Cooperative Federalism and Climate Change:

Why Federal, State, and Local Governments Must Continue to Partner

By Center for Progressive Reform Member Scholars
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The Threat of Climate Change Preemption

Congress is poised to act on climate change. While federal action is both necessary and long overdue, it will prove counterproductive if Congress succumbs to special interest pressure to preempt the innovative state and local laws that combat global warming.[1] The motor vehicle and energy industries have targeted for elimination provisions in climate change legislation that retain state authority, arguing that state and local measures create an intolerable "patchwork" of laws that Congress should displace with a one-size-fits-all, inflexible federal standard. Such a radical displacement of state and local authority is wrong for four fundamental reasons (listed below).

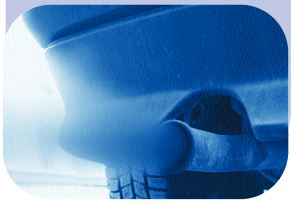
1. Preemption would contradict 40 years of precedent under every major environmental law, all of which allow states to tailor more stringent approaches to their particular circumstances and their citizens' political preferences.
2. Prohibiting state and local governments from acting in areas that have always been within their exclusive jurisdiction – including the regulation of electric utilities, zoning and other land use controls, and building codes – will make it impossible for the United States to achieve the carbon reductions that are necessary to avoid catastrophic climate change.
3. Not only are state and local governments able to use legal tools that are unavailable to the national government, they are far better suited to motivate the lifestyle changes among their citizens that will prove essential over the long run.
4. The notion that a patchwork of environmental protection requirements imposes an unacceptable burden on interstate commerce is both spurious and ahistorical. States have played a critical role in the country's efforts to protect public health since the country was founded. Most industries, including the ones that are seeking climate change preemption, have systems in place to ensure their compliance with different legal regimes at the international, federal, state, and local levels. The patchwork argument is almost always raised only with respect to state requirements that are tougher than federal law, suggesting that regulatory rollbacks, and not an efficient, effective, and well-functioning regulatory program, is the true agenda. Congress should ignore these assertions, as it has on so many previous occasions.

Despite longstanding precedent and the clear merits of a "cooperative federalism" approach to climate change, the threat of preemption has arisen because diverse, comprehensive, and innovative state and local efforts to combat climate change stand in the crosshairs of a myopic effort to construct a weak and preclusive national program acceptable to utilities, domestic automakers, and other affected industries. Rep. John Dingell (D-MI), Chairman of the House Committee on Energy and Commerce, and Rep. Rick Boucher (D-VA), Chairman of the Subcommittee on Energy and Air Quality, have bluntly stated their intention to push for preemption in a white paper submitted to their Committee colleagues, writing that "multiple programs would be an undue burden on interstate commerce."[2] The

white paper further contends that states interested in protecting their citizens from climate change are in conflict with states "dependent on the domestic auto industry."[3]

Representatives Dingell and Boucher present preemption as a political necessity for members of Congress who want to pass climate change legislation. They have argued that "one of the main reasons industry would contribute to the consensus in support of a national program is to avoid a patchwork of State, Tribal, and local regulations." This assertion is revealing in two crucial respects. First, it suggests that expressly reserving the rights of states to adopt their own, more stringent standards is something new in environmental law. It is not. Rather, preemption would be a radical departure from longstanding environmental policy and precedent.

The entire country has benefited from California's innovative automobile standards because those standards paved the way for federal requirements.



Second, the Clean Air Act (CAA) has long balanced the needs of auto producing and auto consuming states. Instead of across-the-board preemption, the CAA allows California — and states that decide to follow California's lead by adopting the same rules — to develop more stringent controls for mobile sources than those imposed at the federal level with EPA's approval.[4] This dual track approach is based upon California's historical leadership in combating air pollution and the size of its economy (tenth largest in the world) and the severity of the problems it faces. Consequently, since 1970, the United States has accepted the possibility of two regulatory schemes for mobile sources. In many instances, the entire country has benefited because manufacturers have chosen to make California cars available nationwide and because California's innovative standards have paved the way for federal requirements (i.e., catalytic converters, collapsible steering columns, and fuel economy standards).[5] This approach hardly involves a "patchwork" approach to the control of motor vehicle pollution because at most manufacturers will need to comply with two standards - the federal standard and any more stringent standard adopted by California, approved by EPA, and emulated by other states that choose to adopt standards that are identical to California's. Moreover, the approach has worked well for almost 40 years. Climate change legislation is virtually the only opening domestic manufacturers have seen in decades to roll back California standards and they apparently hope that this radical provision will be adopted quietly, eclipsed by other issues demanding congressional and media attention.

Existing state and local efforts have the potential to mitigate more than half of our nation's emissions. Preempting their efforts would not only harm the environment, but would be a radical departure from how Congress has dealt with environmental problems in the past. Climate change is indeed a global problem, but combating it effectively will require active engagement by all three levels of American government. Federal climate change legislation must reflect the longstanding principle that federal regulation is the "floor" upon which more stringent state regulation may be built. Because the effects of climate change will not be uniform, strategies for dealing with and adapting to the effects of climate change will differ from region to region. Efforts to preempt state and local efforts to combat climate change would undermine the progress that has been made and dampen future innovation and cooperation.

With respect to the inevitable and complex task of meshing new federal and existing state "cap and trade" systems, this paper supports the view of the National Association of Clean Air Agencies, which has maintained that any national cap and trade program "must preserve and protect the ability of states and localities to set standards above and beyond any federal requirements."[6] In addition, because pending legislation contains very little discussion regarding the crucial roles that states and localities will play in designing, implementing, and monitoring a national cap and trade program, this paper recommends that any efforts to preempt state and local authority in any way, including in the cap and trade context, are premature. We will discuss the options available to Congress in achieving a genuine partnership between the three levels of government in future white papers.

Federal climate change legislation must reflect the longstanding principle that federal regulation is the 'floor' upon which more stringent state regulation may be built.

State and Local Leadership on Climate Change

The United States is the largest contributor on a per capita basis to the greenhouse gas emissions that cause climate change. Thirty-four of the 75 largest greenhouse gas (GHG) sources in the world are located within our borders.[7] Texas is the seventh largest emitter of CO2 in the world; California is the twelfth.[8] Our ten largest cities account for 10 percent of total U.S. emissions.[9] During almost a decade of federal inaction on climate change, beginning with the Bush Administration's decision to walk away from its campaign promise to participate actively in Kyoto treaty negotiations, state and local governments have led the way in adopting programs to control these harmful emissions.[10] A recent analysis of those actions found that a "growing number of these states are every bit as engaged on multiple policy fronts as counterparts in European capitals."[11] These efforts have set the stage for future progress, accomplishing significant emissions reductions.

