Executive Constraint, Judicial Uncertainty, and Legislative Complacency: Washington Responds with a Progressive Approach to Climate Change

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I. INTRODUCTION

Washington, the Evergreen State, is known for its beautiful mountains, trout-laden lakes, clear rivers, bountiful forests, and diverse wildlife. In Washington, you are likely to see a bald eagle soaring over the water in search of salmon, or perhaps a brown bear or a herd of deer walking through the forest. Unfortunately, Washington's precious natural resources and ecosystem are in deep trouble.[1]

Each year, concern grows regarding the serious environmental, economic, and health effects of America's energy policies.[2] Due to our insatiable demand for oil and our overdependence on nonrenewable fossil fuels to generate energy,[3] we are experiencing not only increasing gas prices, but also detrimental health effects caused by the emission of greenhouse gases[4]—"gaseous constituents of the atmosphere, both

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1. Lisa Stiffler & Robert McClure, *Our Warming World: Effects of Climate Change Bode Ill for Northwest*, SEATTLE POST-INTELLIGENCER, Nov. 13, 2003, at A1, *available at* http://seattlepi.nwsource.com/local/148043_warming13.html.

2. CATHERINE SUTER, WASH. STATE DEP'T OF CMTY., TRADE & ECON. DEV., RENEWABLE ENERGY, ENERGY EFFICIENCY, AND SMART ENERGY INDUSTRIES IN WASHINGTON STATE (2005).

3. Paul Stanton Kibel & Ida Martinac, *The Addiction and the Portfolio: An Introduction to the Issue*, 36 GOLDEN GATE U. L. REV. 321, 321 (2006).

4. IRVING M. MINTZER ET AL., THE ENVIRONMENTAL IMPERATIVE 1 (1996). Policymakers and scientists have acknowledged the linkage of fossil fuels, acid rain, and air pollution to human health for several decades. *Id.* ("Recent medical research indicates that energy-related pollution threatens human health even more than previously suspected.").

natural and anthropogenic, that absorb and re-emit infrared radiation."[5] The contribution of greenhouse gases to global warming presents an even greater danger.[6]

Worldwide energy production relies overwhelmingly on the consumption of fossil fuels.[7] As a result, grave environmental concerns surround the production of electric energy, which releases an extraordinary amount of greenhouse gases.[8] A recent report indicated that "without rapid and substantial spending to reduce greenhouse gases, climate change will devastate food sources, cause widespread deaths, and turn hundreds of millions of people into refugees."[9] These greenhouse gases do not affect only the countries that release them; their impact is transnational.[10] Illustratively, recent studies indicate that fossil fuel-based power plants have caused pollutants from Asia to reach the West Coast and U.S. pollutants to drift to Europe.[11]

It should come as no surprise, then, that the impact of global warming is felt at the state level as well. In Washington, for example, the Department of Ecology predicts that climate change caused by global warming could potentially mean warmer temperatures, wetter winters (resulting in increased flooding), and recurring drought seasons.[12] Climate change is expected to cause a rise in sea level, coastal erosion and landslides, the loss of wetlands and estuaries, and seawater intrusion into wells.[13] Moreover, we will see less snow in the mountains[14] and an increase in human diseases.[15] Washingtonians can also expect a loss of forestlands, caused by increased forest fires and insect infestations, as

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5. James A. Holtkamp & Richard M. Saines, *North American Approaches to Climate Change: Greenhouse Gas Emission Control Strategies*, 51 RMMLF-INST 2-1 (2005).

6. *Id.*

7. Steven Ferrey, *Power Future*, 15 DUKE ENVTL. L. & POL'Y F. 261, 272 (2005).

8. *Id.*

9. William Neikirk, *British Turn Up Heat on U.S. over Warming*, SEATTLE TIMES, Oct. 31, 2006, at A1, *available at* 2006 WLNR 18992333.

10. Ferrey, *supra* note 7.

11. *Id.*

12. Washington State Department of Ecology, Extreme Weather, http://www.ecy.wa.gov/climatechange/extremeweather.htm (last visited Mar. 27, 2008).

13. Washington State Department of Ecology, Rising Sea Level, http://www.ecy.wa.gov/climatechange/risingsealevel.htm (last visited Mar. 27, 2008).

14. Washington State Department of Ecology, Reduced Snow Pack and Earlier Runoff, http://www.ecy.wa.gov/climatechange/reducedsnow (last visited Mar. 27, 2008).

15. Washington State Department of Ecology, Warmer Temperatures, http://www.ecy.wa.gov/climatechange/warming_more.htm#DISE (last visited Mar. 27, 2008); *see also* NAT'L WILDLIFE FED'N, GLOBAL WARMING AND WASHINGTON (2008), www.nwf.org/globalwarming/pdfs/Washington.pdf ("Scientists have found that warmer temperatures caused by global warming can lead to higher concentrations of ground-level ozone pollution, a leading cause of respiratory problems, especially in children and seniors. Already, the Seattle-Tacoma area has had trouble meeting the national health standards for ozone.").

well as an increased risk of extinction for salmon, caused by an increase in ocean temperature and a decrease in nutrient levels.[16] In addition to the degradation of Washington's ecosystem, harmful economic consequences will likely occur.[17] Regrettably, the federal government has done little to deter such looming dangers.

The amount of federal support for energy efficiency has vacillated over the years. Although efforts to promote energy conservation at the federal level were spearheaded by President Carter,[18] culminating in the passage of the National Energy Act of 1978,[19] federal support for energy efficiency diminished in the 1980s.[20] In the early 1990s, however, the federal government briefly demonstrated a renewed interest in energy efficiency by enacting the Energy Policy Act of 1992. Since then, federal support in this area has become grossly inadequate.[21] Indeed, critics characterize the Bush Administration's Energy Policy Act of 2005[22] as nothing more than a "smorgasbord" of subsidies for U.S. energy companies.[23] Despite this criticism, as well as pressure from international and state governments to take global warming seriously,[24] the federal government continues to turn a blind eye to the problem of climate change.[25]

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16. Warmer Temperatures, *supra* note 15.

17. NAT'L WILDLIFE FED'N, *supra* note 15 ("Loss of wildlife and habitat could mean a loss of tourism dollars. In 2001, nearly 3 million people spent more than $2.3 billion on hunting, fishing, and wildlife viewing in Washington, which in turn created 45,205 jobs in the state.").

18. ENERGY DIV., WASH. STATE DEP'T OF CMTY., TRADE & ECON. DEV., THE NEXT GENERATION OF ENERGY 8 (1998), *available at* http://www.cted.wa.gov/energy/archive/ECONWReport/Default.htm.

19. 42 U.S.C. § 13212 (1992).

20. *See* Robert L. Glicksman, *From Cooperative to Inoperative Federalism: The Perverse Mutation of Environmental Law and Policy*, 41 WAKE FOREST L. REV. 719, 754 (2006).

21. *See* Kibel & Martinac, *supra* note 3, at 322–24.

22. Pub. L. No. 109-58, § 1(a), 119 Stat. 594 (codified in scattered sections of 5, 7, 10, 15–16, 22–23, 25–26, 30, 33, 35, 40, 42–43, 48–49 U.S.C.).

23. *See* Michael Grunwald & Juliet Eilperin, *Energy Bill Raises Fear About Pollution*, WASH. POST, July 30, 2005, at A1, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2005/07/29/AR2005072901128.html.

24. *Impact of Climate Change and Actions of the States: Hearing Before the S. Comm. on Commerce, Science and Transportation*, 108th Cong. 3 (2004) [hereinafter *Hearing*] (statement of Kenneth A. Colburn, Executive Director, Northeast States Coordinated Air Use Management), *available at* 2004 WL 1027324 ("In short, the states are responding to climate change by positioning themselves defensively to protect their existing economies and reduce their vulnerability to climate risks; offensively to get ahead on the learning curve and secure the economic advantages accruing to early actors; and aggressively to protect public health, ecosystems, and overall quality of life.").

