# THE VIABILITY OF INTERSTATE COLLABORATION IN THE ABSENCE OF FEDERAL CLIMATE CHANGE LEGISLATION

H. JOSEPH DRAPALSKI III*

## I. INTRODUCTION

The United States Federal Government has declined to enact a nationwide regulatory scheme to abate greenhouse gas emissions: Congress has repeatedly failed to pass comprehensive legislation and the Environmental Protection Agency (EPA) has only recently—and reluctantly—begun to regulate greenhouse gas emissions. In the absence of the guidance that might otherwise be afforded by a centralized regulatory scheme, some states are now taking action to collaborate on abatement efforts through regionally defined interstate initiatives. While much scholarship analyzes these state-led initiatives with the expectation that federal legislation will soon exist, this analysis departs from that tradition. As it is increasingly unlikely that federal action will occur in the foreseeable future, it is now necessary to consider the long-term viability of these state-led initiatives in the absence of comprehensive federal legislation. This Note focuses upon two of the most pressing challenges which face the regional initiatives: first, the inherently limited breadth of their jurisdiction; second, the likelihood of survival in the face of potential constitutional challenges.

This paper proceeds in three parts. Part I will first set the stage for this analysis by showing that congressional legislation is not likely to occur in the near future. Second, Part I will briefly describe the regional initiatives as they stand today. The difficulties the regional initiatives face in the absence of federal action will be considered in Parts II and III. Part II explores the viability of the initiatives in light of their limited jurisdiction. Part III, under the assumption that Congress it not likely to pass comprehensive climate change legislation in the near future, considers the constitutional concerns that may threaten the regional initiatives.

* Duke University School of Law, J.D. & LL.M. expected 2012; Amherst College, B.A., *magna cum laude*, 2008.

## II. FEDERAL INACTION AND THE ADVENT OF REGIONAL INITIATIVES

The United States Congress came deceptively close to taking affirmative action to abate nationwide greenhouse gas emissions in 2009, but ultimately failed to pass the American Clean Energy and Security Act (ACES) into law.[1] Early signs were optimistic, however, as ACES did pass through the House of Representatives, but the bill fell flat when it failed to come to a vote in the Senate. Since the bill's failure, the political atmosphere surrounding federal climate change action has become increasingly toxic. Due to the lack of action at the federal level—and the improbability of such action occurring in the near future—some states are now coordinating their own interstate regulatory policies. The Regional Greenhouse Gas Initiative (RGGI), for example, is the most well-known and longest operating regional initiative; a similar initiative has been developed on the West Coast. Before delving into an analysis of the viability of such regional initiatives, it first is necessary to discuss the circumstances that catalyzed the creation of such interstate collaboration and the manner in which they function.

### *A. The Fruitless Search for a Solution*

With so much empirical and academic support in favor of a federal cap-and-trade program,[2] it must have seemed hardly a

1. The American Clean Energy and Security Act, H.R. 2454, 111th Cong. (2009). The Bill passed a vote by the Energy and Commerce Committee by a vote of 33 to 25 on May 21, 2009, then also passed out of the House of Representatives, where it was introduced, by a vote of 219 to 212 on June 26, 2009.

2. JANET PEACE & ROBERT N. STAVINS, PEW CTR. FOR GLOBAL CLIMATE CHANGE, IN BRIEF: MEANINGFUL AND COST EFFECTIVE CLIMATE POLICY: THE CASE FOR CAP AND TRADE 2 (2010) (defining the cap as an upper-limit on emissions determined by the regulatory body overseeing the cap-and-trade regime, which then distributes a number of allowances equal to this cap) [hereinafter MEANINGFUL AND COST EFFECTIVE CLIMATE POLICY]. One of the most successful experiences of the United States with a cap-and-trade program was with its Acid Rain Program (ARP). The cap-and-trade portion of the ARP, which was enacted in 1995, has accomplished a more than 40% reduction in the United States' national sulfur dioxide emissions. Sam Napolitano et al., *The U.S. Acid Rain Program: Key Insights from the Design, Operation, and Assessment of a Cap-and-Trade Program*, 20 ELECTRICITY J. 47, 47 (2007) (estimating that benefits from the ARP emission reductions are approximately $142 billion by 2010, with an annual compliance cost of $3.5 billion); *see generally* Jonathan B. Wiener & Barak D. Richman, *Mechanism Choice*, *in* RESEARCH HANDBOOK ON PUBLIC CHOICE AND PUBLIC LAW 363, 384, 386 (Daniel A. Farber & Anne Joseph O'Connell eds., 2010) (finding that a cap-and-trade system is appealing because of its ability to minimize cost, allow for flexibility, adaptability, and burden distribution); Jonathan B. Wiener, *Property and Prices to Protect the Planet*, 19 DUKE J. COMP. & INT'L L. 515, 519–21 (2009) (comparing the relative merits of a tax

surprise for those attuned to the political winds in Washington when ACES passed through the United States House of Representatives on June 26, 2009. However, the bill's passage was not assured: It passed by a margin of only seven votes, 219 to 212, with forty-three democrats voting against the bill.[3] Although numerous cap-and-trade bills were introduced prior to ACES, this vote marked the first time that either house of Congress passed a bill which comprehensively addressed many climate change inducing greenhouse gases. In addition to implementing a nationwide cap-and-trade system, ACES contained the sweeping provisions needed to make the U.S. internationally competitive by encouraging the development and use of renewable technologies while simultaneously decreasing domestic greenhouse gas emissions.[4]

Despite the overwhelming support it received from industry[5] and environmental organizations,[6] and the tacit approval of politicians

---

or cap-and-trade solution, finding that while a tax removes uncertainty about price, it does not definitively limit the amount of emissions, as opposed to a cap-and-trade system which leaves some uncertainty about price, but does explicitly cap emissions).

3. Support for this bill was far from unanimous among Democrats in the House of Representatives. In this era of partisan politics, Republican votes against the bill were to be expected, but it did not bode well for the bill's future that such a large contingent of Democratic lawmakers also voted against it. *H.R.2454 - American Clean Energy And Security Act of* 2009, OPENCONGRESS, http://www.opencongress.org/bill/111-h2454/actions_votes (last visited Aug. 31, 2011) (reporting that only eight Republicans voted for the bill, while 169 voted against it, and that 211 Democrats voted for the bill, while 43 voted against it).

4. While outside the purview of this paper, the potential panacea this bill promised for the Nation's climate concerns cannot be understood without brief mention of its energy designs. The Committee on Energy and Commerce listed the following as the bill's key provisions: a requirement that electric utilities and the government must meet 20% of their electricity demand through renewable energy by 2020; a multibillion dollar promise of investment in clean energy technology and efficiency; new energy-saving standards for buildings and appliances; a reduction in carbon emissions by 80% by 2050 over 2005 levels; and, despite these lofty, but achievable goals, a guarantee that costs to the average household will not exceed 50 cents per day. STAFF OF H. COMM. ON ENERGY AND COMMERCE, THE AMERICAN CLEAN ENERGY AND SECURITY ACT (H.R. 2454) (2009), *available at* http://democrats.energycommerce.house.gov/Press_111/20090724/hr2454_housesummary.pdf.

