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CLIMATE CHANGE AND THE STATES:

CONSTITUTIONAL ISSUES ARISING FROM STATE CLIMATE PROTECTION LEADERSHIP

by Robert K. Huffman & Jonathan M. Weisgall*

INTRODUCTION

As state, local, and federal legislators develop policies to address global climate change, the United States may soon face the difficult political and legal necessity of reconciling multiple—and potentially conflicting—state, local, regional, and federal climate change programs into a comprehensive national policy to reduce greenhouse gas emissions. This Article reviews some of these programs and explores several constitutional issues that may arise from state programs designed to combat climate change.

The causes of climate change are not completely understood, but there is now widespread agreement that humans are having an impact on the climate, primarily from carbon dioxide and other greenhouse gases (“GHG”) that are emitted from burning fossil fuels. As these gases accumulate in the atmosphere, they trap heat close to the earth’s surface, causing myriad effects on our delicate ecosystem.

Regulators and policymakers at the local, state, federal, and international levels are taking various actions to understand climate change and reduce GHG emissions. The first major action occurred in 1990, with the release of the first report by the Intergovernmental Panel on Climate Change (“IPCC”).¹ This was the first time that a detailed scientific endeavor was undertaken to study the climate change phenomenon. The IPCC’s first report led to international action, with the creation of the United Nations Framework Convention on Climate Change (“UNFCCC”). The UNFCCC is an international environmental treaty, adopted in 1992 at the United Nations Conference on Environment and Development in Brazil.² It created a UN Secretariat to oversee the Convention and substantively serves as a framework for further negotiations on detailed protocols aimed at reducing worldwide GHG emissions.

KYOTO PROTOCOL

Five years after the UNFCCC was created, at the Third Conference of the Parties in Kyoto, Japan, an agreement was reached to create binding emission reduction targets for industrialized nations. This 1997 agreement, known as the Kyoto Protocol, came into force on February 16, 2005, after being ratified

by the required number of parties that represent a specified minimum percentage of worldwide GHG emissions.³

The Kyoto Protocol is in effect only through 2012. Negotiations are currently underway to craft a successor agreement that would operate through at least 2020. This was the focus of the December 2007 Conference of the Parties 13 in Bali, Indonesia. These meetings resulted in an agreement, now known as the Bali Roadmap, to complete further negotiations over the coming two years.⁴

The United States, however, has not adopted the Kyoto Protocol, objecting to the inclusion of industrialized nations (Annex I Parties) but not the developing world. Seeing this as a competitive disadvantage that could cause significant harm to the U.S. economy, the government has refused to adopt the binding emissions limits called for in the Kyoto Protocol. Aside from the United States, every industrialized nation, including the European Union, has adopted the Kyoto Protocol.

The Kyoto Protocol provides three “flexibility mechanisms” that allow countries to reduce the costs of achieving their emissions reduction targets. These mechanisms are the Clean Development Mechanism (“CDM”), Joint Implementation (“JI”), and emissions trading. The CDM allows Annex I Parties to implement projects that reduce emissions in non-Annex I Parties, in return for Certified Emission Reduction (“CER”) credits.⁵ JI allows Annex I Parties to implement projects in other Annex I Parties that either reduce emissions or enhance carbon sinks, in return for Emission Reduction Units (“ERU”).⁶ CDM and JI projects are subject to a verification and certification process, in order to ensure the legitimacy of any CER or ERU credits that

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are generated by the projects. Emissions trading, the final mechanism, is a market-based strategy for reducing GHG emissions.

EMISSIONS TRADING SYSTEMS

Under the Kyoto Protocol, Annex I Parties may develop internal emissions trading markets or link together with other Annex I Parties to create larger trading markets. An emissions trading market contains a system-wide cap on emissions that decreases over time, thus ensuring that overall GHG emissions within the system decrease as well. The system-wide cap and market features give rise to the general term cap-and-trade to describe these emissions markets.

The emissions credits that can be traded are of a standard form, with each credit equal to one metric tonne of carbon dioxide equivalent emissions.⁷ This is the basic unit of currency in the emissions reduction world.⁸ In designing and operating carbon markets, the single most important issue is consistency and quality control in measuring emissions. If a tonne from one facility is not equal to a tonne from a neighboring facility, the market cannot operate properly. Therefore, without adequate monitoring, verification, and reporting procedures, emissions markets will fail to deliver actual emissions reductions.⁹

EUROPEAN UNION EMISSIONS TRADING SYSTEM

The most significant market developed under the Kyoto Protocol flexibility mechanisms is the European Union Emissions Trading System (“EU-ETS”).¹⁰ The EU-ETS, which began operation in 2005, is comprised of twenty-seven European member nations and sets a cap on the total emissions that can be generated from power stations, certain large industrial facilities, and oil refineries. Facilities covered by the EU-ETS must report their total emissions annually and surrender a number of allowances equal to their total GHG emissions. Some allowances are distributed to facilities for free, others are auctioned by governments, and others can be purchased on the market from traders, governments, or other entities that possess them (including allowances generated by credits in CDM or JI projects). If a facility has extra allowances after it surrenders those necessary to match its annual emissions output, it can sell them for profit. This provides an economic incentive to consistently reduce emissions at a facility. On the other hand, if a facility does not have enough allowances to cover its surrender requirement, it will have to purchase additional allowances to make up the shortfall. This serves as an incentive to reduce GHG emissions, particularly if the cost of the allowances in the market is greater than the cost of making modifications that lead to emissions reductions.

The current phase of the EU-ETS runs through 2012, to coincide with the timeframe of the operation of the Kyoto Protocol. Regardless of whether there is a global agreement to replace

the Kyoto Protocol, the EU-ETS will continue to operate, at least in a modified form. In January 2008, the European Commission released proposed rules for the next phase of the EU-ETS, which will run from 2013 to 2020.¹¹ The proposals will change several details in the operation of the market and include a provision that would allow the EU-ETS to link with trading systems in countries that have not ratified the Kyoto Protocol, something that is not permitted in the current phase. This is interpreted as a clear overture to the United States to link its future emissions market(s) to the EU-ETS.