25. *See* Kibel & Martinac, *supra* note 3, at 322–24 (noting that "there presently appears to be a disconnect between the public pronouncements of the current administration and the substantive energy policies being pursued."). Not only has the Bush administration repudiated the Kyoto Protocol and promoted the enactment of the inadequate Energy Policy Act of 2005, but it has also "pressured scientists conducting research for the federal government to downplay their climate change findings." *Id.*

Confronted with federal complacency, many states have courageously taken the initiative to combat global warming[26] by enacting local legislation to curb carbon emissions.[27] Some states have embraced renewable energy as a viable solution and are using tax incentives to promote it. For example, Washington implemented unique tax incentives in 2005 when it amended section 82.04.440[28] and enacted section 82.16.120[29] of the Revised Code of Washington (RCW). While the use of state tax incentives to promote local economic growth is nothing new,[30] these statutes go further: they also promote renewable energy by providing tax incentives for its in-state use and production.[31]

The Supreme Court's Commerce Clause jurisprudence, however, renders these laws constitutionally suspect, because it bars tax incentives that discriminate against interstate commerce.[32] Although the case law in this area is befuddled,[33] a general rule has emerged: "A tax which by its terms or operation imposes greater burdens on out-of-state goods, activities, or enterprises than on competing in-state goods, activities, or enterprises will be struck down as discriminatory."[34]

This Comment argues that Washington's renewable energy tax incentives likely discriminate against interstate commerce. More importantly, however, it contends that although these types of tax incentives violate the Commerce Clause, Congress can and should pass legislation authorizing their use under the state police power.

Part II of this Comment discusses the evolution of cooperative federalism in the environmental policy arena, as well as how many states

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26. *Hearing*, *supra* note 24, at 3; *see also* Kirsten Engel, *Mitigating Global Climate Change in the United States: A Regional Approach*, 14 N.Y.U. ENVTL. L.J. 54, 54 (2005) ("Many state and local governments in the United States are taking the lead in addressing global climate change, tackling a problem that would be otherwise considered the province of the President working with Congress in cooperation with the international community.").

27. Jennifer Lee, *The Warming Is Global but the Legislating, in the U.S., Is All Local*, N.Y. TIMES, Oct. 29, 2003, at A20, *available at* 2003 WLNR 5664120.

28. WASH. REV. CODE § 82.04.440(2), (4), (5)(c)(i) (2008) (granting comprehensive tax incentives to the local solar electric industry).

29. § 82.16.120 (2008) (providing "investment cost recovery incentives" for the use of locally made renewable energy products).

30. *See* Walter Hellerstein, *Commerce Clause Restraints on State Tax Incentives*, 82 MINN. L. REV. 413, 415 (1997).

31. §§ 82.04.440, 82.16.120.

32. Hellerstein, *supra* note 30.

33. *See* Edward A. Zelinsky, *Restoring Politics to the Commerce Clause: The Case for Abandoning the Dormant Commerce Clause Prohibition on Discriminatory Taxation*, 29 OHIO N.U. L. REV. 29, 29 (2002) (noting that "[t]he Supreme Court has itself acknowledged that its dormant Commerce Clause case law is a 'quagmire.'").

34. Hellerstein, *supra* note 30 (citing Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564, 571–72 (1997); Fulton Corp. v. Faulkner, 516 U.S. 325, 345–47 (1996); Associated Indus. of Mo. v Lohman, 511 U.S. 641, 654–56 (1994)).

have responded to federal constraints on environmental protection. Part III explores Washington's efforts to combat global warming and boost its economy by using the renewable energy tax incentives, RCW sections 82.04.440 and 82.16.120. Part IV analyzes the Commerce Clause and the Court's jurisprudence interpreting it. In particular, Part IV focuses on the controversial *DaimlerChrysler Corp. v. Cuno* case[35] and the congressional response it engendered. Part V goes on to explore whether Washington's tax incentives, and other similar state tax incentives, qualify as discriminatory under the Commerce Clause. Part VI argues that although the Court would likely hold that these types of state tax incentives violate the Constitution, Congress can, and should, override such a decision through legislation, thereby allowing the states to protect human health and the environment under their inherent police power. Finally, Part VII summarizes the states' synthesis of tax and environmental policy to combat global warming, with a particular focus on Washington's new statutes.

II. COOPERATIVE FEDERALISM AND ENVIRONMENTAL REGULATION—ARE THE FEDS COOPERATING?

Cooperative federalism requires "that Congress treat the States in a manner consistent with their status as residuary sovereigns and joint participants in the governance of the Nation."[36] In other words, although the federal government is charged with promoting and protecting federal interests, it should always do so in a way that does not unduly interfere with legitimate state activities.[37] In the environmental protection context, the U.S. Supreme Court describes a cooperative federalism program as one "that allows the States, within limits established by federal minimum standards, to enact and administer their own regulatory programs, structured to meet their own particular needs."[38]

Notwithstanding the Court's understanding of this principle, the federal government has not consistently adhered to the notion of dual sovereignty, especially with regard to environmental regulation. The following Sections describe the history and demise of federal environmental protection, as well as the subsequent reemergence of the states as environmental regulators.

35. 547 U.S. 332 (2006).
36. Alden v. Maine, 527 U.S. 706, 748 (1999).
37. Younger v. Harris, 401 U.S. 37, 44 (1971).
38. Hodel v. Va. Surface Mining & Reclamation Ass'n, 452 U.S. 264, 289 (1981).

A. The History and Demise of Federal Environmental Regulation

The federal government derives its authority to protect human health and the environment from its power to regulate interstate and foreign commerce,[39] as well as from the Necessary and Proper Clause, which allows the government to effectuate any federal policy within its enumerated powers.[40] Unlike the federal government, the states derive their authority to protect human health and the environment from their inherent police power.[41] Although the federal and state governments each have ample authority to enact environmental protection legislation, the states were the first to regulate polluting activities.[42] Prior to the 1970s, state courts provided a forum for persons injured from pollution to bring claims such as nuisance, trespass, and negligence in order to receive damages and injunctive relief.[43] Additionally, local governments implemented zoning regulations to separate incompatible land uses and rudimentary pollution control regulations, such as smoke control ordinances.[44]

In 1970, however, the federal government emerged as the chief regulator of pollution, primarily for three reasons.[45] First, Congress believed that a lack of federal regulation had resulted in a wide array of incompatible and onerous state and local measures.[46] Second, it felt that interstate pollution could be dealt with more effectively by the federal government.[47] Finally, Congress believed that its constituents considered the environment "an important national good that transcends individual or local interest."[48] Based on these justifications and on the premise that state measures had proven inadequate, Congress set to work enacting federal pollution control legislation.[49]

Although environmental regulation shifted from states to the federal government, Congress assured the public that it did not intend to usurp the states' traditional role as "guardians of the public health and safety."[50] Rather, Congress envisioned shared governmental regulation

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39. U.S. CONST. art. I, § 8, cl. 3.
40. U.S. CONST. art. I, § 8, cl. 1.
41. Glicksman, *supra* note 20, at 728.
42. *Id.* at 729.
43. *Id.*
44. *Id.*
45. *Id.* at 730.
46. *Id.*
47. *Id.* at 730–31.
48. *Id.* at 732–33 (citing Richard B. Stewart, *Environmental Quality as a National Good in a Federal State,* 1997 U. CHI. LEGAL F. 199, 210 (1997)).
49. *Id.* at 731–32.
50. *Id.* at 738.

in its pollution control statutes.[51] By the end of the 1970s, Congress had adopted or revised more than twenty environmental laws and had assumed the dominant role in mitigating environmental harm.[52]

While the 1970s witnessed the genesis of federal environmental protection, later decades, and particularly the current one, have seen its inexorable erosion.[53] The Energy Policy Act of 2005[54] exemplifies this federal weakening of environment policies. The Act includes billions of dollars in subsidies for energy industries such as oil and nuclear power;[55] exempts hydraulic fracturing[56] from coverage under the Safe Water Drinking Act;[57] exempts gas and oil construction sites from storm water runoff regulations under the Clean Water Act;[58] authorizes the resumption of drilling along the majority of the U.S. coastline;[59] and strips away federal energy tax incentives.[60] Furthermore, it does nothing to decrease America's dependence on foreign oil, promote renewable energy resource development, or address climate change.[61]

Recently, Professor Parenteau, a long-time environmental litigator, blasted the Bush Administration for compiling the "worst environmental record of any administration in history," and asserted that "[f]rom day one, [it] has set about the task of systematically and unilaterally dismantling over thirty years of environmental and natural resources law."[62] Furthermore, he states that the Bush Administration is on a "full-fledged ideological crusade to deregulate polluters, privatize public resources, limit public participation, manipulate science, and abdicate federal responsibility for tackling national and global environmental problems."[63]

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51. *Id.* at 737.

52. *Id.* at 747.

53. *Id.* at 772.

54. Pub. L. No. 109-58, § 1(a), 119 Stat. 594 (codified in scattered sections of 5, 7, 10, 15–16, 22–23, 25–26, 30, 33, 35, 40, 42–43, 48–49 U.S.C.).

55. 151 CONG. REC. S9335, S9346 (2005).

56. Hydraulic fracturing is a method used to create fractures that extend from a borehole into rock formations; its main industrial use is in stimulating production from oil and gas wells. Wikipedia, Hydraulic Fracturing, http://en.wikipedia.org/wiki/Hydraulic_fracturing (last visited Mar. 24, 2008).

