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# Horizontal Federalism and the Problem of Extraterritoriality in Energy Policy

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## KEY TAKEAWAYS

States are growing increasingly aggressive in using legislation and courts to drive change beyond their borders, even without congressional action.

This trend has allowed a limited number of states to pursue energy policies that raise energy prices outside their borders, but which Congress never enacted.

Policymakers should consider how to use state legislation, federal preemption, regulatory actions, and litigation to counter these abuses of state power.

Congressional productivity, as measured by the number of bills enacted into law, has seen a steady decline since at least the 1980s.[1] As the legislative gauntlet has grown more formidable, policymakers and activists have long devised workarounds. Regulations and rulemaking, when one's party controls the presidency,[2] and litigation against federal agencies,[3] especially when one's party does not control the presidency, have been common responses.

Yet outside these relatively traditional avenues to force federal policy change that Congress has not enacted, environmental activists have grown increasingly aware of a new leverage point—within the federalist structure of the U.S. Constitution. Specifically, states can shape their policy with the intent to force national change. This is especially the case as the states and localities have become less politically competitive over time,[4] sorting themselves more cleanly into states with united Democratic and Republican governments and creating larger chasms both between blue and red states and between the states and the more divided federal government.

At its best, the states' rights built into the Constitution improve accountability by ensuring that power remains decentralized[5] and that decisions are made by politicians closer to the affected electorates[6]—while also providing a laboratory of democracy[7] that promotes experimentation as policymakers and citizens alike benefit from the ability to observe how various proposed policies work in practice. However, when states use legislative schemes or litigation to force change outside their own borders, such moves create even less accountability than federal legislation: Voters in Iowa, for example, have little hope of changing legislation in California. Similarly, extraterritoriality undermines the role that states play as policy incubators, as it becomes increasingly difficult to disentangle policy effects caused by one state's laws from external sources.

Under the federal system, states are not meant to have the power to regulate activities that occur within other states. The states gave limited powers to the federal government and kept the rest for themselves; they did not give the unenumerated powers to each other. At different times, the courts have given different names to this principle, such as "interstate federalism,"[8] "comity,"[9] or the "horizontal separation of powers."[10] It has also been referred to as the "extraterritoriality principle."[11] The principle is clear that states may not use their laws, including economic penalties, "with the intent of changing...lawful conduct in other States."[12] The application can be challenging, however; it is not always clear when legitimate self-governance by states, especially prominent ones, bleeds into inappropriate efforts to control legal activities occurring in other states.

## The Extraterritoriality Principle in the Context of State Energy Regulation

This extraterritorial dominance by large states, or groups of states, has been particularly damaging in the energy context. Even as the United States has attained energy independence, if not dominance, energy prices throughout the United States have surged by approximately 40 percent over the past five years,[13] compared to overall inflation of approximately 24 percent over that same time frame.[14] This surge has been largely, but by no means exclusively, driven by policy failures at the state level. These price surges have been most dramatic in states in the Northeast, Pacific, and Mid-Atlantic regions,[15] but lower-cost, lower-regulation states have not been immune, even as many states with the highest energy costs have aggressively sought to push their policy effects across state boundaries. If federal policymakers do not want their energy priorities to be undermined, and if citizens and officials in smaller states want to maintain energy affordability within their own borders, they will need to find ways to counteract the aggressive stance of states with inflationary energy policies, as a matter of urgency.