U.S. FEDERAL GHG POLICY

The federal government has yet to pass legislation or issue regulations covering GHG emissions. In January 2007 a group of major corporations and prominent environmental groups formed the United States Climate Action Partnership (“US CAP”) and released a report entitled *A Call for Action*.¹² Its goal is to put pressure on Congress to adopt legislation regulating GHG emissions, including a comprehensive cap-and-trade program. While it may seem odd for a group of the

largest corporations in America to advocate for potentially costly regulation, they have come to realize that regulatory uncertainty and its concomitant risks may exact a greater long-term economic cost than comprehensive—but definite—legislation.

As of this writing, no comprehensive federal climate change legislation has been adopted. One major cap-and-trade bill, sponsored by Senators Lieberman and Warner,¹³ is considered the leading proposal on Capitol Hill, but there is only a small likelihood of final passage in 2008.

The Energy Independence and Security Act,¹⁴ signed into law in December 2007, contains several provisions that are intended to reduce GHG emissions, but it falls short of the comprehensive legislation advocated by US CAP and others. The Act includes the first increase in Corporate Average Fuel Economy (“CAFE”) standards for automobiles since they were enacted in 1975, requiring average fuel economy of thirty-five miles per gallon in 2020.¹⁵ It also includes provisions to improve energy efficiency in homes and buildings,¹⁶ a renewable fuel standard (mandating the production of at least thirty-six billion gallons of biofuels by 2020),¹⁷ and other provisions to meet President Bush’s “20 in 10” challenge for reducing gasoline usage by twenty percent in ten years.

A recent House Committee on Energy and Commerce white paper looked at the proper role of federal, state, and local governments in any comprehensive carbon regulation scheme.¹⁸ Working under the assumption that the federal government would eventually enact a cap-and-trade program like the Lieberman-Warner bill, the white paper revealed potential situations in which state and local leadership could lead to either increased emissions, increased overall costs, or both. It makes the argument that “climate change is a global, not local, problem, perhaps

No comprehensive federal climate change legislation has been adopted.

providing less need for allowing States to be more stringent.”¹⁹ As a result, “a more stringent State program may just shift the location of, rather than decrease, national emissions”²⁰ This would occur when regulated entities move their operations from states with higher (i.e., more expensive to comply with) standards to ones that follow the lower, federal standards.

The white paper does note, however, that state and local authorities do have a significant, complementary role to play in the effort to reduce GHG emissions. For example, building codes that mandate the use of better insulation in new homes would cause higher initial prices for consumers, but provide long-term savings as a result of lower energy bills. These measures “could capture . . . otherwise lost or uncovered emission reductions, and thereby decrease the societal cost of achieving greenhouse gas reductions.”²¹ The white paper also recognizes the importance of adequate and efficient monitoring, reporting, and verification of emissions. “It is probably more efficient to authorize State, Tribal, and/or local governments to inspect sources to determine compliance with national monitoring and record-keeping requirements than it would be to leave that exclusively to Federal inspectors.”²²

Many state leaders, frustrated at slow federal action to address climate change, are implementing both comprehensive and piece-meal programs at the state level to help reduce GHG emissions. The following section discusses the actions that states have taken on their own to reduce GHG emissions, focusing heavily on cap-and-trade programs. Next, this Article raises and analyzes the constitutional issues that may arise as a result of state responses to this pressing global problem, focusing heavily on the constitutional issues raised by attempts to link emissions trading systems among states and between states and foreign parties.

U.S. STATE-LEVEL ACTIONS

CAP-AND-TRADE PROGRAMS

Although the United States is not a signatory to the Kyoto Protocol, there are several efforts underway to establish state- or regional-level trading systems. These follow not only the model of the EU-ETS, but also other successful domestic cap-and-trade programs administered by the EPA, including the Acid Rain Program.²³

California is in the process of establishing its own cap-and-trade program. In September 2006, California adopted the Global Warming Solutions Act, also known as A.B. 32.²⁴ This law, in part, allows the state to establish a cap-and-trade program to help meet the goal of capping the state’s emissions at 1990 levels by 2020 and eventually reaching eighty percent below 1990 levels by 2050.²⁵ The program would be administered by the California Air Resources Board (“CARB”), which is in the process of adopting a scoping plan to identify California’s primary strategies for reducing GHG emissions under A.B. 32. The goal would be to have the cap-and-trade program operating by January 1, 2012.²⁶ Governor Arnold Schwarzenegger has openly expressed an interest in linking any cap-and-trade program, once it is open for business, with the EU-ETS market.²⁷

In addition to California’s intrastate efforts, three interstate groups are currently in the process of establishing carbon markets. One project, known as the Regional Greenhouse Gas Initiative (“RGGI”),²⁸ was initially formed in 2003 and is now made up of ten states in the Northeast and Mid-Atlantic: Maine, New Hampshire, Vermont, Massachusetts, Rhode Island, Connecticut, New York, New Jersey, Delaware, and Maryland. In addition, several eastern Canadian provinces have expressed interest in joining RGGI.

The consortium administering RGGI has published model rules for each of the states to adopt, and all ten states are in the process of adopting them in statutory or regulatory form. The goal is to have the market operating by January 2009. At this point, it appears likely that the market will be ready to open at that time, although all ten states may not be participating at the outset, as a few may have outstanding issues to resolve in the early stages of the program.

The second multi-state group, known as the Western Climate Initiative (“WCI”), consists of seven Western states and two Canadian provinces: Arizona, California, Montana, New Mexico, Oregon, Utah, Washington, British Columbia, and Manitoba. The WCI was established in February 2007, and as a result is not as far along in the process as RGGI. WCI is currently in the design phase, having completed basic design principles and established a year-long work-plan.²⁹ Its goal is to have the design of the market-based mechanism completed in August 2008. Based on this timeline, it is unlikely that the WCI will be able to establish a functioning market before 2011 or 2012.

