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California's Climate Diplomacy and Dormant Preemption
David L. Sloss

In his lead article for this symposium, Professor Harold Koh suggests that "states and localities are stepping up to fill in the gap" created by President Trump's repudiation of various multilateral regimes.[1] California Governor Jerry Brown's attempt to stake out a leadership role on climate change presents an interesting example of this broader phenomenon. After President Trump announced that the United States would withdraw from the Paris climate agreement, Governor Brown issued a joint statement with his counterparts from New York and Washington, announcing that the three governors "are teaming up to fight climate change in response to President Trump's" withdrawal decision.[2] A few days later, Governor Brown met in Beijing with China's President Xi Jinping to discuss the problem of climate change. The Chinese President reportedly "welcomed California's efforts to work with the Chinese government to help combat global warming."[3] According to the California government web site, the state is party to a total of 54 "international agreements" on climate change, including agreements with both national and sub-national governments.[4]

Like Professor Koh, I believe that multilateral cooperation is necessary to confront the problem of global warming. From that perspective, I applaud Governor Brown's effort to forge partnerships across national boundaries. However, the Governor's international diplomacy raises at least two distinct constitutional concerns. First, the Compact Clause provides: "No State shall, without the Consent of Congress . . . enter into any Agreement or Compact . . . with a foreign Power."[5] Most of the 54 international agreements posted on the California government web site do not raise significant constitutional issues under the Compact Clause.[6] However, California's cap-and-trade agreement with the Government of Québec (the "Linking Agreement") is vulnerable to a constitutional challenge in this respect.[7] (The term "cap-and-trade" refers to a system that

[1] Add citation to Koh article

[2] Timothy Cama, "Liberal Governors Team up to Fight Climate Change," The Hill (June 1, 2017), available at http://thehill.com/policy/energy-environment/336007-california-washington-new-york-team-up-on-climate (last visited June 6, 2017).

[3] Javier C. Hernández and Chris Buckley, "Xi Jinping and Jerry Brown of California Meet to Discuss Climate Change," New York Times, June 6, 2017.

[4] *See* http://climatechange.ca.gov/climate_action_team/partnerships.html (visited June 9, 2017).

[5] U.S. Const. art. I, sec. 10, cl. 3.

[6] A memo from the Office of Legal Counsel suggests that congressional consent is required under the Compact Clause "only when two or more states agree among themselves to impose some legal obligation or disability on state or federal governments or private parties." Applicability of the Compact Clause to Use of Multiple State Entities Under the Water Resources Planning Act, 4B Op. Off. Legal Counsel 828 (1980). It is beyond the scope of this article to undertake a detailed analysis of all 54 international agreements listed on the California government web site. However, a quick scan suggests that most of those agreements do not impose a legal obligation or disability on California or on private parties.

[7] *See* Agreement Between the California Air Resources Board and the Gouvernement du Québec Concerning the Harmonization and Integration of Cap-and-Trade Programs for Reducing Greenhouse Gas Emissions, Sept. 27, 2013, ("Linking Agreement"), *available at* http://climatechange.ca.gov/climate_action_team/partnerships.html (visited June 9. 2017).

restricts greenhouse gas emissions, grants regulated parties permission to produce a limited quantity of greenhouse gas emissions, and creates a market that permits regulated parties to trade their emission allowances.) Second, the Foreign Commerce Clause grants Congress power "to regulate Commerce with foreign Nations."[8] The Supreme Court has held that state laws may violate the Dormant Foreign Commerce Clause if they "prevent this Nation from 'speaking with one voice' in regulating foreign commerce."[9] Again, most of California's transnational climate change agreements appear to be constitutionally valid under current doctrine. However, the Linking Agreement may also run afoul of the Dormant Foreign Commerce Clause.

The Linking Agreement is important because it is currently the most ambitious transnational agreement to limit greenhouse gas emissions in North America. Ontario recently announced plans to link its cap-and-trade system with California and Québec next year.[10] Other Canadian provinces and U.S. states may also join. Because it is unlikely that either Canada or the United States will adopt a national cap-and-trade system in the near future, expansion of the California-Québec agreement to include other states and provinces is one of the more promising options for addressing the threat posed by greenhouse gas emissions in North America.[11]

At present, no federal statute or regulation preempts the Linking Agreement, either expressly or implicitly.[12] Indeed, the Clean Power Plan (CPP), a federal regulation promulgated by the EPA under the Obama Administration, explicitly authorizes California's cap-and-trade program.[13] Moreover, one could argue that the CPP implicitly endorses the Linking Agreement because the EPA issued the final regulation two years after California and Québec concluded the Linking Agreement. However, President Trump issued an Executive Order on March 28, 2017 that directs the EPA Administrator to review the CPP "and, if appropriate . . . publish for notice and comment proposed rules suspending, revising, or rescinding" the CPP in whole or in part.[14]

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[8] U.S. Const. art. I, sec. 8, cl. 3.

[9] Japan Line, Ltd. v. Los Angeles County, 441 U.S. 434, 451 (1979).

[10] Tamsin McMahon, "California, Quebec and Ontario Push Forward with Cap-and-Trade Program," The Globe and Mail, April 20, 2017, available at https://www.theglobeandmail.com/news/world/california-quebec-and-ontario-push-forward-with-cap-and-trade-program/article34770662/ (visited June 9, 2017).

[11] *See* Daniel M. Bodansky et al., Facilitating Linkage of Heterogeneous Regional, National, and Sub-National Climate Policies Through a Future International Agreement, Harvard Project on Climate Agreements, Nov. 2014, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2554732 (explaining the economic and political benefits of linking sub-national cap-and-trade programs); *see also* David V. Wright, *Cross-Border Constraints on Climate Change Agreements: Legal Risks in the California-Quebec Cap-and-Trade Linkage*, 46 Envtl. L. Rep. News & Analysis 10478 (2016).

[12] *See* Wright, *supra* note 11, at 10491-92; *see also* John Stegman, *Cooperative State Cap and Trade to Mitigate Climate Change*, 55 Santa Clara L. Rev. 215, 230-31 (2015).

[13] Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, Final Rule, 80 Fed. Reg. 64661, 64783 (Oct. 23, 2015).

[14] Promoting Energy Independence and Economic Growth, Exec. Order 13783, 82 Fed. Reg. 16093, § 4(a), March 28, 2017 [hereinafter, Exec. Order 13783].