5. Due to the dedicated and extensive negotiations of Senators Kerry, Lieberman, and Graham, support for the bill was secured from a broad base of industry parties including Exelon, General Electric, Dow Chemical Company, Pacific Gas and Electric Company, and Dupont. *Hearing on The American Clean Energy and Security Act of 2009 Before the Subcommittee on Energy and Environment of the House Committee on Energy and Commerce*, 111th Cong. (2009) (testimony of David G. Hawkins, Dir. Climate Programs, Nat'l Res. Def. Council), *available at* http://www.nrdc.org/globalwarming/aces/files/glo_09042301.pdf (stating that ACES is aligned with the interests of the U.S. Climate Action Partnership, of which these companies are members); and closely fits its proposed ideal legislation); John M. Broder, *House Passes Bill to Address Threat of Climate Change*, N.Y. TIMES, June 26, 2009, http://www.nytimes.com/2009/06/27/us/politics/27climate.html?_r=1&hp; Ryan Lizza, *As the*

hailing from both sides of the aisle,[7] the bill ultimately tumbled from its pinnacle of assured success to the worn carpet of a smoke-filled backroom. While a precise reason for the bill's failure to reach a vote in the Senate is subject to discussion, it is clear that internal politics significantly contributed to its demise, as the bill became so politicized that even the White House, under an administration which repeatedly espoused its support for such an initiative,[8] would not fight for the bill's passage.[9]

Bearing in mind the failure of a bill which appeared so favorably positioned to pass both chambers of the Congress, and the particular circumstances which doomed it, the prospects for implementing a federally mandated cap-and-trade regime in the near future to combat climate change are dim.[10] The failure of the federal government to take action has left open a largely uncharted

---

*World Burns*, NEW YORKER, Oct. 11, 2010, http://www.newyorker.com/reporting/2010/10/11/101011fa_fact_lizza (noting that support could be found from the oil companies and the Chamber of Commerce); Tony Kreindler, *New Momentum to Pass a Carbon Cap in 2009*, CLIMATE 411 (May 21, 2009), http://blogs.edf.org/climate411/2009/05/21/new-momentum-to-pass-a-carbon-cap-in-2009/ (noting that the U.S. Climate Action Partnership).

6. The majority of environmental groups supported a bill such as the ACES, something for which they had fought for years, with some demanding even stauncher standards. Among those who supported the bill were the Environmental Defense Fund, Natural Resources Defense Council, Sierra Club, Audubon Society, The Nature Conservancy, Alliance for Climate Protection, League of Conservation Voters, and Defenders of Wildlife. *See supra* note 5.

7. While Democratic support seemed predominately a given, the Republicans were far from enthusiastic, and thus any support from their party was a huge boon for the bill. Kerry, Lieberman, and Graham counted on support from a handful of Republicans: Susan Collins, Olympia Snowe, Scott Brown, George LeMieux, and, of course, Lindsey Graham. *Id.* Although even this small Republican support was promising, if the vote on the bill from the House was any indicator, the Senators would need more votes than that to compensate for the number of Democrats who might oppose it.

8. President Obama's enthusiastic support for climate change legislation was a principal pillar of his campaign in 2008. *See* Press Release, President Barak Obama, President-Elect Obama Promises "New Chapter" on Climate Change (Nov. 18, 2008), *available at* http://change.gov/newsroom/entry/president_elect_obama_promises_new_chapter_on_climate_change/.

9. The White House did not follow through on its earlier promises to push climate change legislation through Congress, however, as it withheld its support from the Bill's sponsors and issued a damaging statement directly to Fox News labeling the bill a "gas tax." Major Garrett, *WH Opposes Higher Gas Taxes Floated by S.C. GOP Sen. Graham in Emerging Senate Energy Bill*, FOX NEWS (Apr. 15, 2010), http://politics.blogs.foxnews.com/2010/04/15/wh-opposes-higher-gas-taxes-floated-sc-gop-sen-graham-emerging-senate-energy-bill.

10. The White House now entirely avoids the issue of cap-and-trade as a pariah and the Republican Party regularly uses the so called "cap-and-tax" as a symbol to disparage any climate action effort. *See* John M. Broder, *'Cap and Trade' Loses Its Standing as Energy Policy of Choice*, N.Y. TIMES, Mar. 25, 2010, http://www.nytimes.com/2010/03/26/science/earth/26climate.html.

regulatory space for state collaborations to take the lead in the fight to abate greenhouse gas emissions. Due to their limited impact, regional responses are not the optimal solution, and the threats to their successful implementation are many. However, in light of the present circumstances, an analysis of the continued viability of subnational action is warranted.

### *B. Regional Initiatives: Coordinated State Action to Abate Greenhouse Gas Emissions*

One alternative to federal action lies in the concerted effort of a number of states to take coordinated action.[11] Interest in the potential of such regional initiatives to fill this unoccupied regulatory space is growing, but these efforts face many debilitating problems that will take considerable effort to overcome.

1. *A Subnational Response to Abate Greenhouse Gas Emissions*. Given the threatening political waters of Congress and resulting inactivity, regional initiatives have become an attractive option for states. While such an approach may seem to be a novel reaction to the failure of ACES, the first such program, the Regional Greenhouse Gas Initiative (RGGI), began operation over five years ago. Two other regional initiatives are currently in varying stages of development: the Western Climate Initiative (WCI), slated to become operational on the West Coast in 2012, and the Midwestern Greenhouse Gas Reduction Accord (the Midwestern Accord).

It is argued that the driving force behind a regional approach, as opposed to a single state taking action on its own, is cost effectiveness.[12] Regional actions may be lucrative as they allow states to pool their resources and realize a much more significant abatement of emissions than any one state could hope to accomplish on its own. While the promise of such rewards is alluring, it is by no means guaranteed; in fact, some scholars might take the opposite position.[13]

---

11. Any discussion of regional initiatives in this paper refers solely to their provisions regarding the implementation and administration of a cap-and-trade program. Although the initiatives also enact various other standards or mechanisms, they are outside the purview of this discussion.

12. *See infra* Part III.A.

13. *See* Jonathan B. Wiener, *Think Globally, Act Globally: The Limits of Local Climate Policies*, 155 U. PA. L. REV. 1961, 1965–66 (2007) [hereinafter *Think Globally*] (arguing that subnational action is both inherently inadequate to reduce global greenhouse gas emissions and inefficient because of economic considerations (e.g., leakage and free-riding)). The problems which face a subnational response are many, and these difficulties are addressed and considered at length in Part III, *infra*.

2. *The Regional Initiatives*. RGGI is comprised of ten Mid-Atlantic and New England States,[14] all of which agreed to the Regional Greenhouse Gas Initiative Memorandum of Understanding (MOU)[15] by the year 2007. Functionally, RGGI is a market-based emissions trading program that distributes allowances and administers the trade in carbon dioxide emissions allowances from fossil fuel-fired power plants of twenty-five megawatts (MW) capacity or greater.[16] RGGI establishes a regional cap on carbon dioxide emissions[17] and requires regulated power plants—209 region-wide—to possess an allowance for each ton of carbon dioxide emitted.[18] A critical note about RGGI is that it does not *bind* any state to follow its model rule. RGGI publishes a model rule, and the decision of the member states to adopt a similar rule occurs through their respective state legislatures.

As its name suggests, the Western Climate Initiative is a West Coast-based regional initiative, but it has an increasingly international purview. The Initiative's membership presently consists of seven states and four Canadian provinces.[19] The international ambitions of

---

14. The ten states which participate in RGGI are Connecticut, Delaware, Massachusetts, Maryland, Maine, New Hampshire, New Jersey, New York, Rhode Island, and Vermont. REG'L GREENHOUSE GAS INITIATIVE, FACT SHEET: THE REGIONAL GREENHOUSE GAS INITIATIVE, *available at* http://www.rggi.org/docs/RGGI_Fact_Sheet.pdf. Massachusetts, Rhode Island, and Maryland which joined in 2007, were the only states not to join earlier with the drafting of the Model Rule. *Regional Greenhouse Gas Initiative*, PEW CTR. ON GLOBAL CLIMATE CHANGE, http://www.pewclimate.org/what_s_being_done/in_the_states/rggi (last visited Aug. 31, 2011).