57. 151 CONG. REC. S9335, S9346 (2005).

58. *Id.*

59. *Id.*

60. *Id.* at S9343.

61. *Id.* at S9346.

62. Patrick Parenteau, *Anything Industry Wants: Environmental Policy Under Bush II*, 14 DUKE ENVTL. L. & POL'Y F. 363, 363 (2004).

63. *Id.*

B. The States Reassert Their Police Power

Dissatisfied with the appalling federal response to environmental protection, especially with respect to global warming—the most significant environmental issue of our time—states have reasserted themselves by pursuing their own environmental initiatives.[64] Despite the established trend of federal control over social and economic policy, states have become increasingly proactive in reasserting their roles as independent policymakers and have been quite innovative in implementing a broad assortment of policies on economic development, health care, human welfare, and environmental issues.[65] Tax incentives are a common means of implementing policies.[66] In Washington, legislators have combined environmental and tax policies by promoting renewable energy investment through the use of tax incentives.

III. A NEW APPROACH—SYNTHESIZING ENVIRONMENTAL AND TAX POLICIES IN WASHINGTON

In what has been called the most progressive renewable energy legislation ever passed in the country,[67] RCW sections 82.04.440 and 82.16.120 codify the legislature's intent to provide incentives for the greater use of locally created renewable energy technologies, and to encourage businesses in the solar electric energy sector to locate in Washington.[68] Section 82.16.120 promotes strong market demand for renewable energy projects, particularly solar photovoltaic energy,[69] by establishing an "investment cost recovery incentive" for homeowners, businesses, and local governmental entities that install solar electric systems, wind turbines, and biomass-powered generators.[70] Additionally, the incentive is available if certain components used to produce customer-generated electricity are manufactured within Washington.[71]

While section 82.16.120 takes care of the demand side of the equation, section 82.04.440 tackles the supply side by fostering the

64. Vicki Arroyo, *Learning from State Action on Climate Change March 2006 Update*, SL098 ALI-ABA 101, 103 (2006) ("State governments cite a variety of reasons for action, including promoting economic development, reducing vulnerability to fluctuating energy prices, and preventing damages to the states' resources from climate change.").

65. Peter D. Enrich, *Saving the States from Themselves: Commerce Clause Constraints on State Tax Incentives*, 110 HARV. L. REV. 377, 378–79 (1996).

66. Hellerstein, *supra* note 30, at 413.

67. Jesse Broehl, *Washington State Passes Progressive Renewable Energy Legislation*, RENEWABLEENERGYACCESS.COM, May 10, 2005, http://www.renewableenergyworld.com/rea/news/story?id=28478.

68. 2005 Wash. Sess. Laws ch. 300, § 1; *id.* ch. 301, § 1.

69. Broehl, *supra* note 67.

70. WASH. REV. CODE § 82.16.120(1), (5) (2008).

71. § 82.16.120(5)(a)–(c).

manufacture of renewable energy systems and components.[72] Specifically, this section provides a tax credit to solar energy companies, with the purpose of encouraging the in-state manufacture and sales of photovoltaic and related equipment.

With the enactment of these statutes, Washington State has the potential to become one of the world's most robust regions of economic growth.[73] In the past, Washington was a national leader in the manufacture of renewable energy equipment,[74] but many manufacturers have moved to other regions, perhaps due to the state's high sales tax.[75] Through the use of these tax incentives, Washington can expect to revitalize its renewable energy manufacturing industry.[76]

More importantly, however, these bills facilitate environmental protection by promoting the use of renewable energy. While promoting economic growth is a state imperative, combating global warming and ozone degradation is paramount. To this end, the increased use of renewable energy is critical. The massive danger posed by climate change provides a compelling reason to encourage such increased use by means of tax incentives.[77]

Since the 1980s, every state has used tax incentives to encourage expansion of local industry.[78] State policymakers urge that these are indispensable tools for stimulating and maintaining business investment, job opportunities, and economic growth.[79] Incentives such as these have nonetheless created intense competition between states in attracting businesses.[80] As a result, tax incentives favoring local industry are subject to being struck down as unconstitutional under the Commerce Clause.[81] Indeed, many scholars of state and local tax law have posited that state

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72. Broehl, *supra* note 67.

73. *Id.*

74. *Id.*

75. ENERGY DIV., *supra* note 18, at 24 (noting that "state sales tax poses a major barrier to doing business in Washington").

76. *Id.*

77. Wendy B. Davis, *Elimination of the Depletion Deduction for Fossil Fuels*, 26 SEATTLE U. L. REV. 197, 210 (2002).

78. Veena Iyer, Cuno v. DaimlerChrysler, Inc. *Dormant Commerce Clause Limits State Location Tax Incentives*, 40 HARV. C.R.-C.L. L. REV. 523, 523 (2005).

79. *Id. But see* S. Mohsin Resa, Comment, Daimlerchrysler v. Cuno*: An Escape from the Dormant Commerce Clause Quagmire?*, 40 U. RICH. L. REV. 1229, 1231–32 (2006) ("Critics of tax incentives argue that there are a host of reasons why the pervasive use of such incentives is a fiscally unsound practice. One complaint is that the current system allows public officials to unfairly pick and choose which companies and projects will receive millions of dollars in aid. . . . Perhaps the most basic criticism of the broad use of tax incentives is that they are not nearly as vital to the creation of jobs and growth of business as proponents of tax incentives believe.")

80. Bradford C. Spencer, *Evaluating Kentucky's Investment Tax Credits in Light of* Cuno v. DaimlerChrysler, Inc., 94 KY. L.J. 161, 164 (2005).

81. Hellerstein, *supra* note 30; *see infra* Parts IV–V.

tax incentives, like Washington's, represent an unconstitutional exercise of state power.[82]

IV. THE CURRENT STATE OF COMMERCE CLAUSE JURISPRUDENCE

A. The General Powers of Congress under the Commerce Clause

The Commerce Clause expressly empowers Congress to regulate interstate commerce,[83] as articulated by the Court in *Prudential Insurance Co. v. Benjamin*:

> The power of Congress over commerce exercised entirely without reference to coordinated action of the states is not restricted, except as the Constitution expressly provides, by any limitation which forbids it to discriminate against interstate commerce and in favor of local trade. Its plenary scope enables Congress not only to promote but also to prohibit interstate commerce, as it has done frequently and for a great variety of reasons. That power does not run down a one-way street or one of narrowly fixed dimensions. Congress may keep the way open, confine it broadly or closely, or close it entirely, subject only to the restrictions placed upon its authority by other constitutional provisions and the requirement that it shall not invade the domains of action reserved exclusively for the states.[84]

Hence, Congress has the ability to establish essentially any policy regarding any aspect of interstate commerce,[85] which means that it can control "competition in interstate business—and by virtue of the Necessary and Proper Clause, take measures designed to work its will regarding that competition, even if those measures regulate local activities."[86] By virtue of its Commerce Clause power, Congress can limit the taxing power of the states by implementing additional restrictions on state taxing authority.[87] Conversely, it can increase the state taxing power by removing any existing restraints.[88]

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82. Spencer, *supra* note 80, at 162.

83. U.S. CONST. art. I, § 8, cl. 3 ("The Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.").

84. Prudential Insurance Co. v. Benjamin, 328 U.S. 408, 434 (1946) (footnotes omitted).

85. DAVID E. ENGDAHL, CONSTITUTIONAL FEDERALISM IN A NUTSHELL 114 (West Publishing Co. 1987) (1974).

86. *Id.*

87. *Economic Development and the Commerce Clause: Joint Hearing Before the Subcomm. on the Constitution, Civil Rights, and Civil Liberties and the Subcomm. on Commercial and Administrative Law of the H. Comm. on the Judiciary*, 109th Cong. 11 (2005) [hereinafter *Joint Hearing*] (statement of Walter Hellerstein, Professor, University of Georgia School of Law), *available at* 2005 WL 1236824.

88. *Id.*

The Commerce Clause power is twofold. It grants power to Congress to regulate interstate commerce, but it also limits the states' power to interfere with such commerce.[89] This negative restriction on state power is the basis for the dormant Commerce Clause doctrine.[90] Specifically, the dormant (or negative) Commerce Clause doctrine establishes that the power to regulate commerce is reserved for Congress, thus prohibiting the states from legislating in that arena even if Congress is silent on a particular commerce-related issue.[91] In the absence of congressional legislation—when congressional commerce authority is dormant—the Court is left to determine whether state legislation has nevertheless impermissibly impinged upon inherent federal commerce authority:

> For a hundred years it has been accepted constitutional doctrine that the commerce clause, without the aid of congressional legislation, thus affords some protection from state legislation inimical to the national commerce, and that in such cases, where Congress has not acted, this Court, and not the state legislature, is under the commerce clause the final arbiter of the competing demands of state and national interests.[92]

Because Congress has failed to legislate on the subject of the use of state tax incentives, the Court, in its role as "final arbiter," has concocted an abstruse jurisprudence that has left state officials baffled as to the constitutional legitimacy of the tax incentives they use to promote economic growth.

