Legal Backgrounder

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CONSTITUTIONAL PRINCIPLES PROHIBIT STATES FROM REGULATING CO_2 EMISSIONS

by

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As national and international debate continues regarding global climate change, states have begun to adopt their own policies to address the issue. Some states have expressed dissatisfaction at decisions by the federal executive and legislative branches to use nonregulatory methods for emissions of carbon dioxide ("CO_2"), one of the principal greenhouse gases that contribute to global climatic phenomena. Although states may have adopted these policies with the best intentions, some of them ignore constraints on state action that arise from federal foreign and domestic policy in this area. In particular, state-enacted programs imposing binding, unilateral CO_2 emission reduction requirements for the purpose of addressing global climate change impermissibly conflict with federal law and federal policy.

State Initiatives. Recently, some states have pursued means to regulate CO_2 emissions, sometimes jointly with other states. These states' methods vary and include direct regulation of emission sources, agreements with neighboring states and Canadian provinces, and litigation seeking court orders. Although some state programs may not be inconsistent with federal climate change policy (*e.g.*, programs to purchase hybrid vehicles for state fleets, efforts to promote renewable energy and energy conservation, and voluntary emission reduction programs), others do create conflict with federal policy. For example, some states are regulating CO_2 sources directly. California's Air Resources Board has approved regulations to limit greenhouse gas emissions from new motor vehicles. *See* Chapter 200, Statutes of 2002 (AB 1493, Pavley) (enabling legislation); *see also* http://www.arb.ca.gov/cc/cc.htm.[1] Massachusetts, New Hampshire, and Oregon have enacted statutes or regulations limiting CO_2 emissions from power plants. MASS. REGS. CODE tit. 310, § 7.29; N.H. REV. STAT. ANN. § 125-O:3; OR. REV. STAT. § 469.503.

[1]These regulations are being challenged in federal district court in *Central Valley Chrysler-Jeep v. Witherspoon*, Case No. CIV-F-04-6663 REC-LJO (E.D. Cal.). For more information on California's regulations limiting motor vehicles' greenhouse gas emissions and why those regulations conflict with federal law, see E. Z. Jones & A. C. Sloane, Washington Legal Foundation LEGAL OPINION LETTER, *Federal Law Preempts California's Attempt To Regulate Global Warming* (Mar. 11, 2005), available at http://www.wlf.org/upload/031105LOLJones.pdf.

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States also have entered into agreements to form regional coalitions that address global climate change. In 2001, Governors of the New England states (Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, and Vermont) and Premiers of Eastern Canadian provinces entered into a commitment to reduce greenhouse gas emissions to 10 percent below 1990 levels by 2020. Climate Change Action Plan 2001, *available at* http://www.negc.org/documents/NEG-ECP%20CCAP.pdf. Another Northeastern program is the creation of the Regional Greenhouse Gas Initiative, in which nine states (Connecticut, Delaware, Maine, Massachusetts, New Hampshire, New Jersey, New York, Rhode Island, and Vermont) are developing a regional cap-and-trade program to control power plants' CO_2 emissions in those states. *See* http://www.rggi.org. Similarly, the Governors of California, Oregon, and Washington have entered into the West Coast Governors' Climate Change Initiative to explore adoption of regional emission reduction goals, limiting motor vehicles' greenhouse gas emissions, and creation of a cap-and-trade program. *See* http://www.ef.org/westcoastclimate/.

States also have gone to court to try to compel reductions in CO_2 emissions. For example, eight states and three land trust organizations sued five electric utilities in federal district court alleging that power plant CO_2 emissions constituted a public and private nuisance under federal and state common law. *Connecticut v. American Electric Power Co.*, No. 04-CV-05669 (S.D.N.Y.); *Open Space Institute v. American Electric Power Co.*, No. 04-CV-05670 (S.D.N.Y.). These suits sought a court order to limit and then reduce those emissions. The court dismissed the claims on September 15, 2005, holding that the cases presented a non-justiciable political question. In particular, the court noted that the plaintiffs were "seek[ing] to impose by judicial fiat" carbon dioxide emission limitations that Congress and the Executive repeatedly had rejected. *Id.*, Opinion and Order, at 18 (S.D.N.Y. Sept. 15, 2005).

Conflict with Foreign Policy. State regulatory programs such as those described above conflict with the federal government's foreign policy. When state and federal law conflict, state law is preempted and "without effect." *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981). The U.S. Supreme Court has long held that federal foreign policy has a particularly strong preemptive effect on state action. *American Insurance Ass'n v. Garamendi*, 539 U.S. 396 (2003); *Hines v. Davidowitz*, 312 U.S. 52 (1941).