Therefore, it is quite possible that, within the next couple of years, Congress could enact preemptive legislation, or the EPA could promulgate preemptive regulations.[15]

Absent affirmative action by Congress or the EPA, climate change skeptics who may wish to scuttle the Linking Agreement could raise dormant preemption arguments. The phrase "dormant preemption" is often used to include both dormant foreign affairs preemption and Dormant Foreign Commerce Clause arguments. The claim that the Linking Agreement violates the Compact Clause also raises a dormant preemption issue because the constitutional argument, if accepted by a court, would entail judicial invalidation of the agreement without any affirmative legislative or regulatory action by the federal political branches. Thus, this essay uses the term "dormant preemption" to include all three types of constitutional arguments. However, the article focuses primarily on the Compact Clause and the Foreign Commerce Clause because it is debatable whether the doctrine of dormant foreign affairs preemption has ongoing constitutional vitality.[16]

The remainder of this article is divided into three parts. Part One provides background information about California's cap-and-trade system and the Linking Agreement. Part Two assesses the validity of the Agreement under the Dormant Foreign Commerce Clause. Part Three considers whether the agreement violates the Compact Clause. Although the matter is not free from doubt, I conclude that the Linking Agreement does not violate the Dormant Foreign Commerce Clause. However, the Agreement may well be unconstitutional under the Compact Clause, absent congressional consent. Accordingly, the Conclusion considers options available to Governor Brown to mitigate potential constitutional difficulties.

I.
California's Cap-and-Trade Agreement with Québec

In September 2013, representatives of the California and Québec governments signed an agreement regarding the harmonization and integration of their respective cap-and-trade programs for reducing greenhouse gas emissions (the Linking Agreement).[17] Before finalizing the agreement, each government independently enacted statutes and regulations to create its own cap-and-trade program for greenhouse gas emissions. Additionally, in 2011, California joined with the Provinces of British Columbia, Ontario, and Québec to create Western Climate Initiative, Inc. (WCI, Inc.), a non-profit corporation whose primary purpose is "to provide technical and scientific

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[15] It is not entirely clear whether the EPA has the authority to preempt California law without further congressional action to grant the EPA such authority. Regardless, a detailed analysis of EPA's authority under existing statutes is beyond the scope of this paper.

[16] The doctrine of dormant foreign affairs preemption has come under sustained attack from leading scholars. *See especially* Jack L. Goldsmith, *Federal Courts, Foreign Affairs, and Federalism*, 83 Va. L. Rev. 1617 (1997); David H. Moore, *Beyond One Voice*, 98 Minn. L. Rev. 953 (2014). The doctrine has its origins in *Zschernig v. Miller*, 389 U.S. 429 (1968). With the possible exception of *American Insurance Ass'n v. Garamendi*, 539 U.S. 396 (2003), the Supreme Court has not relied on the *Zschernig* dormant foreign affairs doctrine since 1968. Moreover, *Garamendi* is best explained as an implied preemption case, not a dormant foreign affairs case. *See infra* notes 98-109 and accompanying text.

[17] Linking Agreement, *supra* note 7.

advisory services" for U.S. states and Canadian provinces "in the development and collaborative implementation of their respective greenhouse gas emissions trading programs."[18]

Part One is divided into three sections. The first section briefly describes California's cap-and-trade program. The next section summarizes the Linking Agreement. The third section explains the role of WCI, Inc. in facilitating implementation of the Agreement. Part One does not present a detailed explanation of the statutes and regulations adopted by the Government of Québec because Québec's regulations are broadly similar to California's rules. The Government of Québec has published a very helpful overview for readers who would like to know more about Québec's cap-and-trade program.[19]

A. California's Cap-and-Trade Program

The term "cap-and-trade" refers to a regulatory system that places limits on greenhouse gas emissions (a "cap"), grants regulated parties "emission allowances" so that they are legally entitled to produce a limited quantity of greenhouse gas emissions, and creates a market that permits regulated parties to trade their emission allowances.[20] In theory, trading among covered entities is economically efficient because a company that is able to reduce greenhouse gas emissions at low cost can sell its excess allowances to a company for whom it would be more costly to reduce emissions.

California adopted the Global Warming Solutions Act in 2006.[21] Popularly known as AB 32, the statute designates the Air Resources Board (ARB) as "the state agency charged with monitoring and regulating sources of emissions of greenhouse gases that cause global warming in order to reduce emissions of greenhouse gases."[22] The legislation instructs ARB to "adopt regulations to require the reporting and verification of statewide greenhouse gas emissions and to monitor and enforce compliance with this program."[23] In addition, the statute directs ARB to "determine what the statewide greenhouse gas emissions level was in 1990, and approve . . . a statewide greenhouse gas emissions limit that is equivalent to that level, to be achieved by 2020."[24]

ARB first enacted regulations to establish mandatory greenhouse gas (GHG) reporting and verification requirements for companies that emit greenhouse gases in California.[25] Those regulations took effect in January 2009. ARB subsequently promulgated regulations creating a

[18] By-Laws of Western Climate Initiative, Inc., art. I, available at http://www.wci-inc.org/ (visited June 13, 2017) [hereinafter "WCI By-Laws"].
[19] The Québec Cap-and-Trade System for Greenhouse Gas Emission Allowances, available at http://www.mddelcc.gouv.qc.ca/changements/carbone/documents-spede/q&a.pdf (visited June 13, 2017).
[20] *See generally* Andrew J. O'Connell, *A Critical Analysis of Allowance Allocation in Cap-and-Trade and its Effect on Linked Carbon Markets*, 44 Tex. Env'l L.J. 339 (2014).
[21] California Global Warming Solutions Act of 2006, ch. 488, 2006 Cal. Stat. 3419 (codified at Cal. Health & Safety Code § 38500 et seq.).
[22] *Id.*, § 38510.
[23] *Id.*, § 38530(a).
[24] *Id.*, § 38550.
[25] *See* California Code of Regulations, Title 17, Division 3, Chapter 1, Subchapter 10, sections 95100 to 95158.

cap-and-trade system; those regulations took effect in January 2012.[26] The cap-and-trade regulations define the term "covered entities" and establish compliance requirements for all covered entities. Covered entities include manufacturers, electrical power generation facilities, suppliers of natural gas, and others whose annual output of greenhouse gas emissions equals or exceeds specified thresholds.[27] The regulations establish three separate compliance periods: (1) 2013-14, (2) 2015-17, and (3) 2018 to 2020.[28] Each covered entity has a compliance obligation for each compliance period—the obligations are designed to promote a steady reduction in greenhouse gas emissions for each successive compliance period. Overall, the statewide cap on emissions declines about three percent annually from 2015 to 2020.[29]