B. The Gloss: How the Supreme Court Interprets the Dormant Commerce Clause

Unfortunately, few principles of constitutional law are as imprecise and ill defined as the premise that the dormant Commerce Clause forbids states from enacting taxes that discriminate against interstate commerce.[93] The Court itself has openly admitted that its dormant Commerce Clause jurisprudence is a "quagmire."[94] While declaring that its decisions "[do] not prevent the States from structuring their tax systems to encourage the growth and development of intrastate commerce and industry,"[95] the Court has invalidated state tax incentives "designed to

89. Philip M. Tatarowicz & Rebecca F. Mims-Velarde, *An Analytical Approach to State Tax Discrimination Under the Commerce Clause*, 39 VAND. L. REV. 879, 881 (1986).

90. *Id.* at 881–82.

91. Christopher R. Drahozal, *Preserving the American Common Market: State and Local Governments in the United States Supreme Court*, 7 SUPREME CT. ECON. REV. 233, 237 (1999).

92. S. Pac. Co. v. Arizona *ex rel.* Sullivan, 325 U.S. 761, 769 (1945).

93. Zelinsky, *supra* note 33, at 1.

94. *Id.*

95. Boston Stock Exch. v. State Tax Comm'n, 429 U.S. 318, 336 (1977).

achieve that very objective."[96] How then is one to distinguish between those state taxes which discriminate against interstate commerce and those which do not, when the Court has never clearly set out the scope of the doctrine that bars discriminatory taxes?[97]

C. The History of the Court's Dormant Commerce Clause Jurisprudence

In the last three decades, the Court has considered four state tax measures, each of which was designed to generate economic activity within the state.[98] The Court invalidated each measure, but "did so with rhetoric so sweeping that a literal reading of the Court's opinions cast a constitutional cloud over a broad array of tax incentives."[99] The following Subsections briefly review these cases in an attempt to create a clearer understanding of the Court's jurisprudence in this area.

1. Boston Stock Exchange v. State Tax Commission

In *Boston Stock Exchange v. State Tax Commission*,[100] the Court dealt with an amendment to New York's securities transfer tax that was intended to promote the New York securities industry.[101] The plaintiff argued that the amendment discriminated against interstate commerce because it "impos[ed] greater tax burden[s] on securities transactions involving out-of-state sales than on [similar] transactions . . . involving in-state sales."[102] Prior to the amendment, the transfer tax was "neutral as to in-state and out-of-state sales,"[103] because, regardless of the location of the sale, the tax burden fell evenly on all transactions effectuated by a New York transfer agent.[104] The amendment, the plaintiff alleged, "upset this equilibrium" by forcing a seller to consider tax liability when determining where to conduct business.[105]

The Court unanimously concluded that the amendment violated the Commerce Clause; by inducing sellers to deal with in-state instead of out-of-state brokers, the New York amendment "forclose[d] tax-neutral decisions."[106] Furthermore, the Court noted that by "using its power to

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96. Hellerstein, *supra* note 30, at 414.

97. *Id.* at 415; *see also* Note, *Functional Analysis, Subsidies, and the Dormant Commerce Clause*, 110 HARV. L. REV. 1537, 1537 (1997).

98. *Joint Hearing*, *supra* note 87.

99. *Id.*

100. 429 U.S. 318 (1977).

101. *Id.* at 326–28 & n.10.

102. *Id.* at 320.

103. *Id.* at 330.

104. *Id.*

105. *Id.* at 330–31.

106. *Id.* at 331.

tax an in-state operation as a means of 'requiring [other] business operations to be performed in the home State,'" New York had caused business activity to be diverted from the most economically efficient channels, an act wholly inconsistent with the free trade purpose of the Commerce Clause.[107] In its conclusion, the Court pointed out that its decision "[did] not prevent the States from structuring their tax systems to encourage the growth and development of intrastate commerce and industry."[108] It failed, however, to provide a means to pursue this end.

2. Bacchus Imports, Ltd. v. Dias

In *Bacchus Imports, Ltd. v. Dias*,[109] the Court examined Hawaii's excise tax exemption on wholesale liquor sales for certain locally produced alcoholic beverages.[110] While recognizing that the purpose of the tax exemptions was to aid Hawaii's industry, and reaffirming that a state can enact laws under its police power "that have the purpose and effect of encouraging domestic activity," the Court noted that "the Commerce Clause stands as a limitation on the means by which a State can constitutionally seek to achieve that goal."[111] The Court also noted that it was irrelevant to the Commerce Clause inquiry that Hawaii desired to aid the makers of locally produced beverages rather than to harm manufacturers based in other states.[112] Ultimately, the Court ruled that Hawaii's liquor tax exemption was unconstitutional under the Commerce Clause "because it had both the purpose and effect of discriminating in favor of local products."[113] Unfortunately, the Court did nothing more than reaffirm its ban on discriminatory taxation; it offered no new insights regarding the scope of the dormant Commerce Clause.[114]

3. Westinghouse Electric Corp. v. Tully

In *Westinghouse Electric Corp. v. Tully*,[115] the Court confronted the legality of a franchise tax credit provided by New York to certain income of "Domestic International Sales Corporations," a type of corporate entity given special recognition in the Internal Revenue Code.[116] Simply put, the state taxed income attributable to New York exports at 30% of

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107. *Id.* at 336 (quoting Pike v. Bruce Church, Inc., 397 U.S. 137, 145 (1970)).
108. *Id.*
109. 468 U.S. 263 (1984).
110. *Id.* at 265.
111. *Id.* at 271.
112. *Id.* at 273.
113. *Id.*
114. Hellerstein, *supra* note 30, at 418.
115. 466 U.S. 388 (1984).
116. *Id.* at 390.

the rate applicable to income attributable to export shipments from other states.[117] The Court held that New York's reduction of tax liability for New York exporters violated the Commerce Clause both because it "'create[d] . . . an advantage for firms operating in New York by placing a 'discriminatory burden on commerce to its sister States,'" and because it foreclosed neutral tax decisions.[118]

4. New Energy Co. of Indiana v. Limbach

In a more recent case, *New Energy Co. of Indiana v. Limbach*,[119] the Court reviewed a state tax incentive designed to promote ethanol production in the state. Ohio provided a tax credit against the Ohio motor vehicle fuel sales tax for each gallon of ethanol sold by fuel dealers, but only if the ethanol was produced in Ohio or in a state that granted similar tax advantages to ethanol produced in Ohio.[120]

The Court—unsurprisingly—held that the ethanol tax incentive violated the Commerce Clause, because it "explicitly deprive[d] certain products of generally available beneficial tax treatment because they [were] made in certain other States, and thus on its face appear[ed] to violate the cardinal requirement of nondiscrimination."[121] In response to the State's argument that it could have accomplished the same result by using a cash subsidy, the Court maintained that the Commerce Clause, rather than prohibiting all state actions that grant marketplace advantages to its residents, only prohibits actions arising under a state's regulation of interstate commerce.[122]

5. Lessons Learned

In sum, state tax incentives that violate the Commerce Clause prohibition against discriminatory taxation typically have two things in common. First, discriminatory state tax incentives favor in-state over out-of-state activities.[123] Second, discriminatory state tax incentives, as vital components of the state's taxing mechanism, implicate the coercive power of the state.[124] While states may enact laws that encourage

117. Hellerstein, *supra* note 30, at 419.

118. *Tully*, 466 U.S. at 406 (quoting Boston Stock Exch. v. State Tax Comm'n, 429 U.S. 318, 331 (1977)).

119. 486 U.S. 269 (1988).

120. *Id.* at 270.

121. *Id.* at 274.

122. *Id.* at 278 ("Direct subsidization of domestic industry does not ordinarily run afoul of that prohibition; discriminatory taxation of out-of-state manufacturers does.").