15. REG'L GREENHOUSE GAS INITIATIVE, MEMORANDUM OF UNDERSTANDING (2005) [hereinafter RGGI MOU], *available at* http://rggi.org/docs/mou_final_12_20_05.pdf.

16. REG'L GREENHOUSE GAS INITIATIVE, OVERVIEW OF RGGI $CO_2$ BUDGET TRADING PROGRAM (2007) [hereinafter RGGI OVERVIEW], *available at* http://rggi.org/docs/program_summary_10_07.pdf.

17. The RGGI cap is currently projected out to 2018. From 2009 to 2014, the cap is 188 million tons of $CO_2$ emissions per year, which will decline by 2.5 percent a year beginning in 2015. This plan will realize a total reduction of 10 percent by 2018. *Id.* at 2.

18. RGGI allowances are auctioned quarterly and may also be obtained through secondary markets, the Chicago Climate Futures Exchange (CCFE), or Green Exchange. RGGI uses the majority of the proceeds of these auctions to invest in consumer benefit programs such as energy efficiency, renewable energy, direct energy bill assistance, and other programs to reduce greenhouse gases. *Id.* at 4–6.

19. A Partner to the WCI is a state or province which commits to participate fully in the program's cap-and-trade and reduction commitments. The seven states which are active partners in the WCI are Arizona, California, New Mexico, Montana, Oregon, Utah, and Washington. The four Canadian provinces are British Columbia, Manitoba, Ontario, and Quebec. WESTERN CLIMATE INITIATIVE, DETAILED DESIGN § 1.1 (2010) [hereinafter WCI DETAILED DESIGN], *available at* http://westernclimateinitiative.org/component/remository/general/program-design/Detailed-Design/.

this program, which extends into both Canada and Mexico, is not matched by any other regional initiative.[20] While the WCI's cap-and-trade mechanism is not yet operational, it is scheduled to become active in 2012;[21] its allowance auction will occur in a nearly identical manner to RGGI.[22] The scope of its emissions cap is comparatively massive—it covers nearly ninety percent of economy-wide emissions of the states within the WCI's jurisdiction.[23] The Initiative will grow substantially in 2015, when the WCI's jurisdiction will expand to cover "any fuel supplier"[24] that distributes "any fossil fuel sold or imported for consumption" that emits 25,000 tons or more of $CO_2$ equivalent when combusted.[25] The WCI is designed to achieve a fifteen percent reduction in greenhouse gas emissions beneath the 2005 baseline year by 2020.[26]

The Midwestern Accord is still in its introductory planning stages, given that its Advisory Group just announced their recommendations[27] and model rule[28] in May 2010. Six of the

---

20. In addition to the states and provinces which are partners to the WCI, there are also numerous members which have not made a full commitment and are thus considered observers. The observer states from the United States are Alaska, Colorado, Idaho, Kansas, Nevada, and Wyoming. The observer provinces from Canada are Nova Scotia, Saskatchewan, and Yukon. The observer states from Mexico are Baja California, Chihuahua, Coahuila, Nuevo Leon, Sonora, and Tamaulipas. THE WESTERN CLIMATE INITIATIVE, DESIGN FOR THE WCI REGIONAL PROGRAM: DESIGN SUMMARY 3 (2010) [hereinafter WCI DESIGN SUMMARY], *available at* http://westernclimateinitiative.org/component/remository/func-startdown/281/.

21. The cap-and-trade program will begin in 2012 regulating generators and industrial sources, then expand in 2015 to include providers of transportation fuels and residential and commercial fuels. *Id.* at 8–10.

22. WCI DETAILED DESIGN, *supra* note 19, § 6; WCI DESIGN SUMMARY, *supra* note 20, at 18–19.

23. *Compare* WCI DESIGN SUMMARY, *supra* note 20, at 5 (embracing a broad scope that is "economy-wide" in order to achieve the "most cost-effective reduction opportunities"), *with* RGGI OVERVIEW, *supra* note 16, at 2 (mandating that RGGI will regulate only "fossil fuel-fired electric generating units serving a generator of 25 MW or larger" and that any source which commenced operation prior to 2005 must use fossil fuels for more than 50% of its heat output to qualify).

24. WCI DETAILED DESIGN, *supra* note 19, § 3.2.3 (including under the umbrella of fuel suppliers any distributors of liquid transportation fuels, petroleum coke, natural gas, propane, heating fuel, or "any other fossil fuel sold or imported for consumption").

25. *Id.*

26. *Id.* § 5.2.4.2.

27. MIDWESTERN GREENHOUSE GAS REDUCTION ACCORD, FINAL RECOMMENDATIONS OF THE ADVISORY GROUP (2010) [hereinafter ACCORD RECOMMENDATIONS], *available at* http://www.seventhgenerationadvisors.org/images/stories/pdfs/accord_final_recommendations.pdf.

Initiative's seven member states are of the United States: Iowa, Illinois, Kansas, Michigan, Minnesota, Wisconsin; the other, Manitoba, is a Canadian province.[29] Not included in its count of seven member states are its four observer states; that is to say, states without full voting participation.[30] The Midwest Accord's cap-and-trade program sets 2005 as its baseline year and sets the cap at twenty percent below this level by December 31, 2020 and eighty percent below this level by December 31, 2050.[31] Assuming that the Initiative follows the Advisory Group's recommendations, its program will include all sources which emit over 25,000 metric tons of $CO_2$ equivalent within the following sectors: electricity generation, industrial combustion sources, industrial process sources, fuels serving residential, commercial, industrial buildings, or transportation fuels; there is exception for biomass, biofuels and biogenic emissions.[32]

Although the magnitude of greenhouse gas emissions in the United States is too large for any state to handle on its own, collective action amongst the regional initiatives has the potential to yield meaningful reductions and set the stage for future national-level cooperation. While some of the regional initiatives make no secret of their preference for national action,[33] the Midwest Accord,[34] WCI,[35]

---

28. MIDWESTERN GREENHOUSE GAS REDUCTION ACCORD, FINAL MODEL RULE FOR THE MIDWESTERN GREENHOUSE GAS REDUCTION ACCORD (2010) [hereinafter ACCORD MODEL RULE], *available at* http://www.igreenlaw.com/storage/Final_Model_Rule1.pdf.

29. A state is a participating jurisdiction to the Midwestern Accord if it signed the Midwestern Accord's Memorandum of Understanding. *Id.* § XX-1.2(bh). On November 15, 2007, the governors of Iowa, Illinois, Kansas, Manitoba, Michigan, Minnesota, and Wisconsin signed a Memorandum of Understanding and entered the Midwestern Accord. ACCORD RECOMMENDATIONS, *supra* note 27, at 2.

30. The Midwestern Accord's Observer States are Indiana, Ohio, Ontario, and South Dakota. *Midwest Greenhouse Gas Reduction Accord*, PEW CTR. ON GLOBAL CLIMATE CHANGE, http://www.pewclimate.org/what_s_being_done/in_the_states/mggra (last visited Aug. 31, 2011) (listing the partner jurisdictions and observer states (which are not included in either the Model Rule or Advisory Recommendations documents)).