Every state in the country has adopted some kind of policy or law to deal with climate change.[12] "As of January 2008, 33 states and many more localities, representing a majority of U.S. GHG emissions, have either completed climate change action plans or will complete them within the year."[13] Reflecting state needs, these plans reduce GHG emissions by means of a wide range of policies and programs. State plans generally consist of 50 to 75 policy measures, including codes and standards, market-based systems, renewable portfolio standards, financial incentives, and technical assistance.[14] These "portfolios" of policies result in emissions reductions "that are best suited to the unique economic circumstances and needs of each state."[15] Such a "portfolio" approach is also "crucial to gaining political support for any climate-related action, as it provides an enormously flexible range of choices by which potential conflicts may be resolved."[16]

The measures target GHGs emitted by transportation, land use, agriculture, forestry, and waste management sources.[17] They also seek to promote energy efficiency and the development of renewable energy sources. State mitigation plans address 53 percent of national GHG emissions, and regional partnerships supporting emissions trading mechanisms address 89 percent of national emissions.[18] As Nicholas Lutsey and Daniel Sperling of the Institute of Transportation Studies have explained: "If the 17 states that have

set their own GHG emission-reduction targets (generally to 1990 levels by the year 2020) in fact were to achieve those targets, nationwide U.S. GHG emissions would be stabilized at 2010 levels by 2020—without any serious mitigation action taken by over half the states."[19]

These proactive efforts represent a tremendous commitment of time and resources by states and localities to deal with climate change. They reflect the emergence of a systemic and consistent set of actions by state and local governments that belies any attempt to characterize them as "patchwork."[20] In particular, state and local efforts have involved "consistent sets of mitigation actions prescribed by state policy innovators" and "approaches that do not dictate particular technologies."[21] After years of planning and coordination, local, state, and regional governments are generally taking the following consistent steps that also allow them to adopt unique programs to meet varied local needs:

- Establishing an emissions inventory;
- Developing a mitigation action plan;
- Setting an emissions reduction target;
- Enacting sector-specific policies; and
- Partnering with other governments to integrate their efforts and leverage their reductions.[22]

Strikingly, while the federal government has remained in rancorous deadlock on climate change, state initiatives typically reflect broad bipartisan support, as states feel the impact of climate change in immediate ways.[23] States also are seeking to develop mitigation efforts that promote economic development, and utilize "in-house" capacity that has grown increasingly more sophisticated to deal with complicated environmental matters. As Barry Rabe of the Brookings Institution notes, "Extending such resources and powers into the realm of climate change is a fairly incremental step in some instances, such as electricity regulation where state governments have been dominant for decades."[24] Our federalist system is working well, as states have served as "laboratories of innovation" and proving grounds for new ideas and practical strategies to address climate change.[25]

Please see Appendix A for further details on state and local GHG reduction programs.

Dividing the Job: Cooperative Federalism in Environmental Law

All of the nation's major environmental laws "divide the job" among federal, state, and local government because the task of protecting the environment is too big for one level of government to tackle alone. This cooperative federalism model establishes a framework for federal, state, and local governments to work together to protect the environment.[26] Each level of government has a particular role to play. The federal government is generally responsible for issuing the minimum standards to protect the environment. States then have

the option to administer various programs to achieve the standards. In most instances, Congress explicitly gives states the authority to adopt standards that are more protective than federal standards. Local governments may have enforcement and monitoring responsibilities, as well as implement grants and demonstration projects.

Today, federal efforts to prevent environmental harm - particularly those relating to climate change - have fallen on extremely hard times. The Bush Administration has systematically opposed efforts to strengthen the federal government's responsibility (and particularly the responsibility of the Environmental Protection Agency (EPA)) to mitigate climate change. Budget cuts have left the Agency's resources and expertise decimated.[27] By necessity, state and local governments have had to fill the void left by EPA's refusal to acknowledge that climate change is a serious problem or the nation's responsibility to address it in a meaningful fashion. As a result, these governments have served as "laboratories of democracy" by tailoring regulation to address local needs and conditions.[28] If not for state and local efforts, the nation's track record on climate change would be even more abysmal than it has been to date.

Federal efforts to prevent environmental harm have fallen on extremely hard times.

The forward-looking state and local initiatives on climate change initiated in recent years have been made possible only because of the structure of our federal system of government. The Supreme Court has described "our federalism" as a governmental system that "require[s] that Congress treat the States in a manner consistent with their status as residuary sovereigns and joint participants in the governance of the Nation."[29] The Court has established a presumption against preempting state authority, because "an essential principle of federalism is that states retain broad sovereign authority to regulate for the well-being of their people."[30] Conversely, the Court has required that on the rare occasion that Congress decides to preempt state and local authority, it must make an explicit statement articulating the reasons why federal programs will achieve a better outcome than state and local action.[31]

If Congress has the constitutional power to legislate in a particular area, it has the authority, in theory, to preclude all state and local activity in that area by completely "occupying the field" covered by federal legislation. Congress has almost never exercised that authority to completely oust state laws designed to protect the public health, safety, and the environment. Instead, Congress has engaged in what is commonly referred to as "floor preemption" by creating a minimum level of federal protection and then allowing states to exceed this minimum standard by adopting more protective state laws. As noted earlier, floor preemption is the predominant approach reflected in almost all of the major federal environmental laws. By limiting its power to displace state law to floor preemption, Congress accomplishes at least two goals. First, it mandates a minimum level of environmental protection for the entire nation that states must not undercut. Second, by preserving state authority to adopt more protective programs, it provides opportunities for the creation of genuine partnerships among federal, state, and local governments in achieving desirable levels of health, safety, and environmental protection.[32]

Congress has repeatedly chosen to preempt only state laws that are weaker than corresponding federal standards for several reasons:

- **Transboundary Pollution.** Pollution is "transboundary" in the sense that it does not respect arbitrary jurisdictional dividing lines, traveling easily from one state to another. Since the states tend to lack the incentive to control the extent to which their own industries create spillover effects in other states, Congress has wisely chosen to vest in the federal government the authority to abate transboundary pollution. At the same time, if states want to go beyond the minimum federal standards, there is no reason not to allow them to do so.

- **Races to the Bottom.** Minimum, nationally applicable federal standards (often administered with the assistance of state and local officials) level the playing field by prohibiting states from participating in a "race-to-the-bottom" by promulgating weaker standards than those in effect in other states competing for the same industries. Again, if state or local governments see fit to exceed the federal standards, the race-to-the-bottom rationale provides no basis for prohibiting them from doing so.

- **Laboratories for Democracy.** Floor preemption preserves the important concept of states serving as "laboratories of democracy," exercising their ability to generate and test new ideas, often prompting the development of new technologies. By deferring to states' rights and giving states the authority to innovate and to enact more protective regulations as they see fit, the resulting flexibility creates benefits outside of the state's boundaries, because other states and the federal government get the opportunity to learn from a particular state's unique approach.[33] Congress has long recognized the benefits of such an approach. As explained more fully below, it decided to allow California to regulate motor vehicle emissions in part because it valued the knowledge and experience California was able to provide to the federal government on the basis of the state's early regulatory efforts, which preceded those of EPA. Had Congress chosen to completely preempt the field of climate change regulation, for example, the wide array of state and local programs that deal with climate change would never have been allowed to develop.

- **Minimum Environmental Protection.** A consistent system of regulatory requirements promotes uniform, minimum protection of public health and natural resources.[34] At worst, residents of each state are assured of a level of protection deemed adequate by federal officials. If state or local officials decide they wish to provide additional protections to satisfy the demands of their constituents, they are free to do so.

- **Avoiding one-size-fits-all.** Regulatory floors, coupled with the preservation of state and local authority to go beyond them, overcome the problem of a "one-size-fits-all" approach. States have diverse geography, climate, natural resources, and population patterns.[35] Giving them authority to tailor more stringent requirements to their own situations allows flexible and efficient decision-making.[36] In contrast, rigid edicts from

Washington that preclude adaptation in a manner consistent with federal objectives or supplementation at the state and local level often straitjacket local initiative, infuriating state and local officials.[37]

■ **Institutional Diversity.** The combination of floor preemption and state and local discretion to establish more protective regimes also creates "institutional diversity," by empowering various actors to pursue diverse policies for tackling difficult environmental problems.[38] Such diversity not only fosters much-needed cooperation in meeting federal statutory goals, but also creates an institutional backup, so that a state, for example, is able to address an environmental problem when the federal government does not.[39]

The almost universal decision by federal legislators to preempt weaker, but not stronger or supplemental state and local programs, not only makes sense as a matter of federal environmental policy. States historically have strongly favored this approach for several reasons as well:

■ **Public Choice.** State and local officials often feel strongly that the adoption of measures that provide levels of health, safety, and environmental protection that go beyond those mandated by federal law is necessary to meet the demands of their constituents.[40] Floor preemption provides them with the ability to satisfy those demands.

