A Federal Midwife: Assisting the States in the Birth of a National Greenhouse Gas Cap-and-Trade Program

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I. INTRODUCTION

In June 2008, the United States Senate took up floor debate on America's Climate Security Act (ACSA), Senate Bill 2191, known by its cosponsors' names as Lieberman-Warner-Boxer.[1] The law would establish a national cap-and-trade program for greenhouse gases (GHGs). Though the bill failed to muster enough support to overcome a

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1. *See* America's Climate Security Act (ACSA), S. 2191, 110th Cong. (2007).

dogged Republican filibuster (at one point, they required the clerk of the Senate to read the full 491-page bill out loud),[2] most understood it to be a "congressional debate on training wheels"[3]—a rehearsal for when Congress takes up climate change again next year, after the 2008 elections take place and President George W. Bush has left the White House. With the expected shift in national leadership as well as undeniable scientific evidence that human-caused climate change is real,[4] it appears increasingly likely that there will be a federal program enacted within the next year mandating GHG-emission caps.

But just because *a bill* is passed does not mean the *right bill* will be passed. During the June debate, both the politicians and the media failed to give much thought to how the proposed law would interact with the pastiche of local, state, and regional laws and policies already in place to address climate change.[5] Two of the most prominent are cap-and-trade programs established by the northeastern states participating in the Regional Greenhouse Gas Initiative (RGGI) and California's state-wide program under its Assembly Bill 32 (AB 32).[6] More typical of the debate was political posturing that did not address how to make this essential legislation work.[7] Both the public and policymakers are in dire need of analysis and clarification on the interaction between federal and

2. Steven Mufson & Juliet Eilperin, *Senate Democrats May Pull Climate Bill; Week's Debate Has Been Contentious*, WASH. POST, June 6, 2008, at A2.

3. *CNN News: Issue #1* (CNN television broadcast June 2, 2008), *transcript available at* http://transcripts.cnn.com/TRANSCRIPTS/0806/02/ino.01.html (statement of Eamon Javers, Financial Correspondent for Politico).

4. *See* INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, SUMMARY FOR POLICY MAKERS 3 (2007), *available at* http://www.ipcc.ch/pdf/assessment-report/ar4/wg1/ar4-wg1-spm.pdf (explaining that there is "*very high confidence* that the global average net effect of human activities since 1750 has been one of warming"). "Very high confidence" means greater than 90% probability. *Id.* at 3 n.7.

5. *See* Robert B. McKinstry, Jr., John C. Dernbach & Thomas D. Peterson, *Federal Climate Change Legislation as if the States Matter*, 22 NAT. RES. & ENV'T 3, 3 (2008) ("[O]ne would think that the climate change bills introduced in Congress in 2007 would assign an important role to the states. One would be wrong. Six comprehensive climate change bills are now pending in Congress, and all are focused predominantly on the role of the federal government.").

6. Memorandum of Understanding, Regional Greenhouse Gas Initiative 1-2 (Dec. 20, 2005), *available at* http://www.rggi.org/docs/mou_12_20_05.pdf [hereinafter RGGI MOU]; CAL. HEALTH & SAFETY CODE § 38500-38599 (Deering 2008).

7. For example, Republican Senator James Inhofe said in a statement, "Now Democrats are on record as supporting legislation that would significantly increase prices at the pump and in our homes." Mufson & Eilperin, *supra* note 2. Not that the Democrats were more substantive. Senator Barbara Boxer expounded: "Here, as shown in this picture, is a beautiful creature, the polar bear." David. M. Herszenhorn, *More Talking than Listening in the Senate Debate about Climate Change*, N.Y. TIMES, June 5, 2008, at A27.

"subnational" (i.e., state, local, and regional) GHG mandates in order to avoid debilitating litigation down the road.

Yet something more fundamental is at stake. The lack of meaningful discussion on state roles in confronting climate change during the June debate reflects just how far the American political mainstream has drifted from the view that states are sovereigns in their own right. Nonetheless, in the absence of environmental leadership in Washington over the last decade, state governments, acting alone or in regional blocs like RGGI, have emerged to push courageous climate programs. The states accomplished this with little interference or oversight from an all but dysfunctional federal government and demonstrated a capacity for constructive problem-solving noticeably absent within the Beltway.[8] Rather than fostering these efforts, the debate in Washington is tilting closer and closer to shutting them down, through express preemption of subnational cap-and-trade programs in federal legislation.[9]

The United States is at a critical juncture in its history. The vast array of scandals and abuses emanating from both the Bush Administration and Congress have compelled thoughtful Americans of all political stripes to wonder whether massive corruption and imperial overreach are not aberrant, but emblematic of overcentralized national power. Never in most Americans' lifetimes have national-level politicians and bureaucrats seemed so out of touch with the needs and concerns of the general public. At the same time, rarely in American history have individual states so dramatically risen to the challenge in filling the resultant void. Giving the states a central and continuing role in a national endeavor as epoch-defining as climate change may be just the catalyst for the revitalization of an older style of American democracy—one in which "states-rights" is not just a convenient slogan for those opposed to federal public welfare legislation—that still has relevance in an era defined by Guantanamo, Jack Abramoff, and the Iraq War.

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8. *See* Richard E. Ayres & Jessica L. Olson, *The New Federalism: States Take a Leading Role in Clean Air*, 23 NAT. RES. & ENV'T 29, 32 (2008) ("[T]he last seven years have also shown how difficult it is for states to move national policy against an administration that seeks to roll back existing programs.").

9. During production of this Article, Representatives John Dingell and Rick Boucher, both Democrats, introduced the first federal climate bill that expressly preempts the California and RGGI programs. Draft Bill for Discussion, 110th Cong., § 733(b) (2008) ("No state, local, or regional authority may adopt or enforce a program that caps the amount of greenhouse gases that may be emitted or sold . . . .").

This Article focuses primarily on preemption issues arising from the linkage and integration of existing subnational carbon markets (like RGGI and AB 32) with a comprehensive federal scheme like ACSA.[10] Some types of state and local programs to reduce GHGs, such as smart-growth ordinances or green standards in building codes, will likely be unaffected by federal climate legislation.[11] More comprehensive regulatory efforts like RGGI, which establishes a cap-and-trade program for the Northeast's electric-utility sector, are at much greater risk of preemption in the event of a broad federal program like ACSA, which covers all major sectors of the economy. Although ACSA certainly pays respect to state climate leadership and offers some incentives to states that take on more ambitious goals, it does not go far enough in affirming the central regulatory role the states could play.[12]

The recent history of climate leadership in the states offers not just an opportunity to revitalize a more democratic federalism, but also a new understanding of what federalism means. In this model, the federal government has a "midwife" role to play. It should guide and support the states in the birth of GHG cap-and-trade systems, rather than preempting them from the top down. A monolithic national program will remain susceptible to the corruption endemic in a political environment as isolated from local democratic participation as our national capital.

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10. State and regional cap-and-trade programs face legal challenge under a number of other theories besides preemption, including the Dormant Commerce Clause, the Compact Clause, and "executive foreign affairs preemption." These challenges could be brought even in the absence of congressional enactment of a climate bill. While these issues may come up tangentially throughout the Article, a fuller analysis of them is beyond its scope. *See generally* Robert K. Huffman & Jonathan M. Weisgall, *Climate Change and the States: Constitutional Issues Arising from State Climate Protection Leadership*, 8 SUSTAINABLE DEV. L. & POL'Y 6, 12 (2008); Michael S. Smith, Note, *Murky Precedent Meets Hazy Air: The Compact Clause and the Regional Greenhouse Gas Initiative*, 34 B.C. ENVTL. AFF. L. REV. 387, 407-15 (2007); Yvonne Gross, Note, *Kyoto, Congress, or Bust: The Constitutional Invalidity of State CO2 Cap-and-Trade Programs*, 28 T. JEFFERSON L. REV. 205, 222-24, 230-35 (2005); Kirsten H. Engel, *Mitigating Global Climate Change in the United States: A Regional Approach*, 14 N.Y.U. ENVTL. L.J. 54, 73-75 (2005) [hereinafter Engel, *Mitigating Global Climate Change*]; Kirsten Engel, *The Dormant Commerce Clause Threat to Market-Based Environmental Regulation: The Case of Electricity Deregulation*, 26 ECOLOGY L.Q. 243, 250-52 (1999) [hereinafter Engel, *Dormant Commerce Clause*].

11. *See* U.S. HOUSE COMM. ON ENERGY & COMMERCE, CLIMATE CHANGE LEGISLATION DESIGN WHITE PAPER: APPROPRIATE ROLES FOR DIFFERENT LEVELS OF GOVERNMENT 6 (2008) [hereinafter HOUSE WHITE PAPER] (outlining traditional areas of state and local regulation that have the residual benefit of GHG reductions); *id.* at 21 (identifying building codes as one area where local expertise should govern); *see also* Nathan E. Endrud, Note, *State Renewable Portfolio Standards: Their Continued Validity and Relevance in Light of the Dormant Commerce Clause, the Supremacy Clause, and Possible Federal Legislation*, 45 HARV. J. ON LEGIS. 259, 270-74 (2008).

12. McKinstry, Dernbach & Peterson, *supra* note 5, at 4-5.

Thus, state cap-and-trade programs can serve as an effective counterweight to the accrual of wealth and power that can be expected in a regulatory framework as complex and all-encompassing as ACSA proposes. This is not to say that Congress should not impose some baseline standard below which states cannot be allowed to drop in regulating GHG-emissions. Rather, it is to argue that the "cooperative federalism" model that has served well in other federal environmental statutes should not be discarded in the climate context. In the struggle against global warming, Congress has the opportunity to give states the freedom to choose their own methods. It can open up what Justice Brandeis called our "laboratories" of democracy[13] in bringing to completion the environmental revolution now at hand.

Part II provides an overview of the two major state cap-and-trade initiatives, RGGI and California's AB 32, and then looks at the savings clause and other provisions touching on state roles in ACSA, the bill most likely to be enacted into law by Congress. Part III reviews the preemption doctrine and discusses its recent uses (and abuses) by industry lobbyists, Congress, and the Supreme Court. Part IV more closely analyzes some of the legal issues raised by cap-and-trade programs existing within a comprehensive federal system. It argues that linkage rather than preemption of these programs is possible, and in fact, would serve a vital democratic function in our federal system.

Before proceeding, a note regarding a carbon tax is in order. This is a policy proposal alternative to cap-and-trade for reducing GHG emissions. This Article assumes that political momentum is almost inexorably on the side of some type of federal cap-and-trade program. Many economists and environmentalists agree, however, that a tax is a superior policy instrument in terms of economic benefits and ecological efficacy.[14] There are bills in Congress for a carbon tax.[15] In fact, there is nothing inherently contradictory about having both a federal carbon tax

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13. New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

14. The Carbon Tax Center, for instance, lists the following leading economists as favoring a carbon tax: Paul Volcker, former Chairman of the United States Federal Reserve; Joseph Stiglitz, Nobel Laureate and Professor of Economics at Columbia University; Robert Reich, former Secretary of Labor; Jeffrey Sachs, Economist and Director of the Earth Institute; Gregory Mankiw and Edwin Glaeser, Professors of Economics at Harvard; Herman E. Daly, Economist and Founder of the School of Ecological Economics; Edward Snyder, Dean of the University of Chicago's Graduate School of Business; Tyler Cowen, Professor of Economics at George Mason University and Director of the Mercatus Center; and a majority of economists polled by the *Wall Street Journal* in February 2007. Carbon Tax Ctr., Scientists and Economists, http://www.carbontax.org/who-supports/scientists-and-economists/ (last visited Aug. 4, 2008).

15. *E.g.*, Save Our Climate Act, H.R. 2069, 110th Cong. (2007); America's Energy Security Trust Fund Act, H.R. 3416, 110th Cong. (2007).

and a federal cap-and-trade program or a federal carbon tax on top of state cap-and-trade programs, though nigh impossible politically.[16] This Article's discussion of the preemptive legal effects of a federal trading program should not be taken as endorsement of the trading model. Indeed, in calling for a federal program that pays respect and gives maximum effect to state emission-reduction programs, this Article is as (or *more*) supportive of a simple, nonpreemptive federal carbon tax as it is of a full-fledged federal carbon trading scheme. Such a tax would give the federal government an effective tool to reduce GHGs at the national level, while allowing state programs to remain intact and producing huge revenues that can offset tax breaks for other segments of society (e.g., income tax cuts for the middle class or rebates to offset higher electric bills).[17]

II. SUBNATIONAL CAP-AND-TRADE SYSTEMS AND FEDERAL PROPOSALS

In the wake of the federal government's failure to address climate change comprehensively, states and municipalities have undertaken a variety of efforts to encourage or mandate GHG reductions. Part II.A covers the major state-led cap-and-trade programs, the Regional Greenhouse Gas Initiative (RGGI) in the Northeast, AB 32 in California, and two more recent regional agreements of the Western states and the

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16. U.S. Representative John Dingell (D-MI), Chairman of the House Energy and Commerce Committee, proposed a carbon tax that would be in addition to a cap-and-trade program. The Honorable John D. Dingell, Carbon Tax Summary, http://www.house.gov/dingell/carbonTaxSummary.shtml (last visited Aug. 5, 2008). Rep. Dingell has since withdrawn his tax proposal, citing an economic downturn. *See* Charles Komanoff, *Carbon Tax Loses a Congressional Voice*, GRISTMILL, Apr. 16, 2008, http://gristmill.grist.org/story/2008/4/16/112741/007.