The regulations establish two types of "compliance instruments": greenhouse gas emissions allowances (GHG allowances) and offset credits.[30] "Each compliance instrument . . . represents a limited authorization to emit up to one metric ton" of CO_2 or CO_2 equivalent of any of the greenhouse gases covered by the regulations.[31] The ARB granted covered entities free allocations of GHG allowances when the regulations first took effect.[32] As time progresses, covered entities that want to continue to emit greenhouse gases in California may either purchase GHG allowances during periodic auctions conducted by the state,[33] or trade GHG allowances with other covered entities.[34] Alternatively, a covered entity can obtain an "offset credit" by undertaking a project, such as a forestry project, designed to remove CO_2 from the atmosphere. To qualify for offset credits, the project must result in "a GHG emission reduction or GHG removal enhancement that is real, additional, quantifiable, permanent, verifiable, and enforceable."[35]

The regulations include a complex formula for calculating an annual compliance obligation and a triennial compliance obligation for each covered entity.[36] To satisfy its compliance obligation, at the end of each compliance period "[a] covered entity must surrender" a number of compliance instruments corresponding to its compliance obligation for that period.[37] For example, assume that XYZ Company has a GHG emissions limit of 100,000 metric tons of CO_2 equivalent for the 2015-17 compliance period. Assume, further, that XYZ had an initial free allocation of 80,000 metric tons of GHG allowances. To satisfy its compliance obligation, XYZ could reduce its emissions by 20,000 metric tons of CO_2 equivalent, or purchase an additional 20,000 metric

[26] *See* California Code of Regulations, Title 17, Division 3, Chapter 1, Subchapter 10, sections 95801 to 96022.
[27] *See* Cal Code Regs., title 17, §§ 95811, 95812.
[28] Cal Code Regs., title 17, § 95840.
[29] *See* Overview of ARB Emissions Trading Program, https://www.arb.ca.gov/cc/capandtrade/guidance/cap_trade_overview.pdf (visited June 13, 2017).
[30] Cal Code Regs., title 17, § 95820.
[31] Cal Code Regs., title 17, § 95820(c).
[32] *See* Overview of ARB Emissions Trading Program, https://www.arb.ca.gov/cc/capandtrade/guidance/cap_trade_overview.pdf (visited June 13, 2017).
[33] *See* Cal Code Regs., title 17, §§ 95910-95914.
[34] *See* Cal Code Regs., title 17, §§ 95920-95922.
[35] Cal Code Regs., title 17, § 95970(a)(1).
[36] *See* Cal Code Regs., title 17, §§ 95850-95858.
[37] Cal Code Regs., title 17, § 95856.

tons of GHG allowances, or undertake projects to obtain 20,000 metric tons of offset credits, or some combination thereof.[38]

All covered entities are required to maintain accounts with the ARB. The regulations provide that "[t]he Executive Officer shall serve as accounts administrator or may contract with an entity to serve as accounts administrator."[39] The accounts administrator is responsible for tracking GHG emissions for all covered entities. In addition, the administrator maintains a current account of compliance instruments, including the purchase and sale of GHG allowances, any award of offset credits, and the surrender of compliance instruments used to satisfy a covered entity's compliance obligations.

B. The Linking Agreement

The central purpose of the Linking Agreement is to allow the Governments of California and Québec "to work jointly and collaboratively toward the harmonization and integration of [their] mandatory greenhouse gas emissions reporting programs and cap-and-trade programs for reducing greenhouse gas emissions."[40] The Agreement obligates the Parties to "consult each other regularly" and to "continue to examine their respective . . . [regulations] to promote continued harmonization and integration."[41] Furthermore, they agreed to "work together to develop and use common electronic platforms in order to ensure program compatibility . . . including but not limited to a program registry platform and an auction platform."[42]

The Agreement provides that "auctioning of emission allowances and emission units by the Parties' respective programs shall occur jointly."[43] Covered entities in California are authorized to trade emission allowances with covered entities in Québec, and vice-versa, "as provided for under their respective cap-and-trade program regulations."[44] California agreed to accept compliance instruments issued by the Government of Québec to satisfy compliance obligations in California, and Québec agreed to accept compliance instruments issued by the Government of California to satisfy compliance obligations in Québec, "as provided for under their respective . . . program regulations."[45] The Parties agreed to consult with each other before "making changes to their respective offset protocols . . . or changing procedures for issuing offset credits."[46] They also agreed to "continue coordinating administrative and technical support through the WCI, Inc., which was created to perform such tasks."[47]

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[38] A covered entity is permitted to use offset credits to satisfy no more than 8 percent of its compliance obligation. *See* Overview of ARB Emissions Trading Program, https://www.arb.ca.gov/cc/capandtrade/guidance/cap_trade_overview.pdf (visited June 13, 2017).
[39] Cal Code Regs., title 17, § 95830(a).
[40] Linking Agreement, *supra* note 7, art. 1.
[41] *Id.*, arts. 3 and 4.
[42] *Id.*, art. 9.
[43] *Id.* art. 8.
[44] *Id.*, art. 7.
[45] *Id.*, art. 6.
[46] *Id.*, art. 5.
[47] *Id.*, art. 11.

The Agreement stipulates that it "does not modify any existing laws and regulations" of either party.[48] Each party is permitted to withdraw, but the Agreement requires "12 months prior written notice to the other Party" before withdrawal is legally effective.[49] Moreover, termination of the Agreement requires "unanimous consent of the Parties" and termination is not legally effective until "12 months following such consent."[50] In the event of either withdrawal or termination, "a Party's obligations under article 14 regarding confidentiality of information . . . continue to remain in effect."[51] One commentator noted that the withdrawal and termination provisions are designed to build "market security by mitigating the risk of a disintegration of the linked carbon markets without notice."[52]

C. The Western Climate Initiative and WCI, Inc.

The Governors of Arizona, California, New Mexico, Oregon, and Washington launched the Western Climate Initiative in 2007 "to develop a regional target for reducing greenhouse gas emissions."[53] Over the next two years, "the Premiers of British Columbia, Manitoba, Ontario, and Quebec, and the Governors of Montana and Utah joined the original five states in committing to tackle climate change at a regional level."[54] In November 2011, participating governments formed Western Climate Initiative, Inc. (WCI, Inc.), a non-profit corporation created to "provide administrative and technical services to support the implementation of state and provincial greenhouse gas emissions trading programs."[55]

At present, California, British Columbia, Ontario and Quebec are the only "participating jurisdictions" that support the ongoing operations of WCI, Inc.[56] WCI, Inc. performs three primary functions to support the operation of the Linking Agreement. First, WCI, Inc. operates a Compliance Instrument Tracking System (CITSS) "for tracking compliance instruments for emissions trading programs, including allowances and offset certificates."[57] Second, WCI, Inc. conducts "auctions of allowances" in conformity with "the requirements of State and Provincial programs."[58] Third, WCI, Inc. conducts "market monitoring of allowance auctions and allowance and offset certificate trading."[59] WCI, Inc.'s total budget for calendar year 2017 is about 4.8 million dollars.[60]

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[48] *Id.*, art. 13.
[49] *Id.*, art. 16.
[50] *Id.*, art. 20.
[51] *Id. See also* art. 16.
[52] Wright, *supra* note 11, at 10491.
[53] *See* http://www.westernclimateinitiative.org/history (visited June 15, 2017)
[54] *See* http://www.westernclimateinitiative.org/history (visited June 15, 2017)
[55] *Id.*
[56] *See* WCI By-Laws, *supra* note 18, art. III.
[57] *Id.*, art. I(a).
[58] *Id.*, art. I(b).
[59] *Id.*, art. I(c).
[60] *See* Western Climate Initiative, Inc. Budget for Calendar 2017, available at http://www.wci-inc.org/docs/2017%20Budget%20and%20Projected%20Expenses%20for%202018_English_Final%20(10-11-16).pdf (visited June 15, 2017).