■ **Green Competition.** Some states and localities also have a strong interest in "being green" to attract new residents and businesses who place a high value on environmental amenities.[41] Put simply, doing business in an energy-efficient state saves money for producers and consumers alike. "The cost and quality of electric service in a state is now a significant factor informing location decisions of intensively computerized businesses[.]"[42]

■ **Areas of Exclusive Jurisdiction.** Regulation of land use has long been the traditional province of local government, and Congress has been very careful to respect local and state authority in this area. Local and state governments are working to address transportation concerns, create workable land use policies, and create reliable and efficient energy supplies. Floor preemption allows states and local governments to continue these efforts as long as they do not conflict with federal requirements.

■ **Low Income Energy Assistance and Other Social Policy Goals.** Preservation of state and local authority to exceed or supplement federal environmental protection standards sometimes allows these governments to pursue other social policy objectives that are not being met by the federal government. For example, states also have an incentive to promote energy efficiency and reduce carbon emissions to help poor and moderate income households.[43] Investment in energy efficient appliances and weatherizing low-income housing not only reduces energy costs for individual residents, it also reduces demands on state and governments to provide energy assistance to low-

income residents in winter. In this way, reducing carbon emissions is a way to bring savings to the entire state.[44]

■ **Green Development.** Many states see climate change not only as a threat but also as an economic opportunity and are working to position themselves as market leaders in "producing and selling alternative fuels, ramping up renewable energy exports, attracting high-tech business, and selling greenhouse gas emission reduction credits."[45] Floor, but not complete, preemption allows states to retain their crucial role in pursuing policies that promote both environmental protection and economic development, as well as address their unique problems and utilize their different resources.

■ **Partnership.** Many state and local officials are convinced that a top-down, "one-size-fits-all" approach is detrimental to regulatory effectiveness.[46] Instead of following such a rigid approach, state and local governments want to work hand-in-hand with the federal government in the effort to achieve environmental protection objectives. Indeed, since the major environmental laws were passed in the 1970s, states have increasingly accumulated sophisticated expertise and qualified employees to implement federal environmental programs.[47] The combination of the delegation of authority to the states to implement federal legislation and the preservation of state power to exceed or supplement federal requirements provides states with the flexibility they believe is needed to provide optimal levels of protection for health, safety, and welfare as well as encourages inter-governmental cooperation that redounds to the benefit of all.

Many states see climate change as an economic opportunity and are willing to position themselves as market leaders.

For all of these reasons, environmental "statutes reflect the understanding that, despite the creation of an extensive body of federal environmental restrictions, the states would continue to play an important role in the adoption and implementation of environmental policy, and that, in particular, they would remain free to supplement or exceed federally established goals or standards."[48] Under the Clean Water Act, for example, federal pollution control standards establish a floor by setting minimum standards of protection that apply in all states. The statute requires all states to adopt and implement water quality standards sufficient to meet the statute's fishable-swimmable waters goal. It also leaves them free to pass additional, more protective standards or "any requirement respecting control or abatement of pollution" if it would be consistent with local policies or voter preferences that they do so.[49]

The CAA, the principal federal statute for controlling air pollution, also exemplifies this model of cooperative federalism.[50] Under the CAA, states are responsible for implementing National Ambient Air Quality Standards (NAAQS). NAAQS are set for "criteria pollutants" and must "protect the public health" within an "adequate margin of safety."[51] Once EPA issues the NAAQS, the statute requires that each state develop "state implementation plans" (SIPs) to meet the standards.[52] As the Supreme Court has recognized, Congress consciously chose to leave to the states the freedom to adopt whatever mix of emission controls they feel are an appropriate way to meet the NAAQS.[53] In this way, the 1970 CAA compels the

achievement of uniform standards deemed necessary by EPA to protect the public health and welfare, but allows the states as a general matter to decide how to achieve these standards by crafting plant-specific and industry-specific reduction strategies appropriate to each state's own economic, social, and environmental needs. And the statute preserves the states' authority to protect air quality by imposing more stringent controls on stationary sources than EPA has adopted.

Indeed, the cooperative federalism approach so undergirds our environmental laws that, even when Congress concludes that preemption is necessary in certain rare contexts, it does its best to preserve state and local authority. Complete preemption is a drastic approach because it "leav[es] states with no power whatsoever to protect the health, safety, and welfare of their citizens."[54] It involves a judgment that providing certainty by vesting in the federal government the exclusive power to operate within a certain field is preferable to encouraging regulatory innovation, preserving state authority, and maximizing cooperative efforts among multiple sovereigns.[55]

Product design or engineering is the most common area for federal requirements that preempt all state activity, even more stringent regulation.[56] Congress has decided to oust states completely from certain aspects of product design or engineering, but it has defined those aspects narrowly so as to minimize intrusion on state and local authority. The Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA),[57] for example, completely preempts states from regulating pesticide labeling and packaging.[58] It specifically saves state power, however, to regulate the use and sale of such products, as long as the regulations do not clash with federal requirements.[59] Similarly, the Toxic Substances Control Act prohibits states from implementing manufacturing requirements on toxic substances, but preserves state authority to regulate the sale and use of toxic substances.[60]

In addition, as mentioned earlier, the California car provisions of the CAA establish a balance between establishing uniform standards and preserving state authority. When it adopted the CAA in 1970, Congress sought to reduce the potential for multiple state tailpipe emission requirements in order to avoid subjecting the auto manufacturers to a multiplicity of varied, and potentially conflicting state requirements. Accordingly, the CAA preempts the states from adopting their own tailpipe emission standards. Even in this area, however, the statute contains an important exception: Congress chose to empower California to apply to EPA for a waiver of the state preemption provisions.[61] Congress decided to preserve California's ability to exceed federal standards in recognition of the state's historical leadership in combating air pollution. Under § 209(b) of the Act, if California determines that mobile source controls that are more protective than those adopted by EPA are needed to deal with the state's air pollution problems, it may apply to EPA for a waiver of the CAA's preemption of state tailpipe emission controls. Once Congress recognized the wisdom of allowing California to adopt a second set of auto emission controls, it saw no need to constrain other states from following California's example. Once EPA grants a waiver to California, any other state is free to adopt standards that are identical to those adopted by

California. The result is a compromise that protects the auto manufacturers from the need to comply with multiple state standards, while also protecting the federalism values and advantages discussed above by affording all states the option of adopting any California standards approved by EPA. California has taken full advantage of this accommodation. It has requested, and EPA has granted, § 209(b) waivers 53 times.[62]

California's ability to obtain a waiver of the CAA's prohibition on the adoption by states of any auto emission standard represents a Congressional effort to strike a balance. On the one hand, the statute authorizes EPA to establish uniform and preemptive standards that provide minimal levels of protection for all residents in the United States without subjecting the auto manufacturers to a welter of regulatory standards. On the other hand, the provisions that allow California to adopt (and other states to emulate) its own more protective standards if it meets the CAA's requirements for doing so promote federalism values by preserving meaningful albeit limited state authority to go beyond federal requirements to further protect its citizens and the environment. In effect, since 1970, the United States has had two standards for controlling various kinds of emissions from mobile sources.