17. Ecological economist Herman E. Daly writes:

> Is it hard to come up with a reasonable [climate] policy? Not really—a stiff severance tax on carbon, levied at the well head, mine mouth, or port of entry, would go a long way by both reducing carbon use and giving an incentive for developing alternative carbon-free technologies. . . . We need to raise public revenue somehow, so why not tax carbon extraction heavily and compensate by taxing income lightly? More generally, tax the resource throughput (that to which value is added) and stop taxing value added. Tax bads (depletion and pollution), not goods (income). . . . People don't like to see the value added by their own efforts taxed away, even though we accept it as necessary up to a point. But most people don't mind seeing resource rents, value that no one added, taxed away. . . . And much of the revenue from the carbon severance tax could be rebated to the public by abolishing other taxes, especially regressive ones.

Herman Daly, *Climate Change: From "Know How" to "Do Now,"* GRISTMILL, Aug. 15, 2007, http://gristmill.grist.org/story/2007/8/14/165012/828.

upper-Midwestern states. Part II.B turns to the proposed federal legislation.

A. *State and Regional Cap-and-Trade Programs*

As of July 2008, nineteen states or state agencies have set GHG-emission reduction targets.[18] Six states have individually codified caps through legislation—Washington, Oregon, Hawaii, Maine, Minnesota, and New Jersey.[19] One commentator counted no less than 250 types of state and local laws or policies that have been enacted to combat climate change.[20] There are many other examples of state leadership in the climate arena beyond the scope of this Article. Relevant for our discussion are the two major cap-and-trade initiatives currently going forward in the states: RGGI and California's AB 32. Two other regional programs in the West and the Midwest are also in early stages of development. This Part provides a brief overview of these programs and discusses the legal and practical concerns attendant specifically on subnational cap-and-trade programs.

1. RGGI

Perhaps the most well-known state-led cap-and-trade program is RGGI—the Regional Greenhouse Gas Initiative. It covers the electric-utility sectors in the ten northeastern states.[21] It will also be the first program to go online in the United States, with a start-up date set for January 1, 2009 and two auctions to be held in the latter half of 2008.[22] In a Memorandum of Understanding (MOU) signed by the governors of the seven original state members of RGGI (Connecticut, Delaware, Maine, New Hampshire, New Jersey, New York, and Vermont) in December 2005, the states identified their common purpose not only to work to reverse global warming but

> to establish themselves and their industries as world leaders in the creation, development, and deployment of carbon emission control technologies, renewable energy supplies, and energy-efficient technologies, demand-side

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18. *See* Pew Ctr. on Climate Change, Greenhouse Gas Emissions Targets, http://www.pewclimate.org/what _s_being_done/in_the_states/emissionstargets_map.cfm (last visited Aug. 6, 2008).

19. HOUSE WHITE PAPER, *supra* note 11, at 3 n.4.

20. Robert B. McKinstry & Thomas D. Peterson, *The Implications of the New "Old" Federalism in Climate Change Law: How To Function in a Global Marketplace When States Take the Lead*, 20 PAC. MCGEORGE GLOBAL BUS. & DEV. L.J. 61, 72 (2007).

21. *See* RGGI MOU, *supra* note 6.

22. Press Release, Regional Greenhouse Gas Initiative Auction Process Goes Live Today (July 24, 2008), *available at* http://www.rggi.org/docs/press_release_7_24_08_final.pdf.

> management practices and increase the share of energy used within the Signatory States that is derived from secure and reliable supplies of energy. . . .[23]

To accomplish its goals, the RGGI states agreed to establish a "regional CO_2 emissions budget and allowance trading program" that will cover fossil-fuel-fired, electricity-generating plants producing 25 megawatts (MW) of power or more annually.[24] The regional emissions cap is set to start at approximately 190 million tons (U.S.) allocated by specific amount among the states, and decreasing at 2.5% per year beginning in 2015.[25] The program provides for a safety valve which is triggered at $10.00 (2005$) plus 2% annually starting in 2006.[26] If there is a safety valve triggering event, the compliance period is extended up to three years.[27] Offsets will be allowed to achieve up to 3.3% of compliance per covered power plant unless the price of a ton of CO_2 goes over $7.00 (2005$), at which point offsets for compliance will go up to 5% and additional measures kick in to make offsetting cheaper and more feasible.[28]

To oversee the RGGI market, the states established the Regional Organization (RO) (now known as RGGI, Inc.), headquartered in New York and run by an executive board made up of two representatives from each state.[29] The RO is to play an advisory and technical assistance role and will not have any regulatory or enforcement authority.[30] Each state must pass its own laws and regulations to implement the RGGI program.[31] Signatory states have the power to back out of RGGI with 30-days' notice.[32] By not giving the RO enforcement power and allowing states to withdraw voluntarily, the RGGI signatories seek to avoid a conflict with the Compact Clause in Article I of the United States Constitution.[33]

The RGGI states initially planned to continue only until a federal program was enacted. The MOU expressly provided for the event that a federal cap-and-trade program might be adopted.

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23. RGGI MOU, *supra* note 6.
24. *Id.* at 2.
25. *Id.* at 2-3.
26. *Id.* at 3.
27. *Id.*
28. *Id.* at 5.
29. *Id.* at 7.
30. *Id.* at 7-8.
31. *Id.* at 7.
32. *Id.* at 9.
33. *See* Smith, *supra* note 10, at 410-11 (discussing RGGI's validity under the test in *U.S. Steel Corp. v. Multistate Tax Commission*, 434 U.S. 452 (1978)).

> When a federal program is proposed, the Signatory States will advocate for a federal program that rewards states that are first movers. If such a federal program is adopted, and it is determined to be comparable to this Program, the Signatory States will transition into the federal program.[34]

However, an October 2007 letter from RGGI-state agency heads to members of Congress outlining recommendations for design of a federal program indicated no intention to cease operating if a federal emissions scheme were enacted but rather encouraged Congress to "work with and learn from" the state climate leaders.[35] The RGGI website itself contains no hint that the states intend to see the program folded if and when a federal program goes online.[36] Those involved with the design of RGGI have also argued that it should be able to coexist with a federal program, noting that the Clean Air Act (CAA) has allowed states to set their own, more stringent standards in the past, for example through State Implementation Plans (SIP) under section 108 of the CAA.[37]

Several key players in the development of the RGGI framework have noted potentially serious problems with its start-up and implementation. First, as a practical matter, there appears to be an overallocation problem; in other words, there are more allowances for release planned than emissions for which they are needed. In 2000, when the RGGI cap was first set, it was approximately equal to the total amount of emissions in the RGGI states.[38] But emissions in the region have already declined since 2000.[39] By 2006, the spread between actual emissions and the cap, which is not set to begin decreasing until 2015,

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34. RGGI MOU, *supra* note 6, at 10.

35. *See* Letter from RGGI to Members of Congress (Oct. 31, 2007), *available at* http://www.rggi.org/docs/rggi_letter_10_31_07.pdf. One contribution that initiatives like RGGI can bring to the design of federal legislation is institutional knowledge about the construction of complex emissions trading programs. In this letter, the RGGI administrators counsel Congress: (1) auction, do not distribute, allowances to the electric sector; (2) use the revenue from such auctions for consumer savings and energy efficiency; (3) give *states* the power to distribute that revenue; (4) do not grandfather new coal-plants—force them to purchase their allowances on the open market; (5) use emissions offsets as a flexibility mechanism; (6) develop rigorous accounting methods for offsets; (7) do not use safety valves in a way that will undermine the integrity of the cap or distort long-term carbon price signals; and (8) use existing emissions-reporting platforms to avoid redundancy. *Id.*

36. *See* About RGGI, http://www.rggi.org/about (last visited Sept. 17, 2008).

37. E-mail from David Farnzworth, Staff Attorney, Vermont Public Service Board, to author (Dec. 5, 2007, 14:13:00 EST) (on file with author); *see also* McKinstry & Peterson, *supra* note 20, at 98 (describing how National Ambient Air Quality Standards under section 108 of the Clean Air Act could be used to lower GHG-emissions at the state level if the EPA authorized states to do so).

38. Seth Kaplan, Conservation Law Found., RGGI in Context—Debunking Myths and Looking to the Federal Solution (Jan. 23, 2008) (PowerPoint presentation on file with author).

39. *Id.*

had widened to several million short tons of CO_2.[40] Overallocation carries a number of problems. The EU experience with its Emissions Trading System (ETS) demonstrates that an overallocated trading regime leads to windfall profits for emitting industries, does not reduce GHG emissions, and hits consumers and taxpayers the hardest financially.[41]

Beyond this concern, state or regional trading programs like RGGI apparently face a "Hobson's choice"[42] between (1) "leakage" of emissions due to import of electricity from non-RGGI-covered power plants located outside of the RGGI states on the one hand and (2) running afoul of the "Dormant" Commerce Clause on the other hand.[43] The Dormant Commerce Clause is a judicial doctrine limiting state power to interfere with interstate commerce.[44] The doctrine is derived from the plenary authority Congress is given over interstate commerce by Article I, Section 8, of the Constitution.[45] A basic rule in Dormant Commerce Clause jurisprudence is that state legislation that is facially discriminatory against out-of-state commerce is "virtually per se" invalid.[46] According to one of RGGI's designers, Richard Cowart, now at the Regulatory Assistance Project in Montpelier, Vermont, an increase in electricity imports of only 1.8% from coal-fired plants outside RGGI would negate 100% of the emissions reductions it achieves.[47] But banning out-of-state imports outright raises a serious constitutional problem.[48] Thus, this rule would likely invalidate any type

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40. *Id.*

41. Richard Cowart, The Regulatory Assistance Project, Power Markets, Efficiency, and Cap and Trade Architecture—Lessons from the States, slides 13-14 (Apr. 23, 2007) (PowerPoint presentation at Vermont Law School, on file with author).

42. City of Philadelphia v. New Jersey, 437 U.S. 617, 631 (1978) (Rehnquist, J., dissenting) (noting that Dormant-Commerce-Clause invalidation of New Jersey's law banning wastes from out of state presented the state with a "Hobson's choice" between prohibiting "*all* landfill operations" or accepting "waste from every portion of the United States, thereby multiplying the health and safety problems which would result if it dealt only with such wastes generated within the State").

43. Cowart, *supra* note 41, slides 25, 33.

44. Laura Gardner, *State Employers Are Not Sovereign: By analogy, Transfer the Market Participant Exception to the Dormant Commerce Clause to States as Employers*, 79 CHI.-KENT L. REV. 725, 738 (2004).

45. U.S. CONST. art. I, § 8, cl. 3.

46. *See, e.g.*, Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564, 607-08 (1997) (Scalia, J., dissenting).

47. *See* Cowart, *supra* note 41, slide 30.

48. On the other hand, if restrictions on electricity imports from outside of RGGI were worded in such a way that a court could conclude that these restrictions were not for the purpose of discriminating against out-of-state commerce but rather to protect the public health and safety, it might uphold them as merely an incidental impact on commerce. *See* Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 470-74 (1981) (upholding state law that did not discriminate on its

of ban RGGI-states might seek to impose on imported electricity from sources not covered by the RGGI cap.[49] California, however, has designed a "load-side emitter" cap-and-trade variant discussed below that might solve the Dormant Commerce Clause/leakage conundrum.

2. California's AB 32

California has recently enacted its own cap-and-trade system in the Global Warming Solutions Act of 2006, often referred to by its legislative number as Assembly Bill 32 (AB 32).[50] California's preliminary goal is to reduce GHG emissions to 1990 levels by 2020.[51] The energy crisis that hit in the wake of unscrupulous trading after the state deregulated its energy sector in 1998 has caused some in the state to oppose the state-level cap-and-trade program, which presents similar potential for manipulation, and to favor a state carbon tax.[52] Californians' fears that the system will be too "leaky" parallel the concerns raised by many in the Northeast regarding RGGI.[53]

California's program includes a "load-side emitter" cap-and-trade variant that may succeed in both avoiding the Dormant Commerce Clause pitfall and emissions "leakage."[54] This program brings out-of-state power producers under the cap for those emissions associated with the electricity those producers import into the state.[55] Even though such a scheme is not as facially discriminatory as a blanket ban on out-of-state imports, it would still face challenge under the Commerce Clause as an "undue burden" on interstate commerce using the familiar balancing analysis from *Pike v. Bruce Church, Inc.*[56]

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face between in-state and out-of-state interests, even though it would be of benefit to in-state producers on the basis that it served a "substantial state purpose").