II.
The Dormant Foreign Commerce Clause (DFCC)

The Commerce Clause grants Congress the power "to regulate Commerce with foreign Nations, and among the several States."[61] The so-called Dormant Commerce Clause is a judge-made doctrine that constrains the power of state governments to enact regulations that discriminate against or otherwise burden interstate commerce.[62] As applied to commerce with foreign nations, the doctrine is known as the Dormant Foreign Commerce Clause (DFCC). California's cap-and-trade system undoubtedly burdens commerce with foreign nations because it imposes regulatory requirements on companies engaged in international commerce.

In *Japan Line, Ltd. v. County of Los Angeles*, the Supreme Court rejected the argument that "Commerce Clause analysis is identical, regardless of whether interstate or foreign commerce is involved."[63] Instead, the Court said: "When construing Congress' power to 'regulate Commerce with foreign Nations,' a more extensive constitutional inquiry is required."[64] For state laws that burden commerce with foreign nations, the Court created a two-prong test that must be satisfied, in addition to the usual criteria that apply to interstate commerce.[65] The first prong applies only to state tax laws. Under that test, a state tax law is unconstitutional if it "creates a substantial risk of international multiple taxation."[66] The second prong applies to all state laws. Under that test, a state law is unconstitutional if it "prevents the Federal Government from "speaking with one voice when regulating commercial relations with foreign governments."[67]

One could argue that California's cap-and-trade program imposes a "tax" on greenhouse gas emitters. Indeed, in *California Chamber of Commerce v. State Air Resources Board*, plaintiffs made precisely this argument.[68] Specifically, they claimed the revenue that the state collects from sales of GHG allowances constitutes an illegal tax under California law.[69] The California Court of Appeal divided on this question. The majority held that revenue collected from sales of GHG allowances does not constitute a "tax" under California law.[70] One judge dissented; he concluded

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[61] U.S. Const., art. I, § 8, cl. 3.
[62] *See generally* Brannon P. Denning, Bittker on the Regulation of Interstate and Foreign Commerce §§ 6.01-6.08 (2d ed. 2013).
[63] 441 U.S. 434, 446 (1979).
[64] *Id.*
[65] For analysis of the doctrine applied to domestic commerce, *see* Denning, *supra* note 62. For the purpose of this essay, I assume that California's cap-and-trade program is constitutional under ordinary Dormant Commerce Clause analysis. Accordingly, I focus on the additional criteria that apply to international commerce.
[66] *Japan Line,* 441 U.S. at 451.
[67] *Id.*
[68] 10 Cal.App.5th 604 (2017).
[69] *Id.* at 613.
[70] *See id.* at 634. The majority explained that the subject revenue is not a tax "for two interrelated reasons: First, the purchase of emissions allowances . . . is a business-driven decision, not a governmentally compelled decision; second, unlike any other tax to which we have been referred by the parties, the purchase

that California's "cap-and-trade auction program is a tax."[71] Regardless, as the majority correctly noted, "the term 'tax' has different meanings in different contexts."[72] Therefore, even if the revenue from sales of GHG allowances is not a "tax" for the purpose of California law, it could be considered a tax under DFCC doctrine.

Assume, *arguendo*, that the revenue at issue is a "tax" for the purpose of DFCC analysis. Even so, it is clearly constitutional under the first prong of the *Japan Line* test because it does not "create a substantial risk of international multiple taxation."[73] Viewed in isolation, California's cap-and-trade system does not impose a "tax" upon any entity except those that emit greenhouse gases within the state of California.[74] The Linking Agreement allows California to collect revenue from companies that emit greenhouse gases only in Québec.[75] That revenue might plausibly be deemed a "tax" on greenhouse gas emitters based in Québec. However, that revenue does not create a risk of international multiple taxation. Under the Agreement, "the auctioning of emission allowances and emission units by the Parties' respective programs shall occur jointly."[76] In fact, California and Québec have been conducting joint auctions since November 2014.[77] Thus, when a greenhouse gas emitter based in Québec purchases an emission allowance at auction, the company is not making two separate payments to the governments of California and Québec. Instead, the company is making a single payment to an auction administrator who conducts the auction on behalf of both governments. Similarly, if a greenhouse gas emitter based in Québec purchases emission allowances from a California company, that transaction reduces the amount of emission allowances that the Québec company must purchase at auction to satisfy its compliance requirement under Québec law. Therefore, the Québec agreement does not create a risk of international multiple taxation. If anything, it reduces the risk of international multiple taxation (assuming, again, that money paid to procure an emission allowance constitutes a "tax").

However, the second prong of the *Japan Line* test—whether the Linking Agreement "prevents the Federal Government from speaking with one voice when regulating commercial relations with foreign governments"[78]—presents a closer question. In a March 2017 Executive Order, President Trump decreed that "it is the policy of the United States that executive departments and agencies . . . immediately review existing regulations that potentially burden the

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of an emissions allowance conveys a valuable property interest—the privilege to pollute California's air—that may be freely sold or traded on the secondary market." *Id.*

[71] *Id.* at 652 (Hull, J., dissenting).

[72] *Id.* at 640.

[73] *Japan Line*, 441 U.S. at 451.

[74] The regulatory definition of "covered entities" applies only to GHG emitters in California. *See* Cal Code Regs., title 17, § 95811. The regulations allow entities outside California to hold California compliance instruments if they are approved as "voluntarily associated entities." *See* Cal Code Regs., title 17, § 95814. However, revenue collected from voluntarily associated entities is not a "tax" because the payment is voluntary.

[75] Linking Agreement, *supra* note 7,

[76] *Id.*, art. 8.

[77] *See* http://www.wci-inc.org/news-archive.php (visited June 11, 2017).

