil fuel projects); Jefferey Tomich, *Minnesota Legislature Passes Bill to Bolster Renewables*, UTILITY DIVE (May 22, 2024); Diana DiGangi, *Massachusetts Commission Recommends Faster Approvals of Clean Energy Projects, Infrastructure,* UTILITY DIVE (April 3, 2024).

[157]. See *CAISO Board Approves $6.1B Transmission Plan, with Focus on Access to Clean Energy,* UTILITY DIVE (May 24, 2024).

[158] See Ethan Howland, *21 States, DOE Launch Initiative to Spur Grid-Enhancing Technologies, Advanced Conductors*, UTILITY DIVE (May 19, 2024).

[159] See Herman K. Trabish, *Innovative Solutions Emerge to Reduce 2.5-TW US Clean Energy Interconnection Backlog,* UTILITY DIVE (July 22, 2024).

[160] The preemption provision reads as follows:

> When an average fuel economy standard prescribed under this chapter is in effect, a State or a political subdivision of a State may not adopt or enforce a law or regulation *related to* fuel economy standards or average fuel economy standards for automobiles covered by an average fuel economy standard under this chapter.

49 U.S.C. 32919(a) [emphasis added].

has been settled, bringing such lawsuits would carrying the risk of legitimating the preemption argument, but it would do no harm to hold such lawsuits in reserve.

Dormant commerce clause claims against brown states are another possibility. Fossil-fuel producing states have adopted numerous policies favoring use of their fuels and discouraging the growth of renewable energy. These policies may be discriminatory in their favoritism toward in-state energy sources or at the very least may unduly burden the market for solar and wind generators and the electricity they produce. Brown states have also brought suits against state restrictions on the use of electricity generated from coal[161] and against coastal state restrictions on coal export facilities.[162] Brown states may be vulnerable to lawsuits challenging policies disfavoring the import of energy from renewable sources, which seems to have been a deliberate policy in West Virginia and perhaps other states.

The risk of bringing such tit-for-tat lawsuits is that they might increase the credibility or legal support for attacks on green state regulations. This is undoubtedly a serious concern, but it may be possible to select targets for litigation that minimize that risk. Green states have long feared such legal attacks and have designed their regulations with an eye to limiting their litigation risk. Brown states have not had reason to fear such litigation, so their regulations may be much more open to attack. If so, it may be possible to bring targeted litigation against egregious limits on clean energy without much risk of fallout for the more carefully designed green state laws. It may be particularly easy to limit fallout from challenges based on the *Pike* balancing test, since those cases are likely to be highly fact dependent.

Even if litigation of this kind is only threatened or is brought only sporadically, it could serve a useful function by backfooting brown states, so that they cannot blithely attack clean energy without fear of legal repercussions. Creating a sense of defensiveness could be all to the good.

IV. Conclusion

States clearly can cushion American climate policy against the sudden reversals that seem endemic in our polarized and closely divided policy.[163] We saw in Part II of this article how states responded during the Bush years when federal climate action was stymied at the federal level. In the first Trump Administration, Part II documented an even stronger state reaction. Trump's tenure saw massive litigation by state governments against the Administration and a flowering of

[161] North Dakota v. Heydinger, 825 F.3d 912 (8th Cir. 2016).

[162] *Kayla Race, A Tale of Two Portlands: How Port Cities Can Survive Dormant Commerce Clause Challenges to Fossil Fuel Shipping Restrictions,* 26 HASTINGS ENVT'L L.J. 81(2020).

[163] This is an example of what has been called federalism hedging:

> The concept of "federalism hedging" recognizes the benefits of overlapping regulatory activity by different levels of government. Though potentially duplicative, regulatory overlap can stabilize policies, promote market confidence, and facilitate private innovation to address social problems. Overlapping federal and state regulations also reduces industry incentives to lobby for policy change and may even prompt industry support for existing policies. In climate regulation, multiple jurisdictions' establishment of renewable portfolio standards, cap-and-trade systems, and direct emissions regulation has produced a "web of regulation" that fosters stable policy and markets, even if one jurisdiction's regulation is rolled back.

Albert C. Lin, *Climate Policy Buffers*, 39 YALE J. ON REG. 699, 736 (2022).

ambitious state climate programs. We have every reason to expect something similar during Trump's second term.

This article has examined strategies that states could use in upcoming years. As in Trump's first term, we can expect a wave of agency efforts to repeal climate-related regulations, and a corresponding wave of litigation by state governments to invalidate those efforts. States will confront a much more conservative judiciary than they did in Trump's first term, but they may also benefit from some doctrinal changes – in particular, from the decreased judicial deference that Trump's actions will receive due to the overruling of *Chevron*. States will also need to defend some of their own programs, especially the California car waiver, from preemption efforts. Faced by legal threats against their regulatory actions, states can also consider cooperative efforts with the private sector, including inducing industry to opt into state requirements, using green banks to promote clean energy, and even equity investments in start-ups.

In seeking to achieve their own climate goals, states can also benefit from strengthening the ties between likeminded states, creating a "coalition of the willing," and filling gaps in federal support for innovation and research, particularly low-cost research into behavioral and policy-related issues. To achieve rapid progress in decarbonization, states will need reforms to permitting and other processes that can impede deployment of clean energy. Finally, although green states have relatively little leverage on policies in pro-fossil fuel states, they could consider turning the tables on those states by supporting commerce clause and preemption challenges to state policies disfavoring clean energy.

There is no gainsaying that Trump's reelection is a serious blow to climate policy. Even if, through some miracle, it does not hinder future climate efforts, it will at least delay urgently needed emission cuts. The resulting excess carbon dioxide will linger in the atmosphere to haunt future generations. Although there is no way of averting significant harm, states can help minimize the damage through litigation against federal rollbacks, and they can continue climate progress within their borders. Perhaps most importantly, they can provide a beacon of hope for American climate policy in a dark time.