49. The Dormant Commerce Clause issue for subnational emissions markets is also discussed in Part III as it arose in *Clean Air Markets Group v. Pataki*, 194 F. Supp. 2d. 147, 157-58 (N.D.N.Y. 2002).

50. CAL. HEALTH & SAFETY CODE §§ 38500-38599 (Deering 2008).

51. *Id.* § 38550.

52. Editorial, *California's Cap-and-Trade Won't Work: A Plan To Combat Greenhouse Gas Emissions Is Open to Abuse*, L.A. TIMES, Mar. 10, 2008, *available at* http://www.latimes.com/news/opinion/la-ed-captrade10mar10,0,2201883.story ("Cap and trade stands a decent chance of working at the national level, where individual power plants could be regulated regardless of which state they're in, but California will be asking for trouble if it imposes a statewide program.").

53. *See* Cowart, *supra* note 41, slide 25.

54. *Id.* slide 33.

55. Heddy Bolster, Note, *The Commerce Clause Meets Environmental Protection: The Compensatory Tax Doctrine as a Defense of Potential Regional Carbon Dioxide Regulation*, 47 B.C. L. REV. 737, 746 (2006).

56. Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970) (stating that state laws affecting interstate commerce are upheld "unless the burden imposed . . . is clearly excessive in relation to

3. Other Regional GHG Reduction Agreements

It is worth highlighting two other major regional initiatives that have followed RGGI.[57] On February 26, 2007, the governors of Arizona, California, New Mexico, Oregon, Washington, and the Premiers of Manitoba and British Columbia signed the Western Climate Initiative (WCI).[58] This regional plan intends to establish by August 2008 a market-based, multisector approach to GHG reduction, most likely in the form of a cap-and-trade program.[59] Montana and Utah have since joined the Initiative.[60] This plan builds off of predecessor regimes: the Southwest Climate Change Initiative and the West Coast Governors' Global Warming Initiative.[61] The most recent regional climate agreement is the Midwestern Regional Greenhouse Gas Reduction Accord, signed on November 15, 2007, by the governors of Illinois, Iowa, Kansas, Minnesota, Wisconsin, and the premier of Manitoba.[62] This plan also contemplates a multisector cap-and-trade program to be set up within thirty months.[63]

Like RGGI, neither of the directional documents for the Midwestern or Western regional programs contain provisions that plan for incorporation into a federal scheme if and when such would come online.[64] Interestingly, the states in the WCI currently have not set a

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the putative local benefits"); *see also* Engel, *Dormant Commerce Clause*, *supra* note 10, at 250-52 (arguing against Commerce-Clause invalidation of state-based market systems because they are not for a protectionist purpose).

57. The proliferation of subnational cap-and-trade programs in various regions may have the effect of increasing political pressure on Congress to preserve significant state roles in climate change.

> [I]f there are carbon cap-and-trade programs in the northeast, the west and the mid-west [sic] by the time Congress gets around to developing its own federal program, then you have to ask yourself, 'who is politically invested?' . . . That is about half the states, and politically speaking, that is some clout that Senators and Rep[resentative]s in Congress will not be able to avoid.

See E-mail from David Farnzworth to author, *supra* note 37.

58. The Pew Ctr. on Global Climate Change, Regional Initiatives, http://www.pewclimate.org/what_s_being_done/in_the_states/regional_initiatives.cfm?preview=1 (last visited Sept. 26, 2008).

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

64. *See* W. Climate Initiative, Statement of Regional Goal 1-2 (Aug. 22, 2007), *available at* http://www.westernclimateinitiative.org/ewebeditpro/items/O104F13006.pdf; Midwestern Governors' Ass'n, Midwestern Regional Greenhouse Gas Reduction Accord 2-4 (Nov. 15, 2007), *available at* http://www.wisgov.state.wi.us/docview.asp?docid=12497.

standardized goal for the region for GHG reductions.[65] Yet all are more ambitious than ACSA, debated by the Senate in June 2008. For example, Arizona's goal is 50% of 2000-level emissions by 2040, Washington's goal is 50% of 1990-level emissions by 2050, and California has set a more ambitious goal of 80% below 1990-levels by 2050.[66] ACSA, by comparison, seeks to achieve a nationwide goal of about 70% below 2005 levels by 2050,[67] a more modest target that will likely be insufficient by itself to accomplish the GHG reductions the United States must make to contribute substantially to a reversal of global warming trends.[68]

The problems of overallocation, leakage, and potential legal challenges highlight the precarious position of the regional trading programs as they now stand. Obviously, a federal cap-and-trade system will present yet greater obstacles, both practical and legal. Importantly, however, Congress can *immediately* foreclose Compact Clause, Dormant Commerce Clause, and preemption arguments against the state programs simply by authorizing them in a statute.[69] In the climate debate, this solution is often overlooked. Congress does not have to enact its own program at all (though a federal program is no doubt necessary and compatible with congressional authorization of subnational programs). But this would represent a sophisticated, "soft" use of federal power that the current climate bills do not contemplate.

B. America's Climate Security Act (Lieberman-Warner-Boxer)

Congress may be poised to join the states in the project of reducing GHGs. With Democrats regaining control of Congress in 2007, legislative proposals to address climate change have proliferated. At

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65. *See* W. Climate Initiative, *supra* note 64, at 4.

66. *Id.*

67. Andrea Hudson et al., Van Ness Feldman Law, Lieberman-Warner Climate Change Cap and Trade Bill Seen as Framework for Senate Climate Debate (Oct. 19, 2007), http://www.vnf.com/news-alerts-217.html.

68. *See* Steffen Kallbekken & Nathan Rive, *Why Delaying Emission Reductions Is a Gamble*, 82 CLIMATE CHANGE 27 (2007) (warning that an 80% reduction in emissions from current levels by 2050 is necessary to give the world a 50% chance of limiting global warming to two degrees Celsius).

69. *See* S.-Cent. Timber Dev., Inc. v. Wunnicke, 467 U.S. 82, 90-92 (1984) (explaining that congressional authorization preserves state law otherwise invalid under the Dormant Commerce Clause); Virginia v. Tennessee, 148 U.S. 503, 519 (1893) (explaining that congressional consent validates even those state compacts that "interfere with the just supremacy of the United States").

least seven major cap-and-trade proposals were introduced in 2007.[70] In addition, several more bills have proposed a "carbon tax"—either as an alternative to a cap-and-trade program or in addition to it.[71] This represents a significant shift in the political landscape of climate change. Just last year, it was safe to say that the federal government had "abandoned the field to the states."[72] Of course, any bill will still need to muster sixty votes to pass and the support of two-thirds of the Senate to become veto-proof—a level of support no bill currently has. The bill with the greatest likelihood of passage at the time of publication is ACSA, also known as Lieberman-Warner or Lieberman-Warner-Boxer since Senator Barbara Boxer became a cosponsor.[73]

In the anticipation that Congress will enact either a modified version of ACSA or a similar cap-and-trade program within several years, a closer inspection of this bill's impact on existing regional climate change programs is essential.[74] The following is a brief summary of provisions in ACSA relevant to the future roles of the states. In general, ACSA carves out a role for states, including the ability to set more stringent emission-reduction standards, but lacks specificity about the exact nature of the state-federal regulatory interface, especially with respect to preexisting subnational trading schemes like RGGI. As discussed in Part IV, this lack of specificity may result in a variety of preemption problems.

The bill would set a nationwide cap of 5.2 billion tons of "carbon dioxide equivalent" (CO_2e)[75] emissions when the program goes into effect in 2012.[76] This level of emissions is roughly the same as the level of

70. ACSA, S. 2191, 110th Cong. (2007); S. 309, 110th Cong. (2007); S. 1766, 110th Cong. (2007); S. 280, 110th Cong. (2007); S. 485, 110th Cong. (2007); H.R. 620, 110th Cong. (2007); H.R. 1590, 110th Cong. (2007).

71. *See, e.g.*, Save Our Climate Act, H.R. 2069 , 110 Cong. (2007); America's Energy Sec. Trust Fund Act, H.R. 3416, 110 Cong. (2007).

72. *See* Smith, *supra* note 10, at 408 (quoting David R. Hodas, *State Law Responses to Global Warming: Is It Constitutional To Think Globally and Act Locally?*, 21 PACE ENVTL. L. REV. 53, 74 (2003)).

73. ACSA, S. 2191.

74. *See* Richard Rosenzweig, Managing Dir., Natsource, Remarks at Panel on "Global Warming and the SEC" at Georgetown Law Center (Nov. 30, 2007) (arguing that utilities would be foolish not to begin tracking their GHG emissions shortfalls under ACSA) (notes on file with author).

75. The term "carbon dioxide equivalent" is defined as "for each greenhouse gas, the quantity of the greenhouse gas that the Administrator determines makes the same contribution to global warming as 1 metric ton of carbon dioxide." ACSA, S. 2191, § 4(5). While carbon dioxide is the most familiar GHG, there are five other GHGs that the Act also covers: methane, nitrous oxide, sulfur hexafluoride, hydrofluorocarbons, and perfluorocarbons. *Id.* § 4(15).

76. *Id.* § 1201(d).

emissions in 2005,[77] so "covered facilities"[78] would actually need to start implementing reductions before the cap-and-trade program takes effect. Over the next thirty-eight years, the cap would be ratcheted down, until 2050, when the United States would be emitting only 1.56 billion tons of CO_2e, or about 30% of its 2005 emissions.[79]

Unlike many major federal environmental statutes of the past, but similar to the sulfur dioxide (SO_2) emissions trading regime set up by the 1990 CAA Amendments, ACSA does not take a "cooperative federalism" approach in which states are given a significant regulatory role to play.[80] The EPA is given the sole authority to establish a national registry to keep track of emissions as well as the sole authority to prosecute violations of reporting requirements.[81] Similarly, enforcement of actual emissions reduction obligations is solely in the hands of the EPA, which is given broad discretion to reduce penalties for noncompliance.[82]

Further, ACSA creates a new administrative authority within the EPA, not to guarantee compliance with emissions reductions, but to protect the U.S. economy from the trading regime itself. Subtitle F of Title II establishes the Carbon Market Efficiency Board to ensure that the ACSA program does not result in serious harm to the U.S. economy and that the carbon market remains stable, functional, and efficient.[83] The Board will be composed of seven members who are appointed by the President with the advice and consent of the Senate.[84] It is to be broadly representative of all U.S. geographical regions, and members are to be appointed from a variety of stakeholder groups—but will not include an environmental representative.[85] During the first two years of its operation, the Board's duties will be primarily related to information gathering, after which it will assume its powers to implement cost-relief measures.[86] The information ACSA directs the Board to consider

77. Hudson et al., *supra* note 67.

78. There are four categories of "covered facilities" under the Act: (1) power plants that emit greater than 10,000 CO_2e emissions annually, (2) any other industrial facility that emits that amount, (3) any facility or entity that produces or imports petroleum or coal-based transportation fuels whose use results in that amount of emissions, and (4) any facility or entity that produces or imports "nonfuel chemicals" whose use results in that amount of emissions. ACSA, S. 2191, § 4(7).

79. *Id.* § 1201(d); Hudson, *supra* note 67.

80. *See* ACSA, S. 2191.

81. *See id.* §§ 1105-1106.

82. *See id.* § 1203.

83. *Id.* § 2601.

84. *Id.* § 2602(c)(1).

85. *See id.* § 2602(c)(2)(A).

86. *Id.* § 2603(b).

includes the following: (1) the allocation and pricing of allowances, (2) economic impacts of price volatility in the emissions-allowance market, (3) appropriate thresholds for implementation of cost-relief measures and impacts of those measures on the market, (4) maximum levels of cost relief necessary to avoid economic harm while achieving the purposes of ACSA, and (5) whether the emissions market is in fact achieving the purposes of ACSA.[87]

The Board will have the power to implement cost-relief measures whenever it determines that ACSA's emissions allowance market "poses a significant harm to the economy of the United States."[88] Disturbingly, the Act does not establish the standard against which the determination is to be made. The Board's powers will include the abilities to: (1) increase the number of allowances that can be borrowed against future years, (2) expand the repayment period for borrowers, (3) lower the interest rate on borrowing, (4) increase the number of foreign allowances an "owner or operator of a covered facility" (OOCF) may use, (5) increase the number of offset allowances an OOCF may use, and (6) expand the total number of allowances by borrowing against the total number of allowances planned for future years.[89]

The Board's powers are limited, however, and it is prohibited from granting any individual OOCF cost relief from ACSA's programs; carrying out investigative or punitive processes under the jurisdiction of state or federal courts; interfering, modifying, or adjusting any emissions allowance scheme under federal law; or modifying the total number of allowances issued under ACSA for the 2012-2050 period.[90]

Although states and regions are not given a substantial role in the organic structure of the emissions trading program created by ACSA, the Act contains a savings clause under "Retention of State Authority":

> Except as provided in subsection (b) [forbidding states from setting emission-reduction requirements *less* stringent than the federal level], in accordance with section 116 of the Clean Air Act (42 U.S.C. 7416) and section 510 of the Federal Water Pollution Control Act (33 U.S.C. 1370), nothing in this Act precludes or abrogates the right of any State to adopt or enforce—(1) any standard, cap, limitation, or prohibition relating to emissions of greenhouse gas; or (2) any requirement relating to control, abatement, or avoidance of emissions of greenhouse gas.[91]

87. *See id.* § 2603(a)(2)(A)-(G).
88. *Id.* § 2603(d)(1).
89. *Id.* § 2604(a)(1)(A)-(F).
90. *Id.* § 2604(c)(1)-(4).
91. *Id.* § 9004(a).