[78] *Japan Line*, 441 U.S. at 451.

development or use of domestically produced energy resources and appropriately suspend, revise, or rescind those that unduly burden the development of domestic energy resources."[79] In the same Executive Order, President Trump rescinded President Obama's Climate Action Plan and revoked several executive orders and Presidential memoranda on climate change issued under the Obama Administration.[80] Moreover, President Trump directed the EPA Administrator to review certain regulations on greenhouse gas emissions promulgated by the Obama Administration "and, if appropriate . . . publish for notice and comment proposed rules suspending, revising, or rescinding those rules."[81] Finally, on June 1, 2017, President Trump announced that the United States will withdraw from the Paris Climate Agreement.[82]

Recent actions by the Trump Administration are apparently based on the premise that the costs of reducing greenhouse gas emissions outweigh the benefits. In contrast, California's cap-and-trade system and the Linking Agreement are based on the opposite premise: that the benefits of reducing greenhouse gas emissions outweigh the costs.[83] Since the question of whether and how to reduce greenhouse gas emissions is an ongoing subject of international diplomacy, California's cap-and-trade system and the Linking Agreement arguably prevent the United States "Government from speaking with one voice when regulating commercial relations with foreign governments"[84] related to greenhouse gas emissions.

However, *Japan Line* was not the Supreme Court's last word on DFCC doctrine. In *Barclays Bank PLC v. Franchise Tax Bd. of California*, the Court rejected a DFCC challenge to a California tax law.[85] Justice Ginsburg's opinion for the Court arguably modified the one-voice test from *Japan Line*. In *Barclays*, plaintiff cited "a series of Executive Branch actions, statements, and *amicus* filings" to support its argument that the California tax law at issue "impermissibly interferes with the Federal Government's ability to 'speak with one voice.'"[86] The Court rebuffed that argument as follows: "The Executive statements to which [plaintiff] refers, however, cannot perform the service for which [plaintiff] would enlist them. The Constitution expressly grants Congress, not the President, the power to 'regulate Commerce with foreign Nations.'"[87] Moreover, the Court added: "Executive Branch communications that express federal policy but lack the force of law cannot render unconstitutional California's otherwise valid" tax law.[88] In sum, *Barclays* suggests that—when it comes to commerce with foreign nations—Congress, not the President, is the "one voice" that speaks for the nation. Since Congress has done nothing to express its

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[79]Exec Order13783, *supra* note 14, § 1(c).
[80] *Id.*, § 3.
[81] *Id.*, § 4(a).
[82] President Trump Announces U.S. Withdrawal from the Paris Climate Accord, June 1, 2017, *available at* https://www.whitehouse.gov/blog/2017/06/01/president-donald-j-trump-announces-us-withdrawal-paris-climate-accord (visited June 11, 2017).
[83] *See, e.g.*, Linking Agreement, *supra* note 7, Preamble.
[84] *Japan Line*, 441 U.S. at 451.
[85] 512 U.S. 298 (1994).
[86] *Id.* at 328.
[87] *Id.* at 328-29.
[88] *Id.* at 330.

disapproval of California's cap-and-trade program, or of the Linking Agreement, the Agreement appears to be consistent with the one-voice requirement, as elaborated in *Barclays*.

A plaintiff challenging the Linking Agreement might distinguish the Trump Administration's climate policy from the executive branch actions at issue in *Barclays* by noting that President Trump issued a formal executive order, whereas the executive actions in *Barclays* consisted solely of Presidential statements, letters, and amicus briefs.[89] However, this distinction is unavailing. The key requirement from *Barclays* is that executive branch action must have "the force of law" to displace otherwise applicable state law.[90] The Court's decision in *Medellín v. Texas* makes clear that a Presidential executive order lacks the force of law.[91] Therefore, President Trump's March 2017 executive order on energy independence, without more, cannot invalidate California's cap-and-trade regulations or the Linking Agreement.

Although *Barclays* was the last major Supreme Court decision applying DFCC doctrine, two subsequent cases are pertinent. First, in *Crosby v. Nat'l Foreign Trade Council*,[92] the First Circuit invalidated a Massachusetts law on three separate grounds. The lower court held that a federal statute preempted the state law, that the state law was unconstitutional under DFCC doctrine, and that the state law violated the dormant foreign affairs doctrine.[93] The Supreme Court affirmed on statutory preemption grounds without addressing the DFCC argument. The Court relied to some extent on executive branch policy statements to support its conclusion that federal law preempted Massachusetts law.[94] Justice Souter, writing for the Court, conceded that the *Barclays* Court had found "the opinions of the Executive irrelevant."[95] He distinguished *Barclays* as follows: "In this [Massachusetts] case, repeated representations by the Executive Branch supported by formal diplomatic protests . . . are more than sufficient to demonstrate that the state Act stands in the way of Congress's diplomatic objectives."[96] Thus, both *Crosby* and *Barclays* are consistent with the proposition that executive branch policy statements are relevant in determining whether a state law "stands as an obstacle to the accomplishment . . . of the full purposes and objectives of Congress."[97] However, executive branch policy statements, by themselves, cannot invalidate an otherwise valid state law.

Three years after *Crosby*, in *American Ins. Ass'n v. Garamendi*, the Court invalidated a California law.[98] The rationale in *Garamendi* is not entirely clear, so the Court's opinion is open

[89] *See id.* at 328 n.30.
[90] *Id.* at 330.
[91] 552 U.S. 491 (2008).
[92] 530 U.S. 363 (2000).
[93] *See id.* at 371-72.
[94] *See id.* at 380-86.
[95] *Id.* at 385.
[96] *Id.* at 386.
[97] *Id.* at 373 (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941)).
[98] 539 U.S. 396 (2003).

to competing interpretations.[99] One could argue that *Garamendi* is inconsistent with both *Crosby* and *Barclays* because the Court in *Garamendi* granted preemptive effect to executive branch policy statements to support its conclusion that the California law at issue "interfere[d] with [the] foreign policy of the Executive Branch."[100] Call this the "dormant preemption" interpretation of *Garamendi*. If the dormant preemption interpretation is correct, *Garamendi* arguably resurrected the President's voice as the "one voice" that matters for the second prong of *Japan Line*. Under this interpretation of *Garamendi*, the Linking Agreement is arguably invalid because it interferes with the foreign policy of the Trump Administration.