In establishing this regime, Congress concluded that having two possible standards as opposed to fifty would "minimize economic disruption and provide emission control systems at lower costs to the people of the Nation."[63] On its own, California is the world's tenth largest economy with 32 million cars – easily large enough that it makes economic sense for automobile manufacturers to build cars that comply with California standards. As a result, "the compromise has given the country the benefit of California's continual efforts to reduce auto pollution and push technology forward."[64] The compromise also rewards California and other states for excelling in environmental protection. Most importantly, the compromise retained the states' historic role in protecting public health and safety, in this case by allowing them to adopt more protective standards under precisely defined circumstances. The CAA waiver provision for California auto emission standards is therefore a prime example of Congress's recognition of the desirability of exercising its federal preemptive authority conservatively and cautiously — in a way that preserves state authority, establishes workable national standards, and furthers the ultimate environmental goal of the CAA, namely, that cleaner air is achieved.[65]

Keeping the Cooperative Federalism Balance: Why it Matters for Climate Change

Complete preemption of state and local authority to address climate change would not only be inconsistent with federalism values and with nearly forty years of federal environmental regulation, it also would prevent the United States from taking the steps needed to avoid the potentially devastating effects of climate change. In particular, prohibiting state and local governments from acting in areas that have always been within their exclusive jurisdiction – including the regulation of electric utilities, land use control, agriculture, landfills, and building codes – would make it impossible for the United States to achieve the carbon

reductions needed to avoid catastrophic climate change. States are now targeting these sources in creative and innovative ways, including renewable portfolio standards, emissions trading programs, and policies relating to residential energy usage, transportation planning, taxation, and waste reduction. Preempting these efforts will be detrimental to reducing carbon emissions for the following reasons:

A "top-down" approach characterized by complete preemption of state and local climate change programs ignores the reality of climate change, namely that it is a problem caused by disparate and diverse sources and that *all of these sources* must reduce their carbon emissions if we want to address the problem effectively. As many states have already shown, a rational and effective climate change policy requires the use of many different tools. Such a "portfolio" approach affords state and local governments the flexibility they need to implement the policies and programs that serve their unique constituencies best. In addition, "[d]iversification enhances a state's resilience to external energy challenges," allowing states to be better prepared when prices spike.[66] Complete preemption would both preclude flexibility and impair effectiveness in the nation's quest to minimize the adverse effects of climate change.

Not only are state and local governments able to use legal tools that are not available to the national government, they are far better suited to motivate the lifestyle changes among their citizens that will prove essential to an effective climate change policy over the long run. Unless individuals bear some of the burden of combating climate change, the entire task will be thrust upon the industries responsible for generating most of the nation's GHGs (although compliance with climate change requirements by industries such as electric utilities obviously will affect individual citizens indirectly). Lifestyle changes will require "local commitment, down to individuals, to accomplish the type of economic and societal transformations that will be necessary to achieve very large reductions in carbon."[67]

The kinds of emissions trading regimes envisioned under most pending federal climate change bills will not be enough to combat climate change. Development and transportation decisions made by local governments will be key to reducing carbon emissions. One estimate finds that "if 60 percent of new growth" consists of "compact" or "high-density" development,"[68] up to 85 million metric tons of carbon gas emissions could be prevented from reaching the atmosphere each year by 2030," the equivalent of a 28 percent increase in federal vehicle efficiency standards.[69] This is five percent greater than the levels of emissions reductions predicted to be generated by the increased vehicle efficiency standards mandated by the 2007 Energy Independence Security Act – reduction predictions that notably do not take into account the likelihood that driving will continue to increase.[70] State and local governments recognize that they must promote less driving, not more, if carbon emissions are to be reduced significantly.

Another reason to preserve state and local authority to address climate change, notwithstanding the establishment of federal programs, is to preserve state and local

State and local governments have legal tools not available to the national government, and they are far better suited to motivate the lifestyle changes that will be essential to combating climate change.

authority to deal with the divergent impacts that climate change is likely to have in different parts of the country. Regional variation in the impacts of climate change is likely to be significant.[71] Some regions will experience severe droughts. Others will lose coastlines. Still others will suffer from flooding caused by severe weather events. States will need the authority to enact more stringent programs or supplemental programs tailored to address the unique impacts that climate change will have on their populations and natural resources. States will also play crucial roles in adaptation planning. Although we know that the impacts of climate change will differ by region, we cannot predict with certainty what these differences will be. In the face of such uncertainty, straitjacketing states by forcing them to conform to a single, minimally protective federal regime would be both unnecessarily limiting and unwise.

States and localities often serve as the federal government's agent or partner in the implementation of federal environmental legislation, and the freedom to apply the experience and expertise they have developed over the past four decades by creating programs that supplement federal climate change efforts will be invaluable and necessary if federal climate change programs are to succeed. A cooperative approach that retains state and local authority better utilizes state and local resources than an approach that vests the exclusive power to deal with climate change in the federal government.

EPA's decision to deny California's waiver request to enforce its GHG emission reduction rules is a glaring example of how broad federal preemption of state and local climate change initiatives could cripple innovative and concrete state efforts to combat climate change.[72] If California's waiver had been granted, it would have reduced California GHG emissions more than twice as much as the new federal CAFE standard would by 2016.[73] By 2020, the GHGs eliminated by California's standards would have equated to taking 6.5 million cars off of the road.[74] Twelve states have adopted California's program, waiting only for EPA's approval of California's waiver request to begin implementation.[75] Five additional states – Florida, Arizona, Nevada, Colorado, and Iowa — have gubernatorial commitments to adopt.[76] Together these states represent approximately 45 percent of the population and 45 percent of the cars in the United States.

If California's rule were implemented in these additional 12 states by 2016, the result would be a reduction in GHG emissions that would be an 89 percent improvement over the new federal CAFE standards.[77] By 2020, the resulting reductions would be equivalent to the elimination of GHG emissions from approximately 22 million vehicles.[78] Unless Congress intends to adopt emissions reduction standards more stringent than California's proposed standards, preempting this effort will result in significantly fewer carbon reductions, or reductions achieved more slowly, a result we cannot afford.

Preempting regional and state efforts to reduce GHG emissions in the electricity sector would also hamper the nation's ability to achieve the degree of GHG emission reductions necessary to make a significant impact on climate change. For example, approximately 26 states use renewable portfolio standards (RPS) – policies that require utilities operating in a

state to designate a portion of their power generation to come from renewable resources such as wind or solar energy – to reduce GHG emissions.[79] These states account for more than half of the electricity sold in the United States.[80] Some of these programs are far-reaching. New York, for example, plans for 25 percent of its electricity to derive from renewable energy by 2013.[81] California has mandated 20 percent by 2010.[82]

State RPSs also represent a consistent trend in state climate change mitigation activity – they "maintain many common design features and yet are tailored to the particular realities of each individual state."[83] Interestingly, the support for RPSs has been bipartisan. "Among the 22 RPSs established [as of 2006], 16 were enacted with a Republican governor, five with a Democrat, and one with an Independent."[84] States are very concerned that the federal government will undermine their progress in developing RPSs, and this concern crosses partisan and regional lines.[85] "In particular, state officials are opposed to any federal legislation that would preempt or constrain existing state policies and are very concerned about any steps that would penalize them for taking early actions."[86] A decision to enact complete preemption of state and local climate change programs would fly in the face of these concerns.

Building codes, land use policies, and transportation policies will also contribute greatly to reducing GHG emissions. Energy use in residential, commercial, and industrial buildings constitutes 43 percent of U.S. carbon emissions.[87] Moreover, this percentage will increase if current trends are not reversed. "GHG emissions from the building sector in the United States have been increasing at almost two percent per year since 1990, and CO2 emissions from residential and commercial buildings are expected to continue to increase at a rate of 1.4 percent annually through 2025."[88] State and municipal energy codes are the primary way to promote energy efficiency in buildings.[89] By applying currently available technologies to new buildings, GHG emissions can be reduced 30 to 40 percent.[90] An effective climate change strategy requires state and local participation and commitment to reducing emissions, and that participation would be precluded by broad preemption of federal and state climate change programs.