31. ACCORD MODEL RULE, *supra* note 28, § XX-1.1. Additionally, the cap-and-trade program is to begin on "January 1 of the first calendar year that is at least 12 months after the adoption of the model rule and execution of an implementing memorandum of understanding by the participating jurisdictions." *Id.*

32. *Id.* § XX-1.4.

33. *See, e.g.*, ACCORD RECOMMENDATIONS, *supra* note 27, at 3 (stating that all member states and Canadian provinces "strongly prefer the implementation of an effective cap-and-trade program at the federal level in both countries, rather than a regional program").

34. The Accord makes quite clear its intention to pursue linkage in its design principles which state that it must "[e]nable linkage to systems in other jurisdictions with similarly rigorous

and RGGI[36] all recognize that collective action is possible, although not guaranteed, and may serve as a vehicle for more widespread greenhouse gas emissions abatement.

## III. THE CHALLENGES PRESENTED BY LIMITED JURISDICTION

While the desire and ability to link the initiatives is critical to a successful future effort to reduce greenhouse gas emissions in the United States, the regional initiatives also will be required to navigate numerous obstacles. The most immediate and glaring problem is, quite simply, their limited jurisdiction: An individual initiative's ability to put a dent in nationwide greenhouse gas emissions is limited,[37] and, even if they were to combine the entirety of their membership, the initiatives could not compel non-participating states to abide by emission abatement goals. As is true in the global context, and as applies here by analogy, any abatement action, both with regard to its enforceability and its effectiveness, will require the broadest possible cooperation.[38]

The extent of the initiatives' jurisdiction is one of the most determinative elements of their ability to mitigate the deleterious effect of the two most critical threats: free riders[39] and leakage.[40] Employing asymmetrical regulation to reduce greenhouse gases will inevitably lead some states to take little or no action of their own. These non-participating states will recognize that there is little

---

accounting in order to create economies of scale and to increase market efficiencies, diversity, and liquidity, while reducing costs." *Id.* at 4.

35. Of all three initiatives, WCI is by far the most adamant on the subject of linkage. It includes both a detailed provision to allow for linkage in its Detailed Design, see WCI DETAILED DESIGN, *supra* note 19, § 9, and reiterates its "commitment to promote[] broad collaborative action to reduce GHG emissions" in its design summary. WCI DESIGN SUMMARY, *supra* note 20, at 22.

36. RGGI's Model Rule includes an elaborate provision to incorporate an offset mechanism into the program. REG'L GREENHOUSE GAS INITIATIVE, MODEL RULE 83–135 (2007), http://www.rggi.org/docs/Model%20Rule%20Revised%2012.31.08.pdf [hereinafter RGGI MODEL RULE]. Additionally, RGGI has reportedly even held informal talks with the EU ETS on the potential for linkage. *See* Saeed Shah, *U.S. States Defy Bush Over Greenhouse Gases*, THE INDEPENDENT (U.K.), Nov. 12, 2004, at 30.

37. *Think Globally, supra* note 13, at 1965–66.

38. *Id.* Professor Wiener makes this argument in the context of international climate change law, but states that it is even more powerful, "*a fortiori*," made in the case of the United States. It is entirely relevant by analogy here, as the individual states of the United States are equally powerless to combat climate change when viewed in light of the aggregate emissions of the United States as a whole—not to mention the world.

39. *See infra* Part II.B.1.

40. *See infra* Part II.B.2.

economic incentive for them to act when other states, of their own volition, will take action and incur the related expenses—thus the free rider. Additionally, as regulatory standards for greenhouse gas reductions develop and become more stringent, it may become economically viable for sources and industry to relocate their sources of energy from those states that participate in the initiatives to those that do not—leakage.[41] Both problems threaten to undermine the efficacy of a program that is not of a national scope, underscoring the necessity for collaboration.

### *A. The Benefits of Collaboration*

All three initiatives have the regulatory power to mandate greenhouse gas emissions abatement within their jurisdictions, but their long-term viability could be greatly enhanced if they coordinate their efforts.[42] There is little question that encompassing a greater diversity of sources will foster a more robust market for allowances.[43] Including more sources in the market will increase flexibility and minimize costs by enabling firms to find the lowest cost methods and locations of abatement.[44] Additionally, as the defeat of ACES revealed, the initiatives will face adamant opposition from industry and hostile political forces; therefore collaboration is critical, as political capital pooled by a larger community of states would have greater potential to overcome such opposition.[45] Aside from increasing the likelihood of initiative survival, a larger collaboration

---

41. The form of economic leakage discussed here also has evident corollary implications for the abatement of greenhouse gas emissions. While a state or initiative's emissions may decrease as sources reallocate their production or relocate their facilities, net emissions will not actually be curbed—the same amount of carbon is still being released into the atmosphere. Kirsten H. Engel, *Mitigating Global Climate Change in the United States: A Regional Approach*, 14 N.Y.U. ENVT'L. L.J. 54, 75–78 (2005).

42. *See* W. COAST GOVERNOR'S GLOBAL WARMING INITIATIVE, STAFF RECOMMENDATIONS TO THE GOVERNORS (2004), *available at* http://www.ef.org/westcoastclimate/WCGGWI_Nov_04%20Report.pdf (finding that it would be more efficient and effective to act on a regional level and to learn from RGGI's experience creating a regional collaboration); *see also* Press Release, Office of N.Y. State Governor George Pataki, Governor Calls on Northeast States to Fight Climate Change (Apr. 25, 2003), *available at* http://www.ny.gov/governor/press/03/april25_2_03.htm.

43. *See* Wiener, *supra* note 2, at 519 ("[A] broader and thicker market enhances the cost-effectiveness of trading by engaging lower-cost abatement opportunities. Extending the cap and trade market to include all sectors of the economy [and additional states] will further ensure cost-effectiveness.").

44. *Id.*

45. For a brief overview of the political battle that doomed ACES, see *supra* notes 14–22 and accompanying text.

of states might also facilitate the transfer of technology and ideas, while enhancing the competitiveness and cost-efficiency of abating greenhouse gas emissions in the United States.[46]

There are strong signals that coordination between the regional initiatives will continue to grow. First, both WCI and the Midwest Accord appear to have integrated a number of the lessons learned from RGGI, the first initiative of this type, into their own regulatory frameworks. This influence is well documented in the WCI and the Midwest Accord's regulatory designs and is made explicitly clear in some of their founding documents.[47] Most importantly, the shared characteristics of the initiatives' cap-and-trade programs could greatly ease a future integration, especially because their procedural and functional similarities will facilitate the registration, tracking, and trade of allowances across the initiatives. Second, in May 2010 the three initiatives joined their resources to create the Three-Regions Offsets Working Group, which released a white paper on how best to design and implement an interregional program to ensure the quality of offsets. [48] This action is significant because it signals that the initiatives share a "common vision" and may work towards a mechanism that will allow parties in any initiative to develop interchangeable offset projects in another initiative's jurisdiction.[49]

---

46. After all, the initiatives would unite not only twenty-three American states, but also several Canadian provinces and, potentially, even a few Mexican states. Two of the United States' and the world's largest economies are leading members of the initiatives, California and New York City. California is the eighth largest economy in the world, with a gross domestic product (GDP) of $1.83 trillion, which constitutes 13% of the entire GDP of the United States. *See Gross Domestic Product By State*, BUREAU OF ECON. ANALYSIS, U.S. DEP'T OF COMMERCE, http://www.bea.gov/regional/gsp/ (choose "California" for the "state" tab, then choose appropriate tabs to find data) (last visited Dec. 12, 2010). New York has a GDP of $1.1 trillion, and, if it were a nation, it would rank as the 16th largest GDP in the world. *See id.* (choose "New York" for the "state" tab, then choose appropriate tabs to find data). Combined, California and New York have an annual GDP of $2.93 trillion.