Although the dormant preemption interpretation of *Garamendi* is not manifestly incorrect, the better view is that *Garamendi* is an implied preemption case, not a dormant preemption case.[101] The Court in *Garamendi* referred explicitly to "executive agreements with Germany, Austria, and France."[102] Those agreements were all legally binding as a matter of international law. The Court noted that the President has the authority to make such binding executive agreements without congressional approval,[103] and that such "executive agreements are fit to preempt state law, just as treaties are."[104] If the executive agreements had included express preemption clauses, said the Court, "the issue would be straightforward."[105] Since the executive agreements did not include express preemption clauses, the question was whether those executive agreements implicitly preempted California law. The Court held that the state law was preempted because it conflicted with the "foreign policy of the National Government" embodied in those executive agreements.[106] As in *Crosby*, the Court cited executive branch policy statements to support its conclusion that the California law at issue in *Garamendi* created "an obstacle to the success of the National Government's chosen" policy.[107] But the Court did not rely on those executive branch policy statements, standing alone, to preempt California law. The Court relied on legally binding executive agreements with foreign nations. The Supreme Court had held several decades earlier that such international executive agreements "have a similar dignity" as treaties, which are the "Law of the Land under the Supremacy Clause."[108] Thus, the implied preemption interpretation of *Garamendi* is consistent with the Court's holding in *Barclays*, that federal government action must

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[99] *See, e.g.*, Michael P. Van Alstine, *Executive Aggrandizement in Foreign Affairs Lawmaking*, 54 UCLA L. Rev. 309 (2006); Brannon P. Denning & Michael D. Ramsey, *American Insurance Association v. Garamendi and Executive Preemption in Foreign Affairs*, 46 Wm. & Mary L. Rev. 825 (2004).
[100] *Garamendi*, 539 U.S. at 413.
[101] Admittedly, the *Garamendi* Court's lengthy discussion of *Zschernig* supports the dormant preemption interpretation and tends to negate the implied preemption interpretation. *See Garamendi*, at 417-19. However, the implied preemption interpretation is consistent with *Barclays, Crosby,* and *Medellín*, whereas the dormant preemption interpretation is difficult, if not impossible, to reconcile with those cases.
[102] *Garamendi*, at 413.
[103] *Id.* at 415.
[104] *Id.* at 416.
[105] *Id.* at 417.
[106] *Id.* at 420.
[107] *Id.* at 425.
[108] United States v. Pink, 315 U.S. 203, 230 (1942).

have "the force of law" to displace otherwise applicable state law.[109] Since the executive agreements with Germany, Austria, and France had "the force of law" under established Supreme Court precedent, the California law was invalid because it stood as an obstacle to the success of the national foreign policy embodied in those agreements.

In sum, the Linking Agreement is probably constitutional under DFCC doctrine as elaborated in *Barclays Bank.* The Agreement is vulnerable to a constitutional challenge under the dormant preemption interpretation of *Garamendi.* However, the implied preemption interpretation is a better reading of *Garamendi.* The Linking Agreement is constitutionally valid under the implied preemption interpretation because the Trump Administration has not (yet) created any new federal law that explicitly or implicitly preempts the Linking Agreement.

III.
The Compact Clause

The Constitution provides that "[n]o State shall enter into any Treaty, Alliance or Confederation" with a foreign state.[110] The Compact Clause adds: "No State shall, without the consent of Congress . . . enter into any Agreement or Compact with another State, or with a foreign Power."[111] The distinction between a "treaty, alliance or confederation," on one hand, and an "agreement or compact," on the other hand, has never been entirely clear.[112] For the purpose of this essay, though, I will assume that the Linking Agreement is not a "treaty, alliance, or confederation." Even so, the Linking Agreement is vulnerable to a constitutional challenge under the Compact Clause because California has not obtained congressional consent.

Although a literal reading of the Compact Clause suggests that every "agreement or compact" requires congressional consent, the Supreme Court long ago rejected a literal reading of the Clause. Justice Field, writing for the Court in *Virginia v. Tennessee*, observed that "[t]he terms 'agreement' or 'compact,' taken by themselves, are sufficiently comprehensive to embrace all forms of stipulation, written or verbal, and relating to all kinds of subjects."[113] Despite the plain meaning, he argued, "the terms 'compact' or 'agreement' in the constitution do not apply to every possible compact or agreement between one state and another." Instead, he concluded, "it is evident that the prohibition is directed to the formation of any combination tending to the increase of political power in the states, which may encroach upon or interfere with the just supremacy of the United States."[114] The Court has adhered to this functionalist interpretation of the Compact Clause ever since.

Modern developments confirm the wisdom of the Court's approach. In a recent law review article, Professor Hollis described state practice involving agreements between U.S. states and

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[109] *Barclays,* 512 U.S. at 330.
[110] U.S. Const. art. I, sec. 10, cl. 1.
[111] U.S. Const. art. I, sec. 10, cl. 3.
[112] *See* Duncan B. Hollis, *Unpacking the Compact Clause,* 88 Tex. L. Rev. 741, 772-79 (2010) (analyzing this issue in greater detail).
[113] Virginia v. Tennessee, 148 U.S. 503, 517-18 (1893).
[114] *Id.* at 518-19.

foreign states, which he calls "foreign state agreements" (FSAs). He noted that "[t]he states have concluded at least 340 FSAs since 1955." More than half of those were concluded after the year 2000.[115] However, "Congress has reviewed fewer than a dozen FSAs in the last century, consenting to just six and rejecting only one outright."[116] To insist now on a literal reading of the Compact Clause would disrupt decades of settled practice in which states have concluded a large number of interstate and foreign state agreements with Congress' implicit acquiescence, if not its consent.

Unfortunately, the rejection of a literal reading and Justice Field's dictum from *Virginia v. Tennessee* provide very little guidance for modern courts. The Supreme Court and the Department of Justice have identified specific criteria to guide application of the *Virginia v. Tennessee* standard to compacts among states within the United States. However, the Supreme Court has not decided an FSA case since 1840[117] and the Attorney General has never issued a formal legal opinion regarding application of the Compact Clause to FSAs. Just as the Court has identified additional factors to be considered when applying the Dormant Commerce Clause to foreign commerce,[118] one could argue that courts should consider additional criteria when applying the Compact Clause to an agreement with a foreign state.[119] Nevertheless, in a legal memorandum to Senator Byron Dorgan, the State Department Legal Adviser noted that "it is not a settled question that the [*Virginia v. Tennessee*] standard applies to state compacts with foreign powers." However, he added, "at least one state court, the Department of State and numerous scholars have assumed that it does."[120] Given that assumption, this essay will apply the criteria developed for domestic interstate compacts to assess the constitutionality of the Linking Agreement.

In *Northeast Bancorp, Inc. v. Board of Governors of the Federal Reserve System*,[121] the Supreme Court seemed to endorse a two-step approach to application of the Compact Clause. Under that approach, step one requires a decision about whether the arrangement at issue constitutes an "agreement or compact." If it does, then step two requires a decision about whether that "agreement violates the Compact Clause."[122] However, other authorities simply apply a one-step approach in which the central question is whether the agreement at issue is the type of agreement or compact that requires congressional consent under the Compact Clause. The one-step approach makes sense here because California and Québec entered into an express agreement. In contrast, in *Northeast Bancorp,* Massachusetts and Connecticut enacted similar statutes but did not conclude any formal agreement.[123] Hence, the following paragraphs summarize and apply the one-step approach.