Local land use policies and transportation initiatives are also crucial to combating climate change. The transportation sector is responsible for about one-third of GHG emissions.[91] Urban sprawl contributes greatly to GHG emissions because it creates inefficient traffic patterns.[92] To address this problem, local governments are investing in municipal fleets that rely on alternative fuels, improving mass transportation, and providing alternative means of transportation.[93] In addition, local land use policies promoting higher-density and mixed-use developments have the potential to reduce GHG emissions significantly, because there is a direct correlation between the number of dwellings per acre and the level of GHG emissions released. Emissions per suburban households located in a density of 4 homes per acre are about 25 percent higher than in neighborhoods with 20 homes per acre.[94] Experience has shown that Congress does not want to go into the business of dictating state and local land use policies. Nor should it. It would therefore be particularly foolish for

The federal government only established energy efficiency standards for appliances after states did so.

Congress to preclude states and localities from adapting their land use policies to achieve climate change protections that the federal government is not going to provide.

The 'Patchwork' Argument: Smokescreen for Deregulation

The notion that a patchwork of environmental protection requirements imposes an unacceptable burden on interstate commerce is both spurious and ahistorical. States have contributed significantly to the country's efforts to protect public health since the country was founded.[95] The CAA, for example, was enacted only after California established automobile tailpipe standards and other states were working toward their own vehicle emission standards.[96] The federal government only established energy efficiency standards for appliances after states began doing so. Acid rain provisions were added to the CAA only after states began imposing aggressive sulfur dioxide controls.[97]

Regulated industries typically raise the patchwork argument only with respect to state requirements that are tougher than their federal counterparts, suggesting that deregulation is their true agenda. Nevertheless, business has simultaneously argued that devolution of federal authority to control environmentally damaging activities is desirable to state governments. If a patchwork of state requirements is truly anathema to business interests, then pressing for local control makes no sense – unless the agenda is to roll back federal regulation with the hope that weaker state regulation will take its place.[98] When it appears that state regulation will be stronger than federal regulation, however, industry suddenly cries foul. Put simply, industry favors the weakest standards – and will press for whatever forum – local, state, or federal – it perceives to be most aligned with its deregulatory agenda.

Moreover, most industries, including the ones that are the most vociferous in their opposition to federal climate change regulation, have systems in place to ensure their compliance not only with different federal, state, and local laws, but also with the differing international legal regimes that affect their increasingly globalized business. The idea that large multinational companies are overburdened by more stringent state laws for administrative reasons is therefore not credible.

Finally, presenting environmental regulation as an "either/or" proposition obscures the benefits of promoting a cooperative and potentially dynamic relationship among local, state, and federal authorities to protect public health and the environment.[99] Local, state, and federal governments routinely address issues that are simultaneously local, regional, national, and even international in nature. Indeed, the effects of environmental harm are often disparate, making their impact difficult to sort out. "Real-world" environmental federalism consists of a partnership between federal and state regulators, and an acknowledgement that different levels of government are best situated to take the lead on an issue at different times. Calls for complete preemption of state and local efforts ignore this real-world partnership and subvert the environmental protection potential it provides. It is hard to escape the

conclusion that the proponents of complete preemption understand all too well the adverse implications of ousting state and local authority on the ability to combat climate change, and that their position is based primarily on their goal of doing whatever it takes to ensure that the steps necessary to address climate change will affect their own interests as little as possible.

Conclusion

Combating climate change is the greatest environmental challenge America and the world have ever faced. Indeed, it is not an exaggeration to say that all other environmental programs could look in retrospect like a dry run for this main event. Pushing state and local governments out of this effort not only will sabotage its effectiveness, but also would ignore forty years of painful lessons in how best to protect public health and natural resources in the wake of the unforeseen harms of industrial development. Continued adherence in the climate change context to historic cooperative federalism principles would not only preserve cherished federalism values. It also would generate long-run benefits to the health and welfare of the nation's people that are likely to far outweigh whatever inconvenience might flow from a climate change agenda that is, in some respects, multi-level. If America expects to lead the world in this monumental effort, we must begin by honoring the constitutional structure of government in our own country.

APPENDIX A

Specific Initiatives

Because of their potential impact and relative institutional maturity, several specific regional and state initiatives are worth highlighting.

The Regional Greenhouse Gas Initiative (RGGI or "ReGGie"). RGGI began in 2003, when Republican Governor George E. Pataki invited 11 neighboring states to participate in a regional effort to reduce carbon emissions.[100] RGGI, with ten Northeastern and Mid-Atlantic states now participating,[101] is an agreement establishing a regional cap-and-trade program for carbon emissions from electric power plants. The first auction is scheduled for September 10, 2008, with a second scheduled for December 17, 2008. RGGI requires signatory states to stabilize carbon emissions over the first six years of program implementation at level roughly equal to current emissions, and then initiate an emissions decline of 2.5 percent per year for the four years 2015 through 2018.[102] RGGI encompasses 16 percent of the U.S. population and, if its commitments are met, would address 10 percent of U.S. greenhouse gas emissions.[103]

Western Climate Initiative (WCI). Launched in February 2007 by the Governors of Arizona, California, New Mexico, Oregon and Washington, the Western Climate Initiative (WCI) now consists of six states and three Canadian provinces.[104] WCI has set a goal to reduce regional greenhouse emissions to 15% below 2005 levels by 2020.[105] The design of a market-based mechanism to reach this goal is set to be completed by August 2008.[106] These emissions will not necessarily be limited to power plants, as the "sectors" WCI's "workplan" may address include "residential, commercial, industrial, transportation, waste management, agriculture, and forestry."[107] WCI encompasses 19 percent of the U.S. population and, if its commitments are met, would address 13 percent of U.S. greenhouse gas emissions.[108]

The Midwestern Regional Greenhouse Gas Reduction Accord. In November 2007, six states – Illinois, Iowa, Kansas, Michigan, Minnesota, and Wisconsin – and the Canadian Province of Manitoba agreed to establish GHG reduction targets and to establish a multi-sector cap-and-trade program.[109] Indiana, Ohio, and South Dakota joined the agreement as observers.[110]

U.S. Mayors' Climate Protection Agreement. More than 600 mayors have signed the U.S. Mayors Climate Protection Agreement.[111] Under the Agreement, cities have committed to "strive to meet or beat the Kyoto Protocol targets in their own communities, through actions ranging from anti-sprawl land-use policies to urban forest restoration projects to public information campaigns."[112] The agreement encompasses 26 percent of the U.S. population and, if its commitments are met, would address 23 percent of U.S. greenhouse gas emissions.[113]

The Climate Registry. More than 30 states have joined The Climate Registry, a nonprofit partnership designed to develop a common system for reporting GHG emissions supported by "robust reporting and verification infrastructure."[114] It is the largest U.S. collaboration to date to track GHG emissions.[115]

Clean Energy States Alliance (CESA). Traditionally, states have had significant authority over electric generation. Currently, 26 states and the District of Columbia require electric utilities to generate a certain amount of electricity from renewable resources, usually in the form of "renewable portfolio standards or RPSs.[116] Eighteen states have established "clean energy funds" to promote renewable energy projects.[117] CESA provides "information and technical services to its members and works with them to build and expand clean energy markets in the United States."[118]