The big state challenge looms particularly large in California, which, as of the 2020 Census, accounted for more than 39.5 million inhabitants,[16] which is 11.9 percent of the U.S. population.[17] California's 2025 gross domestic product (GDP) of $4.3 trillion accounted for 14 percent of U.S. GDP that year.[18] California also controls most of the West Coast, including the two busiest ports in the country by total container volume (and three of the top 10)[19] and is such an important economic actor that many products unintentionally end up in California. This is why, for example, so many products outside California's borders contain Proposition 65 warnings. (Proposition 65 requires companies to put warning labels on products that contain even trace amounts of just one of more than 900 different chemicals, even where the product itself has no known or demonstrated safety risk.)[20] Moreover, California has not been shy about using its power to force national change. For example:

- **California's Cap-and-Invest Program.** In 2013, three years after the U.S. Senate refused to pass a national "cap-and-trade" program at the federal level,[21] California launched its "Cap-and-Trade" program, as authorized by the California Global Warming Solutions Act of 2006,[22] since renamed "Cap-and-Invest."[23] The program requires covered industries to lower carbon emissions below a state-mandated limit, or otherwise purchase allowances to offset overages, which has led to an increasingly challenging business environment for California's energy sector, amongst others. Governors of neighboring states, which depend on California refineries for gas, expressed alarm when the California Air Resources Board (CARB) recently proposed strict carbon limits that would raise gas prices for residents of neighboring states that rely on supplies from California's oil refineries.[24] In this case, CARB listened to industry concerns to some extent to finalize more manageable levels,[25] but the episode exposed the extent to which consumers in neighboring states were exposed to regulatory decisions by state governments in which they lacked representation.

- **California's Vehicle Emissions Mandates.** Under the terms of the Clean Air Act, the U.S. Environmental Protection Agency (EPA) sets nationwide vehicle emissions standards.[26] However, the statutory framework specifically provides a waiver that allows California to adopt its own, more stringent, standard,[27] which other states have permission to follow.[28] Seventeen states, along with the District of Columbia, have opted to follow California's lead on Low-Emission Vehicle (LEV) regulations.[29] The manufacturing reality is that many automobile manufacturers build their fleet to meet the California standard, rather than two different sets of vehicles for the California and federal standard. The end result in many cases is that California's stricter mandates effectively set the national standard. California has been ambitious in trying to use these standards to promote not just low-emission vehicles, but so-called zero-emission vehicles in the form of electric vehicles, which causes major challenges for states that do not have the electrification infrastructure that California possesses, particularly but not only in the case of smaller, more rural, states.

- **California's Energy Compacts.** California also seeks opportunities to act in concert with like-minded states, as well as other countries, to accomplish climate goals outside its borders. The most robust example is probably the Western Climate Initiative,[30] wherein California has legally linked its cap-and-invest carbon market with similar regulatory markets in Quebec and Washington State. Other examples include the U.S. Climate Alliance,[31] which California cofounded in 2017, and which consists of 24 states that have committed to achieving the climate objectives of the Paris Agreement, notwithstanding the U.S. government's withdrawal,[32] and the Affordable Clean Cars Coalition, a project within the U.S. Climate Alliance in which 11 states coordinate to facilitate a transition to electric vehicles and to tailpipe regulations stricter than the federal standard.[33]

While California is the most prominent concern in this area,[34] California is not alone. Other prominent states, such as New York, Minnesota,[35] and Washington,[36] have imposed laws that would have economic and legal effects beyond their borders, and both California and smaller states have used interstate compacts to enhance the impact of their policies.

- **Vermont's and New York's Climate Superfund Laws.** Both Vermont[37] and New York[38] have enacted "climate superfund" laws that, by their terms, require major fossil fuel companies to contribute to state funds as compensation for the role that those companies allegedly play in contributing to climate change. Attempts to pass similar legislation in New Jersey have not been successful, but remain ongoing.[39] The legislation, if enacted, would result in billions of dollars of liability for the covered companies, based on activities that occurred outside the states in question. To the extent that such liabilities threaten the viability of these companies, especially imposed cumulatively across states, it is fair to characterize these laws as not merely compensatory, but potentially prescriptive in scope. The Vermont[40] and New York[41] laws have been subject to litigation in the federal courts.