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[115] Hollis, *supra* note 112, at 750-51 .
[116] *Id.*, at 742.
[117] Holmes v. Jennison, 39 U.S. 540 (1840).
[118] *See supra* notes 63-67 and accompanying text.
[119] *See* Hollis, *supra* note 112, at 769-96 (contending that "foreign agreements warrant entirely different treatment than that accorded to interstate agreements").
[120] Memorandum from William H. Taft, IV, Legal Adviser, Dep't of State, to Senator Byron L. Dorgan (Nov. 20, 2001), available at http://www.state.gov/s/l/22720.htm (visited June 12, 2017).
[121] 472 U.S. 159, 175-76 (1985).
[122] *Id.*, at 175.
[123] *See id.*

In *U.S. Steel Corp. v. Multistate Tax Comm'n*, the Supreme Court applied the *Virginia v. Tennessee* standard to a multistate tax compact.[124] The Court identified three specific criteria that are helpful in assessing whether a compact requires congressional consent under the *Virginia v. Tennessee* standard. First, does the agreement "purport to authorize the member States to exercise any powers they could not exercise in its absence"?[125] Regarding the Linking Agreement, the answer is clearly "no." California adopted its cap-and-trade system by enacting legislation and regulations before it entered into the agreement with Québec. California exercised its sovereign power to regulate greenhouse gas emissions in California by means of the legislation and regulations. The Linking Agreement did not augment California's sovereign power in that respect, nor did it impose any additional obligations on greenhouse gas emitters in California. To the contrary, the Linking Agreement provides additional flexibility for covered entities in California by enabling them to trade compliance instruments with covered entities in Québec.[126]

Second, the Court in *U.S. Steel* considered whether "each State retains complete freedom to adopt or reject the rules and regulations" promulgated by a multi-state entity.[127] With respect to the Linking Agreement, the answer is clearly "yes." The parties to the Linking Agreement created WCI, Inc. to coordinate "administrative and technical support" for implementation of the agreement.[128] WCI, Inc. does not have the authority to promulgate legally binding rules or regulations. Rather, WCI, Inc. conducts auctions of emissions allowances, maintains a registry to track compliance instruments, and monitors the market for purchases and sales of compliance instruments.[129] The Linking Agreement states expressly: "This Agreement does not modify any existing laws and regulations."[130] Moreover, the Agreement specifies that it does not and will not "restrict, limit or otherwise prevail over each Party's sovereign right and authority to adopt, maintain, modify or repeal any of their respective program regulations."[131] Under the Linking Agreement, California retains unfettered discretion to determine the annual and triennial compliance obligations for all covered entities in California.

However, the third criterion from *U.S. Steel* is more problematic—whether "each State is free to withdraw at any time."[132] The Court in *U.S. Steel* repeated this point twice to emphasize its importance.[133] The Linking Agreement does not give California unfettered discretion to withdraw.

[124] 434 U.S. 452 (1978).
[125] *Id.* at 473.
[126] *See* Linking Agreement, *supra* note 7, art. 7.
[127] *U.S. Steel Corp.*, 434 U.S. at 473.
[128] *See* Linking Agreement, *supra* note 7, art. 11. *See also* http://www.wci-inc.org/
[129] *See* WCI By-Laws, *supra* note 18, art. I. *See also* http://www.wci-inc.org/
[130] Linking Agreement, *supra* note 7, art. 13. Professor Hollis notes that "many agreements made by U.S. states with foreign governments specifically disavow any legal effect." Duncan B. Hollis, *The Elusive Foreign Compact*, 73 Mo. L. Rev. 1071, 1083 (2008). In some cases, this type of language may be included primarily to help protect the agreement from a constitutional challenge under the Compact Clause.
[131] *Id.*, Preamble.
[132] *U.S. Steel Corp*, 434 U.S. 452, 473.
[133] *See id.* at 457 ("Article X permits any party to withdraw from the compact by enacting a repealing statute."); *id.* at 473 ("Moreover, as noted above, each State is free to withdraw at any time.").

To the contrary, Article 16 requires "12 months prior written notice to the other Party" before either party is allowed to withdraw.[134] Moreover, Article 20 stipulates that termination of the Agreement requires unanimous written consent of the Parties and termination is not effective until "12 months following such consent."[135] As noted previously, the Parties apparently believed that these withdrawal and termination provisions were necessary to provide regulated entities the assurance they needed to participate in a transnational market for buying and selling compliance instruments.[136] Even so, by constraining its right to withdraw, California may have triggered a constitutional requirement to obtain congressional consent under the Compact Clause.

A 1980 memo from the Office of Legal Counsel (OLC memo) confirms the preceding analysis.[137] In that memo, the Deputy Assistant Attorney General evaluated the constitutionality of regional river basin commissions under the Compact Clause. The opinion says: "The states may agree, without congressional consent, to create, fund, and participate in a regional . . . plan, so long as each state is free to accept or reject a plan or any of its provisions *and has the unfettered power to withdraw* from the regional sponsor."[138] Thus, the OLC Memo reinforces the conclusion that congressional consent is required for an interstate compact that imposes excessive constraints on a state's power to withdraw.

The OLC memo adds three other factors, in addition to the *U.S. Steel* criteria, that are relevant to a Compact Clause analysis of the Linking Agreement. First, congressional "consent would be required if the regional sponsor possessed any legally effective authority, regulatory or otherwise, *to ensure* the plan's implementation by . . . private parties."[139] Under the Linking Agreement, WCI, Inc. has authority to monitor implementation of compliance obligations by private parties. However, California and Québec retain the authority "to ensure" that private parties carry out their compliance obligations. Neither the Linking Agreement nor any other instrument delegates enforcement authority to WCI, Inc. Moreover, the relevant regulations make clear that California government entities retain complete control over enforcement.[140]

Second, the OLC memo says: "The test is whether the state action is truly independent or whether it is made instead in return for reciprocal action by other states."[141] The Linking Agreement may raise constitutional problems under this test also. California's agreement to accept compliance instruments issued by the Government of Québec to satisfy compliance obligations in California was apparently made in return for reciprocal action by Québec.[142] Similarly, California's decision to permit covered entities in California to trade compliance instruments with

[134] Linking Agreement, *supra* note 7, art. 16.
[135] *Id.*, art. 20.
[136] *See supra* note 52 and accompanying text.
[137] Applicability of the Compact Clause to Use of Multiple State Entities Under the Water Resources Planning Act, 4B Op. Off. Legal Counsel 828 (1980) [hereinafter, "OLC Memo"].
[138] *Id.* at 831 (emphasis added).
[139] *Id.* at 831 (emphasis added).
[140] *See* Cal Code Regs., title 17, §§ 96010-014.
[141] OLC Memo, *supra* note 137, at 831.
[142] *See* Linking Agreement, *supra* note 7, art. 6.