California's Motor Vehicle GHG Standard (Pavley Law). Under the CAA, states are preempted from adopting their own emissions standards for mobile sources of pollution.[119] The exception to this rule is California.[120] Prior to the enactment of the CAA, California had developed stringent standards to deal with motor vehicle pollution.[121] In recognition of that historic leadership role, when Congress enacted the CAA, it allowed California to apply for a waiver from EPA so that it would be able to continue to issue mobile source regulations more protective than the federal government's. If the waiver is granted, other states may adopt California's standards. Since 1967, California has requested, and has been granted, a waiver from EPA 53 times.[122]

EPA has never rejected a waiver request from California until December 19, 2007, when EPA Administrator Stephen Johnson denied California's request to enforce GHG emission reduction rules for motor vehicles, established pursuant to California legislation enacted in 2002 (AB 1493, known as the "Pavley Law").[123] In 2004, pursuant to this authority, the California Air Resources Board (CARB) had adopted regulations requiring GHG reductions in fleet averages, rather than compliance by individual vehicles.[124] Under the regulations, between 2009 and 2016, passenger cars, light duty trucks, and SUVs weighing 3,750 lbs. or less must reduce emissions by 36.5 percent, and light trucks and passenger vehicles weighing more than 3,750 lbs. must reduce emissions by 24.4 percent.[125] The regulations allow for credit generation from alternative fuel vehicles, and trading of credits among vehicle manufacturers.[126,127]

Twelve states have adopted California's program, waiting only for EPA's approval of California's waiver request to begin implementation.[128] If California's waiver had been granted, it would have reduced California GHG emissions at more than twice the level than the new federal CAFE standard by 2016.[129] By 2020, the GHGs eliminated would equate to taking 6.5 million cars off of the road.[130] Including the 12 states adopting California's standard magnifies the result. If California's rule was implemented in California and these 12 states by 2016, the limits would result in a GHG emissions reduction that would be an 89 percent improvement over the new federal CAFE standards.[131] By 2020, this would result in the elimination of GHG emissions from approximately 22 million vehicles.[132]

California's Global Warming Solutions Act. In 2006, California passed the Global Warming Solutions Act, which requires the state to reduce GHG in California to 1990 levels by 2020.[133] The Act requires CARB to develop regulations, including the possibility of market mechanisms, to reach this goal. CARB is currently developing a "Scoping Plan" that will contain the primary strategies California will use to reduce GHGs. "The Plan, when it is completed, will have a range of GHG reduction actions which can include direct regulations, alternative compliance mechanisms, monetary and non-monetary incentives, voluntary actions, and market-based mechanisms such as a cap-and-trade system."[134] The Plan will be released for public review and comment in June 2008, and is scheduled for CARB approval in November 2008.

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End Notes

[1] As of the date of this paper, the most prominent piece of climate change legislation is a substitute amendment to S. 2191 known as the Lieberman-Warner Climate Security Act of 2008, offered by the Senate Environment and Public Works Committee Chairwoman Barbara Boxer (D-CA) and Senators Joe Lieberman (I-CT) and John Warner (R-VA). In Section 1741, Retention of State Authority, the substitute amendment provides:
(a) IN GENERAL.—Except as provided in subsection (b), nothing in this Act precludes, diminishes, or abrogates the right of any State to adopt or enforce—
(1) any standard, limitation, prohibition, or cap relating to emissions of greenhouse gas; or
(2) any requirement relating to control, abatement, mitigation, or avoidance of emissions of greenhouse gas.
(b) EXCEPTION.—Notwithstanding subsection (a), no State may adopt a standard, limitation, prohibition, cap, or requirement that is less stringent than the applicable standard, limitation, prohibition, or requirements under this Act.

[2] John D. Dingell, Chairman, Committee on Energy and Commerce, and Rick Boucher, Chairman, Subcommittee on Energy and Air Quality, *Climate Change Legislation Design White Paper: Appropriate Roles for Different Levels of Government* 25 (Feb. 25, 2008), *available at* http://energycommerce.house.gov/Climate_Change/ (last visited May 8, 2008).

[3] *Id.* at 23.

[4] 42 U.S.C. §§ 7543(b), 7507.

[5] *See* Committee on State Practices in Setting Mobile Source Emissions Standards, National Research Council, State and Federal Standards for Mobile Source Emissions 121 (2006) [hereinafter "State and Federal Standards for Mobile Source Emissions"].

[6] National Association of Clean Air Agencies, Conference on *Defining the Role of States and Localities in Federal Global Warming Legislation*, Discussion Paper #1 at 13 (Feb. 12-13, 2008) [hereinafter "NACAA Conference"].

[7] Center for Climate Strategies, *National Impact of State Actions, available at* http://www.climatestrategies.us/National_Impact.cfm (last visited May 27, 2008).

[8] David Hodas, *State Initiatives*, in Global Climate Change 345 (Michael B. Gerrard ed., 2007).

[9] Pew Center on Global Climate Change, *Climate Change 101: Local Action, available at* www.pewclimate.org/global-warming-basics/climate_change_101 (last visited May 27, 2008)[hereinafter "Climate Change 101"].

[10] Nicholas Lutsey & Daniel Sperling, *America's Bottom-Up Climate Change Mitigation Policy*, 36 Energy Pol'y 671, 674 (2008) (providing an inventory and analysis of local, state and regional actions in the United States) [hereinafter "American's Bottom-Up Climate Change Mitigation Policy"].

[11] Barry Rabe, The Brookings Institution, Second Generation Climate Policies in the American States: Proliferation, Diffusion, and Regionalization, Executive Summary at 1 (2006), *available at* http://www.brookings.edu/papers/2006/08energy_rabe.aspx (last visited April 28, 2008)[hereinafter "Second Generation Climate Policies"].

[12] David Hodas, *State Initiatives*, in Global Climate Change 345 (Michael B. Gerrard ed., 2007).

[13] NACAA Conference, *supra* note 6 at 1.

[14] The Center for Climate Strategies, *State Policy Solutions That Work, available at* www.climatestrategies.us/Policies_That_Work.cfm (last visited Apr. 22, 2008)[hereinafter "State Policy Solutions That Work"].

[15] *Id.*

[16] Thomas D. Peterson, et al., *Developing a Comprehensive Approach to Climate Change Policy in the United States that Fully Integrates Levels of Government and Economic Sectors,* 26 Va. Envtl. L.J. 227, 240-41 (2008).

[17] The Center for Climate Strategies, *State Policy Solutions That Work, supra* note 14.

[18] Lutsey & Sperling, America's *Bottom-Up Climate Change Mitigation Policy, supra* note 10 at 676, 683.

[19] *Id.* at 683.

[20] *Id.* at 675.

[21] *Id.* at 682.

[22] *Id.*

[23] Rabe, Second Generation Climate Policies, *Supra* Note 11 At 1. *See also Climate Change 101, supra* note 9.

[24] *Id.* at 2.

[25] NACAA Conference, *supra* note 6 at 10.

[26] Robert L. Glicksman, *From Cooperative to Inoperative Federalism: The Perverse Mutation of Environmental Law and Policy*, 41 Wake Forest L. Rev. 719, 719-721 (2006)[hereinafter "From Cooperative to Inoperative Federalism"].

[27] Rena I. Steinzor, *Unfunded Environmental Mandates and the "New (New) Federalism: Devolution, Revolution, or Reform?,* 81 Minn. L. Rev. 97, 166 (1996)[hereinafter "Unfunded Environmental Mandates"].

[28] *Id.* at 778; David Hodas, *State Initiatives*, in Global Climate Change 343 (Michael B. Gerrard ed., 2007) ("In the absence of federal leadership on global warming, state and local governments have moved into the void").

[29] Alden v. Maine, 527 U.S. 706, 748 (1999).