A third group, consisting of nine Midwestern states and the Canadian province of Manitoba, signed the Midwestern Regional Greenhouse Gas Reduction Accord in November of 2007, which is designed to establish greenhouse gas reduction targets, a regional cap-and-trade protocol, and a regional system to track and manage greenhouse gas emissions.³⁰

RENEWABLE PORTFOLIO STANDARDS

A renewable portfolio standard (“RPS”) is a state-level mandate requiring electric utilities to obtain a certain percentage of their power from renewable resources. Twenty-four states and the District of Columbia currently have RPSs, while four other states have non-binding goals for adopting renewable energy.³¹

A typical RPS might call for having twenty percent of energy produced from renewable resources by 2020. Currently, Minnesota and Oregon have the highest standards calling for twenty-five percent renewable energy production by 2025.³² The renewable resources that qualify for state RPS programs generally include wind, solar (concentrated and photovoltaic), geothermal, and biomass. Nuclear power does not satisfy RPS requirements and cannot be used to meet the renewable standards.

AUTO EMISSIONS REGULATIONS

The Clean Air Act (“CAA”) prohibits states from issuing their own auto emissions regulations. There is one exception that applies only to California, as California was the only state regulating auto emissions prior to the enactment of the CAA in 1966.

Section 209(b) of the Act allows California to seek a waiver from the EPA, which shall be granted unless “the Administrator finds that—(A) the determination of the State is arbitrary and capricious, (B) such State does not need such State standards to meet compelling and extraordinary conditions, or (C) such State standards and accompanying enforcement procedures are not consistent with section 202(a)” of the CAA.³³ Other states then have the choice of adopting the federal rule or the California rule.

Citing the fact that automobile emissions account for roughly forty percent of GHG emissions in California, the California Greenhouse Gas Reduction Bill of 2002, known as A.B. 1493, requires CARB to adopt “regulations that achieve the maximum feasible reduction and cost-effective reduction of greenhouse gases from motor vehicles.”³⁴ The regulations are not fuel economy standards per se, but instead regulate the amount of GHG emissions that automobiles sold in the state may produce.

In 2004, CARB promulgated regulations pursuant to A.B. 1493 calling for a reduction in emissions by automobiles totaling over fifty million tonnes of carbon dioxide by 2030.³⁵ This equates to a twenty-seven percent reduction in automobile emissions by 2030. California formally sought a waiver from the EPA in December 2005.³⁶ Since California adopted its regulations, sixteen other states have followed its lead and passed laws requiring automobiles to meet the California standards.

After the April 2007 Supreme Court decision in *Massachusetts v. EPA*,³⁷ in which Massachusetts won a significant victory that formally establishes EPA’s authority to regulate GHG gases as pollutants, Governor Schwarzenegger met with EPA Administrator Stephen Johnson to encourage EPA to grant California’s waiver application. However, in December 2007, Administrator Johnson notified California that the waiver application would be denied, on the grounds that California’s situation does not meet the “compelling and extraordinary conditions” test.³⁸ Identifying global climate change as a worldwide problem and citing the Energy Independence and Security Act of 2007,³⁹ which increased CAFE standards, the EPA determined that California’s more strict GHG emissions reduction rule may not be enforced. This was the first time, after more than fifty successful applications, that a waiver request under Section 209(b) was denied by the EPA.⁴⁰

California and several other states have since sued the EPA, and the case is currently pending in federal court.⁴¹ For advocates of state action to slow the impacts of climate change, the waiver denial was both a significant blow to their efforts and a rallying

cry. Regardless of one’s views on the merits of the EPA decision, the decision underscores the importance of clarifying the role of the states, as this waiver decision is likely to be a major court battle lasting several years and costing millions of dollars.

GREENHOUSE GAS PERFORMANCE STANDARDS

In January 2007, California became the first state to adopt a greenhouse gas performance standard (“GGPS”).⁴² This is a facility-based emissions standard, affecting electric utilities, which requires that all new long-term baseload generation com-

mitments in California produce no more emissions than a combined gas cycle turbine plant.⁴³ It prohibits load-serving entities (investor-owned utilities, energy service providers, and community choice aggregators) from entering into long-term financial commitments (five years or more) for baseload generation with higher than proscribed emissions, regardless of the type of fuel used in the plant.⁴⁴

This means that no new coal-fired plants can be built in California, nor can existing plants make significant capital improvements that do not con-

form to the GGPS. In addition, it prohibits California utilities from contracting to import power from out of state that does not comply with the emissions requirements of the GGPS.⁴⁵

CONSTITUTIONAL ISSUES

The United States’ system of federalism allows the federal and state governments to share power in certain areas, while each maintains exclusive areas where the other may not regulate. The power of the federal government is constrained by the Constitution and does not include general police powers, which are reserved to the states.⁴⁶ State governments, however, may not regulate certain aspects of interstate and foreign commerce, foreign affairs, and other areas of reserved federal power.

When states take actions to regulate greenhouse gases, it raises questions about the extent of state authority to regulate the economy and the environment. Linking emissions trading programs or enacting auto emissions regulations brings states to the far end of their regulatory authority, given the transborder nature of emission trading and carbon dioxide emissions generally. This section explores the constitutional issues that can potentially arise from state actions to reduce GHG emissions.

COMMERCE CLAUSE

The Commerce Clause, Article I, § 8, cl. 3, gives the federal government the power “[t]o regulate Commerce with foreign Nations, and among the several States[.]”⁴⁷ The Supreme Court has long considered the Commerce Clause to be “an implicit

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restraint on state authority, even in the absence of a conflicting federal statute.”⁴⁸ This concept is known as the Dormant Commerce Clause—wherein the Constitution acts as a prohibition on certain types of state actions that affect interstate commerce, invalidating the state law by negative implication.⁴⁹

Although the Dormant Commerce Clause doctrine has gained widespread acceptance, at least two current Supreme Court justices (Justice Scalia and Justice Thomas) reject it altogether. Regardless of these two justices, it is highly unlikely that a majority of the Court would reject the Dormant Commerce Clause doctrine. Were the doctrine to be rejected by the Court, state actions would never be invalidated for conflicting with unexercised congressional power under the Commerce Clause, but would be subject to invalidation only for express or implied preemption by federal law.