Similar savings clauses are in virtually all the other climate bills in Congress.[92] Despite this broad-sweeping language, other provisions of ACSA as well as its silence on other topics raise the possibility of implied preemption (discussed in Part III) for a variety of state actions to address climate change. The very lack of an explicit reference to preexisting regional cap-and-trade programs raises serious regulatory conundrums that could be avoided were Congress to explain how RGGI and similar initiatives are to be synthesized with the new national regime. The broadly antipreemptive language of ACSA section 9004 is welcome over express preemption provisions, but it is still early enough in the legislative process that future changes are difficult to predict.

Two other provisions in the current draft of ACSA present a classic implied preemption problem and demonstrate the inadequacy of the current savings-clause language in protecting state climate laws. With respect to appliance heating and cooling efficiency standards, ACSA requires the Secretary of Commerce to establish both a minimum national standard and several, more stringent regional standards.[93] The section provides no explicit authority for states to set their own efficiency standards for the covered appliances, and in fact the bill states:

> A product manufactured that meets or exceeds all regional standards established under this paragraph shall bear a prominent label affixed to the product that includes at the top of the label, in print of not less than 14-point type, the following statement: '*This product has achieved an energy-efficiency rating under Federal law allowing its installation in any State*.'[94]

Without a clear statement in this section that states may still set higher standards than those established by the Secretary of Commerce, this provision might be found to impliedly preempt states from setting more stringent appliance efficiency standards.

Seeming to contradict this provision, ACSA contains incentives and rewards for states who lead in GHG-reduction efforts. For every year of the operative period (2012-2050), states that, among other things, pass *efficiency* standards that are as "stringent as, or more stringent than, the most recent energy performance requirements of [American Society of Heating, Refrigerating, and Air-Conditioning Engineers standards] and

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92. *Compare* S. 309, 110th Cong. § 712(f) (2007) ("Nothing in this section shall supersede or otherwise affect any State or local law requiring or otherwise relating to reductions in total annual electricity consumption, or peak power consumption, by electric consumers to the extent that the State or local law requires more stringent reductions than those required under this section."), *with* Dingell-Boucher Draft Bill, 110th Cong., § 733(b) (2008) (expressly preempting state, local, and regional cap-and-trade programs).

93. ACSA, S. 2191, § 5102(a)(2).

94. *Id.* § 5102(a) (emphasis added) (amending 42 U.S.C. § 6297(e)(3)(B)).

the International Energy Conservation Code for new buildings," or that implement programs that surpass federal emissions targets, are rewarded with 2% of the total emissions allowances in a given year.[95]

Sections 5102 and 3401 of ACSA appear to contradict one another with respect to the extent of state power to set heating-and-cooling efficiency standards. A judge eager to protect industry from state standards more burdensome than federal ones may not hesitate to conclude that ACSA preempts those standards based on these specific provisions—notwithstanding section 9004. In short, ACSA lays out an impressive and comprehensive plan for a national cap-and-trade system, but the role of states in its framework is far from clear.

III. THE USES AND ABUSES OF THE PREEMPTION DOCTRINE

The preemption doctrine is an outgrowth of the Supremacy Clause in Article VI of the Constitution, which provides that federal law is the "supreme law of the land."[96] There are three primary ways in which Congress may preempt state law. First, Congress may expressly provide in a statute itself the extent to which it is preempting state laws regarding a particular area of regulation.[97] This is known as "express preemption."[98] Second, even without explicit language, Congress may enact regulations so comprehensive that courts will find it to have exclusively occupied a regulatory field.[99] This is referred to as "field preemption."[100] A third instance occurs when state laws are found to be preempted to the extent they actually conflict with federal law; in other words, it would not be possible to comply with both at the same time.[101] This is sometimes called "conflict" or "physical impossibility" preemption.[102] A subset within this category are state laws that "stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[103] There is also a fourth type of preemption we may call "executive foreign affairs preemption." Within traditional areas of

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95. *Id.* §§ 3401(a)(2), 3402(a)(1).

96. "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. CONST. art. VI, § 1, cl. 2.

97. *E.g.*, Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 95 (1983).

98. *E.g.*, Am. Ins. Ass'n v. Garamendi, 539 U.S. 396, 439 (2003) (Ginsburg, J., dissenting).

99. *E.g.*, Fidelity Sav. & Loan Ass'n v. De la Cuesta, 458 U.S. 141, 153 (1982).

100. *E.g.*, *Am. Ins. Ass'n*, 539 U.S. at 420 n.11 (citing Hines v. Davidowitz, 312 U.S. 52, 63 (1941)).

101. *See, e.g.*, Fla. Lime & Avocado Growers v. Paul, 373 U.S. 132, 142-43 (1963).

102. *E.g.*, *Am. Ins. Ass'n*, 539 U.S. at 419.

103. *Hines*, 312 U.S. at 67.

foreign policy, the Supreme Court has held that state laws must "give way" to the valid "exercise of the federal executive authority . . . where . . . there is evidence of clear conflict between the policies adopted by the two."[104] This type of preemption is not dependent on any congressional action.[105]

As long as there are no federal climate laws in place, state programs are very unlikely to be found preempted.[106] However, those same laws are threatened both by the possibility of express preemption in a federal climate statute itself and by various doctrines of implied preemption, in particular, "field preemption," should a federal law be enacted. This threat is especially acute given the recent lobbying and litigation strategies of private industry discussed below.

A. *Field Preemption: A Brooding Presence*

Field preemption is an acute concern for state GHG-reduction programs, because climate change touches on so many different regulatory areas. If industry successfully argues that a bill like ACSA should "field preempt" states, it could result in the single greatest restriction of state power to protect the environment yet seen. The doctrine of "field" preemption provides that states can be completely preempted from regulating in a particular field even in the absence of express language from Congress.[107] This rule was established by the

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104. *Am. Ins. Ass'n*, 539 U.S. at 421. The automotive industry attempted this argument against California's automotive GHG-emission standards in *Central Valley Chrysler-Jeep, Inc. v. Goldstone*, 529 F. Supp. 2d 1151, 1180 (E.D. Cal. 2007), contending that California's higher standard interfered with U.S. bargaining power in international climate negotiations. Far from finding a "clear conflict" between state efforts to reduce GHG emissions and U.S. foreign climate policy, however, the district court judge had trouble even making sense of the industry's contentions.

> Plaintiffs' "bargaining chip" theory of interference only makes logical sense if it would be a rational negotiating strategy to refuse to stop pouring poison into the well from which all must drink unless your bargaining partner agrees to do likewise. The court declines to make any presumptions to that effect.

Id. at 1187.

105. *See, e.g.*, *Am. Ins. Ass'n*, 539 U.S. at 421.

106. It is possible though highly unlikely that, prior to new federal climate legislation, the EPA could choose to regulate automotive GHG-emissions with the authority it currently possesses under section 202(a)(1) of the Clean Air Act (CAA), 42 U.S.C. § 7521 (2000). The EPA's existing authority to regulate GHGs as "air pollutants" under the CAA was affirmed by the Supreme Court in *Massachusetts v. EPA*, 127 S. Ct. 1438, 1459-60 (2007). If the EPA did so, an entirely different preemption analysis for state cap-and-trade programs would be required under the regulatory structure of the CAA. *See* McKinstry & Peterson, *supra* note 20, at 63 (noting that after *Massachusetts v. EPA*, the CAA could be "applied to incubate and protect state climate change innovations").

107. JOSEPH F. ZIMMERMAN, CONGRESSIONAL PREEMPTION 140-41 (2005).

Supreme Court almost a century ago.[108] The general rationale set forth by the courts has been that Congress cannot be expected to anticipate how a federal statute will interact with all subnational laws; thus, "a rule stipulating a state law would remain in effect unless specifically prohibited by a congressional statute 'would be intolerable.'"[109]

In 1973, the Supreme Court outlined a two-step analysis for whether state regulations are field-preempted by a federal statute: first, courts are to determine Congress's purpose in enacting the statute; second, courts must ask whether the statute covers "a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject."[110] While consumer-rights and other public-interest groups generally regard field preemption as unduly restrictive on the ability of states to enforce their reserved police powers,[111] field preemption in some circumstances can actually work to a state's advantage.[112]

The "cooperative federalism" environmental statutes of the past several decades generally utilize some type of "minimum standards preemption," whereby states are allowed to set higher standards than at the federal level and also may handle the implementation or enforcement of a federal environmental scheme.[113] Critics of this approach attack "partial preemption" statutes for unnecessarily complicating state-level implementation with voluminous federal regulations and burdensome programmatic requirements and diminishing state input into the regulatory scheme.[114] Some commentators go further, alleging that these laws have had the unintended effect of reducing total environmental protection by discouraging more stringent state regulation.[115]

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108. *Id.* at 130 (citing S. Ry. Co. v. Reid, 222 U.S. 424, 442 (1912)).

109. *Id.* at 140-41 (quoting Attorney General George B. Braden in 1942).

110. City of Burbank v. Lockheed Air Terminal, 411 U.S. 624, 633 (1973) (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)); ZIMMERMAN, *supra* note 108, at 141.

111. For example, the blanket preemption of state motor vehicle safety standards in the National Traffic and Motor Safety Act of 1966, 80 Stat. 719, 15 U.S.C. § 3702, were highly controversial because they also preempted state tort remedies. ZIMMERMAN, *supra* note 108, at 78-79.

112. ZIMMERMAN, *supra* note 108, at 85 (citing Abandoned Shipwreck Act of 1987, 102 Stat. 432, 43 U.S.C. § 2101 (1988), which gives states automatic title to any shipwreck located in its waters).

113. *Id.* at 159-60.

114. *Id.* at 160.

115. Professor Jonathan Adler argues:

> The existence of federal regulation will reduce the demand for state regulation by an amount equal to the extent to which federal regulation is a substitute for state regulation of the same environmental concern . . . . This substitution effect will reduce the net benefit of adopting state-level environmental regulations . . . . By reducing the net

The savings clause in section 9004 of ACSA may not be enough in itself to prevent courts from finding a state cap-and-trade program field-preempted. The section does little to establish the boundaries of permissible state regulatory action on climate change. While some suggest that savings clauses have the beneficial effect of preventing courts from finding "express preemption,"[116] another view holds that "a negative inference could be drawn from [a] savings clause that everything else not preserved by that clause is preempted."[117] For example, one commentator has noted that provisions for financial assistance of communities harmed by climate change in the Bingaman-Specter bill (S.1766) might be found impliedly to preempt common law actions for damages.[118] Even clauses expressly denying any congressional intent "to occupy the field," such as found in the Clean Water Act or the Oil Pollution Act, have been interpreted by the courts to protect only a "narrowly defined field" of state power.[119] Thus, a court could easily conclude that ACSA § 9004's authorization of more stringent state "*caps*" does not extend to full-fledged subnational cap-and-trade *programs*.

Any new "cooperative federalism" environmental statutes, including a federal climate law, should contain more detailed clauses explaining what is saved and what is not, and possibly a "code of restrictions" to increase regulatory certainty, decrease litigation, establish clear lines of accountability, and make public participation easier.[120]

> benefits of state-level environmental regulation in this manner, federal regulation has the potential to crowd out state-level environmental protections, even if the quantity of environmental protection demanded in the state is greater than that provided by the federal government. In such cases, the aggregate level of environmental protection will be lower with federal regulation than it would be without it.

Jonathan Adler, *When Is Two a Crowd? The Impact of Federal Action on State Environmental Regulation*, 31 HARV. ENVTL. L. REV. 67, 101 (2007).

116. JAMES T. O'REILLY, FEDERAL PREEMPTION OF STATE AND LOCAL LAW: LEGISLATION, REGULATION, AND LITIGATION 18 (2006) (citing Brian Wolfman & Douglas Stevick, *Preempting the Preemption Defense*, 29 TORT & INS. L.J. 511, 516 (2001)).

117. *Id.*; *see also* Geier v. Am. Honda Motor Co., 529 U.S. 861, 874 (2000) (holding that implied preemption overrides a clause saving common law tort actions where there is "actual conflict both in cases involving impossibility . . . and in 'frustration-of-purpose' cases" (emphasis removed)). *But see* Int'l Paper Co. v. Ouellette, 479 U.S. 481, 493 (1987) (giving effect to savings clauses in sections 505(e) and 510 of the Clean Water Act, 33 U.S.C. §§ 1365(e), 1370).