- **Section 401 of the Clean Water Act.** Section 401 of the Clean Water Act requires certification that authorizes states and tribes to grant, condition, or deny certification for federally licensed or permitted projects that may result in a discharge into the navigable waters of the United States.[42] Although the terms of the statute limit the grounds for denial to potential discharges into "navigable waters of the United States," there are many examples of states denying permits for reasons that have nothing to do with water quality. This is problematic for infrastructure that crosses state lines, including pipelines. States that have used this provision to block energy infrastructure with cross-border economic impacts, for reasons unrelated to water quality concerns, include New York,[43] Washington,[44] and Oregon,[45] among others.

- **The Regional Greenhouse Gas Initiative (RGGI).** The RGGI[46] is a compact across states in the mid-Atlantic and Northeastern United States, implemented through a memorandum of understanding[47] and backed by the statutes and regulations of the constituent states, to set a cap on carbon-dioxide emissions throughout the region. Where the RGGI requires large fossil-fuel-fired power plants to buy allowances for their carbon emissions (with a limited, annually declining amount available for purchase) in a regionally coordinated cap-and-trade market, this framework is often complemented by renewable portfolio standards (RPS)[48] within the states, which require a percentage of a state's electricity sales to derive from renewable sources.

## The Extraterritoriality Principle in the Context of State and Locality Energy Litigation

Litigation is a time-tested method that activists of all stripes have used to circumvent congressional inaction. It has long been noted that torts actions can force behavioral change outside the constraints of the legislative process, particularly in the case of punitive damages awards.[49] However, environmental activists at the state and local levels have become increasingly strategic about how they deploy environmental litigation to effect change well beyond their borders. Over the past decade, nearly 60 state and local governments have sued energy companies to recover damages that allegedly stem from climate change.[50] Prominent recent examples include:

- ***Suncor Energy, Inc. v. County Commissioners of Boulder County.*** In 2018, both the City and County of Boulder, Colorado, sued Suncor Energy, Inc., and Exxon Mobil for an unspecified, "fair share" of monetary damages to cover the costs of climate damage, asserting traditional common law claims for nuisance and trespass, along with claims for consumer protection and conspiracy for allegedly misinforming the public on climate change risk. Essentially, the City and County of Boulder are using litigation to try to regulate emissions that occur well outside Boulder, and even Colorado. Yet the Colorado supreme court found that the state courts have jurisdiction and that the lawsuit could proceed. The U.S. Supreme Court has recently granted *certiorari* to determine the questions of whether federal law precludes such state claims, and whether the Supreme Court even has jurisdiction to hear the case.[51]

- ***County of Multnomah v. Exxon Mobil Corp.*** The County of Multnomah, Oregon, has sued 38 defendants, including Exxon Mobil, a variety of major fossil-fuel companies, the American Petroleum Institute, investment and consulting companies, and 250 "John Doe's" that can be added at a later date, for $51.5 billion in abatement and damages, blaming the 2021 Pacific Northwest heat dome on decades' worth of energy production and alleged deception. The suit[52] is based on state common law causes of action for public nuisance, negligence, fraud, and trespass. Despite efforts to remove the case to federal court, the litigation remains ongoing in the Oregon state courts.

## The Damaging Ramifications of Horizontal Federalism

Inherent in the role that the states play as laboratories of democracy, is the opportunity to see successful and failed policies in effect and to restrict the ramifications of failed policies within the borders of the state in question. Yet when the (mostly blue) states successfully pursue policies with extraterritorial effect, an unfortunate disconnect results; voters elect candidates to fix their problems and restrain their energy costs, but those choices at the ballot box are not and cannot be reflected in the energy options that are available to them.

The rising energy costs throughout many states are not a mere side effect, but the intended result of progressive climate policies, such as cap-and-trade (or cap-and-invest). The entire point of such policies is to limit emissions by forcing power generators to pay for their emissions, which will have clear consequences across state lines when, for example, refiners in California are subject to carbon taxes for fuel that is eventually sold in Arizona and Nevada. Yet defeating such policies at the federal level is relatively meaningless for states that are downstream in the energy supply chain from states that adopt these policies.