47. In its design summary, WCI specifically analyzes RGGI's use of auctions to distribute its allowances and adopts a similar quarterly auction system. WCI DESIGN SUMMARY, *supra* note 20, at 18.

48. THREE-REGIONS OFFSETS WORKING GROUP, ENSURING OFFSET QUALITY: DESIGN AND IMPLEMENTATION CRITERIA FOR A HIGH-QUALITY OFFSET PROGRAM (2010), http://www.rggi.org/docs/3_Regions_Offsets_Announcement_05_17_10.pdf.

49. *Id.* An offset project is a mechanism incorporated into all three initiatives' programs which reduce compliance costs and increase compliance flexibility for sources by allowing them to literally offset their own emissions requirements by sponsoring projects to reduce or sequester emissions in another sector outside those regulated by the cap-and-trade program to which they belong. Given the inherently extra-jurisdictional nature of the mechanism, a legitimate, accurate, and comprehensive reporting system must be implemented by all three initiatives to ensure its functioning. Due to the necessary stringency of this inter-regional

### B. *The Shortcomings of Limited Collaboration*

Collaboration not only provides benefits for the regional initiatives; it is necessary to ensure their long-term viability. Unfortunately, there are daunting challenges that threaten subnational action due to limitations on the reach of their jurisdiction and concerns about federalism.

1. *Leakage*. The United States' market is a highly integrated, open network for trade in and among the states. While the exchange of domestic goods with as little restriction as possible is positive in many circumstances, this lack of constraint makes any regional initiative's effort to reduce greenhouse gas emissions exponentially more difficult. With fewer barriers to the flow of goods, energy, and services, it is easier for energy producers and industry users to reallocate their production and distribution, or to relocate their facilities.[50]

This open market creates particular difficulties for the regional initiatives because the ease of leakage also encourages free-riding. Power plants and other sources regulated under the regional initiatives that are located outside of the initiatives' jurisdictions incur no expense from the initiatives and may distribute their products to states within the jurisdiction of the initiatives at no additional expense. To restrict them would violate the free flow of interstate commerce.[51] As a result, states that do not join the regional initiatives stand to benefit from increased demand for their products without submitting themselves to more stringent emissions standards. Thus, states are indirectly encouraged to free-ride for two reasons: first, their domestic industries will remain independent of any regulatory standard promulgated by the regional initiative, and second, domestic industries may also enjoy increased demand for their products as a result of the additional constraints imposed on initiative member states.

---

reporting component, it is unavoidable that the growth of an offset program should thereby foster collaboration and interdependence amongst the initiatives.

50. It is unlikely that the initiatives or their member states could enact similar barriers, as such state action would almost certainly come into conflict with the Dormant Commerce Clause, which prohibits a state from discriminating against commerce from another state. *See* Engel, *supra* note 41; *Think Globally*, *supra* note 13, at 1969–70.

51. City of Phila. v. New Jersey, 437 U.S. 617, 624 (1978) (concluding that any state action that the Court finds improperly discriminates against or burdens interstate commerce is unconstitutional).

This problem is further complicated due to the use of massive shared interstate electrical grids in the United States. These grids make it possible for energy production to shift "immediately and seamlessly," albeit not over long distances;[52] thus, if the price of energy production in one state or region increases, it is practically effortless for a neighboring state outside of the initiative's jurisdiction to increase its own production in response. The deleterious ramifications of such a relationship for greenhouse gas abatement are not mere speculation—this form of leakage is believed to be the driver behind RGGI's enormous leakage rates[53]—and should be an enormous motivator for inter-initiative cooperation.

2. *The Free-Rider*. So long as participation in the initiatives is voluntary, and there is no reason to believe that it will ever be anything other than voluntary,[54] states that do not participate will benefit from the abatement of greenhouse gas emissions achieved by those states that do participate.[55] In other words, the states that act to reduce their emissions cannot realize the full return on their investment because they cannot entirely internalize the benefits of their effort.[56] The burden of the states that free ride will fall on those states that take action to reduce their emissions.[57] At its core, this is a collective action problem: there is little, if any, incentive for a state which does not fall under the jurisdiction of the initiatives or which will not benefit from those advantages conferred by the initiatives[58] to acquiesce to more stringent emissions standards. This problem is particularly poignant in light of the competitive advantage previously considered in the discussion of leakage.

3. *Industrial Flight*. As inevitable as the phenomenon of the free rider is, so too is that of industrial flight: As the price of doing

---

52. *Think Globally*, *supra* note 13, at 1969.

53. *The Magnificent Seven: States Take the Lead on Global Warming*, AM. COUNCIL FOR AN ENERGY-EFFICIENT ECON. (Jan. 16, 2006, 8:00 PM), http://www.aceee.org/blog/2006/01/magnificent-seven-states-take-lead-global-warming (estimating that RGGI's rate of leakage falls between 60% and 90%).

54. *See infra* Part II.B.2 for a discussion on the constitutional limitations of the regional initiatives.

55. *See* Robert N. Stavins, *Policy Instruments for Climate Change: How Can National Governments Address a Global Problem?*, 1997 U. CHI. LEGAL F. 293, 318 (1997) (arguing, by analogy for the action of a subnational polity, that free-riding is an inescapable phenomenon so long as a state acts unilaterally or membership in a collective initiative is voluntary).

56. J.R. DeShazo & Jody Freeman, *Timing and Form of Federal Regulation: The Case of Climate Change*, 155 U. PA. L. REV. 1499, 1516–21 (2007).

57. *Think Globally*, *supra* note 13, at 1965.

58. *See infra* II.B.1.

business in a state which is party to the initiatives increases—or at minimum oscillates due to the effect of new emissions standards—some sources will reallocate their resources or relocate their operations to non-member states.[59] This multifaceted problem may be understood as the embodiment of two interrelated phenomena: the price effect and relocation effect.[60]

The price effect is the initial and direct response to the change in cost that will inevitably occur when a state adopts new, more stringent emissions standards.[61] As the cost to produce emissions-intensive goods rises within a given initiative's jurisdiction, producers within this jurisdiction will raise the price of the good and reduce the quantity that they produce. In reaction to this change, producers of the same good located in a non-member state will benefit because their costs to produce the good will not rise and as a result, they will be able to increase their production and profit.[62]

The relocation of a source's facilities should only take place if an initiative's restrictions on emissions become so stringent that it would be more cost effective for a business to move its entire operation to another location outside the initiative's jurisdiction.[63] The extent of this phenomenon will depend upon the cost-benefit analysis undertaken by firms that fall under the jurisdiction of an initiative, and will consider the costs of moving their operation against the expense of complying with the more stringent local regulation.

59. Stavins, *supra* note 55. It bears mentioning that these dangers are purely economic arguments; many other factors may also come into play that might influence a firm's decision to move its operations.

60. *Cf. Think Globally*, *supra* note 13, at 1967–68 (arguing, in a global context, that there is an additional factor: the "slack off" effect which theorizes that one country may decrease its abatement if it is abating up to the point at which its global marginal benefits equal its domestic marginal costs and another country then abates beyond its own such equilibrium point, but this is not incorporated into the argument of the paper, as such a relationship seems inapplicable for an analysis of the behavior of sources in the United States).