118. Victor B. Flatt, *Taking the Legislative Temperature: Which Federal Climate Change Legislative Proposal Is "Best"?*, 102 NW. U. L. REV. 123, 134 (2007).

119. O'REILLY, *supra* note 116, at 19 (citing United States v. Locke, 529 U.S. 89, 106 (1999); Int'l Paper Co. v. Ouellette, 479 U.S. 481, 493-94 (1987)). Nonetheless, the Court in *Ouellette* affirmed the ability to bring state law actions under the Clean Water Act; they just had to be based on the law of the state where the pollution originated. *Ouellette*, 479 U.S. at 493-94.

120. ZIMMERMAN, *supra* note 108, at 165-67.

Unfortunately, the current trend in Washington has been to rely on preemption arguments, both in lobbying and litigation, to weaken state regulatory authority rather than clarify, expand, or affirm it.[121]

B. Preemption: A Fiend's Best Friend

Preemption of state law can be a good thing when it makes strong regulation more efficient—for example, a federal cap on GHGs that is more ambitious than any set by the states.[122] The public gets the benefit of a nationally protective law, and private industry gets the benefit of complying with one standard instead of fifty. But preemption can also stop states from setting any standard, even though a federal law would not adequately protect the public. Broad preemption to limit stronger action at the state and local level is a growing trend in federal legislation, no doubt due in part to the continuing influence of industry's powerful lobbying groups.[123]

In one frightening example from the fall of 2005, Secretary of the Department of Homeland Security (DHS) Michael Chertoff and DHS's general counsel, Philip Perry (who happens to be Dick Cheney's son-in-law), almost succeeded in slipping a clause into a DHS appropriations rider that would have preempted states from setting chemical-industry safety standards even though there was *no federal standard at all*.[124] Chertoff and Perry were motivated to take action because New Jersey

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121. *Id.* at 9-10.

122. The need for nationally protective public welfare and economic legislation was the driving force of the New Deal legislation during the Great Depression. Michael S. Greve, *Business, the States, and Federalism's Political Economy*, 25 HARV. J. L. & PUB. POL'Y 895, 901-02 (2002). For an antiregulatory perspective on the dynamics of state and federal power during the New Deal Era, see *id.* at 898-907.

123. *See* Samuel J. Winokur, Note, *Seeking Through the Smoke: The Need for National Legislation Banning Smoking in Bars and Restaurants*, 75 GEO. WASH. L. REV. 662, 674 (2007) ("Because tobacco companies typically have more influence at the state and national levels, they actively push weak statewide legislation to ensure preemption of any stronger, more restrictive local laws." (footnote omitted)); *see also* Sybil Ackerman, *What Are Lobbyists Saying on Capitol Hill? Climate Change as a Case Study for Reform*, 37 ENVTL. L. 137, 139-41 (2007) (discussing two instances in which major corporate lobbyists were able to derail congressional action on climate change); Sybil Ackerman, Note, *New Evidence on the Presumption Against Preemption: An Empirical Study of Congressional Responses to Supreme Court Preemption Decisions*, 120 HARV. L. REV. 1604, 1610 & n.41 (2007) (noting that pro-preemption business interests have greater influence and more at stake than do antipreemption interests such as states and environmental groups); James T. O'Reilly, *Losing Deference in the FDA's Second Century: Judicial Review, Politics, and a Diminished Legacy of Expertise*, 93 CORNELL L. REV. 939, 967-68 (2008) (discussing the pharmaceutical industry's efforts to obtain preemption of state-law tort liability claims, and if not from Congress, then from the other two branches working in concert).

124. *See* Art Levine, *Dick Cheney's Dangerous Son-in-Law: Philip Perry and the Politics of Chemical Security*, WASH. MONTHLY, Mar. 2007, *available at* http://www.washingtonmonthly.com/features/2007/0703 .levine.html.

was about to pass laws to make its gigantic chemical industry safer from terrorist attacks.[125] Luckily, Congress caught on before the law passed, and the provision did not survive.[126] Perry has since gone on to a lucrative position as an attorney with Latham & Watkins, representing corporate clients in Washington.[127] These antics would almost be humorous if they were not such a monumental abrogation of the duties outlined in Homeland Security's job description. But folks like Chertoff and Perry answer to a higher power: the market.

Free market proponents like Michael Greve at the American Enterprise Institute endorse the preemption doctrine as a means of dampening state regulation.[128] There is an unquestionable logic behind that: businesses do not like being told what to do. But you will also hear him endorse limits on Congress's Commerce Clause power[129] and call for a return to the *Lochner* Era's substantive due process jurisprudence, in which freedom of contract is a fundamental right with which no level of government may interfere in the absence of a "compelling" interest.[130] This is an extremely reactionary departure from the consensus on government's broad authority to regulate business that has developed over the past eighty years. Greve's advocacy for congressional use of preemption and his call for constitutional evisceration of business regulation each contain a certain internal consistency. But the two positions taken together make for a bizarre twist on the Constitution's federalist vision, in which congressional authority is supposed to be limited primarily by the power retained in the *states*.[131] Douglas Kendall,

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125. *Id.*

126. *See id.*

127. Latham & Watkins LLP, Press Release: General Counsel of the Department of Homeland Security Rejoins Latham (Feb. 14, 2007), http://www.lw.com/News.aspx?page=pressreleasedetail&publication=1780.

128. *See* Greve, *supra* note 122, at 906-07 (dismissing states' and trial lawyers' opposition to federal preemption as self-serving and "political"); Michael S. Greve, *Federalism's Frontier*, 7 TEX. REV. L. & POL'Y 93, 117 (2002) ("Preemptive statutes . . . merely establish limits within which states remain free to do as they wish. Preemptive statutes are inherently less intrusive [on states] than regulatory statutes.").

129. *See* Greve, *supra* note 122, at 909 (endorsing the holding limiting federal regulatory power over intrastate wetlands in *Solid Waste Agency of Northern Cook Co. v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001), and commenting "a decentralized regime is more likely to reflect local values and interests").

130. *See* MICHAEL S. GREVE, THE DEMISE OF ENVIRONMENTALISM IN AMERICAN LAW 118 (1996); *see also* Boyd Thompson, *Willful Blindness: The Downfall of the Demise of Environmentalism in American Law*, 10 TUL. ENVTL. L.J. 179, 185 (1996) (reviewing GREVE, *supra*).

131. The Tenth Amendment specifies: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X.

an environmental attorney and founder of the Constitutional Accountability Center, notes the incoherency of Greve's dual argument for preemption and *Lochner*-like constitutional restrictions on the federal government. "[Greve] has to accept a broad regulatory power for the federal government in order to justify a broad power of federal preemption."[132] A constitutional theory that gives Congress the power to block states from protecting their citizens, but not enough to pick up the slack, is not just opportunistic and unprincipled, but also, in a way, sets up Congress as an impotent tyrant.[133] Kendall writes, "The libertarian right has seized on federalism as a potential vehicle for advancing their antiregulatory political agenda and has constructed a definition of federalism that is hostile to government at all levels."[134]

So far the only voices raising the cry of hypocrisy have been out of the wilderness. Literally, the environmental law community—people like Kendall or Professor Robert Glicksman at the University of Kansas—has written eloquently about this "perverse" new form of federalism.[135] Given the full-throated assault on the states embodied in the abuse of preemption, one might expect a group like the Federalist Society to be on the case as well. But its silence has been deafening. In fact, Michael Chertoff and Philip Perry are among its most celebrated members.[136]

The manipulation of preemption doctrines by those who claim to espouse a traditional, states-friendly view of federalism does not end at K Street. Prominent jurists, most notably Justice Antonin Scalia, have shown themselves amenable to preemption arguments in blocking state common law tort claims. In the February 2008 decision in *Riegel v. Medtronic, Inc.*, written by Justice Scalia, the Court held that Congress preempted state common law tort claims for defective medical devices when it enacted an express preemption provision, 21 U.S.C. § 360k, as part of the Medical Devices Act of 1976 (MDA).[137] The majority's

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132. Douglas T. Kendall, *Redefining Federalism*, *in* STRATEGIES FOR ENVIRONMENTAL SUCCESS IN AN UNCERTAIN JUDICIAL CLIMATE 259, 279-80 (Michael Allan Wolf ed., 2005).

133. *See* McKinstry, Dernbach & Peterson, *supra* note 5, at 4 ("Constitutional limitations on federal power have been reinforced by a long political tradition of local decision making epitomized by the New England town meeting and concern that centralizing power would undermine political freedoms.").

134. Kendall, *supra* note 132, at 267.

135. *E.g.*, Robert L. Glicksman, *From Cooperative to Inoperative Federalism: The Perverse Mutation of Environmental Law and Policy*, 41 WAKE FOREST L. REV. 719, 778 (2006).

136. *See* Levine, *supra* note 124.

137. Riegel v. Medtronic, Inc., 128 S. Ct. 999, 1007-08 (2008). Section 360k provides:

> [N]o State or political subdivision of a State may establish or continue in effect with respect to a device intended for human use any requirement—

holding hinged on defining the word "requirements" in § 360k to include common law duties; if that were the case, then state common law tort actions would be preempted.[138] Justice Stevens concurred on the basis of the plain statutory language, though he noted that preemption of common law claims was probably beyond Congress's intent in 1976.[139] In dissent, however, Justice Ginsburg pointed out that Congress was fully aware of 500 similar lawsuits pending when the MDA was enacted,[140] and the legislative history of the MDA revealed no intent by Congress to stop these suits.[141] Ginsburg also noted that the majority was ignoring two fundamental rules of construction: that the "purpose of Congress is the ultimate touchstone of pre-emption analysis"[142] and that "[c]ourts have 'long presumed that Congress does not cavalierly pre-empt state-law causes of action.'"[143]

While this may have been a close case, it is revealing that Justice Scalia and other conservative members of the Court showed little hesitancy in holding these state-law claims preempted (which could have resulted in billions in damages for those injured by defective devices), whereas the sovereignty of the states propels their analysis when voiding federal laws related to public welfare.[144] The common denominator in both types of cases is not the guarantee of the states' police powers, but the financial interests of industry.

More principled adherents to a conservative "federalist" political philosophy, like Professor Jonathan Adler at Case-Western University, tend to oversimplify the relationship between the states and the federal government. Adler is simply hostile to federal regulation in general.[145] As Adler puts it, "two is a crowd"—that is, it is generally optimal to have just one governmental level (either state or federal), regulating in a

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(1) which is different from, or in addition to, any requirement applicable under this chapter to the device, and

(2) which relates to the safety or effectiveness of the device or to any other matter included in a requirement applicable to the device under this chapter.

21 U.S.C. § 360k(a) (2000).

138. *Riegel*, 128 S. Ct. at 1008.

139. *Id.* at 1011-12 (Stevens, J., concurring). The majority declined to consider arguments based on legislative history. *Id.* at 1009.

140. *Id.* at 1015 (Ginsburg, J., dissenting).

141. *Id.* at 1013.

142. *Id.* (quoting Cipollone v. Liggett Group, Inc., 505 U.S. 504, 516 (1992)).

143. *Id.* (quoting Medtronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996)).

144. *See infra* note 150 and accompanying text.

145. *See* Adler, *supra* note 115, at 107-08 (cataloguing instances in which state environmental regulation has been "qualitatively" better though not as onerous as federal regulation).

particular field and not both together.[146] This is not an unconventional view, and it typically results in disputants lining up for state power on one side and federal power on the other.[147] As Adler himself admits, this dualism does not necessarily "comport" with the actual experience of environmental regulation in the United States.[148] More normatively, it fails to unlock the possibilities of a more dynamic federalism, in which the nation as a whole reaps the benefits of regulatory cooperation between states and the federal government.[149]

In the latter conception, the federal and state governments work together in the evolution of public policy while respecting the sovereign prerogatives of the other. The so-called "federalist" decisions like *Printz v. United States*, *United States v. Lopez*, and *New York v. United States* during the Rehnquist Era of the Supreme Court paid lip service to this ideal.[150] But more than a decade on, that flowery rhetoric seems merely

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146. *Id.*

147. *See* Kirsten H. Engel, *Harnessing the Benefits of Dynamic Federalism in Environmental Law*, 56 EMORY L.J. 159, 163-66 (2007) (outlining the history of this debate since the 1970s).

148. Engel seized on a statement by Adler. As Adler openly admits:

> [T]he division of authority and responsibility in environmental policy does not comport with the analytical framework" that has dominated the scholarly environmental federalism debate. Researchers have found a substantial degree of overlap in the types of environmental issues actually addressed by the states and the federal government. Moreover, it appears that jurisdictional overlap is the norm, not the exception.

Id. at 166 (footnotes omitted) (quoting Jonathan Adler, *Jurisdictional Mismatch in Environmental Federalism*, 14 N.Y.U. ENVTL. L.J. 130, 157 (2005)).