Similarly, state RPS requirements play a major role in undermining the affordability and reliability of the electric grid, as states deploy vast amounts of subsidized solar and wind power to displace traditional, reliable, baseload sources of power such as coal and natural gas.[53] To the extent that these requirements merely affect a state's own electric grid, this is a natural outgrowth of federalism. Yet when states band together in compacts with other states, and even foreign entities, to create regulatory schemes that are explicitly designed to export the states' policies beyond their borders, it is appropriate to ask how such extraterritorial schemes fit within the federal structure, and where and when the federal government has any role to play.

Moreover, the interstate nature of the grid means that these RPS requirements will often have major effects across state lines. For example, when electricity is pooled in multistate, Regional Transmission Organizations (RTOs), strict climate rules in one state can affect energy markets in the other states,[54] and clean energy mandates in one state can require energy generators in other states to restructure their grid delivery operations.[55]

## Constitutional Issues Raised

The most apparent constitutional implications lie in the Dormant Commerce Clause. Implicit in Congress's exclusive power to regulate interstate commerce[56] under the Dormant Commerce Clause lies a prohibition against state interference in interstate commerce.[57] This prohibition takes two forms. Traditionally, the most straightforward way to establish a violation here is to show that a state law or regulation intentionally discriminates against commerce from other states.[58] In this vein, the U.S. Court of Appeals for the Eighth Circuit relied on the Dormant Commerce Clause to strike down a Minnesota law that purported to limit greenhouse gas emissions on power imported from other states, although the panel disagreed on whether to overturn the Minnesota law on Dormant Commerce Clause or on preemption grounds.[59]

Yet even in cases where discrimination is not established, the Dormant Commerce Clause can be met when a state law imposes an "undue burden" on commerce from other states.[60] The Supreme Court recently reined in this test when it held that such a burden was *not* indicated by a California law that prevented the in-state sale of bacon from outside states that did not meet certain animal welfare requirements in California law.[61] Yet the opinion was fractured, and could leave room to explore how the undue burden test fleshed out in *Pike* and *Healy*[62] would apply in other contexts, including in the transportation of energy across state lines.

The Compact Clause[63] prohibits states from entering into interstate compacts with other states or with foreign powers without congressional authorization.[64] The Supreme Court has seen almost no distinction between "compacts" and "agreements" generally,[65] and has functionally read the Compact Clause to allow states to enter into their own agreements *unless* the resulting agreement undermines federal authority.[66] Given that many of these compacts are explicitly meant to address perceived shortcomings from the failed enactment of policies such as cap-and-trade, or to challenge federal regulations, or to send delegations to international fora from which the U.S. has withdrawn, it seems likely that many of these state activities would meet that threshold.

## Potential Solutions

The problems arising from extraterritoriality, both in general and in the energy and environmental contexts specifically, are too multifaceted to identify a single, sweeping solution. That said, a variety of measures can be pursued by policymakers at both the federal and state levels.

**State Legislation.** Even the most conservative states will have deep blue jurisdictions which can use litigation against private actors to effect sweeping change beyond local, or even state, boundaries. State legislatures have a role to play in limiting the power of local governments to use state courts in this way. The legislation to limit the ability of local governments to act in this way can be quite straightforward, as Utah, for example, has shown.[67]

**Federal Preemption.** Pursuant to the Supremacy Clause of the U.S. Constitution,[68] the federal government can preclude many state claims by legislating in the subject area and banning them. Congress should legislate with caution, as many subjects are inappropriate for federal legislation, and should not legislate in new areas solely for the purpose of preemption. However, federal policymakers should ensure that any area in which they legislate has built-in protections against state abuse.