The basic test for whether a state law violates the Commerce Clause is to look first at whether the law discriminates on its face against out-of-state entities or transactions.⁵⁰ If there is facial discrimination, which essentially means a protectionist measure that is written in a manner that singles out foreign entities or transactions for disadvantageous treatment when compared to their in-state counterparts, then the state law will be invalidated.⁵¹ If there is no facial discrimination, the state law can still run afoul of the Commerce Clause if it places unwarranted burdens on interstate commerce in a particular application or range of applications.⁵² “Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.”⁵³

A linked cap-and-trade program may raise questions of discrimination. One of the biggest issues with establishing regional cap-and-trade programs is “leakage,” which occurs when a regulated entity imports cheaper, higher-polluting power from an area outside the program to evade cap obligations. For example, if an electrical utility in a state covered by RGGI did not possess enough allowances for the current year, and it was more economical to purchase coal-fired electricity from the neighboring state than to buy allowances on the open market, the emissions produced by the neighboring utility company would “leak” into the regulated space of the cap-and-trade system when the electricity was purchased by the RGGI-covered company.

This leakage issue creates a serious problem for regulators. If the trading system allows or remains silent on importing power from states that leave GHG emissions unregulated, the credibility of the program as a whole will become suspect. At the same time, if the regional system were to attempt to ban the purchase of any power from non-member states, there would be at least a colorable argument of facial discrimination. In order to avoid these problems, the designers of regional cap-and-trade programs like RGGI will have to find innovative solutions that can protect the integrity of the emissions reduction mechanisms while at the same time avoiding potential constitutional pitfalls.

Linking a state or regional cap-and-trade program with a foreign trading system like the EU-ETS would raise unique con-

stitutional issues not present in a wholly domestic linkage situation. Emission trading linkages with foreign parties would create a whole host of problems, from verification and standardization of credits at an international level to accounting and securities disclosure laws and regulations. Credits created by European entities would require some sort of regulation under federal securities and/or commodities law. The federal government would have a good argument that states should not be involved in activities over which they do not have full control. Because a state cannot independently regulate securities and commodities markets, it may be impossible for a state or group of states to provide adequate oversight of a market linked to international participants.

In addition, the Dormant Commerce Clause can potentially affect attempts to institute greenhouse gas performance standards. This would not be a discrimination issue, as the performance standards are facially neutral. Rather, courts would have to look at whether the performance standards unduly burden interstate commerce. If California’s rules prohibit long term contracts for the in-state sale of energy from out-of-state coal-fired plants, out-of-state producers are likely to cry foul and sue over the lost business from California’s utilities. At that point, the courts would have to weigh the relative benefits of California’s standards against the burden they place on interstate commerce.

COMPACTS CLAUSE

The Compacts Clause, Article I, § 10, cl. 3, reads in part: “No state shall, without the consent of Congress, . . . enter into any Agreement or Compact with another State, or with a foreign power[.]”⁵⁴

In reviewing claims under the Compacts Clause, courts look generally to whether states are attempting to enhance their power at the expense of the federal government.

Where an agreement is not ‘directed to the formation of any combination tending to the increase of political power in the States, which may encroach upon or interfere with the just supremacy of the United States,’ it does not fall within the scope of the Clause and will not be invalidated for lack of congressional consent.⁵⁵

The first question that courts look at is whether a contractual arrangement, such as a cap-and-trade system, reaches the point of being a “compact” under the Compacts Clause. If it is a compact, then it generally must be approved by Congress or it will be invalid.⁵⁶ Once approved by Congress, it reaches the level of federal law. Thus, for an unapproved state-to-state or state-to-foreign-party relationship to be valid, it must not reach the formality of being a “compact” for these purposes.

To answer the first question, whether an arrangement is an agreement or compact, the courts look to the general indicia of a compact. The Supreme Court summarized the relevant factors in *Northeast Bancorp v. Federal Reserve*,⁵⁷ a decision involving an agreement by holding companies to purchase banks:

The . . . statutes . . . both require reciprocity and impose a regional limitation But several of the classic indicia of a compact are missing. No joint organization or body has been established to regulate regional banking

or for any other purpose. Neither statute is conditioned on action by the other State, and each State is free to modify or repeal its law unilaterally. Most importantly, neither statute requires a reciprocation of the regional limitation.⁵⁸

From the passage above, one can draw some general criteria for determining whether a contractual relationship is an agreement or compact. There should be some sort of joint organization or body to govern the agreement, if necessary. It should be binding; that is, no state can freely remove itself from the agreement. And it must require a reciprocity of the regional limitation, meaning that one party cannot agree to a nationwide program while another believes the agreement only covers a handful of states.

Regarding a regional cap-and-trade program, courts are unlikely to find that RGGI or a similar program is a compact, unless the agreement contains language that conditions actions (in one state) on actions by other states and is not freely revocable by participant states. It appears, based on *Northeast Bancorp*, that a voluntary union, which allows for a state to back out should it not want to participate, would not be considered a compact for the purposes of the Clause.

However, it is difficult to see how a linked international cap-and-trade framework could be crafted so as not to constitute a compact or even a treaty, which would be impermissible under Article I, § 10, cl. 1, regardless of the presence or absence of congressional approval. In order to have a properly functioning linkage between markets, there would need to be guarantees regarding enforceability and permanence. Without legally enforceable guarantees about the quality of the credits being traded, the markets are unlikely to succeed. There would be a serious problem, for example, if an offset project in California created credits that were purchased by a steel manufacturer in France, and California de-linked itself from the markets. The problem of how the French manufacturer would account for the credits in the absence of a monitoring or verification mechanism to account for what is happening in California is a significant one. The only way to ensure the integrity of the credits being traded in the marketplace is to create a framework that is robust enough to protect all of the parties involved. This would presumably include the inability to voluntarily leave the program and would be most easily accomplished with some sort of central emissions registry that aggregates and processes data from all participants. These components are almost certain to create a compact under the Compacts Clause, which would then require congressional approval in order to be valid.

SUPREMACY CLAUSE

The Supremacy Clause, Article VI, cl. 2, defines the Constitution and laws made “in Pursuance thereof” as “the supreme Law of the Land[.]”⁵⁹ This provision allows federal law to preempt state law in certain circumstances.