149. *See* Gonzalez v. Raich, 545 U.S. 1, 42 (2005) (O'Connor, J., dissenting) ("One of federalism's chief virtues, of course, is that it promotes innovation by allowing for the possibility that 'a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.'" (quoting New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting))); *see also* Engel, *supra* note 147, at 187 ("These benefits include the potential for achieving better regulatory solutions due to the ability to jumpstart policymaking at multiple levels of government. Overlapping jurisdiction provides more opportunities for a diverse set of players in the policy-making process, and thus fewer opportunities for regulatory capture by interest groups. Finally, overlapping jurisdiction should provide for the development of more innovative regulatory approaches.").

150. Printz v. United States, 521 U.S. 898, 920 (1997) ("The great innovation of [U.S. federalism] was that 'our citizens would have two political capacities, one state and one federal, each protected from incursion by the other'—'a legal system unprecedented in form and design, establishing two orders of government, each with its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it.'" (quoting U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring))); United States v. Lopez, 514 U.S. 549, 552 (1995) ("'Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front.'" (quoting Gregory v. Ashcroft, 501 U.S. 452, 458 (1991))); New York v. United States, 505 U.S. 144, 162 (1992) ("While Congress has substantial powers to govern the Nation directly, including

to have been camouflage for an assault on public welfare legislation led by industry-friendly political ideologues. As one commentator puts it, "Preemption [is] the real threat to federalism."[151]

C. The Gathering Clouds of Express Preemption

Preemption threatens not just the sovereignty of the states, but the future of our climate. As discussed above, currently ACSA has one section allowing states to set their own, stricter GHG standards.[152] This section is essential (though in itself inadequate) to protect state GHG-reduction programs fully, but its future is in doubt. And while ACSA currently has no express preemption provisions, this will likely change as well.[153] Key legislators in both the House and Senate are lining up in support of at least some preemption of state GHG-reduction efforts, and the first in line to go are any major state or regional cap-and-trade systems.[154]

Senator Jeff Bingaman (D-NM) set the tone for the upcoming 2009 debate by calling for preemption of state programs in July 2008.[155] Prior to the June 2008 debate, David McIntosh, an aide to Senator Lieberman, said, "[T]here will be filed first degree amendments to preempt state authority in every aspect."[156] In May 2008, the three co-sponsors of ACSA, Senators Boxer, Lieberman and Warner, made a go at "bribing" the states into relinquishing their opposition to preemption by promising them a bigger chunk of the carbon-credit largesse to be doled out under ACSA.[157] It is as though the Senators were saying to the states, "Why save the climate when you could be emitting more carbon?"

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in areas of intimate concern to the States, the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions.").

151. Engel, *supra* note 147, at 184.

152. *See* ACSA S. 2191, 110th Cong., § 9004 (2007).

153. *See* Huffman & Weisgall, *supra* note 10, at 12 (predicting some level of preemption and "inevitable" litigation as a result).

154. *See* HOUSE WHITE PAPER, *supra* note 11, at 18-19 ("State or regional cap-and-trade programs may interfere with the efficient functioning of the Federal cap-and-trade program and increase demands on both governmental and non-governmental resources."); SEN. JEFF BINGAMAN, 10 PRINCIPLES FOR CLIMATE LEGISLATION (2008) ("[W]e should not have multiple overlapping cap and trade systems in place. . . . In the absence of a Federal program, I can't fault anyone for wanting [regional trading systems]. But when we are able to enact a Federal cap-and-trade system, in my view it should preempt the field.").

155. Ben Geman, *U.S. Emissions Scheme Should Pre-empt State Caps—Bingaman*, GREENWIRE, July 9, 2008, http://www.eenews.net/Greenwire/2008/07/09/4/.

156. *Federal GHG Bill Includes Incentives for States To Accept Preemption*, INSIDE CAL/EPA, May 30, 2008, *available at* http://www.lexisnexis.com (follow "Search" hyperlink; then follow "Find a Source" hyperlink; then follow "I" hyperlink; then select "Inside Cal/EPA" and search for "Federal GHG Bill Includes"; then follow "Find" hyperlink).

157. *Id.*

Unfortunately, preemption clauses can often be the most contentious provisions in any piece of federal legislation, and thus detailed explication of state and federal roles accompanied by a meaningful legislative history is virtually foreclosed by political exigency.[158] As one commentator has written:

> For society at large, the optimal response to . . . safety-related preemption conflicts may be a full and lively debate over the inclusion of express preemption clauses in amendments to the particular statute governing that particular product or activity. Sadly, such debate is a rare event. Preemption clause language is so visibly controversial in the news media that it tends to appear as a sort of "immaculate conception"; the language appears in the legislative drafts with little fanfare and no visible parentage. . . . To even express the slogan that "I am the legislator from Texas who took away the local powers of Texans" is to recognize why the parentage of preemption clauses is left so obscure.[159]

Assuming an express preemption clause does make its way into a final bill, as it has into a climate bill draft circulated by Representatives John Dingell and Rick Boucher in October 2008,[160] how expansively might the Supreme Court interpret it? A recent case sheds some light. In *Rowe v. New Hampshire Motor Transportation Ass'n*,[161] the Court invalidated a Maine law regulating carriers of tobacco on the basis that it was preempted by a federal statute forbidding states 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."[162] The Court reasoned, "[T]o 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."[163] As evident from the purposes of ACSA's Carbon Market Efficiency Board,[164] one of the major objectives of the climate bill is protection of the economy from the cap-and-trade program itself. If the Court continues to view so-called "regulatory patchworks" as inherently

158. *See* O'REILLY, *supra* note 116, at 94.
159. *Id.*
160. *See* discussion *supra* note 9.
161. Rowe v. N.H. Motor Transp. Ass'n, 128 S. Ct. 989, 995-96 (2008).
162. *Id.* (quoting 49 U.S.C. § 14501(c)(1) (2000)).
163. *Rowe*, 128 S. Ct. at 996; *see also* Huffman & Weisgall, *supra* note 10, at 12 (discussing *Rowe*).
164. *See* ACSA S. 2191, 110th Cong., § 2602(b) (2007).

antagonistic to a "competitive marketplace," state GHG-reduction efforts are in trouble indeed.[165]

IV. AN ALTERNATIVE TO PREEMPTION: AUTHORIZATION

As long as no federal program to reduce GHG emissions exists, states and regional organizations must continue to take the lead on climate change in the United States.[166] As a legal matter, however, several commentators have noted constitutional and other infirmities with particular state or regional approaches.[167] Even ardent supporters of regional efforts are quick to voice a preference for a national program and analogize state efforts' importance to previous state roles in environmental protection that resulted in federal legislation.[168] More disturbing, though without empirical support, even commentators who support strong regional initiatives (such as Professor Kirsten Engel at the University of Arizona), have suggested that regional programs to reduce GHG emissions may be the result of less-than-admirable parochial concerns and inter-state competition and could actually result in a net increase in GHG emissions.[169] Congress is in a position to make these programs better and to insulate them from legal challenge through direct federal authorization. This Part explores past experiences with expansion of cap-and-trade programs and state roles in those programs in order to develop principles to guide Congress in designing a federal climate law that gives states a continuing role in the climate arena.

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165. *Rowe*, 128 S. Ct. at 996.

166. *See* Engel, *Mitigating Global Climate Change*, *supra* note 10, at 58 ("[B]ecause a regional interstate cooperative approach will likely lead to greater emissions reductions, it constitutes a more effective and efficient approach to climate change than leaving the matter to individual states.").

167. *See* Gross, *supra* note 10, at 207-08 (noting possible violations of the Dormant Commerce Clause, the Supremacy Clause, and the Foreign Affairs Clause); Engel, *Mitigating Global Climate Change*, *supra* note 10, at 74-82 (noting possible invalidity under the Dormant Commerce Clause and the Compact Clause and noting that state-level allowance trading with Kyoto member countries can only be into the United States, which would result in an increase in emission allowances here); Smith, *supra* note 10, at 389 (noting that vesting "regulatory and enforcement powers in RGGI's administrative body" might run afoul of the Supreme Court's Commerce Clause jurisprudence) (citing U.S. Steel Corp. v. Multistate Tax Comm'n, 434 U.S. 452, 473 (1978)).

168. *See* Engel, *Mitigating Global Climate Change*, *supra* note 10, at 56-57 ("[T]he long-term significance of state and local climate change programs is best evaluated in terms of the degree to which they may prompt or enhance mitigation efforts by larger geographic jurisdictions, such as mitigation efforts at the regional or national levels.").

169. *Id.* at 72-73 (hypothesizing that politicians in one state may seek to curb another states' more aggressive GHG reductions through a regional agreement that sets a lower normative standard in order to appease both antiregulatory and environmental interest groups).

A. Litigation of Subnational Roles in the Acid Rain Program

The sulfur dioxide (SO_2) trading program established by Title IV of the Clean Air Act (CAA) Amendments of 1990 is arguably one of the most successful and economically efficient routes to pollution reduction ever created. States most likely retain within that trading program some ability to set lower caps under the generally applicable CAA savings clause in 42 U.S.C. § 7416.[170] And as one court has made clear, "The Clean Air Act does not expressly invalidate state laws on acid deposition."[171] Section 9004 of ACSA makes direct reference to § 7416, and the interaction of this provision with the SO_2 emission trading program sheds light on the extent and limitation of states' roles in any future federal carbon cap-and-trade program.[172]

Several cases arising from the SO_2 cap-and-trade program established under Title IV provide some guidance in determining the limits of state authority over emissions allowances in the absence of express authorization in ACSA. In *Clean Air Markets Group v. Pataki*, a federal district court concluded that a New York state law restricting the sale of SO_2 emissions allowances to upwind states was both preempted by the CAA as well as a violation of the Dormant Commerce Clause.[173] The law imposed an "offset" fee equal to the price of the allowance for the sale of any allowance unaccompanied by a restrictive covenant forbidding its future sale into a state upwind of New York.[174]

The court first acknowledged that the CAA "does not expressly invalidate state laws on acid deposition," and that states may "adopt and enforce" emissions regulations more stringent than the federal standards.[175] However, the court went on to find that New York's law created "an obstacle to the accomplishment and execution of the full

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170. "Except as otherwise provided . . . nothing in this chapter shall preclude or deny the right of any State or political subdivision thereof to adopt or enforce (1) any standard or limitation respecting emissions of air pollutants or (2) any requirement respecting control or abatement of air pollution . . . ." 42 U.S.C. § 7416 (2000).

171. Clean Air Markets Group v. Pataki, 194 F. Supp. 2d. 147 (N.D.N.Y. 2002) (distinguishing impermissible state restrictions on the trade of emissions allowances from in-state emission reductions); *see* Exxon Mobil Corp. v. U.S. EPA, 217 F.3d 1246, 1249, 1256 (9th Cir. 2000) (holding state regulation requiring a minimum oxygenate level of 3.5% in winter gasoline not preempted by Clean Air Act provisions requiring a minimum of 2.7%).

172. ACSA, S. 2191, 110 Cong., § 9004 (2007).

173. Clean Air Markets Group v. Pataki, 194 F. Supp. 2d 147, 159, 162 (N.D.N.Y. 2002), *aff'd in part*, 338 F.3d 82 (2d Cir. 2003).

174. *Id.* at 154.

175. *Id.* at 157 (citing 42 U.S.C. § 7401(a)(3); *id.* § 7416; Hillsborough Co., Fla. v. Automated Med. Labs., Inc., 471 U.S. 707, 713 (1985)).

purposes and objectives of Congress,"[176] because 42 U.S.C. § 7651(b) provides that allowances may be traded with "*any* other person who holds such allowances."[177] (Both Congress and the EPA had considered and rejected geographical restrictions on allowance trading.[178]) Nor could the law be saved by 42 U.S.C. § 7416, which allows for more stringent state regulation, because rather than merely setting "requirements for air pollution control," New York's law restricted the transfer of allowances; as such, the court held the law was "preempted because it interferes with the Clean Air Act's method for achieving the goal of air pollution control: a cap and *nationwide* SO_2 allowance trading system."[179] Finally, the law could not be upheld under the savings clause in 42 U.S.C. § 7651b, which preserves state laws regulating electric utility rates. The court opined:

> [I]f this saving clause were read so broadly as to permit states to enact laws pertaining in any way to electric utilities, as must be done to save [New York's law] as defendants wish, then each state could forbid or otherwise limit the transfers of allowances. Clearly such a result would be contrary to the Congressional intent . . . .[180]

The court held that the law "*actually conflicts* with the Federal [CAA]" and was therefore preempted.[181]

Although the preemption holding would seem to have resolved the case, the court proceeded to evaluate the statute under the Dormant Commerce Clause using the balancing test the Supreme Court set forth in *Pike v. Bruce Church, Inc.*: "state laws enacted for a legitimate public purpose with only an incidental effect on interstate commerce are constitutional 'unless the burden imposed is clearly excessive in relation to the putative local benefits.'"[182] The first step of the court's analysis was to determine the purpose of the law, i.e., whether it was protectionist or not. Acknowledging the "laudable goal" of seeking to reduce sulfuric acid deposition in the state, the court nonetheless held the law to be an unconstitutional "protectionist" measure because it "isolate[ed New York

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176. *Id.* at 158 (quoting *Hillsborough Co., Fla.*, 471 U.S. at 713 (internal quotations omitted)).