123. Hellerstein, *supra* note 30, at 424.

124. *Id.*

domestic industry under the police power,[125] the Commerce Clause confines the manner in which they can legitimately compete for interstate trade.[126] When a state provides a tax benefit to an in-state taxpayer, but fails to make the same benefit available to an out-of-state taxpayer, any decision by a taxpayer to invest in that state is coerced.[127] To put it differently, when a rational taxpayer allocates its resources in a method that maximizes its after-tax profits, it will steer its investments toward the states which offer such tax benefits.[128] Consequently, these tax incentives are subject to constitutional challenge on the basis of their discrimination against interstate commerce through the coercion of resources into the state on the basis of tax, rather than nontax, criteria.[129]

D. The Court Dodges the Constitutional Question in DaimlerChrysler Corp. v. Cuno

The Court's most recent opportunity to clarify its Commerce Clause jurisprudence arose in *DaimlerChrysler Corp. v. Cuno*,[130] a case in which the constitutionality of state tax incentives was challenged. In *Cuno*, the Sixth Circuit, trying to find its footing on the shaky ground of Commerce Clause case law, had issued an opinion that called into question the constitutionality of all state tax incentives. When the Court granted certiorari, many state and federal actors hoped that it would seize the opportunity to definitively announce the constitutional status of such incentives. Unfortunately, the Court concluded that the plaintiffs lacked standing and thus refused to examine the merits of their claim.

1. Sixth Circuit's Decision in *Cuno*

The *Cuno* case involved tax abatements and investment tax credits that were granted to an automobile manufacturer in order to induce it to build a new plant locally, the Sixth Circuit unanimously held that the tax credits for the new in-state investment were unconstitutional because they discriminated against interstate commerce.[131] The court, however, did sustain the state's personal property tax exemption for new in-state investment.[132] It stated that the investment tax credit, while not discriminatory on its face because it was equally available to both in-state and

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125. Bacchus Imps., Ltd. v. Dias, 468 U.S. 263, 271 (1984).
126. *Id.* at 272.
127. Hellerstein, *supra* note 30, at 422.
128. *Id.* at 423.
129. *Id.*
130. 547 U.S. 332 (2006).
131. Cuno v. DaimlerChrysler, Inc., 386 F.3d 738, 742–46 (6th Cir. 2004), *vacated in part*, 547 U.S. 332 (2006).
132. *Id.* at 746–48.

out-of-state businesses, was discriminatory nonetheless.[133] The court reasoned that any business that was already doing business in Ohio would be able to reduce its existing tax liability by locating new machinery and equipment within the state, while it would not receive the same benefit if it located a comparable business operation outside the state.[134]

The defendants unsuccessfully argued that the Commerce Clause case law should be interpreted narrowly to reach the result that tax incentives are permissible so long as they do not penalize out-of-state economic activity.[135] Specifically, the defendants argued that state tax credits and exemptions only violate the Commerce Clause if they either function like a tariff, by placing a higher tax upon out-of-state businesses or products, or penalize out-of-state economic activity, by relying on both the taxpayer's in-state and out-of-state activities to determine the its effective tax rate.[136] In rejecting this argument, the court noted that the defendants' proposed approach was premised on a "tenuous" distinction between laws that benefit in-state activity and those that burden out-of-state activity.[137]

The court also rejected the defendants' attempt to analogize the investment tax credit to a direct subsidy.[138] While acknowledging that subsidies do not "ordinarily run afoul" of the Commerce Clause, the court pointed out that the Supreme Court "has intimated that attempts to create location incentives through the state's power to tax are to be treated differently from direct subsidies despite their similarity in terms of end-result economic impact."[139]

Conversely, the Sixth Circuit held that Ohio's personal property tax exemption was constitutional.[140] The plaintiffs had urged that the exemption was discriminatory because its eligibility conditions required a recipient to agree to maintain a specific level of employment and investment in the state, and that effectively, the conditions subjected two similarly situated owners of Ohio personal property to different tax rates.[141]

The court sided with the defendants on this claim, holding that "exemptions raise no constitutional issues when the conditions for obtaining the favorable tax treatments are related to the use or location of the

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133. *Id.* at 743.
134. *Id.*
135. *Id.* at 745.
136. *Id.*
137. *Id.*
138. *Id.* at 746.
139. *Id.*
140. *Id.*
141. *Id.* ("A taxpayer who agrees to focus his employment or investment in Ohio receives . . . a tax break, while a taxpayer who prefers to preserve the freedom to hire or invest elsewhere does not.").

property itself."[142] In other words, "an exemption may be discriminatory if it requires the beneficiary to engage in another form of business in order to receive the benefit or is limited to businesses with a specified economic presence."[143] The exemption in issue required only an investment in new or existing property; thus, because the conditions related to the property itself, they did not burden interstate commerce.[144] Moreover, the court noted that the exemption was not discriminatory because the property tax was levied only on Ohio businesses.[145] Consequently, if a business were to invest in Ohio, it could limit its personal property tax liability, but if it were to invest elsewhere, it would not be subject to Ohio's personal property tax, thus rendering the loss of the tax credit irrelevant.[146]

Because of its ominous implications for any and all state tax incentives, many of which are materially indistinguishable from Ohio's, the Sixth Circuit's decision created quite a stir.[147] In addition, it drastically departed from precedent and further muddied the already murky waters of Commerce Clause jurisprudence.[148]

2. Supreme Court

In granting certiorari, the Court instructed the parties to brief and argue the question of whether the plaintiffs had standing to challenge Ohio's investment tax credit.[149] A mere eight weeks after hearing oral argument on this issue, the Court unanimously concluded that the plaintiffs had no standing to challenge state tax or spending decisions simply by virtue of their status as state taxpayers.[150] As a result, it declined to evaluate the merits of the challenged tax credit, instead remanding the case for dismissal.[151] Subsequently, the Court declined to review the

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142. *Id.*

143. *Id.*

144. *Id* at 747.

145. *Id.*

146. *Id.*

147. *See* Petition for a Writ of Certiorari at 7, 9, DaimlerChrysler Corp. v. Cuno, 547 U.S. 332 (2006) (No. 04-1704), *available at* 2005 WL 1457703; *see also* Chris Atkins, Cuno v. DaimlerChrysler*: A Pyrrhic Victory for Economic Neutrality*, TAX FOUND., Apr. 18, 2005, http://www.taxfoundation.org/publications/show/344.html ("Not only does *Cuno* fail to stop the bidding war between states and localities for business investment, but it also applies to legitimate tax policies that are naturally, but not unconstitutionally, discriminatory.").

148. *See* Brief of Amicus Curiae Tax Foundation in Support of Petition for a Writ Certiorari at 2–4, DaimlerChrysler Corp. v. Cuno, 547 U.S. 332 (2006) (No. 04-1704), *available at* 2005 WL 1687283.

149. DaimlerChrysler Corp. v. Cuno, 545 U.S. 1165 (2005).

150. DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 342–46 (2006).

151. *Id.* at 354.

Sixth Circuit's ruling that Ohio's personal property tax exemption did not violate the Commerce Clause.[152]

Conveniently, or perhaps strategically, the Court was able to temporarily avoid dealing with the ever-looming constitutional quandary of state tax incentives. Barring any forthcoming congressional legislation seeking to remedy this legal uncertainty, other plaintiffs are sure to bring suits presenting similar questions, which the Court would eventually need to face. The question, then, is whether the current Court is disinclined to further muddle its dormant Commerce Clause jurisprudence. Could it instead be encouraging—if not obligating—Congress to determine what constitutes a burden on interstate commerce?

E. Congressional Response to Cuno

Following the Sixth Circuit's decision in *Cuno*,[153] Senator Voinovich introduced legislation "clarify[ing] that State tax incentives for investment in new machinery and equipment are a reasonable regulation of commerce and not an undue burden on interstate commerce."[154] Shortly thereafter, Representative Chandler introduced similar legislation.[155] Both bills were referred to committee, but no further action was taken before the end of the 108th Congress.

After the 109th Congress convened, Senator Voinovich introduced the Economic Development Act of 2005.[156] Cosponsored by Senator Frist and at least twelve other senators, the bill authorized "any State to provide to any person for economic development purposes tax incentives that otherwise would be the cause or source of discrimination against interstate commerce under the Commerce Clause."[157] Representative Tiberi introduced an identical companion bill in the House on the same day.[158] Although these bills were not enacted, Senator Voinovich's quest to overrule *Cuno* continues.[159]

In sum, the Court's Commerce Clause jurisprudence suggests that any state tax incentive program could potentially be found unconstitutional.[160] A challenged tax incentive will not pass constitutional muster

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152. Cuno v. DaimlerChrysler Corp., 547 U.S. 1147 (2006).

153. *See supra* notes 131–48 and accompanying text.

154. S. 2881, 108th Cong. (2004).

155. H.R. 5427, 108th Cong. (2004).

156. Economic Development Act of 2005, S. 1066, 109th Cong. (2005).

157. *Id.* § 2.