“Even without an express provision for preemption, we have found that state law must yield to a congressional Act in at least two circumstances,” the Supreme Court noted in *U.S. v. Locke*.⁶⁰ “When Congress intends federal law to ‘occupy the

field,’ state law in that area is preempted. And even if Congress has not occupied the field, state law is naturally preempted to the extent of any conflict with a federal statute.”⁶¹

A presumption of non-preemption arises in disputes involving the traditional police powers of the states; despite the presumption, even the police powers will yield when Congress clearly intends to supersede state law.⁶² In addition, when there is a history of significant federal presence in the area of regulation, there is no presumption of state law validity.⁶³

With a cap-and-trade system, the question is whether any federal law creates a conflict or if the federal government otherwise occupies the field. At this point, Congress has not passed any legislation that would present a direct conflict with a multi-state cap-and-trade system. Indeed, the federal government has been remarkably absent from the field of greenhouse gas regulation in general.

In the wake of *Massachusetts v. EPA*,⁶⁴ the federal government’s inaction becomes even more stark. The Court noted that “EPA has not identified any Congressional action that conflicts in any way with the regulation of greenhouse gases from new motor vehicles.”⁶⁵ Although issued in the context of federal regulations rather than state statutes, the point is the same: the federal government has not taken efforts to regulate GHG emissions. *Massachusetts v. EPA* held that EPA has the authority to regulate GHG emissions from automobiles because they fit within the statutory definition of “air pollutant” under § 202(a)(1).⁶⁶ The case was remanded to the EPA for the agency to either make a finding of endangerment and regulate auto emissions or provide a reasoned judgment as to why GHGs do not contribute to global warming and can thus escape regulation.⁶⁷

Even if the EPA decides to regulate GHG emissions from autos, that would not necessarily provide a conflict for a cap-and-trade program. Most proposals for cap-and-trade programs only regulate tailpipe emissions indirectly. If they capture the transportation sector, it is done upstream through regulating the fuel industry, rather than limiting actual vehicle emissions. As a result, it is unlikely that any forthcoming rule stemming from *Massachusetts v. EPA* would preempt state cap-and-trade initiatives.

The best case for federal preemption would arise if the federal government instituted a similar cap-and-trade system or other form of comprehensive carbon emissions regulation. Any program that created a nationwide price for carbon would likely be interpreted as directly conflicting with state programs; in the alternative, courts would probably hold that federal efforts occupy the field of GHG regulation. But lacking such a program, as is currently the case, it is difficult to see any way in which a state-organized cap-and-trade program could be preempted under the Supremacy Clause.

Some congressional leaders are advocating for express preemption in any future comprehensive cap-and-trade bill. The Dingell-Boucher white paper,⁶⁸ which discusses the role of federal, state, and local governments in efforts to reduce GHG emissions, makes the case for express preemption. “[O]nce a national, economy-wide cap-and-trade program is adopted, State

or regional cap-and-trade programs may interfere with the efficient functioning of the Federal cap-and-trade program[.]”⁶⁹ As a result, “Chairman Dingell has made it very clear that he believes that motor vehicle greenhouse gas standards should be set by the Federal Government, not by State governments[.]”⁷⁰ In addition, the analysis finds that compliance costs and overall system costs (including regulatory overhead) are likely to be higher in any duplicative system of federal and state/regional regulation.⁷¹ While the current version of the Lieberman-Warner bill actually encourages and provides incentives for states to take actions above and beyond the federal cap-and-trade program,⁷² there is a possibility that an express preemption clause could be part of any final bill.

The Supreme Court recently looked at the scope of express preemption of state laws, which may be relevant as applied to future GHG regulations.⁷³ In *Rowe v. New Hampshire Motor Transp. Ass’n*, several transport carrier associations sued Maine over regulations governing the conduct of carriers that deliver packages containing tobacco, as a way to help prevent youth from purchasing cigarettes through mail-order retailers. Federal motor carrier law expressly preempts any state from “enact[ing] or enforc[ing] a law . . . related to a price, route, or service of any motor carrier . . . with respect to the transportation of property.”⁷⁴ The state law, for example, required carriers to utilize a recipient-verification service, to ensure that the person who ordered the tobacco is also the recipient, and that the recipient is at least eighteen years old.⁷⁵

In holding that the state law was preempted, the court noted that “to interpret the federal law to permit these, and similar, state requirements could easily lead to a patchwork of state service-determining laws, rules, and regulations. That state regulatory patchwork is inconsistent with Congress’s major legislative effort to leave such decisions, where federally unregulated, to the competitive marketplace.”⁷⁶ This line of reasoning could be relevant, particularly for state efforts to regulate GHG emissions from automobiles.

Although there has not been affirmative congressional action to deregulate GHG emissions, as there was with the motor carrier industry, the threat of inconsistent state regulations is a significant tool for the federal government to yield. The threat of a patchwork of state laws was one of the major reasons EPA Administrator Johnson decided to reject California’s application for a waiver—even though there could never be more than just the federal standard and the California standard in that instance. The easiest way to prevent the threat of a patchwork of standards is to include in any federal legislation an express preemption clause that prohibits states from acting in a given area.⁷⁷ Should the federal government adopt comprehensive carbon legislation, it is likely to include some level of express preemption of state laws to ensure a consistent approach for the entire country. This will inevitably lead to legal battles that delay the implementation of any comprehensive carbon regulation program.

INTERFERENCE WITH FOREIGN AFFAIRS

The power to conduct foreign affairs is vested exclusively in the federal government. Aspects of the power are constitu-

tionally divided between the President in Article II (e.g., power to make treaties) and the Congress in Article I (e.g., power to raise an army, declare war). States do not play a role in foreign affairs, as it is important for the federal government to be able to speak with one voice on behalf of the national interest for matters involving foreign affairs.