177. *Id.* (quoting 42 U.S.C. § 7651b(b) (internal quotations omitted)).

178. *Id.*

179. *Id.* (citing Int'l Paper Co. v. Ouellette, 479 U.S. 481, 494 (1987) (emphasis added)).

180. *Id.* at 159.

181. *Id.* (emphasis added). Note that this was a case of "actual conflict" preemption rather than "field preemption"—both are implied, not express, forms of preemption, but the standard courts use is different.

182. *Id.* (quoting Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970)).

State] from the national economy"[183] by "'overtly block[ing] the flow of interstate commerce' at New York's borders."[184] New York argued that the law was not protectionist "because it is aimed at protecting natural resources, not protecting in-state businesses."[185] But the court explained, "Protectionism is about a state isolating itself from a common problem by restricting the movement of articles of commerce in interstate commerce."[186] The court further held that the law was ineffective at accomplishing its goals, because New York could not show that it would actually reduce acid deposition in the state.[187] As discussed in Part II.A.1 above, the Dormant Commerce Clause threatens state climate programs, with or without a federal climate law. But Congress could obviate these types of challenges to the state programs through explicit statutory authorization.[188] A Dormant Commerce Clause analysis analogous to the one in *Clean Air Markets Group* could be expected without such authorization and even despite a general savings clause like section 9004 of the ACSA.

Another case discussing the role of states in the SO_2 cap-and-trade program arose in the United States Court of Appeals for the Fourth Circuit in 1996.[189] There, the court held that questions about the legal status of the allowances must be answered in federal rather than state courts. "[I]ssues about who is entitled to share in the EPA's initial allocation of allowances, affecting title to subsequent ownership, and what is the nature of the ownership interest in such allowances raise questions of federal law."[190] The court went on:

> For allowances to "be treated like economic commodities," their nature and those entitled to an interest in them must be uniformly established throughout the market. State by state variations of interpretation about the nature and the initial title to allowances could create uncertainty in the market and thereby undermine the very device that Congress created for reducing pollution. Where the resolution of a federal issue in a state-law cause of action could, because of different approaches and inconsistency,

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183. *Id.* at 160 (quoting City of Philadelphia v. New Jersey, 437 U.S. 617, 626-27 (1978) (internal quotations omitted)).

184. *Id.* at 161 (quoting *City of Philadelphia*, 437 U.S. at 624 (internal quotations omitted)).

185. *Id.* at 161.

186. *Id.* (citing *City of Philadelphia*, 437 U.S. at 627-28).

187. *Id.* at 162. Utilities in the Midwest held 4.67 million more allowances than they needed in 2000, and 97.7% of the allowances they purchased came from states other than New York. *Id.*

188. *See id.* at 154.

189. Ormet Corp. v. Ohio Power Co., 98 F.3d 799, 807 (4th Cir. 1996).

190. *Id.*

> undermine the stability and efficiency of a federal statutory regime, the need for uniformity becomes a substantial federal interest, justifying the exercise of jurisdiction by federal courts.[191]

While the court used this reasoning to justify federal subject-matter jurisdiction in the district court, it did not state explicitly that federal jurisdiction was necessarily exclusive of state court jurisdiction, particularly with respect to "routine transactional questions" that can be answered through "application of standard principles of commercial law."[192]

One commentator has noted that these two cases, *Clean Air Markets Group* and *Ormet*, taken together, suggest that for emissions-allowance markets established in federal-system countries like the United States, "in the interest of uniformity and consistency in the legal character of the unit to be commercially traded, a single national definition of the nature of the credit should apply."[193] Should RGGI seek to continue to operate its own cap-and-trade program, an industry litigant could argue that these interests in national market uniformity would not be served, and the program would be susceptible to a preemption challenge of the sort that invalidated the New York law in *Clean Air Markets Group*. However, RGGI could be modified to fit within a federal framework. Furthermore, these arguments do not account for Congress's capacity to explicitly authorize and link subnational and federal GHG-emissions markets while imposing some uniform accounting rules. This possibility is explored below.

B. Market Linkage in the Clean Air Interstate Rule (CAIR)

The problem of linking markets and creating a consistent trading regime is not a new one for emissions cap-and-trade programs. This Part explores a key historical example of how another regional trading regime, the Ozone Transport Commission (OTC), organized for trading in nitrogen oxide (NO_X) emissions allowances, grew into a federal program implemented as part of the Clean Air Interstate Rule (CAIR).[194] Further, OTC did so in a manner that preserved an essential regulatory role for the states at the same time as ensuring national uniformity in the

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191. *Id.*
192. *Id.*
193. Markus W. Gehring & Charlotte Streck, *Credit Systems Legal Nature, Title, Transfer, and Taxation of Emission Allowances and Credits*, 35 ELR 10,219, 10,224 (2005).
194. Rule To Reduce Interstate Transport of Fine Particulate Matter and Ozone (Clean Air Interstate Rule), Revisions to Acid Rain Program, Revisions to the NO_X SIP Call (CAIR Rule), 70 Fed. Reg. 25,162 (May 12, 2005).

allowance market. CAIR created an EPA-administered cap-and-trade program for NO_X and sulfur dioxide (SO_2), covering twenty-eight eastern states and the District of Columbia, but allowed those states the option of creating their own programs to meet the emissions budget set by EPA.[195] The states and the EPA attempted to do this completely within their existing regulatory authorities under the CAA[196]—the cooperation among the states and with the federal government had virtually no congressional oversight or direction.[197] But this very lack of statutory authority for the EPA's actions led the United States Court of Appeals for the District of Columbia Circuit to vacate the entire rule in July 2008.[198] The story of its development and demise provides a key lesson: while local jurisdictions and stakeholders are capable of developing their own emissions trading systems without significant congressional intervention, statutory authorization is nevertheless essential to ensure those systems' legal validity.[199]

In 1998, the EPA issued the "NO_X SIP Call," which notified twenty-two states and the District of Columbia that they were contributing to downwind states' nonattainment of ozone standards.[200] In response, through the leadership and partnership of state administrators, the OTC's

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195. EPA, Fact Sheet, Clean Air Interstate Rule Basic Information, http://www.epa.gov/CAIR/basic.html (last visited Aug. 7, 2008).

196. *See generally* Michigan v. EPA, 213 F.3d 663, 685-88 (D.C. Cir. 2000) (discussing respective roles and powers of states and EPA with respect to NO_X SIP Call); *see also* Thomas D. Peterson, Robert B. McKinstry & John C. Dernbach, *Developing a Comprehensive Approach to Climate Change Policy in the United States that Fully Integrates Levels of Government and Economic Sectors*, 26 VA. ENVTL. L.J. 227, 263 (2007) ("By enacting [CAIR], the EPA has already found the authority to impose a cap and trade program that will control emissions from both new and existing sources more effectively than reliance on technology-based standards . . . .").

197. *See* ANDREW AULISI, ALEXANDER E. FARRELL, JONATHAN PERSHING & STACY VANDEVEER, WORLD RES. INST., GREENHOUSE GAS EMISSION TRADING IN U.S. STATES: OBSERVATIONS AND LESSONS FROM THE OTC NO_X BUDGET PROGRAM 5 (2005), *available at* http://pdf.wri.org/nox_ghg.pdf ("[T]he OTC NO_X Budget Program set an important precedent: the successful negotiation by multiple jurisdictions to establish a shared emissions-trading program that would eventually be expanded to other jurisdictions.").

198. *See* North Carolina v. EPA, 531 F.3d 896, 929-30 (D.C. Cir. 2008).

199. *See* Peterson, McKinstry & Dernbach, *supra* note 196, at 264 ("Although a cap-and-trade program could be established under the same rationale as that supporting the CAIR rule, amendments to the CAA specifying caps and their reductions would be desirable. Changes in the law would remove any question regarding authority and could more precisely guide the EPA in implementation.").

200. Finding of Significant Contribution and Rulemaking for Certain States in the Ozone Transport Assessment Group Region for Purposes of Reducing Regional Transport of Ozone, Final Rule, 63 Fed. Reg. 57,356 (Oct. 27, 1998).

NO_X Budget Program was created under the auspices of the CAA.[201] From 1999-2002, this program achieved significant emissions reductions for NO_X, with no major litigation challenges from the regulated entities and no impact on the region's economic vitality.[202] By 2002, NO_X levels in the OTC states were 34% below 1995 levels.[203] In 2005, after extended rulemaking hearings, the EPA issued specific rules and instructions for an expanded program covering most of the Eastern United States and took over the program's administration.[204]

The 2005 rulemaking outlined some important principles underlying the new federally administered CAIR trading program. First, states would have continued flexibility to achieve emissions reductions "however they choose."[205] States "may elect" to participate in the EPA-administered trading program; if they do so, the allocation of emission allowances among sources is left to each state to decide.[206] If they wish to participate in the trading program, they must adopt the EPA's model NO_X and SO_2 emissions trading rule, in order "to ensure that all participating sources . . . are subject to the same trading and allowance holding requirements."[207] Also of note, once federalized, the EPA would be the accountant for the emissions allowances, rather than one or more private contractors, because the states "could not see any advantage in having competing private accounting systems."[208] The wisdom of accounting uniformity in a national GHG trading program that links subnational markets is also readily apparent.

In a reconsideration of the 2005 rule in April 2006, the EPA addressed a series of arguments related to the nature of the emissions trading program.[209] This analysis also sheds helpful light on proper state and federal roles in a future federal GHG trading system. For example, CAIR called for linking its trading program with the Title IV SO_2 trading

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201. WRI, *supra* note 197, at 6 ("Although the OTC NO_X Budget was designed to help states meet federal requirements . . . it was not federally mandated or scripted by a federal regulatory process.").

202. *Id.* at 1.

203. *Id.* at 10.

204. *See* Rule To Reduce Interstate Transport of Fine Particulate Matter and Ozone (Clean Air Interstate Rule), Revisions to Acid Rain Program, Revisions to the NO_X SIP Call (CAIR Rule), 70 Fed. Reg. 25,162, 25,273 (May 12, 2005). The trading program began with nine states, but by 2007, parts of twenty-two states were voluntarily participating in the process. WRI, *supra* note 197, at 6.

205. CAIR Rule, 70 Fed. Reg. 25,274.

206. *Id.*

207. *Id.* at 25,275.

208. WRI, *supra* note 197, at 10.

209. Rule To Reduce Interstate Transport of Fine Particulate Matter and Ozone (Clean Air Interstate Rule): Reconsideration, 71 Fed. Reg. 25,304, 25,305-06 (Apr. 28, 2006).

system created by the 1990 CAA Amendments.[210] Entities covered by CAIR would use the same Title IV allowances to meet heightened obligations under CAIR, but at an incrementally increasing ratio over time.[211] Thus, instead of 1-to-1 correspondence between allowance and tonnage of SO_2 emitted, which is the general rule for entities covered by the Title IV program, CAIR entities will pay for emissions with allowances at a 2-to-1 ratio for 2010-2014, and at a 2.86-to-1 ratio from 2015 on.[212]

The EPA stressed the importance of using Title IV allowances in the CAIR SO_2 trading program rather than creating a new type of SO_2 credit.

> [I]t is necessary to use the existing title IV allowances in order to preserve the viability and emissions reductions of the highly successful title IV program. The disruption of the title IV SO_2 trading program would also potentially result in *increased emissions* outside of the CAIR region starting in 2010 because, with title IV allowances having little or no value, the title IV program would no longer constrain SO_2 emissions in those States. Further, if title IV allowances are not used for compliance in the CAIR SO_2 trading program, the likely result will be: a significant surplus of title IV allowances; *a collapse of the price of title IV allowances*; and a title IV SO_2 trading program that, contrary to Congressional intent, no longer provides incentives to minimize emissions control costs and encourage pollution prevention and innovation.[213]

By contrast, the EPA was not persuaded the same need for continuity was present in the implementation of the NO_X trading program under CAIR that would replace another pre-existing trading program, the OTC NO_X Budget Program. Unlike the SO_2 trading under CAIR, the EPA did not believe it had to concern itself with the intent of Congress because the OTC was developed at a regional level and under regulations developed by the EPA rather than a statute designed by Congress.[214] Perhaps of more practical significance in developing principles for carbon-market linkages, while many Title IV SO_2 allowances had already been allocated well past the 2010 CAIR start date, no states had allocated any NO_X allowances under OTC past 2009.[215] The EPA did not have to fear a glut of NO_X allowances diluting the market. By the same token,

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210. *Id.* at 25,307. The D.C. Circuit held this to be a serious violation of the CAA. *See infra* notes 222-224 and accompanying text. Nonetheless the principles discussed here are still applicable in the design of *congressionally authorized* GHG trading programs.
211. 71 Fed. Reg. 25,304, 25,307.
212. *Id.*
213. *Id.* at 25,308 (emphasis added).
214. *Id.* at 25,313.
215. *Id.*

EPA chose not to allocate SO_2 allowances to the CAIR region at an annual "coverage ratio of 1.0, which would assume that in a given year total SO_2 emissions in the region are equal to the total region-wide SO_2 budget."[216] Noting the "existence of a significant bank of pre-2010 [SO_2] allowances that will be eligible for use for compliance with CAIR [resulting from Title IV banking]," the EPA chose coverage ratios of 0.7 for 2010 and 0.6 for 2015.[217]

The use of a schedule of ratios to link and conform two different regimes is not unprecedented in U.S. emissions trading. Similarly simple formulas have been used in international currency exchanges for decades. A schedule of ratios between RGGI allowances and federal ones should not be difficult to implement.