[30] Robert L. Glicksman & Richard Levy, *A Collective Action Perspective on Ceiling Preemption by Federal Environmental Regulation: The Case of Global Climate Change,* 102 Nw. L. Rev. 3 (forthcoming 2008) (manuscript at 10, on file with authors) [hereinafter "A Collective Action"].

[31] William Buzbee, *Asymmetrical Regulation: Risk, Preemption, and the Floor/Ceiling Distinction*, 82 N.Y.U. L. Rev. 1547, 1564 (2007)[hereinafter "Asymmetrical Regulation"].

[32] *Id.*

[33] Nina A. Mendelson, *Chevron and Preemption*, 102 Mich. L. Rev. 737, 767 (2004).

[34] Rena I. Steinzor, *EPA and her Sisters at 30,* 31 Envtl. L. Rep. 11086, 11093 (2001) [hereinafter "EPA and her Sisters at 30"].

[35] *Id.*

[36] Buzbee, *Asymmetrical Regulation, supra* note 31 at 1587.

[37] Steinzor, *Unfunded Environmental Mandates, supra* note 27 at 174.

[38] Buzbee, *Asymmetrical Regulation, supra* note 31 at 1576.

[39] *Id.* at 1593; William L. Andreen, "Climate Change Legislation and Preemption" at 11, Symposium on U.S. Climate Change Legislation, University of Houston Law Center (Feb. 11, 2008) (copy available upon request)[hereinafter "Climate Change Legislation and Preemption"].

[40] Glicksman, *From Cooperative to Inoperative Federalism*, *supra* note 26 at 780.

[41] *Id.* See Barry G. Rabe et al., *State Competition as a Source Driving Climate Change Mitigation*, 14 N.Y.U. Envtl. L.J. 1, 20-21 (2005); NACAA Conference, *supra* note 13 at 10-12.

[42] David Hodas, *State Initiatives*, in Global Climate Change 349 (Michael B. Gerrard ed., 2007).

[43] *Id.*

[44] *Id.*

[45] Climate Change 101, *supra* note 9 at 1.

[46] Steinzor, *EPA and Its Sisters at 30, supra* note 34 at 11093-94.

[47] Glicksman, *From Cooperative to Inoperative Federalism, supra* note 26 at 721.

[48] Glicksman, *From Cooperative to Inoperative Federalism, supra* note 26 at 721.

[49] Buzbee, *Asymmetrical Regulation*, *supra* note 31 at 1567; Andreen, *Climate Change Legislation and Preemption*, *supra* note 39 at 2.

[50] 42 U.S.C. §§ 7401-7671q (2000).

[51] 42 U.S.C. § 7409(b).

[52] *Id.* at § 7410.

[53] *See, e.g.,* Train v. NRDC, Inc., 421 U.S. 60, 79 (1975). *See also* Union Elec. Co. v. EPA, 427 U.S. 246 (1976).

[54] Glicksman & Levy, *A Collective Action*, *supra* note 30 at 46.

[55] Buzbee, *Asymmetrical Regulation*, *supra* note 31 at 1601.

[56] *Id.* at 1561-62.

[57] Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. 136.

[58] Buzbee, *Asymmetrical Regulation*, *supra* note 31 at 1562.

[59] *Id.* This has also been narrowly interpreted. *See* Bates v. Dow Agrosciences, 544 U.S. 431, 125 S.Ct. 1788 (2005).

[60] *Id.* Toxic Substances Control Act, 15 U.S.C. 2601 et seq.

[61] Clean Air Act, § 209, 42 U.S.C. § 7543.

End Notes

[62] James E. McCarthy, Congressional Research Service, California's Waiver Request to Control Greenhouse Gases Under the Clean Air Act 2, (2007)[hereinafter "CRS: California's Waiver Request"]. California received its first denial in December 2007, when it requested a waiver to enforce GHG emission reduction rules for motor vehicles. EPA Administrator Stephen Johnson overrode the recommendations of EPA's experts and denied California's waiver, *see* Notice of Decision Denying a Waiver of Clean Air Act Preemption for California's 2009 and Subsequent Model Year Greenhouse Gas Emission Standards for New Motor Vehicles, 73 Fed. Reg. 12156-01 (Mar. 6, 2008), a dispute that is now headed to court. Because California's waiver request rests on firm legal grounds, most legal analysts expect EPA's decision to be overturned.

[63] Andreen, *Federal Climate Change Legislation and Preemption*, *supra* note at 6.

[64] *Id.*

[65] *State and Federal Standards for Mobile Source Emissions*, *supra* note 5 at 264.

[66] David Hodas, *State Initiatives*, in Global Climate Change 349 (Michael B. Gerrard ed., 2007).

[67] Lutsey & Sperling, *America's Bottom-Up Climate Change Mitigation Policy, supra* note 10 at 674.

[68] "Compact," here, refers to "compact development," which is also known as "smart growth." "Compact development" is defined by the Urban Land Institute as "higher average blended densities" that feature a variety of "land uses, development of strong population and employment centers, interconnection of streets, and the design of structures and spaces at a human scale." Reid Ewing et al., Growing Cooler: The Evidence on Urban Development and Climate Change, Urban Land Institute 1 (2008) [hereinafter "Growing Cooler"].

[69] Urban Land Institute, Richard Rosan, *Land Use and Climate Change, Urban Land* (Feb. 2008), *available at* http://www.uli.org/AM/Template.cfm?Section=Home&CONTENTID=117285&TEMPLATE=/CM/ContentDisplay.cfm (last visited May 11, 2008).

[70] Ewing et al., *Growing Cooler*, *supra* note 68 at 3. If the U.S. Department of Energy is correct in forecasting that driving will increase by 48 percent in the United States by 2030, any gains in emissions reductions made as a result of the Energy Independence Security Act will be outpaced by increased carbon emissions. *Id.* at 4.

[71] Andreen, *Federal Climate Change Legislation and Preemption*, *supra* note at 12.

[72] California's proposed regulations require GHG reductions in fleet averages, rather than compliance by individual vehicles. Under the regulations, between 2009 and 2016, passenger cars, light duty trucks, and SUVs weighing 3,750 lbs. or less must reduce emissions by 36.5%, and light trucks and passenger vehicles weighing more than 3,750 lbs. must reduce emissions by 24.4%. The regulations allow for credit generation from alternative fuel vehicles, and trading of credits among vehicle manufacturers. For an excellent overview of California's waiver request, see McCarthy, CRS: *California's Waiver Request*, *supra* note 62 at 2. In an effort to bypass EPA's waiver denial, California officials are currently considering including motor vehicle manufacturers in an economy-wide GHG market trading program, an innovative approach to address tailpipe emissions. "California Weighs Novel Auto GHG Plan to Sidestep EPA Waiver Denial," *Inside EPA* (April 18, 2008).

[73] *Id.* at vii.

[74] Press Release, Office of the Governor of California, *available at* http://gov.ca.gov/index.php?/press-release/8353/ (last visited Apr. 30, 2008)[hereinafter "Governor of California Press Release"].

[75] California Environmental Protection Agency, Air Resources Board, Comparison of Greenhouse Gas Reductions for the United State and Canada under U.S. CAFE Standards and California Air Resources Board Greenhouse Gas Regulations vi (Feb. 25, 2008)[hereinafter "CARB: Comparison of Greenhouse Reductions"]. The states adopting California's program are Connecticut, New Mexico, Maine, Maryland, Massachusetts, New Jersey, New York, Pennsylvania, Rhode Island, Vermont, Oregon and Washington. See Clean Cars Campaign, *available at* www.cleancarscampaign.org (last visited Apr. 30, 2008).

[76] *Id.*

[77] CARB: Comparison of Greenhouse Reductions, *supra* note 75 at vii (Feb. 25, 2008).