**Regulatory Actions.** Where the federal government has explicitly allowed state actions that affect interstate commerce, federal regulators should enforce the limits built into the enabling statute. For example, California's ability to request waivers under the Clean Air Act does not require the EPA to grant the waiver, and the EPA has commenced a rulemaking project to narrow the scope of state objections to Section 401 waivers.[69]

**Litigation.** These constitutional issues can and should be raised in litigation against state laws that have extraterritorial effects. The Supreme Court's recent decision in *Ross*, which did not affect energy or environmental equities, should be treated as a continuation of the legal conversation about the constitutional issues inherent in extraterritoriality and horizontal federalism, not as the end of that conversation.

## Conclusion

The U.S. Supreme Court has long recognized a presumption against the extraterritorial application of federal laws. "The general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done."[70] Yet no equivalent presumption has been articulated about the extraterritorial application of state laws. Allowing large states, or powerful groups of states, to enact laws with extraterritorial effect risks losing sight of the fact that the states themselves are similarly sovereign.

This situation is of particular concern in the energy sector, given the multistate nature of the energy grids, the interstate realities of pipeline networks, and the unique arguments that environmentalists raise with respect to the dangers of greenhouse gases. Even a state as large as California knows that, even using the most aggressive of models, limiting emissions within its own borders can only have the most negligible of effects on global climate change. As a result, environmentalists in these states have been innovative in designing their policies to exert effects beyond the borders of their specific states.

These moves to exert state priorities beyond state boundaries are in many cases novel, but policymakers who govern and represent other states that value a reliable energy grid and affordable energy prices are not powerless once they recognize the nature of the problem they face. State legislators can prevent jurisdictions within their states from pursuing these aggressive legal agendas, and federal policymakers can preempt state abuses when necessary. Regulators can enforce limits more rigorously, and policymakers can use the courts to help to establish the legal and constitutional guardrails that would, in fact, help to protect state sovereignty by ensuring that state energy policies are not preempted by other states. In this way, state policymakers can promote energy reliability and affordability, even while protecting the sovereignty of their states.

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# Endnotes

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56. U.S. Constitution, Art. I, § 8, cl. 3 grants Congress the power "To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."
57. Max Farrand, ed., *The Records of the Federal Convention of 1787*, Vol. 2 (1911), p. 135 (recording James Madison as stating that he was "convinced that the regulation of Commerce was in its nature indivisible and ought to be wholly under one authority").
58. For instance, *Wyoming v. Oklahoma*, 502 U.S. 437, 454 (1992).
59. *North Dakota v. Heydinger*, 825 F.3d 912 (8th Cir. 2016).
60. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).
61. *Nat'l Pork Producers Council v. Ross*, 598 U.S. 356 (2023).
62. *Healy v. Beer Institute*, 491 U.S. 324, 336–38 (1989) (overturning a Connecticut beer pricing statute that had the "practical effect" of regulating alcohol prices in other states as well).
63. U.S. Constitution, Art. I, § 10, cl. 3.
64. For instance, *Virginia v. Tennessee*, 148 U.S. 503 (1893).
65. See, for example, ibid. at 520 and 537, and *Rhode Island v. Massachusetts*, 37 U.S. 657, 725 (1838).
66. See, for instance, *Cuyler v. Adams*, 449 U.S. 433, 440 (1981).
67. For instance, Utah Limitation of Actions Amendments, H.B. 222, 206 Gen. Sess. (Utah 2026) (codified at Utah Code Ann. § 78B-4-515).
68. U.S. Constitution, Art. VI, cl. 2.
69. U.S. Environmental Protection Agency, "Updating the Water Quality Certification Regulations," Proposed Rule, *Federal Register*, Vol. 91, No. 10 (January 15, 2026), p. 2008, https://www.govinfo.gov/content/pkg/FR-2026-01-15/pdf/FR-2026-01-15.pdf (accessed July 23, 2026).
70. *Am. Banana Co. v. United Fruit Co.*, 213 U.S. 347, 356 (1909).