covered entities in Québec was seemingly in return for Québec's reciprocal action.[143] One could make the same argument with respect to the agreements to establish a common registry and to conduct joint auctions.[144] Therefore, a court presented with a Compact Clause challenge to the Linking Agreement might cite the OLC memo as authority for the proposition that the reciprocal nature of the agreement is constitutionally problematic. On the other hand, the Supreme Court decision in *Northeast Bancorp* suggests that the reciprocal nature of the agreement makes it an "Agreement or Compact" under the Constitution, but "not every such agreement violates the Compact Clause."[145]

Finally, the OLC memo says that congressional consent is required "when two or more states agree among themselves to impose some legal obligation or disability on state or federal governments."[146] Two aspects of the Linking Agreement arguably impose a legal obligation or disability on California. First, Article 14 addresses confidentiality obligations, which remain legally effective even after the Agreement is terminated under Article 20, or after a party withdraws pursuant to Article 16.[147] Second, the Agreement as a whole arguably creates a legal obligation for California to accept compliance instruments issued by the Government of Québec.[148] If a covered entity in California submitted a compliance instrument issued by Québec to satisfy its compliance obligation under California law, and a state agency refused to accept that instrument, the state might be liable to the regulated entity for breach of a legal obligation.[149] Thus, if a court treated the OLC memo as persuasive authority, these features of the Linking Agreement might raise constitutional problems under the Compact Clause.

In sum, if California does not obtain congressional consent for the Linking Agreement, a court might hold that the Agreement violates the Compact Clause.

Conclusion

The Linking Agreement between California and Québec is a critical element of the broader effort to reduce greenhouse gas emissions in North America. A judicial decision that the Agreement is unconstitutional could create a major impediment for other actors who are trying to address global warming at the sub-national level. Therefore, Governor Brown should consider precautionary steps to avoid a judicial ruling that the Agreement violates the Compact Clause.

In light of the preceding analysis, the Governor might consider three different options for addressing the constitutional problem: seek congressional consent, negotiate an amendment to the

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[143] *See id.*, art. 7.
[144] *See id.*, arts. 8, 9.
[145] Northeast Bancorp, Inc. v. Board of Governors of the Federal Reserve System, 472 U.S. 159, 175-76 (1985).
[146] OLC Memo, *supra* note 137, at 828.
[147] *See* Linking Agreement, *supra* note 7, arts. 14, 16, 20.
[148] *See id.*, especially Article 6.
[149] In *California Chamber of Commerce v. State Air Resources Board*, 10 Cal.App.5th 604 (2017), the California Court of Appeal said that emissions allowances convey "a valuable property interest." *Id.* at 634. If that view is correct, it reinforces the point that refusal to accept emission allowances issued by the Government of Québec could create legal liability for California government agents.

Linking Agreement, or do nothing. Consider the "do nothing" option. If Governor Brown does not seek congressional consent or negotiate an amendment to the Linking Agreement, it is possible that nobody will file suit to challenge the validity of the Agreement. However, given the ideological fervor of climate change skeptics in the United States, it is likely that some plaintiff will step forward to challenge the Agreement. Moreover, the outcome of any such litigation is sufficiently unpredictable that the "do nothing" option is not a very attractive one.

Second, Governor Brown could attempt to negotiate an amendment to the Linking Agreement to eliminate the 12-month notice requirement for withdrawal and termination. Deleting the 12-month notice requirement would not resolve all the potential constitutional issues, but it would eliminate the most significant constitutional problem with the Linking Agreement. Of course, the Government of Québec might not agree to the proposed amendment. Moreover, adoption of the amendment could potentially harm the market for transnational trading of compliance instruments.

However, the experience of northeastern states with the Regional Greenhouse Gas Initiative (RGGI) suggests that a negotiated amendment would not have a significant adverse effect on the market. The RGGI is a regional cap-and-trade program that permits trading of emission allowances among regulated parties in Connecticut, Delaware, Maine, Maryland, Massachusetts, New Hampshire, New York, Rhode Island and Vermont.[150] The participating states created the RGGI when they signed a Memorandum of Understanding (MOU) in December 2005.[151] Section 5.B of the MOU allows signatory states to withdraw "upon 30 days written notice."[152] New Jersey, which was one of the original signatories, withdrew from the agreement in 2011.[153] Despite New Jersey's withdrawal, and despite the 30-day withdrawal provision, the greenhouse gas emissions market created by the RGGI appears to be functioning effectively. Given the experience of RGGI states, California and Québec could amend the termination and withdrawal provisions of the Linking Agreement to reduce the notice requirement to 30 days without risking excessive damage to the market for transnational trading of compliance instruments. Moreover, a 30-day notice requirement would be more likely to survive a constitutional challenge under the Compact Clause than the current 12-month notice requirement because a court might be reluctant to issue a constitutional ruling that would implicitly invalidate the RGGI.

Third, Governor Brown could seek congressional consent for the Linking Agreement. If Congress consents explicitly, that would solve the constitutional problem. However, a formal request for congressional consent presents a risk that Congress could reject the Agreement. The experience of the Midwestern states that formed the Great Lakes Basin Compact is instructive in this regard. That compact is the only case where Congress refused to consent to a compact between

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[150] *See* https://www.rggi.org/rggi (visited June 15, 2017).

[151] *See* Regional Greenhouse Gas Initiative, Memorandum of Understanding, available at https://www.rggi.org/design/history/mou (visited June 15, 2007).

[152] *See* id.

[153] *See* Notice of Withdrawal of Agreement to the RGGI Memorandum of Understanding, available at https://www.rggi.org/docs/Documents/NJ-Statement_112911.pdf (visited June 15, 2007).

U.S. states and a foreign government.[154] The Compact provided that participating "states would create a Great Lakes Commission to make policy recommendations" to the United States and Canada.[155] The agreement "also provided that the Canadian provinces of Ontario and Quebec could join as coequal members."[156] Congress ultimately withheld consent for some provisions in the Compact because the State Department objected that certain aspects of the agreement "infringed upon State Department turf."[157] Thus, if Governor Brown does seek congressional consent for the Linking Agreement, State Department views about the agreement are likely to influence Congress's response.

[154] *See* Hollis, *supra* note 131, at 1078.
[155] *See* Peter R. Jennetten, *State Environmental Agreements with Foreign Powers: The Compact Clause and the Foreign Affairs Power of the States*, 8 Geo. Int'l Envtl. L. Rev. 141, 165 (1995).
[156] *Id.*
[157] *Id.* at 166-67.