[78] Governor of California Press Release, *supra* note 74.

[79] Learning from State Action on Climate Change, Pew Center on Global Climate Change 5 (2007), *available at* http://www.pewclimate.org/policy_center/policy_reports_and_ analysis/state (last visited Apr. 30, 2008); Barry G. Rabe, *Race to the Top: The Expanding Role of U.S. State Renewable Portfolio Standards* vi (2006), Pew Center on Global Climate Change, *available at* www.pewclimate. org/docUploads/RPSReportFinal.pdf (last visited May 27, 2008) [hereinafter "Race to the Top"]; U.S. Dept. of Energy, Energy Efficiency and Renewable Energy, State Partnerships, http://www.eere.energy.gov/states/maps/renewable_portfolio_states.cfm (last visited May 12, 2008).

[80] *Id.*

[81] *Id.*

[82] *Id.*

[83] Rabe, *Race to the Top*, *supra* note 79 at 7.

[84] *Id.* at 6.

[85] *Id.* at 26.

[86] *Id.*

87 J. Kevin Healy, *Local Initiatives*, in Global Climate Change 345 (Michael B. Gerrard ed., 2007) [hereinafter "Local Initiatives"].

[88] Marilyn A. Brown Et Al., Pew Center on Global Climate Change, *Towards a Climate-Friendly Built Environment* iii (2005), *available at* http://www.pewclimate.org/docUploads/Buildings_FINAL.pdf (last visited May 13, 2008)[hereinafter "Towards a Climate-Friendly Built Environment"].

[89] Healy, *Local Initiatives*, *supra* note 87 at 423.

[90] Brown et al., *Towards a Climate-Friendly Built Environment*, *supra* note 88 at v.

[91] Healy, *Local Initiatives*, *supra* note 87 at 425.

[92] *Id.* at 427.

[93] *Id.*

[94] Brown et al., *Towards a Climate-Friendly Built Environment*, *supra* note 88 at 40.

[95] Richard L. Revesz, *Federalism and Environmental Regulation: A Public Choice Analysis*, 115 Harv. L. Rev. 553, 578-79 (2001) ("[T]he view widely held in the legal literature that the states ignored environmental problems before 1970 is simply not correct."); id. at 579H (listing numerous states, cities, and counties with regulatory programs to control air pollution and citing statistics showing that the concentrations of important air pollutants were falling at significant rates).

[96] Kirsten Engel, *Harnessing the Benefits of Dynamic Federalism in Environmental Law,* 56 Emory L.J. 159, 171 (2006)[hereinafter "Harnessing the Benefits"].

[97] *Id.*

[98] Rena I. Steinzor, *Devolution and the Public Health*, 24 Harv. Envtl. L. Rev. 351, 374 (2000).

[99] Engel, *Harnessing the Benefits*, *supra* note 96 at 162.

[100] Regional Greenhouse Gas Initiative, *About RGGI, available at* www.rggi.org/about.htm (last visited Apr. 28, 2008).

[101] The states currently participating in RGGI are Connecticut, Delaware, Maine, Maryland, Massachusetts, New Jersey, New Hampshire, New York, Rhode Island and Vermont. Regional Greenhouse Gas Initiative, Press Release, *Design Elements for Regional Allowance Auctions under the Regional Greenhouse Gas Initiative* (Mar. 17, 2008), *available at* http://www.rggi.org/press.htm (last visited Apr. 28, 2008).

[102] Regional Greenhouse Gas Initiative, *Overview of RGGI CO2 Budget Trading Program* (Mar. 17, 2008), *available at* http://www.rggi.org/press.htm (last visited Apr. 28, 2008).

[103] Lutsey & Sperling, *America's Bottom-Up Climate Change Mitigation Policy*, *supra* note 10 at 681.

[104] WCI partners include Arizona, British Columbia, California, Manitoba, Montana, New Mexico, Oregon, Utah, and Washington. Western Climate Initiative, *available at* http://www.westernclimateinitiative.org/Media_Room.cfm (last visited April 29, 2008).

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[105] Western Climate Initiative, Statement of Regional Goal (Aug. 22, 2007), *available at* http://www.westernclimateinitiative.org/Media_Room.cfm (last visited April 29, 2008).

[106] *Id.*

[107] *Id.*

[108] Lutsey & Sperling, *America's Bottom-Up Climate Change Mitigation Policy, supra* note 10 at 681.

[109] Learning from State Action on Climate Change, Pew Center on Global Climate Change 3 (2007), *available at* http://www.pewclimate.org/policy_center/policy_reports_and_analysis/state (last visited Apr. 30, 2008).

[110] *Id.* See also Midwestern Governors Association, www.midwesterngovernors.org/govenergynov.htm (last visited Apr. 30, 2008).

[111] NACAA Conference, *supra* note 6 at 11-12.

[112] Mayors Climate Protection Center, U.S. Conference of Mayors Climate Protection Agreement, *available at* http://www.usmayors.org/climateprotection/agreement.htm (last visited Apr. 29, 2008).

[113] Lutsey & Sperling, *America's Bottom-Up Climate Change Mitigation Policy, supra* note 10 at 681.

[114] The Climate Registry, *available at* www.theclimateregistry.org (last visited Apr. 30, 2008).

[115] Learning from State Action on Climate Change, Pew Center on Global Climate Change 5 (2007), *available at* http://www.pewclimate.org/policy_center/policy_reports_and_ analysis/state (last visited Apr. 30, 2008).

[116] *Id.* at 7.

[117] *Id. See also* Clean Energy States Alliance at http://www.cleanenergystates.org/ (last visited Apr. 30, 2008).

[118] *Id.*

[119] Clean Air Act, § 209(a), 42 U.S.C. § 7543(a).

[120] *Id.* § 209(b), 42 U.S.C. § 7543(b).

[121] McCarthy, CRS: *California's Waiver Request*, *supra* note 62 at 1.

[122] *Id.* at 2.

[123] *Id.*

[124] *Id.*

[125] *Id.*

[126] *Id.*

[127] In an effort to bypass EPA's waiver denial, California officials are currently considering including motor vehicle manufacturers in an economy-wide GHG market trading program, an innovative approach to address tailpipe emissions. "California Weighs Novel Auto GHG Plan to Sidestep EPA Waiver Denial," *Inside EPA* (April 18, 288).

[128] California Environmental Protection Agency, Air Resources Board, Comparison of Greenhouse Gas Reductions for the United State and Canada under U.S. CAFE Standards and California Air Resources Board Greenhouse Gas Regulations vi (Feb. 25, 2008). The states adopting California's program are Connecticut, New Mexico, Maine, Maryland, Massachusetts, New Jersey, New York, Pennsylvania, Rhode Island, Vermont, Oregon and Washington. See Clean Cars Campaign, *available at* www.cleancarscampaign.org (last visited Apr. 30, 2008). Five additional states – Florida, Arizona, Nevada, Colorado, and Iowa -- have gubernatorial commitments to adopt. *Id.*

[129] *Id.* at vii.

[130] Governor of California Press Release, *supra* note 74.

[131] California Environmental Protection Agency, Air Resources Board, Comparison of Greenhouse Gas Reductions for the United State and Canada under U.S. CAFE Standards and California Air Resources Board Greenhouse Gas Regulations vii (Feb. 25, 2008).

[132] Governor of California Press Release, *supra* note 74.

[133] Press Release, Office of the Governor of California, *available at* http://gov.ca.gov/index.php?/press-release/4111/ (last visited May 29, 2008).

[134] California Environmental Protection Agency, Air Resources Board, AB 32 Scoping Plan, *available at* http://www.arb.ca.gov/cc/scopingplan/scopingplan.htm (last visited April 29, 2008).

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