158. Economic Development Act of 2005, H.R. 2471, 109th Cong. (2005).

159. *See* S. 914, 110th Cong. (2007) ("Congress authoriz[es] any State to provide to any person for economic development purposes tax incentives that would otherwise be the cause or source of discrimination against interstate commerce under the Commerce Clause.").

160. Enrich, *supra* note 65, at 432.

if it discriminates on its face or if, after analyzing the purpose and effect of the provision, it will discriminate against interstate commerce by providing a direct benefit to a local business.[161] Moreover, "[a] state tax provision that discriminates against interstate commerce is invalid unless it advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives."[162] State tax incentives, then, are constitutionally suspect and will likely be held invalid if the state "foreclose[s] tax-neutral decisions" by coercive use of its taxing authority.[163]

V. DO WASHINGTON'S TAX INCENTIVES SURVIVE COMMERCE CLAUSE SCRUTINY?

In light of *Cuno*, the current extent of state power to utilize tax incentives promoting economic growth and renewable energy use is nebulous at best. Thus, the constitutionality of Washington's progressive new incentives under the Commerce Clause is questionable.

A. RCW sections 82.04.440 and 82.16.120

Section 82.16.120 provides an "investment cost recovery incentive" for Washington individuals, businesses (except utilities), or local governmental entities that generate electricity on their property using a wind generator, solar energy system, or anaerobic digester.[164] The law allows for a fifteen-cent credit (up to $2,000 annually per participant) per kilowatt-hour (kWh) of electricity generated by a renewable energy system.[165] The credit increases or decreases based on the type of customer-generated electricity used.[166] For example, a credit of thirty-six cents per kWh is allowed if the customer uses a solar module manufactured in Washington, and a credit of eighteen cents per kWh is authorized if the customer uses a solar or a wind generator equipped with an inverter manufactured in Washington.[167] A customer using only a wind generator with blades not manufactured in Washington, however, will recover a

161. Cuno v. DaimlerChrysler, Inc., 386 F.3d 738, 742–46 (6th Cir. 2004), *vacated in part*, 547 U.S. 332 (2006).

162. *Id.* (citing New Energy Co. of Ind. v. Limbach, 486 U.S. 269, 278 (1988)).

163. Boston Stock Exch. v. State Tax Comm'n, 429 U.S. 318, 331 (1977).

164. WASH. REV. CODE § 82.16.120(1), (5) (2008). Anaerobic digestion is the process by which microorganisms break down biodegradable material in the absence of oxygen, thereby producing a gas suitable for energy production. Wikipedia, Anaerobic Digestion, http://en.wikipedia.org/wiki/Anaerobic_digester (last visited Mar. 26, 2008).

165. § 82.16.120.

166. § 82.16.120(5); WASH. ADMIN. CODE 458-20-273(8) (2008).

167. § 82.16.120.

credit of only eight cents per kWh.[168] Because these factors are cumulative, a customer using Washington-made solar modules and inverter would enjoy a maximum credit of fifty-four cents per kWh.[169]

Section 82.04.440 provides a tax credit for persons manufacturing or wholesaling certain solar energy systems and components, when such activity takes place within Washington.[170] Manufacturers are allowed a credit for (1) gross receipts taxes paid to another state in connection with sales of products manufactured in Washington; (2) manufacturing taxes paid with respect to the manufacturing of products using materials extracted in Washington; and (3) manufacturing taxes paid in connection with manufacturing activities completed in another state for products partly manufactured in Washington.[171] Wholesalers receive a credit for any (1) manufacturing taxes paid with respect to the manufacturing of products sold in Washington, together with (2) extracting taxes paid in connection with the extracting of materials of products sold in Washington.[172]

B. The Constitutionality of RCW Sections 82.04.440 and 82.16.120

Washington's new tax incentives are very similar to the taxing schemes discussed above,[173] and are thus likely to raise similar Commerce Clause concerns.[174] Applying the Court's jurisprudence to these statutes, the credit offered by section 82.16.120 arguably deprives certain products of generally available tax benefits because they are made in other states; as such, it appears discriminatory for Commerce Clause purposes.[175] By providing a tax benefit for in-state investment that is not available to an identical out-of-state investment, a taxpayer's investment location decision is influenced in favor of the former,[176] thus providing an explicit advantage to local businesses.[177]

Similarly, section 82.04.440's manufacturing and wholesaling tax credits are subject to attack on the ground that they "offend the 'free

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168. *Id.*

169. WASH. ADMIN. CODE 458-20-273(9) (2008).

170. § 82.04.440(2), (4). Section 82.04.440 works in conjunction with section 82.04.294, which sets the base tax rate for manufacturers and wholesale sellers of certain solar energy systems and components at 0.2904 percent of the value of the product manufactured or the gross proceeds of sales. § 82.04.294(1)–(2).

171. § 82.04.440(4).

172. § 82.04.440(2).

173. *See supra* Part IV.C–D.

174. Kirsten H. Engel, *The Dormant Commerce Clause Threat to Market-Based Environmental Regulation: The Case of Electricity Deregulation*, 26 ECOLOGY L.Q. 243, 278 (1999).

175. *See* New Energy Co. of Ind. v. Limbauch, 486 U.S. 269, 274 (1988).

176. Hellerstein, *supra* note 30, at 422.

177. Bacchus Imps., Ltd. v. Dias, 468 U.S. 263, 268 (1984).

trade' purposes of the Commerce Clause by inducing resources to be allocated among the states on the basis of tax rather than nontax criteria."[178] The provision of such incentives, it can be argued, will impermissibly induce the solar industry to invest in Washington, rather than in states which do not offer this type of benefit.

One can also argue, of course, that the statutes do not violate the Commerce Clause. Although the incentives appear to discriminate against interstate commerce, courts have been willing to recognize a state's authority to encourage local growth through the use of subsidies, and certain Justices have stated that tax credits and tax breaks are permissible as well.[179] Furthermore, some commentators contend that incentives which "simply reduce the burden of a state tax on the same product, investment, or activity that the state seeks to promote are not constitutionally suspect."[180] Nevertheless, due to the hybrid of goals Washington seeks to effectuate, this argument is comparatively weak and would probably not withstand judicial scrutiny.

Even if Washington's tax incentives violate the Commerce Clause under the traditional analysis, they might nonetheless be upheld under an alternate method of analysis. Under this view, a tax incentive that advances a "legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives" can withstand Commerce Clause scrutiny.[181]

C. Is Environmental Protection a Local Purpose that Cannot Be Adequately Served by Reasonable Nondiscriminatory Alternatives?

Although relevant case law is scarce, the Court has, on at least one occasion, upheld a state statute promoting energy conservation on the ground that there were no less discriminatory avenues to achieve the state's goal. In *Minnesota v. Clover Leaf Creamery Co.*,[182] the Minnesota Legislature, for the purpose of promoting resource conservation, easing solid waste disposal problems, and conserving energy, enacted a statute banning the retail sale of milk in plastic containers, but permitted such sale in other containers, such as paperboard cartons.[183] The

178. Hellerstein, *supra* note 30, at 423 (quoting Westinghouse Elec. Corp. v. Tully, 466 U.S. 388, 402 (1984)).

179. *See, e.g.*, Hughes v. Alexandria Scrap Co., 426 U.S. 794, 816 (1976) (Stevens, J., concurring) ("Whether [a state's] encouragement takes the form of a cash subsidy, a tax credit, or a special privilege intended to attract investment capital, it should note [sic] characterized as a 'burden' on commerce.").

180. Engel, *supra* note 174, at 280.

181. *See* New Energy Co. of Ind. v. Limbauch, 486 U.S. 269, 278 (1988).

182. Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456 (1981).

183. *Id.* at 459.

plaintiffs claimed that the statute violated the Commerce Clause because it imposed an unreasonable burden on interstate commerce.[184] The Court rejected this argument, stating that the statute did not constitute "simple protectionism," but rather "regulate[d] evenhandedly," because it treated all milk retailers alike without regard to whether the milk, the containers, or the sellers were from outside the state.[185] Further, the Court held that the statute was not "clearly excessive," in light of the substantial state interest in easing solid waste disposal problems and promoting the conservation of energy and other natural resources.[186]

Under this line of analysis, Washington would bear the burden of showing the unavailability of nondiscriminatory alternatives adequate to preserve the local interests at stake.[187] This task is onerous and subject to rigorous scrutiny.[188] Washington would be hard pressed to prove that the goals of promoting renewable energy could not be served adequately by other methods. Although the state obviously has a substantial interest in protecting its constituents from the harmful effects of global warming, its tax incentives were not implemented solely to combat that problem; legislators also sought to promote economic growth within the state.[189] In order to withstand rigorous constitutional scrutiny, Washington would need to show both that the incentives at issue are not "clearly excessive" and that there are no less discriminatory alternatives available.[190] Under a *Clover Leaf* analysis, given the grave implications of global warming, as well as the substantial state interest in promoting energy conservation and renewable energy use, a court would likely conclude that the incentives are not "clearly excessive."[191] Whether less discriminatory alternatives are available, however, is a harder question. Arguments supporting an answer in the negative appear unpersuasive when one considers the dual nature of Washington's tax incentives. Consequently, it is unlikely that a court would side with the State under a rigorous scrutiny level of review.