61. *Id.*

62. *Id.* The price effect will occur soon after the implementation of new greenhouse gas emission standards by an initiative, and it will not lead to immediate industry relocation. *Id.* However, in the longer term, the price effect will also likely influence the type of businesses that operate in a given initiative, as it may foster the growth of one industry while increasing the operating costs of another. *Id.*

63. *Id.*

## IV. THE CONSTITUTIONAL VIABILITY OF REGIONAL, INTERSTATE COLLABORATION TO ABATE GREENHOUSE GAS EMISSIONS

With little hope of comprehensive greenhouse gas legislation on the horizon, the concerns previously discussed have proven insufficient to deter the states from taking action of their own. As states continue to take action and interstate cooperation continues to spread, the long-term viability of these efforts will increasingly depend not only upon their economic success, but their ability to survive constitutional challenges within the nation's courts.

The constitutionality of subnational environmental regional initiatives has been considered in previous scholarship, but many of these analyses rest on the flawed assumption that comprehensive federal legislation will be forthcoming—this paper departs from that tradition to present a pragmatic evaluation of the initiatives' constitutionality as they exist today. Congress has declined to pass comprehensive legislation that will regulate nationwide greenhouse gas emissions abatement; it is unlikely that it will do so in the foreseeable future. This neglected dynamic should play a pivotal role in any analysis of the regional initiatives' ability to survive constitutional attacks under preemption doctrine, the Dormant Commerce Clause, and the Compacts Clause.

### *A. In the Absence of Federal Legislation*

1. *The Compact Clause.* The first constitutional question likely to arise is whether collaboration between states is even constitutionally permitted. Indeed, a purely textualist reading of Article I, Section 10—commonly known as the Compact Clause—would lead one to believe that regional initiatives are not allowed by the Constitution.[64] The language of the Compact Clause appears damning for the regional initiatives, as it clearly proclaims that "[n]o State shall, without the Consent of Congress, . . . enter into any Agreement or Compact with another State, or with a foreign Power."[65] At first-glance, this seems to preclude even the existing initiatives because the permission of Congress has been neither granted nor requested. This immediately glaring conflict, however, should not be a problem, as this language was substantially mitigated by the Supreme Court's 1893 decision in *Virginia v. Tennessee*.[66] In that decision, the Supreme

64. U.S. CONST. art. I, § 10, cl. 3.
65. U.S. CONST. art. I, § 10, cl. 3.
66. Virginia v. Tennessee, 148 U.S. 503 (1893).

Court found that an agreement between two states in litigation over a boundary dispute was constitutional under the Compact Clause despite the absence of an explicit grant of congressional consent.[67] Instead, the decision held that "[t]he constitution does not state when the consent of congress shall be given, whether it shall precede or may follow the compact made, or whether it shall be express or may be implied,"[68] and, therefore, that the approval of Congress could be "fairly implied from its subsequent legislation and proceedings."[69]

Here, it is very likely that Congressional approval is fairly implied. First, it would not have been necessary for Congress to grant its consent at the inception of the regional initiatives, as this could "precede" or "follow the compact made."[70] Second, the question of whether Congress has in fact explicitly granted its consent is far from dispositive, as it might be "express" *or* "implied." Given that Congress has thus far chosen not to take action to prevent, displace, or limit the development of the regional initiatives, it seems there is a fair body of evidence to argue that Congress has impliedly granted its consent.

There is an important qualification to the Court's application of the Compact Clause, however, which is that "the prohibition [on compacts between states] 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."[71] Thus, with language reminiscent of the preemption doctrine[72] under the Supremacy Clause,[73] the Court does have the authority to strike down interstate agreements that have not received a grant from Congress and threaten to "encroach upon" its "just supremacy."[74] However, the Supreme Court limited the scope of such a challenge under the Compact Clause in its 1978 decision of *U.S. Steel Corp. v. Multistate Tax Commission*.[75] In *U.S. Steel Corp.*, the Court found that the Constitution permitted a multistate tax policy

67. *Id.* at 519.

68. *Id.* at 522.

69. *Id.*

70. *Id.*

71. *Id.* at 519.

72. *See* infra Part B, for a discussion on the preemption doctrine and its pertinence to the regional initiatives.

73. U.S. CONST., art. IV, § 1, cl. 2. For a discussion of the Supremacy Clause, see *infra* n. 96 and accompanying text.

74. *Virginia*, 148 U.S. at 519.

75. U.S. Steel Corp. v. Multistate Tax Comm'n, 434 U.S. 452 (1978).

agreement that was formed without an express grant of Congressional consent.[76] The Court distinguished between an interstate agreement that would set the tax policy of the member states and one that merely establishes a model rule and expects member states to replicate it through their own legislatures.[77] Therefore, even if a group of states come together and set a model regulatory agenda, so long as each state implements its own policy independently, the Compact Clause will not render it unconstitutional.

This nuance bodes well for the survival of the regional initiatives in the face of a Compact Clause challenge today. However, the threat of such a challenge remains strong enough that the regional initiatives operate as voluntary associations of states with no power to mandate rules to their members. This is likely why RGGI does not impose uniform policies on its members; instead, RGGI adopts model rules—essentially framework regulatory policies—which the member states are theoretically free to interpret and adopt through their own state legislative system. While it may seem that a prisoner's dilemma of sorts might arise out of this situation—meaning here that states might act to expand the initiatives to bind other states to stringent regulations while failing to comply themselves—such a problem has not occurred with the RGGI member states. It is too early to state definitively, however, that the limitations imposed by the Compact Clause will not become a larger problem in the future. As the regional initiatives' membership grows to include more states, each with its own disparate interests, the need for more stringent, compulsory regulation may become increasingly necessary. As the initiatives stand today, however, and so long as the states remain cognizant of their constitutionally mandated design limitations, it seems unlikely that a constitutional challenge under the Compact Clause could succeed against the initiatives in their current form.

2. *The Dormant Commerce Clause.* The difficulty created by the absence of trade barriers and free exchange of goods in the United States is further complicated by the limitations placed upon the states to take action to correct for the price irregularity created by their membership in a regional initiative. If, for example, RGGI's member

76. *Id.* at 479.

77. *Id.* at 497 ("Even if appellants' factual allegations were supported by the record, they would be irrelevant to the facial validity of the Compact. As we have noted above, it is only the individual State, not the Commission, that has the power to issue an assessment—whether arbitrary or not. If the assessment violates state law, we must assume that state remedies are available.")

states, or even RGGI itself, had the ability to place a tax on energy imports into their jurisdiction or, conversely, give an advantage to the utilities that produce energy within their jurisdiction, then they could compensate for the disparity in price created by their more stringent emissions standards. Unfortunately, the states are not entirely free to take such action due to the jurisprudence surrounding the Dormant Commerce Clause. As the following discussion will show, however, it is premature to conclude that the Dormant Commerce Clause precludes interstate climate change action.