CAIR has been vacated in its entirety by the D.C. Circuit's ruling in *North Carolina v. EPA*.[218] The court found multiple ways in which CAIR violated CAA section 110(a)(2)(D)(i)(I), which requires state implementation plans (SIPs) to prevent pollution sources within the state from "contribut[ing] significantly" to a downwind state's failure to meet or maintain national ambient air quality standards (NAAQS).[219] Among other things, petitioners successfully argued that the EPA violated section 110 in taking a region-wide approach to setting a "significant contribution" level, rather than basing it on specific upwind states' contribution to specific downwind states' nonattainment.[220] As a result, sources within a state could theoretically purchase allowances to cover all their current emissions and thus continue to "significantly contribute" to nonattainment of NAAQS in a downwind state.[221] Under section 110, the court stated, "CAIR must do more than achieve something measurable; it must actually require elimination of emissions from sources that contribute significantly and interfere with maintenance in downwind nonattainment areas."[222]

Further, in using the Title IV allowance budget as a "starting point" in setting CAIR's SO_2 budgets, the court held that the EPA ignored the primary criterion of section 110, "significant contribution" to downwind nonattainment.[223] It was not acceptable, reasoned the court, to rely on

216. *Id.*
217. *Id.*
218. North Carolina v. EPA, 531 F.3d 896, 929-30 (D.C. Cir. 2008) ("CAIR's flaws are deep. No amount of tinkering . . . will transform CAIR, as written, into an acceptable rule.").
219. 42 U.S.C. § 7410(a)(2)(D) (2000).
220. *North Carolina*, 531 F.3d at 907-08.
221. *Id.* at 908.
222. *Id.*
223. *Id.* at 917.

Title IV budgets, which were designed to prevent acid rain, in setting SO_2 allowance amounts under CAIR, which was designed to reduce another type of pollution in downwind states, particulate matter.[224] Additionally, the limitations CAIR imposed on the Title IV budget of allowances (i.e., through use of the decreasing ratios discussed above) and requirements that CAIR states retire excess allowances were invalid because the EPA lacked authority to unilaterally order those allowances retired.[225]

These and other flaws in CAIR flowed from the EPA's lack of statutory authorization under the CAA. In itself, the case is a warning that to avoid similar debilitating litigation of GHG-trading regimes, Congress must specifically and explicitly authorize them.[226] However, the major failure of CAIR to achieve compliance with the CAA in specific downwind attainment areas is not as relevant in the climate context, in which the entire planet is a "nonattainment area," and global, rather than state-specific, emissions reductions are the ultimate goal.[227]

There are important lessons for any future regional or national carbon cap-and-trade program to be drawn from the OTC-CAIR process, and the D.C. Circuit's ruling does not upset them. The World Resources Institute identified the following: (1) the prefederal OTC program had no effect on the regional economy; (2) slight overallocation of allowances did not undermine the incentive to lower emissions further; (3) leakage problems were far less than anticipated; (4) state-specific allocation plans were politically necessary, but did not undermine compliance or economic efficiency; (5) centralized federal control was unnecessary to the program's success; (6) states and regions can successfully develop their own trading programs; (7) a limited regional program provides important data, institutional knowledge, and experience as a precursor to an expanded or federalized program; and (8) a central coordinating body is necessary but does not have to be the federal government.[228]

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224. *See id.*

225. *See id.* at 921-22.

226. Congressional hand-wringing over failure to take legislative action authorizing CAIR before it was invalidated was widespread. Senator Tom Carper said, "I'm not going to wait another eight years to do what we should have done eight years ago, and that is pass a strong, comprehensive clean air bill that makes deep and meaningful reductions in mercury, nitrogen oxide and sulfur dioxide." *Strong, New Clean Air Bill May Follow Vacated CAIR*, ENEWSUSA, July 29, 2008, http://enewsusa.blogspot.com/2008/07/strong-new-clean-air-bill-may-follow.html.

227. For a comprehensive discussion on the future of CAIR and its relationship to GHG-reduction efforts, see Envtl. L. Inst., Panel Discussion, What's Next After Vacatur of the Clean Air Interstate Rule? (Oct. 2, 2008), http://www.eli.org/seminars/event.cfm?eventid=433 (follow "MP3 recording of the seminar" hyperlink).

228. WRI, *supra* note 197, at 31-32.

C. State Sovereignty and "Cooperative Federalism"

In calling for continuing state roles in climate change regulation, this Article does not endorse a federal climate law simply mandating states to each adopt RGGI- or AB 32-style programs. Among other things, such a law would likely run afoul of the Tenth Amendment, as applied by the Supreme Court in *New York v. United States*.[229] In a previous case, *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, the Court stated that under the Tenth Amendment, Congress could not "commandeer[] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program."[230] In *New York*, the Court gave teeth to this rule by holding that provisions in the Low-Level Radioactive Waste Policy Amendments Act of 1985[231] were unconstitutional because they gave states only two equally coercive options: to either "take title" to nuclear waste or "regulat[e it] according to the instructions of Congress."[232] "A choice between two unconstitutionally coercive regulatory techniques is no choice at all," reasoned the Court, and thus "infring[es] upon the core of state sovereignty reserved by the Tenth Amendment."[233] Nevertheless, the Court reaffirmed "Congress' power to offer States the choice of regulating [an] activity according to federal standards or having state law pre-empted by federal regulation."[234] This "cooperative federalism," of course, is the structure of many existing federal environmental laws.[235]

"Cooperative federalism" should be the touchstone for a new climate law. Under the *Hodel* rule, it would be constitutionally impermissible for Congress to set a GHG-emissions standard and then demand each state to regulate to meet it. This Article does not endorse such a law. Rather, states should be given the option of continuing to operate their own programs, as long as they conform with or are superior to federal standards. There is nothing inherently impossible or impermissible in using multiple regulatory regimes to address the same environmental problem. And given the recent history of influence-peddling and corruption within both Congress and the federal executive

229. New York v. United States, 505 U.S. 144, 161-63 (1992) (citing Hodel v. Va. Surface Mining & Reclamation Ass'n, 452 U.S. 264, 288 (1981)); FERC v. Mississippi, 456 U.S. 742, 758-59 (1982).

230. *Hodel*, 452 U.S. at 288.

231. Pub. L. No. 96-573, 94 Stat. 3347 (codified at 42 U.S.C. § 2021(b), (h)).

232. *New York*, 505 U.S. at 175-76.

233. *Id.* at 176-77.

234. *Id.* at 167 (citing *Hodel*, 452 U.S. at 288).

235. *Id.* at 167-68 (providing four such examples).

branch, there is much to be lost in removing the states altogether as a counterweight to future federal neglect in protecting the climate.

No doubt, there are countervailing arguments for why a federal cap-and-trade program should preclude state programs on the basis of regulatory efficiency. The United States House Committee on Energy and Commerce frames the debate by asking two questions:

- In the presence of a national cap-and-trade greenhouse gas program and other Federal requirements, will a particular State, Tribal, or local program reduce national greenhouse gas emissions?
- In the presence of a national cap-and-trade greenhouse gas program and other Federal requirements, how will a particular State, Tribal, or local program affect costs and who bears the costs?[236]

The House White Paper goes on to model scenarios based on variables such as the efficiency of a federal program, whether state laws cover emissions not included in a federal law, whether the reductions required are "low-cost" or "high-cost," whether a federal law includes a "safety valve" or sets a hard cap, etc.[237] The Paper offers no solid answers. Regarding subnational cap-and-trade programs, it only observes, "[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 and increase demands on both governmental and non-governmental resources."[238] On the other hand, the report acknowledges that state programs can achieve additional reductions over a federal cap.[239]

In any case, this House White Paper assumes the same "two-sphere" model upon which much of our traditional understanding of federalism is premised. Its authors naturally believe that the federal cap-and-trade program will exist in some neoplatonic realm "above" state and local programs and that the two levels are isolated from each other. In such a conception of federalism, it *would* make sense to view disparate subnational programs as an "interference" with the "higher order" federal law. Concededly, such a view of government may be inevitable, symptomatic of the very name of the constitutional provision from which the rules of preemption flow: the "*Supremacy* Clause." Indeed, the drafters of ACSA's savings clause make the same assumption, albeit with opposite intentions; they would like to see climate protection

236. HOUSE WHITE PAPER, *supra* note 11, at 12.
237. *See id.* at 13-17.
238. *Id.* at 18-19.
239. *Id.* at 11.

on both the state and federal level, but do not see the need or possibility for an organic interrelationship between the two.

An alternative, more integrated conception of federalist government has been present from the earliest days of the Republic. Justice Sandra Day O'Connor wrote in *New York v. United States*:

> The Constitution established Congress as "a superintending authority over the reciprocal trade" among the States, by empowering Congress to regulate that trade directly, not by authorizing Congress to issue trade-related orders to state governments. As Madison and Hamilton explained, "a sovereignty over sovereigns, a government over governments, a legislation for communities, as contradistinguished from individuals, as it is a solecism in theory, so in practice it is subversive of the order and ends of civil polity."[240]

The Framers, this passage suggests, forcefully rejected the trumping-sovereignties concept we now assume to be implicit in the Supremacy Clause. Indeed, a federal climate law preempting state cap-and-trade markets could be seen as an uncalled for "trade-related order" to the states.

Congress has the constitutional tools at its disposal to structure a program that is organically connected to—and organically connects—state and regional cap-and-trade systems. This might help to "flatten" an overly "vertical" mode of federalism that does not flinch when Congress appropriates to itself exclusively ever greater realms of state authority. Might Congress have viewed a federal climate law preempting state cap-and-trade markets as just such an uncalled for "trade-related order" to the states?

V. CONCLUSION

There may be a superior model to the current trend toward federalization of a GHG trading program. Right now, Congress is poised to act in a heavy-handed, top-down manner by preempting state cap-and-trade programs. While ACSA and other proposals contain broad but vaguely worded savings clauses to preserve traditional state authority to regulate GHGs above a federal floor, they do not give states a meaningful enough role to play in allocation decisions, determination of flexibility mechanisms, and program oversight. In addition, multiple forms of judicially created preemption doctrines will remain available to undermine subnational efforts to reduce GHGs, even if the savings

240. *New York*, 505 U.S. at 180 (quoting, respectively, THE FEDERALIST NO. 42 (James Madison) and THE FEDERALIST NO. 20 (James Madison)).

clauses make it into law. In short, rather than paying respect to the regional and state efforts that have preceded federal action, these bills collectively assume a *tabula rasa* upon which they may inscribe their decrees from above. Congress's preemptive powers flow directly from the Constitution's Supremacy Clause, but a model of federal authority based on that Clause alone impoverishes others the Constitution taken as a whole would provide.

Those concerned about the twin goals of retention of state and local authority to protect the public welfare and achievement of maximum environmental protection must present an alternative to the crash course on which national and subnational emissions trading regimes are now heading. In this alternative model, an expanded cap-and-trade program should *emerge* from the state and regional trading programs already developing. The federal government should provide oversight, contribute resources, and impose some degree of uniformity in emissions and offset accounting standards. In short, the federal government should play the role of midwife to a national cap-and-trade program, instead of grabbing the child in a custody battle. Such an organic process pays far greater respect to the "old" federalism of overlapping sovereignties and deference to states that is quickly eroding in the face of the "new" federalism's relentless preemption lobbying and litigation.

There are at least three things Congress can do to preserve the fruitful state and regional efforts we have seen emerge thus far. First, Congress needs to strengthen and clarify the savings clauses now in ACSA and other federal proposals. Second, Congress should pass enabling legislation explicitly authorizing state and regional trading programs. A relatively simple statute including these provisions is all that is required to prevent years of litigation under preemption rules, the Dormant Commerce Clause, and the Compact Clause. Third, Congress must position the federal government to play a supportive, *structural* role in the new trading regime rather than an imposing, top-heavy, preclusive one. In short, the federal law should be a floor, not a ceiling.