In summary, it is uncertain whether Washington's tax incentives could withstand Commerce Clause scrutiny. Indeed, the Court's recent disinclination to address the issue in *Cuno* has left many states wondering about the viability of their own respective tax incentives. Nobody knows what the Court will do next in this area; frankly, it is unlikely the

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184. *Id.* at 470.
185. *Id.* at 471.
186. *Id.* at 473.
187. Hunt v. Wash. State Apple Adver. Comm'n, 432 U.S. 333, 353 (1977).
188. ENGDAHL, *supra* note 85, at 284.
189. 2005 Wash. Sess. Laws ch. 301, § 1.
190. *See* Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 456 (1981).
191. *See id.* at 473.

Justices themselves know. Justice Scalia illustrated the extent of the problem when he recently characterized the Court's Commerce Clause jurisprudence as "various tests from our wardrobe of ever-changing negative Commerce Clause fashions."[192] Moreover, the current Justices have shown less willingness to invoke the Commerce Clause than their predecessors. Justice Thomas, in particular, has adamantly opposed the application of the dormant Commerce Clause doctrine, stating on multiple occasions that it "has no basis in the text of the Constitution, makes little sense, and has proved virtually unworkable in application."[193] As the Court's admissions make clear, the time has come for Congress to act. It must utilize its legislative power under the Commerce Clause to put a stop to the Court's jurisprudential madness.

VI. A COMPELLING CASE FOR CONGRESSIONAL INTERVENTION

A. Periodic Congressional Action Has Been Ineffective and Noncomprehensive

As stated previously, Congress possesses inherent authority under the Commerce Clause to regulate state taxation of interstate commerce. One example of congressional intervention may be found in *Prudential Insurance Co. v. Benjamin*,[194] in which the Court upheld a South Carolina tax on insurance premiums that was imposed solely on foreign companies. The levy would have been invalidated under the Commerce Clause, but Congress, via the McCarran-Ferguson Act, authorized South Carolina to implement it.[195] Unfortunately, Congress has affirmatively acted in this fashion only on rare occasions, and has never clarified the troubling issues that surround state tax incentives.

Congress could, of course, continue to do nothing. According to some academics, the Court is the best arbiter of Commerce Clause disputes. For example, Professor Enrich, a preeminent tax authority, contends that the Court's Commerce Clause jurisprudence provides a solid foundation for constitutional assaults on various forms of business tax breaks.[196] He takes the position that state tax incentives threaten to prompt precisely the type of economic balkanization that the dormant Commerce Clause is meant to prevent, at the expense of the national

192. Am. Trucking Ass'ns v. Mich. Pub. Serv. Comm'n, 545 U.S. 429, 439 (2005) (Scalia, J., concurring).

193. Camps Newfound/Owatonna, Inc. v. Town of Harrison, Me., 520 U.S. 564, 610 (1997) (Thomas, J., dissenting).

194. Prudential Ins. Co. v. Benjamin, 328 U.S. 408 (1946).

195. *Id.*

196. Enrich, *supra* note 65, at 378.

welfare.[197] He further argues that the pressures of interstate competition for economic stability will trigger a race to the bottom.[198] In his view, the Court need only refocus its jurisprudence, which in turn would end the detrimental effects of state competition for business and "reassert the primacy of the Commerce Clause as a protector of a robust national economy and a healthy federalism."[199]

Yet inaction by Congress would unquestionably have profound effects. Professor Hellerstein, another prominent tax authority, contends that if Congress does not act, thereby leaving the validity of state tax incentives to the mercy of existing Commerce Clause jurisprudence, judicial uncertainty and inconsistency will continue to undermine the legitimacy of state tax incentives.[200] He argues that it would take decades for courts to definitively determine the general validity of the tax incentives that exist in practically every state.[201] Moreover, even if the Court were to choose to squarely address the question, it is unlikely that this would lead to a comprehensive resolution of the issue: the Court typically confines its decisions to the facts of individual cases, thereby avoiding questions closely related to those presented in the case before it.[202] Touching upon this very point almost fifty years ago, Justice Frankfurter wrote:

> At best, this Court can only act negatively; it can determine whether a specific state tax is imposed in violation of the Commerce Clause. . . .
>
> . . . Congress alone can provide for a full and thorough canvassing of the multitudinous and intricate factors which compose the problem of the taxing freedom of the States and the needed limits on such state taxing power.[203]

In short, contrary to the beliefs of Professor Enrich, and wholly distinct from the prudence or efficacy of state tax incentives and the viability of various competing readings of the dormant Commerce Clause that may be advanced, a failure to act by Congress will further perpetuate the perplexing state of the Court's jurisprudence.[204]

Alternatively, Congress could continue to respond to the Court's Commerce Clause decisions on a case-by-case basis. But, as stated

197. *Id.* at 407.
198. *Id.* at 467.
199. *Id.*
200. *Joint Hearing*, *supra* note 87.
201. *Id.*
202. *Id.*
203. Nw. States Portland Cement Co. v. Minnesota, 358 U.S. 450, 476 (1959) (Frankfurter, J., dissenting).
204. *Joint Hearing*, *supra* note 87.

previously, this would do nothing to address the broader issues of state tax incentives.

What is truly needed is for Congress to legislate broadly—to create order in an infamously chaotic area of law. While this task is daunting and politically challenging, Congress must nevertheless fulfill its duty to legislate plainly and unambiguously, while retaining the fundamental features of the Commerce Clause antidiscrimination principle.[205] Otherwise, courts will continue to be forced to speculate as to whether a particular tax incentive discriminates against interstate commerce.[206] Whether Congress decides to legislate broadly or narrowly in this arena, it should, at the very least, authorize states to encourage investment in renewable energy through tax incentives.

B. Congressional Intervention Is Critical Given the Grave Danger Posed by Global Warming

Congress should empower the states to combat global warming through their use of tax incentives. Global warming poses a grave danger, not only to this nation, but to the international community as well.[207] Moreover, climate change is not strictly an environmental problem; rather it is a "scientific, diplomatic, technological, educational, social, economic, political, and ethical problem unlike any issue that decision makers or society previously have tackled."[208] States should be permitted to address this complex issue with a wide assortment of interrelated policies. Indeed, while energy policy, tax policy, and global warming may seem like unrelated topics at first glance, they are, in fact, inextricably linked.[209]

Many states, including Washington, have recognized the inextricable link between energy and tax policy and have begun to combat global warming by promoting renewable energy. Commentators have noted that "a properly designed energy-efficiency policy, including a market incentive to reduce fossil fuel consumption, together with cuts in other taxes, would be beneficial to a substantial majority of U.S. businesses."[210] Significantly, states like Washington have created a hybrid

205. *Id.*

206. *Id.*

207. Ferrey, *supra* note 7.

208. Laura H. Kosloff et al., *Outcome-Oriented Leadership: How State and Local Climate Change Strategies Can Most Effectively Contribute to Global Warming Mitigation*, 14 WIDENER L.J. 173, 174 (2004).

209. Roberta Mann, *Waiting to Exhale?: Global Warming and Tax Policy*, 51 AM. U. L. REV. 1135, 1136 (2002).

210. *Id.* at 1155 (quoting J. Andrew Hoerner & Jan Mutl, *Good Business: A Market Analysis of Energy Efficiency Policy* 17 (Ctr. for a Sustainable Econ., Working Paper, 2001)).

approach that combats climate change while stimulating economic growth via tax incentives at the same time.