*a. Dormant Commerce Clause Jurisprudence.*

The Dormant Commerce Clause is a judicial doctrine derived by the Supreme Court from Article I, Section 8, Clause 3 of the Constitution, which grants Congress the power "[t]o regulate Commerce with foreign Nations, and *among the several States*, and with the Indian tribes."[78] This enumerated power of Congress, commonly called the Commerce Clause, has been interpreted by the judicial branch to create a negative power—the Dormant Commerce Clause[79]—which authorizes the federal courts to strike down as unconstitutional any state regulation that improperly burdens or discriminates against interstate commerce. Generally speaking, Dormant Commerce Clause jurisprudence can be grouped into two broad categories: state statutes that facially discriminate against interstate commerce—and are therefore nearly always *per se* unconstitutional—and state statutes that are not found discriminatory, but that are subject to a balancing test originating from the Supreme Court's decision in *Pike v. Bruce Church, Inc.*[80] that weighs the state's purpose and local benefits against the burden placed on interstate commerce.

A state statute is facially discriminatory if it disadvantages out-of-state interests, or favors in-state interests over out-of-state interests.[81] For this reason, state regulations passed merely for the sake of economic protectionism are virtually always *per se* invalid.[82]

78. U.S. CONST. art. I, § 8, cl. 3 (emphasis added).

79. For the origins of the Dormant Commerce Clause, see Gibbons v. Ogden, 22 U.S. 1 (1824). An analysis of the sordid history of the Dormant Commerce Clause is unnecessary for the purposes of this paper, as the holding case law at present will determine the outcome of a Dormant Commerce Clause challenge against local climate change legislation.

80. 397 U.S. 137, 142 (1970).

81. Or. Waste Sys., Inc. v. Dep't of Envtl. Quality of Or., 511 U.S. 93, 99 (1994).

82. City of Phila. v. New Jersey, 437 U.S. 617, 624 (1978).

This would be the case, for example, if a state were to pass a law that prohibits the import of energy from another state without any semblance of justification. This is not *always* the case, however; the Supreme Court ruled in *Maine v. Taylor*[83] that state legislation can be exempt in certain exceptional circumstances if it is passed to accomplish a "legitimate local purpose" that "could not be served as well by available nondiscriminatory means."[84] If the court finds that the law in question is nondiscriminatory on its face, but might still have impact—or, in other words, an "incidental effect"[85]—on interstate commerce, then it applies the *Pike* balancing test that weighs the in-state benefits it produces against its burden on interstate commerce.[86] The weight placed upon the in-state benefits produced by a state statute—and, in particular, on the *type* of in-state benefits produced—has enormous implications for the likelihood of survival of a state statute passed to comply with an interstate environmental initiative.

*b. Implications for Regional Climate Initiatives.*

The threat of a Dormant Commerce Clause challenge does limit the ability of states to pass legislation that might most expediently ensure the success of the regional initiatives, but it does not entirely preclude such action. For example, a statute passed by RGGI member states that prohibits energy imports from non-RGGI states would likely be found discriminatory and therefore unconstitutional under the Dormant Commerce Clause—assuming here, for the sake of argument that it would not fit into the atypical *Maine* exception mold.[87] The states are clearly precluded from passing any blanket legislation that facially discriminates against out-of-state commerce, but, so long as state legislators draft the language of their bills carefully, states should be able to avoid passing statutes that are clearly discriminatory and *per se* unconstitutional under the Dormant Commerce Clause. While this complicates matters somewhat, it does not render local climate legislation moot. It does mean that the RGGI member states cannot pass individual laws that prohibit energy

83. 477 U.S. 131 (1986).

84. *Id.* at 138.

85. *Pike*, 397 U.S. at 142.

86. *Id.*

87. *Maine*, 477 U.S. at 151–52 (finding that Maine's ban on the importation of baitfish is clearly discriminatory but justified by the legitimate local purpose of the state to "protect the health and safety of its citizens and the integrity of its natural resources").

imports from non-RGGI states. This would certainly be the easiest route to account for the ease with which firms in RGGI states circumvent RGGI's regulations, but it is by no means the only approach.

Instead, states should pass legislation that is optimally designed to survive a Dormant Commerce Clause challenge under the *Pike* balancing test and its progeny. The *Pike* test holds that a state regulation passed "evenhandedly to effectuate a legitimate purpose"[88] will only be struck down under the Dormant Commerce Clause if the burden it imposes on interstate commerce is "clearly excessive in relation to the putative local benefits."[89] *Pike* places great importance upon the type of benefit produced by the state regulation: "the nature of the local interest involved" will determine the "extent of the burden [on interstate commerce] that will be tolerated."[90]

The distinction between the types of benefits produced by regulations that place a burden on interstate commerce is critical due to the added legitimacy and authority of state exercises of the police power. Fortunately, the Supreme Court has consistently recognized that benefits to the environment are an important public benefit bestowed by the states upon their citizens.[91] First, the Supreme Court recognized the value of environmental benefits in its decision in *Maine* when it held that a state "retains broad regulatory authority to protect the health and safety of its citizens *and* the integrity of its natural resources"[92] so long as it does not "needlessly obstruct interstate trade or attempt to 'place itself in a position of economic isolation.'"[93] Then, in its 2007 decision in *United Haulers Ass'n v. Oneida-Herkimer Solid Waste Management*,[94] the Supreme Court held that a city ordinance requiring local waste haulers to bring their waste to a facility owned by the city was permissible in part because it "confer[red] significant health and *environmental benefits* upon the citizens of the Counties. . . .[and] [f]or these reasons, any arguable

88. *Pike*, 397 U.S. at 142.

89. *Id.*

90. *Id.*

91. *See, e.g.*, United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth., 550 U.S. 330 (2007).

92. *Maine,* 477 U.S. at 151 (emphasis added).

93. *Id.*

94. 550 U.S. at 330.

burden the ordinances impose on interstate commerce does not exceed their public benefits."[95]

Under a Dormant Commerce Clause analysis, benefits to the state and its citizens' health, welfare, and environment outweigh those that are purely pecuniary.[96] The states have a substantial interest in preserving the health and welfare of their citizenry; this might especially be true in the case of environmental harms found to be a "threat to the public health and welfare."[97] In other words, while a benefit such as "revenue generation is not a local interest that can justify discrimination against interstate commerce,"[98] environmental benefits should be grouped into the category of a "reasonable basis for legislation to protect the social . . . welfare of a community" for which it is not the decision of the court to "deny the exercise locally of [a state's] sovereign power."[99]

Here, state statutes passed as part of an interstate environmental collaboration are therefore predisposed to survive a Dormant Commerce Clause challenge given that there is a clear local interest at stake, with tangible benefits produced, for a purpose that the Court has previously recognized. The states have a substantial interest in preserving the health and welfare of their citizenry, and this remains true for greenhouse gas emissions—a phenomenon that EPA has previously found to be a "threat to the public health and welfare."[100] In sum, not only do the states have a recognized interest under the *Pike* test in taking action to mitigate a recognized threat to their local population when the federal government has declined to do so, but

---

95. *United Haulers*, 550 U.S. at 347 (emphasis added).

96. C & A Carbone, Inc. v. Town of Clarkstown, 511 U.S. 383, 392–93 (1994) (distinguishing between "revenue generation [which] is not a local interest that can justify discrimination against interstate commerce" and legitimate local interests such as "environmental cleanup costs," which would be valid but "must be rejected absent the clearest showing that the unobstructed flow of interstate commerce itself is unable to solve the local problem").

97. Endangerment and Cause or Contribute Findings for Greenhouse Gases Under § 202(a) of the Clean Air Act, 74 Fed. Reg. 66,496 (Dec. 15, 2009). This endangerment finding was made in response to the Supreme Court's decision in *Massachusetts v. EPA*, 549 U.S. 497 (2007), and it follows that such findings might be considered of some value to the courts in appraising the value of local benefits produced.