Generally, the only cases where courts have struck down laws as interfering with foreign affairs power are “state or local laws purporting to set up their own authorities as mini-state-departments, with power to oversee and either approve or disapprove foreign regimes or the negotiation efforts of the U.S. Executive Branch[.]”⁷⁸

In *Zschernig v. Miller*,⁷⁹ the Supreme Court invalidated an Oregon law that prevented a nonresident alien from inheriting property unless certain conditions were met—primarily, a reciprocal right for Americans in the alien’s country and the assurance that any property received in Oregon would not be confiscated at home. Noting that states are the typical forum for probate matters, the Court still found the law problematic. “The several States, of course, have traditionally regulated the descent and distribution of estates. But those regulations must give way if they impair the effective exercise of the Nation’s foreign policy.”⁸⁰ *Zschernig* involved a citizen of East Germany, a country with which the United States had no treaties regarding inheritance. Regardless, “even in absence of a treaty, a State’s policy may disturb foreign relations.”⁸¹

*Crosby v. National Foreign Trade Council*⁸² is the first in a line of recent foreign affairs cases that focus on state attempts to limit contact with foreign countries. The *Crosby* court heard a challenge to a Massachusetts law that prohibited state entities from buying goods or services from companies doing business with Burma.⁸³ At the time the law was passed, there was no similar federal prohibition, although a federal law providing for sanctions on Burma was enacted a few months later. Although the Court spoke specifically of the Supremacy Clause, the decision’s rationale focused heavily on how the Massachusetts law tied the President’s hands and thus reduced his leverage against Burma.

We need not get into any general consideration of limits of state action affecting foreign affairs to realize that the President’s maximum power to persuade rests on his capacity to bargain for the benefits of access to the entire national economy without exception for enclaves fenced off willy-nilly by inconsistent political tactics.⁸⁴

The *Crosby* reasoning was followed recently in an Illinois case.⁸⁵ The district court there looked at an Illinois law that regulated contact with and investment in Sudan and determined that the state law was unconstitutional, based primarily on Supremacy Clause grounds. There was, however, extensive discussion of the foreign affairs powers in the decision. Understanding that the federal government has a unique and exclusive role in carrying out the country’s foreign policy, the court noted that “the degree of impact a state law has or might have on the national government’s conduct of foreign affairs is the relevant inquiry.”⁸⁶ In *National Foreign Trade Council v. Giannoulis*,

requiring pension funds to divest from Sudan, while potentially raising difficulties for the fund managers, did not interfere with the federal government's authority to conduct foreign affairs.⁸⁷

The *Giannoulis* ruling also contains dicta that is supportive of state efforts to reach non-discriminatory agreements with foreign entities: the court indicates that "it does not appear that state and local governments are prohibited from entering into 'sister state' agreements or other bilateral agreements with sub-national foreign governments or foreign trade associations."⁸⁸

Finally, in *American Insurance Ass'n v. Garamendi*,⁸⁹ the Supreme Court extended the ruling in *Crosby* to areas where there was no explicit federal statute, but merely executive agreements between the President and heads of foreign states. *Garamendi* involved a California law requiring any insurer in the state to disclose information about all policies sold in Europe between 1920 and 1945. This was seen as a way of ensuring that claims belonging to Holocaust victims were paid to any survivors and their heirs living in California.

President Clinton, however, had made executive agreements with Germany, Austria, and France so that all claims against German insurance companies relating to the Holocaust would be heard by an international commission established for that purpose.⁹⁰ The Court noted that the President has considerable authority in the area of foreign relations and can act independently of Congress. "While Congress holds express authority to regulate public and private dealings with other nations in its war and foreign commerce powers, in foreign affairs the President has a degree of independent authority to act."⁹¹ Thus, congressional silence does not undermine the executive agreements, which can, even without an explicit conflict, preempt state laws.

Garamendi was a 5-4 decision, with Justices Rehnquist and O'Connor in the majority. Justice Ginsburg's dissent, which was joined by Justices Stevens, Scalia, and Thomas, focused on whether there was an explicit conflict between the executive agreement and the state law. Without such a conflict the dissenting Justices would not allow an executive agreement to preempt a state law. Justice Ginsburg also noted that "the notion of 'dormant foreign affairs preemption' with which *Zschernig* is associated resonates most audibly when a state action 'reflects a state policy critical of foreign governments and involves 'sitting in judgment' on them.'"⁹²

Applying the case law above to a scenario in which states attempted to link to a foreign trading system, the lack of a coher-

ent federal policy on GHG regulation at this point strongly points to the constitutionality of such a linkage. The biggest potential problem would occur if there is federal legislation that makes mention of international linkages, or if the President makes clear statements concerning national priorities for GHG regulation that conflict with linking domestic trading systems with their international counterparts.

Perhaps just as important, any attempt to link to foreign emissions trading systems will be viewed very differently from the *Crosby* and *Giannoulis* cases. States attempting linkages will not be disparaging or otherwise passing negative judgment on foreign parties, as occurred in those cases involving state laws prohibiting or restricting commerce with rogue nations. Without that factor, it is difficult to imagine how courts could find any sort of interference with America's foreign policy prerogatives. Thus, cap-and-trade system linkages are likely permissible overtures to international partners, particularly if the federal government still has not undertaken a comprehensive scheme of carbon regulation.

CONCLUSION

State governments continue to demonstrate leadership in combating climate change—from adopting energy efficiency standards to enacting renewable portfolio standards to developing cap-and-trade programs aimed at reducing carbon dioxide emissions, often as part of regional compacts. At the same time, the Congress is in the process of developing national climate change legislation and agencies in the Executive Branch are defining their roles. As the federal and state governments begin regulating the same areas of the economy and the environment, the potential for conflicting programs arises.

State programs are potentially vulnerable to a variety of constitutional challenges, including through the Commerce, Compacts, Supremacy, and Foreign Affairs clauses. As the federal government solidifies its approach to global climate change over the next several years, the likelihood for preemption of state programs will become more evident. It is apparent now, however, that state programs are in serious jeopardy if the federal government actively seeks to restrict state authority. If the current or future President does not want states to play an active role in climate change regulation, he or she will have several constitutional tools at their disposal to handicap the states' abilities to create programs that reduce GHG emissions. 

Endnotes: Climate Change and the States

¹ INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, FIRST ASSESSMENT REPORT (1990), reprinted in *Climate Change: The IPCC Scientific Assessment* (J.T. Houghton, et al. eds., 1990).

² United Nations Framework Convention on Climate Change, May 9, 1992, 31 I.L.M. 849, available at <http://unfccc.int/resource/docs/convkp/conveng.pdf> (last visited Mar. 13, 2008) [hereinafter UNFCCC].