Tax policy offers a viable economic solution to the problem of global warming.[211] In fact, the federal tax system has proven successful in accomplishing social change through the use of economic pressure.[212] It seems logical that states can likewise employ tax incentives to achieve environmental change. Using tax incentives to combat the effects of carbon emissions encourages energy conservation, enhances the public welfare, and helps avert the potentially catastrophic effects of global warming; doing so may even be considered a moral imperative.[213]

Shifting our reliance from traditional energy sources to renewable energy is critical to quelling the threats of global warming; the increased use of renewable energy will reduce local and regional concentrations of the harmful greenhouse gases that cause global warming.[214] In addition, the renewable energy industry is vitally important to Washington's economic health.[215] Energy efficiency and renewable energy businesses improve the state's quality of life by utilizing technologies that minimize the harmful effects of fossil fuels.[216] Moreover, the renewable energy industry provides jobs and income to a substantial number of Washington residents.[217]

Washington's new tax incentive statutes[218] fall squarely within its police power; Congress should thus allow it and other states to invoke such authority in order to prevent the catastrophic effects of global warming. Indeed, Washington's tax incentives, and the tax system in general, "are an appropriate and effective way in which to encourage businesses to adopt an environmental ethic and take action to reverse global warming."[219]

C. Original Reasons Justifying the Federal Government's Dominance of Environmental Regulation Are Invalid

Despite the widespread belief in cooperative federalism, the federal government essentially dominates environmental regulation.[220] The original reasons for federal intervention in this field, however, are no

211. *Id.* at 1218.
212. *Id.*
213. *Id.* at 1216.
214. Engel, *supra* note 174, at 266.
215. ENERGY DIV., *supra* note 18, at 1.
216. *Id.*
217. *Id.*
218. WASH. REV. CODE §§ 82.04.440(2), (4); 82.16.120.
219. ENERGY DIV., *supra* note 18, at 1.
220. Glicksman, *supra* note 20, at 740.

longer valid,[221] if they ever were. As such, Congress must empower the states to assume the lead role in local environmental regulation.

Advocates of exclusive federal environmental control in the 1970s offered various reasons why states were not well situated to take a lead regulatory role.[222] They argued that the states lacked scientific expertise and sufficient resources needed to implement such environmental regulation.[223] Plus, they argued, the federal government initially took the lead in the development of environmental law and policy, as well as in the development of expertise and the recruitment of qualified workers.[224]

The argument in favor of federal dominance of environmental regulation, however, is no longer true. First, the states spend more money today on environmental issues and employ more environmental officials than the federal government.[225] States are also more competent than before, because environmental research is abundant and readily available through the Internet.[226] State employees also possess local knowledge and expertise, which is critical to solving many environmental problems of a regional nature.

Second, early advocates of federal dominance argued that states were unable to provide effective constraints on transboundary pollution, because "[t]he upwind states lack any incentive to cooperate with the downwind states, and the transactional costs of establishing interstate regulation are too high for the states."[227] This argument, while perhaps true with respect to the states' inability to provide effective constraints on the externalities of pollution, is unpersuasive; the federal government is likewise unable to effectively constrain transboundary pollution. Also, while downwind states may have previously lacked incentive to cooperate, the threat of the potentially devastating effects of global warming has begun to induce states to implement their own policies to combat climate change.[228] Consequently, the problem of interstate regulation costs has ceased to be of great importance.

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221. *Id.* at 802.

222. *Id.* at 731–37.

223. *Id.* at 733–34.

224. *Id.* at 779.

225. Jonathan H. Adler, *The Green Aspects of* Printz*: The Revival of Federalism and Its Implications for Environmental Law*, 6 GEO. MASON L. REV. 573, 628 (1998).

226. *Id.* at 628–29.

227. Glicksman, *supra* note 20, at 735 (quoting John P. Dwyer, *The Practice of Federalism Under the Clean Air Act*, 54 MD. L. REV. 1183, 1220 (1995)).

228. *See* Paul L. Joffe, *The Dwindling Margin for Error: The Realist Perspective on Global Governance and Global Warming*, 5 RUTGERS J.L. & PUB. POL'Y 89 (2007) (noting the effect of international law on California's policy of addressing global warming through state legislation and agreements with European countries).

Finally, the third justification for federally controlled environmental regulation was the belief that, absent federal control, "states [were] likely to compete with one another to attract new business by adopting increasingly lenient controls on activities with potentially damaging environmental effects."[229] This "race to the bottom," it is argued, could be effectively overcome only by adopting federal standards that guaranteed "a minimum level of environmental protection to all Americans, regardless of their state of residence, and a minimum level of environmental restraints for businesses, regardless of where they decide to locate or relocate."[230] Again, this argument, while perhaps a legitimate concern, is plainly without merit today. Instead of states adopting "increasingly lenient controls" on environmentally damaging activities, some states have actually adopted more stringent controls.[231] Indeed, Congress—not the states—is guilty of implementing lenient environmental regulations, due to its rubber stamping of Bush Administration proposals.[232]

In contrast, granting the states primary authority to regulate local environmental policy through state tax incentives will likely have far-reaching benefits. By taking the initiative, innovative states will pave the way for other states, or even the federal government, to adopt similar policies.[233] To be sure, states often function as "policy laboratories" with the purpose of developing initiatives that serve as models for federal action.[234] This is especially true with environmental regulation, and considerable precedent exists for enacting federal environmental laws based on previous state innovations.[235] State action can thus serve as a catalyst for both state and federal governments to enact similar environmental policy, which in turn will decrease the potential devastation threatened by climate change.

D. The Democratic Takeover of Congress Improves the Likelihood of New Environmental Legislation

After the 1994 national election sweep by the Republicans, the 104th Congress began to fundamentally challenge previous congressional approaches toward environmental law.[236] With the "new right"

229. Glicksman, *supra* note 20, at 736.

230. *Id.*

231. *Id.*

232. *See* Parenteau, *supra* note 62, at 364.

233. Kosloff et al., *supra* note 208, at 181.

234. Arroyo, *supra* note 64, at 103.

235. *See id.*; *see also* Barry G. Rabe, *North American Federalism and Climate Change Policy: American State and Canadian Provincial Policy Development*, 14 WIDENER L.J. 121, 152 (2004).

236. Thomas D. Peterson, *The Evolution of State Climate Change Policy in the United States: Lessons Learned and New Directions*, 14 WIDENER L.J. 81, 82–83 (2004).

Republican leadership in both houses for the first time in forty years, amendments to environmental legislation were proposed, causing a significant shift in federal environmental policy.[237] This conservative majority justified policy changes on the premise that environmental regulation had damaged the competitiveness of the economy, injured individual companies and industries, and was not cost effective.[238] Due to the Republican-controlled Congress, the Bush Administration was able to stifle any open debate on the future of environmental policy and was "able to make sweeping environmental changes."[239]

But times have changed. In 2006, the era of Republican dominance ended as the Democrats took control of both the House and the Senate for the first time in twelve years.[240] Because the newly formed Democratic majority is generally associated with a heightened environmental sensibility, there is now a strong counterbalance to President Bush on many critical issues, including environmental ones.[241]

Many believe that this political shift, along with an increase in the number of environmentally savvy governors and state legislators, will lead to environmental policy changes that will help reduce global warming.[242] Already, the new Congress has announced plans to increase funding for renewable energy research and production.[243] Additionally, Congress is expected to lessen America's reliance on oil, terminate the large tax breaks that are currently in place for large oil companies, grant new incentives for energy-efficient materials, hold the Environmental Protection Agency accountable for stricter regulations and oversight, promote "green" businesses, and reduce the threat of drilling in the Arctic National Wildlife Refuge.[244] Recently, the House voted for an $18 billion tax package that would eradicate tax breaks for five of the largest oil companies and use the savings to boost incentives for wind energy, solar energy, and general energy efficiency.[245]

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237. *Id.*

238. *Id.*

239. Parenteau, *supra* note 62, at 364.

240. Larry West, *Election 2006: Top 10 Potential Environmental Benefits of the 2006 Election*, ABOUT.COM, http://environment.about.com/od/environmentallawpolicy/a/2006_election.htm (last visited Mar. 28, 2008).

241. *Id.*

242. *Id.*

243. *Id.*

244. *Id.*

245. *House Votes to Rescind Tax Break for Big Oil*, SEATTLE TIMES, Feb. 28, 2008, at A5, *available at* 2008 WLNR 3991908.

VII. CONCLUSION

Global warming poses one of the gravest threats that mankind has ever faced. Because the federal government has been unable or unwilling to act in response to this crisis, Congress must instead authorize the states to use their police power in order to enact legislation to protect their constituents from the deleterious environmental, economic, and health effects of climate change. Washington's novel synthesis of tax and environmental policy, exemplified by RCW sections 82.04.440 and 82.16.120, is a compelling approach to combating the looming dangers presented by the state's carbon emissions. Of course, climate change is a global problem that demands global action, including federal action in the U.S. State action has been quite innovative in creating viable solutions to combat climate change, but without federal support, state efforts may be in vain. Congress must act. Should it fail to do so, our state ecosystem, and those around the globe, will inevitably face an unprecedented catastrophic deterioration.