98. *C & A Carbone*, 511 U.S. at 393.

99. Breard v. Alexandria, 341 U.S. 622, 640 (1951).

100. Endangerment and Cause or Contribute Findings for Greenhouse Gases Under § 202(a) of the Clean Air Act, 74 Fed. Reg. 66,496 (Dec. 15, 2009).

the type of benefits that their action will produce belong to a class that is most favored by the *Pike* test.[101]

### *B. Preemption*

The absence of federal legislation—and the improbability of any such legislation arriving in the foreseeable future—dramatically alters this analysis. Instead, the focus should shift to the likelihood of preemption by an administrative agency; namely, preemption arising out of a potential conflict between state statutes and EPA's rulemaking under the Clean Air Act (CAA).

1. *Federal Preemption.* Preemption jurisprudence, which arises out of the Supremacy Clause[102] of Article IV of the Constitution, concerns the outcome in instances where there is a potential overlap between state and federal legislation. While, according to the plain text of the Supremacy Clause, it is clear that state law is trumped when it expressly conflicts with federal law, the facts are rarely so straightforward. Congress can indicate preemptive intent either through express language included in its legislation[103]—so-called "express preemption"—or through its "implied intent"[104]—commonly referred to as "field preemption." This implied intent can be inferred through the structure and purpose of Congress's legislation,[105] or, more precisely, "if the scope of the statute indicates that Congress intended federal law to occupy the legislative field, or if there is an actual conflict between state and federal law."[106]

In such an analysis of "field preemption," Congress's purpose is the "ultimate touchstone"[107] of the decision; however, this is tempered by the additional deference afforded to the states that "the historic

---

101. It also bears consideration that since the *United Haulers* decision in 2007, the disposition of the court has not radically changed. Two of the Justices who joined that majority opinion—Justices Stevens and Souter—have been replaced by two similarly-leaning Justices: Justices Sotomayor and Kagan.

102. The text of the Supremacy Clause in the Constitution is as follows:

> "This Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding."

U.S. CONST., art. IV, § 1, cl. 2.

103. Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977).

104. *Id.*

105. *Id.*

106. Freightliner Corp. v. Myrick, 514 U.S. 280, 287 (1995).

107. Medtronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996).

police powers of the States [are] not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress."[108] This presumption in favor of state legislation is further bolstered when Congress legislates in a field previously dominated by the states.[109] Additionally, in the event that expressly preemptive language in a federal statute is ambiguous, it is customary to interpret in a manner that "disfavors preemption," and, therefore, favors state legislation.[110]

2. *Preemption by an Administrative Agency & the Clean Air Act*. Rules promulgated by EPA—*not* Congress—now present the most likely source of possible preemption challenges to state legislation. This is a new federalism question that will play an increasingly important role for the future of subnational interstate initiatives that will operate in an absence of clearly preemptive federal legislation. Interestingly, although the jurisprudence is not as developed for agency preemption as it is for federal preemption, it is clear that the Supreme Court now recognizes an ever-growing deference to administrative agency action.[111]

Most recently, the Supreme Court decided in *Geir v. American Honda Motor Co.*[112] that a state law regarding airbags was preempted by the Department of Transportation's (DOT) implementation of new airbag requirements.[113] In making this decision, the Supreme Court not only granted deference to DOT's interpretation of the statute,[114] but also explicitly recognized that "regulations 'intended to pre-empt state law' that are promulgated by an agency acting nonarbitrarily and within its congressionally delegated authority may also have pre-emptive force."[115] Further expanding the preemptive

108. Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947).

109. *Medtronic*, 518 U.S. at 485.

110. Bates v. Dow Agrosciences, 544 U.S. 431, 449 (2005).

111. This trend in the jurisprudence culminates with *Geir v. American Honda Motor Co.,* 529 U.S. 861 (2000), but it is clearly alluded to prior to that decision in *Medtronic*, 518 U.S. at 496 ("Because the FDA is the federal agency to which Congress has delegated its authority to implement the provisions of the Act, the agency is uniquely qualified to determine whether a particular form of state law [conflicts with the purpose and objectives of Congress] and, therefore, whether it should be pre-empted.") (citation omitted).

112. *Geir*, 529 U.S. at 861.

113. *Id.* at 874.

114. *Id.* at 883.

115. Fidelity Fed. Sav. & Loan Ass'n v. De la Cuesta, 458 U.S. 141, 153-154 (1982) ("Where Congress has directed to an administrator to exercise his discretion, his judgments are subject to judicial review only to determine whether he has exceeded his statutory authority or acted arbitrarily.").

authority of administrative agencies, the Court recognized an implied intent to preempt—in other words, field preemption—when it found that agencies do not need to rely upon a "specific expression of agency intent to pre-empt."[116] The implications of this deference to agency preemption are enormous for state climate change regulation, but the practical ramifications will depend entirely upon the attitude that EPA assumes toward state and regional action.

3. *A New Challenge to Federalism*. For the time being, EPA has not yet posed a preemption challenge to the nascent regional initiatives. This may be due in part to the CAA's generous savings clause that allows states to impose regulatory standards of their own so long as they are more stringent than the federal standards.[117] Worth further consideration is the fact that a savings clause—even one like that contained within the CAA—does not entirely preclude such a challenge, given that the Supreme Court also ruled in *Geir* that a savings clause alone does not "foreclose" the possibility of implied preemption.[118]

Should EPA decide to challenge the legality of a state's statute that it adopted in accordance with its membership in a regional initiative, the state may find some defense in an argument that Congress did not in-fact delegate preemptive authority to EPA based upon a reading of the CAA's declaration of purpose.[119] This declaration does not appear to mandate absolute authority to EPA, but instead grants it the responsibility to "encourage and assist development and operation of regional air pollution prevention and control programs"[120] and "to provide technical and financial assistance to State and local governments."[121] Based upon the CAA's text, EPA is encouraged under its congressional grant of authority to *assist*, not hinder, local initiatives or, in this case, regional initiatives and collaborative state action.

This language may become critical for the regional initiatives should a pre-emption challenge ever arise. Under such circumstances,

116. *Id.* at 885.

117. 42 U.S.C. § 7416 (2006) ("[N]othing in this Act 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; . . . [so long as it is not] less stringent than the standard or limitation under such plan or section.").

118. *Geir*, 529 U.S. at 869.

119. 42 U.S.C. § 7401 (2006).

120. *Id.* § 7401(b)(4).

121. *Id.* § 7401(b)(3).

the regional initiatives would be well-advised to point to this statutory language to prove that Congress intended for EPA to augment state or local action, *not* to preempt it. This will surely be a contested issue, but only time will tell how EPA will choose to respond to the initiatives and their regulatory policies.

## V. CONCLUSION

In the absence of a comprehensive, nationwide federal regulatory scheme to address climate change action, states have stepped in to fill the void through coordinated action of their own. These subnational efforts, although well-guided, face substantial economic and constitutional difficulties. Much of the scholarship on these regional initiatives operates on the assumption that federal action is forthcoming. This Note consciously departs from that position in its analysis of the viability of interstate climate action.

As this analysis shows, a pragmatic acceptance of current events does not preclude an optimistic outlook for the continued success of the regional initiatives. The regional initiatives are viable without comprehensive federal legislation. Hopefully, this initial foray will contribute to a shift in the academic discourse on subnational climate action that will increasingly consider how the initiatives might expand and accomplish nationwide greenhouse gas abatement through their own means.