³ Kyoto Protocol to the United Nations Framework Convention on Climate Change, 1998, 37 I.L.M. 22, available at <http://unfccc.int/resource/docs/convkp/kpeng.pdf> (last visited Mar. 13, 2008) [hereinafter Kyoto Protocol].

⁴ See, e.g., UNFCCC, Decision -/CP.13 (2007); UNFCCC, Decision CMP.3 (2007).

⁵ Kyoto Protocol, *supra* note 3, art. 12.

⁶ Kyoto Protocol, *id.* art 6.

⁷ Kyoto Protocol, *id.* art 17.

ENDNOTES: CLIMATE CHANGE AND THE STATES *continued from page 13*

⁸ The actual credits can originate from emissions allowances assigned to facilities, auctioned by a central body overseeing the market, and from CER and ERU credits.

⁹ Even though the United States does not currently have a federal cap-and-trade program, Senator Feinstein introduced a bill in December 2007 to facilitate price transparency in markets for the sale of emissions allowance. *See* Emission Allowance Market Transparency Act of 2007, S.2423, 109th Cong, (2007). This bill would direct the Environmental Protection Agency and the Commodities Futures Trading Commission to issue regulations that would protect the integrity and transparency of a federally-mandated emissions trading system.

¹⁰ Council Directive 96/61, 2003 O.J. (L 275) (EC), *available at* <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:275:0032:0046:EN:PDF> (last visited Mar. 13, 2008).

¹¹ Commission Proposal for a Decision of the European Parliament and of the Council on the effort of Member States to reduce their greenhouse gas emissions to meet the Community's greenhouse gas emission reduction commitments up to 2020, COM (2008) 30 final (Jan. 23, 2008).

¹² UNITED STATES CLIMATE ACTION PARTNERSHIP, A CALL TO ACTION (2007), *available at* <http://www.us-cap.org/USCAPCallForAction.pdf> (last visited Mar. 13, 2008).

¹³ America's Climate Security Act of 2007, S. 2191, 109th Cong. (2007).

¹⁴ Energy Independence and Security Act of 2007, Pub. L. No. 110-140, 121 Stat. 1492 (2007)[hereinafter EISA].

¹⁵ EISA, *id.* § 102(b)(2)(A).

¹⁶ EISA, *id.* §§ 401-495.

- ¹⁷ EISA, *id.* § 202(a)(2)(B)(i)(I).
- ¹⁸ U.S. HOUSE OF REPRESENTATIVES COMMITTEE ON ENERGY AND COMMERCE, CLIMATE CHANGE LEGISLATION DESIGN WHITE PAPER: COMPETITIVENESS CONCERNS/ENGAGING DEVELOPING COUNTRIES (2008), *available at* http://energyccommerce.house.gov/Climate_Change/White_Paper.Competitiveness.013108.pdf (last visited Mar. 11, 2008) [hereinafter CLIMATE CHANGE WHITE PAPER].
- ¹⁹ CLIMATE CHANGE WHITE PAPER, *supra* note 18, *id.* at 11.
- ²⁰ CLIMATE CHANGE WHITE PAPER, *supra* note 18, *id.*
- ²¹ CLIMATE CHANGE WHITE PAPER, *supra* note 18, *id.* at 18.
- ²² CLIMATE CHANGE WHITE PAPER, *supra* note 18, *id.*; *see supra* note 9 for discussion of S. 2423, the Emission Allowance Market Transparency Act of 2007.
- ²³ 40 C.F.R. pts. 72-78 (2008).
- ²⁴ CAL. HEALTH & SAFETY CODE § 38500 (Deering 2008) [hereinafter CHSA].
- ²⁵ CHSA, *id.* § 38550.
- ²⁶ CHSA, *id.* § 38562(a).
- ²⁷ Exec. Order No. S-20-06 (Oct. 18, 2006) by the Governor of the State of California.
- ²⁸ REGIONAL GREENHOUSE GAS INITIATIVE, MEMORANDUM OF UNDERSTANDING, *available at* http://www.rggi.org/docs/mou_12_20_05.pdf (last visited Mar. 24, 2008).
- ²⁹ WESTERN CLIMATE INITIATIVE, WORK PLAN OCTOBER 2007 – AUGUST 2008 (Oct. 29, 2007), *available at* <http://www.westernclimateinitiative.org/ewebeditpro/items/O104F13792.pdf> (last visited Mar. 23, 2008).
- ³⁰ The agreement was signed by the governors of Wisconsin, Minnesota, Illinois, Indiana, Iowa, Michigan, Kansas, Ohio, South Dakota, and the Premier of Manitoba, with Indiana, Ohio, and South Dakota signing the agreement as observers to participate in the formation of the regional cap-and-trade system. *See* <http://www.midwesterngovernors.org/govenergygov.htm>.
- ³¹ States with Renewable Portfolio Standards, Pew Center on Global Climate Change website, *available at* http://www.pewclimate.org/what_s_being_done/in_the_states/rps.cfm (last visited Mar. 14, 2008).
- ³² States with Renewable Portfolio Standards, *id.*
- ³³ 42 U.S.C. 7543(b)(1) (2008).
- ³⁴ CAL. HEALTH & SAFETY CODE § 43018.5(a) (Deering 2008).
- ³⁵ CAL. CODE REGS. TIT. 13 §§ 1900, 1961, 1961.1 (2008).
- ³⁶ Letter from Catherine Witherspoon, Executive Officer, CARB, to Stephen L. Johnson, Administrator, EPA (Dec. 21, 2005), *available at* <http://www.regulations.gov/fdmspublic/component/main?main=DocumentDetail&d=EPA-HQ-OAR-2006-0173-0017> (last visited Mar. 13, 2008).
- ³⁷ *Massachusetts v. EPA*, 127 S. Ct. 1438 (2007).
- ³⁸ Letter from Stephen L. Johnson, Administrator, EPA, to Arnold Schwarzenegger, Governor of the State of Cal., (Dec. 19, 2007), *available at* <http://www.epa.gov/otaq/climate/20071219-slj.pdf> (last visited Mar. 13, 2008); *see also* Jeremy Schiffer, EPA Rejects California’s Application for Waiver under Clean Air Act (Dec. 19, 2007), *available at* <http://ClimateIntel.com/2007/12/19/epa-rejects-californias-application-for-waiver-under-clean-air-act/> (last visited Apr. 5, 2008).
- ³⁹ Energy Independence and Security Act of 2007, Pub. L. No. 110-140, 121 Stat. 1492 (2007).
- ⁴⁰ CBS News, *Calif. Sues EPA Over Greenhouse Gas Limits* (Jan. 2, 2007), *available at* <http://www.cbsnews.com/stories/2008/01/02/national/main3667368.shtml> (last visited Mar. 13, 2008).
- ⁴¹ Petition for Review of Decision of the Administrator of the United States Environmental Protection Agency, *California v. EPA* (9th Cir., Jan. 2, 2008), *available at* http://ag.ca.gov/cms_attachments/press/pdfs/n1514_epapetition-1.pdf (last visited Mar. 13, 2008).
- ⁴² Public Utility Commission of the State of California, Rulemaking No. 06-04-009 (Apr. 13, 2006), *available at* <ftp://ftp.cpuc.ca.gov/puc/energy/electric/climate+change/Reporting+Ruling+Seeking+Comments.pdf> (Mar. 13, 2008).
- ⁴³ Cal. Pub. Util. § 8341(a) (2007).
- ⁴⁴ Cal. Pub. Util., *id.*
- ⁴⁵ *See* Cal. Pub. Util., *id.* § 8341(e)(8); *see also* SB 1368 Fact Sheet, Natural Resources Defense Council, *available at* <http://www.solutionsforglobalwarming.org/docs/SB1368FactSheet.pdf> (last visited Mar. 13, 2008).
- ⁴⁶ U.S. CONST. amend. X.
- ⁴⁷ U.S. CONST. art I, § 8, cl. 3.
- ⁴⁸ *United Haulers Ass’n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 127 S. Ct. 1786, 1792 (2007).
- ⁴⁹ *See generally* *Gibbons v. Ogden*, 22 U.S. 1 (1824) (laying the foundations for the development of the Dormant Commerce Clause).
- ⁵⁰ *United Haulers Ass’n*, 127 S. Ct. at 1793.
- ⁵¹ *Id.*
- ⁵² *Am. Trucking Ass’ns v. Mich. Pub. Serv. Comm’n*, 545 U.S. 429, 433 (2005).
- ⁵³ *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).
- ⁵⁴ U.S. CONST. art I, § 10, cl. 3.
- ⁵⁵ *Cuyler v. Adams*, 449 U.S. 433, 440 (1981).
- ⁵⁶ *But see* *Virginia v. Tennessee*, 148 U.S. 503 (1893) (providing an exception, where the compact at issue was over historical border between two states). In this case, congressional approval was unnecessary.
- ⁵⁷ *Ne. Bancorp v. Fed. Reserve*, 472 U.S. 159 (1985).
- ⁵⁸ *Ne. Bancorp*, 472 U.S. at 175.
- ⁵⁹ U.S. CONST. art VI, cl. 2.
- ⁶⁰ *U.S. v. Locke*, 529 U.S. 89 (2000).
- ⁶¹ *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 372 (2000) (internal citations omitted).
- ⁶² *Locke*, 529 U.S. at 108.
- ⁶³ *Locke*, 529 U.S. at 108.
- ⁶⁴ 127 S. Ct. 1438 (2007).
- ⁶⁵ *Massachusetts*, 127 S. Ct. at 1461.
- ⁶⁶ *Massachusetts*, 127 S. Ct. at 1462.
- ⁶⁷ *Massachusetts*, 127 S. Ct. at 1463.
- ⁶⁸ CLIMATE CHANGE WHITE PAPER, *supra* note 18.
- ⁶⁹ CLIMATE CHANGE WHITE PAPER, *supra* note 18, at 18-19.
- ⁷⁰ CLIMATE CHANGE WHITE PAPER, *supra* note 18, at 25.
- ⁷¹ *See* CLIMATE CHANGE WHITE PAPER, *supra* note 18, at 16-17.
- ⁷² America’s Climate Security Act of 2007, S. 2191 (“Sec. 3402 – Allocation For States With Programs That Exceed Federal Emission Reduction Targets”).
- ⁷³ *Rowe v. New Hampshire Motor Transp. Ass’n*, 128 S. Ct. 989 (2008).
- ⁷⁴ 49 U.S.C. § 14501(c)(1).
- ⁷⁵ *See* ME. REV. STAT. ANN. tit. 22, § 1555-C(1) (2007).
- ⁷⁶ *Rowe*, 128 S. Ct. 989.
- ⁷⁷ *See, e.g.,* *Riegel v. Medtronic, Inc.*, 128 S. Ct. 999 (2008) (pre-emption clause in Medical Device Amendments of 1976 pre-empts state tort law requirements that are different from, or in addition to, federal requirements for medical devices).
- ⁷⁸ Personal correspondence with Prof. Laurence Tribe, Feb. 2, 2008.
- ⁷⁹ *Zschernig v. Miller*, 389 U.S. 429 (1968).
- ⁸⁰ *Zschernig*, 389 U.S. at 440-41.
- ⁸¹ *Zschernig*, 389 U.S. at 441.
- ⁸² *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363 (2000).
- ⁸³ *Crosby*, 530 U.S. at 366-67.
- ⁸⁴ *Crosby*, 530 U.S. at 381.
- ⁸⁵ *Nat’l Foreign Trade Council v. Giannoulis*, 523 F. Supp. 2d 731 (N.D. Ill. 2007).
- ⁸⁶ *Giannoulis*, 523 F. Supp. 2d at 745.
- ⁸⁷ *Giannoulis*, 523 F. Supp. 2d at 746.
- ⁸⁸ *Giannoulis*, 523 F. Supp. 2d at 744-45.
- ⁸⁹ 539 U.S. 396 (2003).
- ⁹⁰ *Garamendi*, 539 U.S. at 407.
- ⁹¹ *Garamendi*, 539 U.S. at 415.
- ⁹² *Garamendi*, 539 U.S. at 439 (Ginsburg, J., dissenting).