The President has clearly designated a foreign policy for the United States on global climate change. First, the President has established that the United States must work with other nations to achieve a coordinated international response to global climate change. The President has identified "the process used to bring nations together to discuss our joint response to climate change [as] an important one." Transcript, *President Bush Discusses Global Climate Change* (June 11, 2001), *available at* http://www.whitehouse.gov/news/releases/2001/06/20010611-2.html. The United States has been a member of an international coalition since 1992, when President George H. W. Bush signed the United Nations Framework Convention on Climate Change ("UNFCCC"). President George W. Bush recently affirmed this approach, when he signed the Gleneagles Communiqué at the 2005 G8 Summit, which includes an acknowledgment "that the UNFCCC is the appropriate forum for negotiating future action on climate change." The Gleneagles Communiqué (July 8, 2005), *Climate Change, Energy and Sustainable Development* ¶ *14*, *available at* http://usinfo.state.gov/ei/economic_issues/g8_summit_2005.html. The Communiqué also includes a "Plan of Action" to address climate change. Recently, the United States reached an agreement with Australia, China, India, Japan, and South Korea to address climate change issues. *See* Fact Sheet, President Bush and the Asia-Pacific Partnership on Clean Development, *available at* http://www.whitehouse.gov/news/releases/2005/07/20050727-11.html.

Second, the President has articulated a federal policy of not mandating unilateral reductions in CO_2 emissions from United States sources because responsibility for committing to and implementing any binding emission controls to address global climate change must be shared by all nations, including developing nations. Thus, the President has opposed participation by the United States in the Kyoto Protocol, a treaty that emerged from the UNFCCC requiring only developed nations to reduce CO_2 emissions.

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Congress has endorsed the President's policy against requiring CO_2 emission reductions only from the United States and other developed countries. In 1997, the Senate adopted by a 95-0 vote a resolution that effectively opposed ratification of any international climate change agreement that, among other things, failed to require CO_2 emission reductions from developing as well as developed nations. S. Res. 98, 105th Cong. (1997). Congress also enacted provisions in appropriations bills barring EPA from implementing the Kyoto Protocol. *See, e.g.*, Pub. L. No. 106-377, Appendix A, 114 Stat. at 1441A-41 (Oct. 27, 2000) (for fiscal year 2001).

State programs regulating CO_2 emissions undermine the federal government's foreign policy on global climate change. State laws impermissibly conflict with federal foreign policy whenever they "'stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives'" of the policy. *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 373 (2000) (quoting *Hines*, 312 U.S. at 67); *see also Garamendi*, 539 U.S. at 427 ("The question relevant to preemption . . . is conflict, and [whether] the evidence . . . is 'more than sufficient to demonstrate that the state Act stands in the way of [the President's] diplomatic objectives.'") (quoting *Crosby*, 530 U.S. at 386). State greenhouse gas emission reduction mandates "stand[] as an obstacle" to the foreign policy decision that the United States should work through international bodies to craft a coordinated response to global climate change concerns rather than require unilateral emission reductions from domestic sources, as such state mandates do.

For example, state CO_2 emission reduction regulation to address global climate change reduces the federal government's leverage with other nations. As EPA stated in determining that the Clean Air Act does not authorize regulation of CO_2 emissions for global climate change purposes, if domestic law imposed unilateral emission limitations, the President would be weakened in his "efforts to persuade key developing countries to reduce the [greenhouse gas] intensity of their economies." EPA, Control of Emissions From New Highway Vehicles and Engines, Notice of Denial of Petition for Rulemaking, 68 Fed. Reg. 52922, 52931 (Sept. 8, 2003). Therefore, state laws are preempted if they reduce the federal government's bargaining leverage with foreign nations. In *Garamendi*, for instance, the Supreme Court struck down as preempted a California law requiring companies to disclose Holocaust-era insurance policies because, "'[q]uite simply, if the [California] law is enforceable the President has less to offer and less economic and diplomatic leverage as a consequence.'" *Garamendi*, 539 U.S. at 424 (quoting *Crosby*, 530 U.S. at 377); *see also Crosby*, 530 U.S. at 377 (Because "the state Act reduces the value of the [bargaining] chips created by the federal statute," it "'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'") (quoting *Hines*, 312 U.S. at 67).

States that disagree with federal policy on global climate change cannot simply implement their own policies. Instead, "dissatisfaction should be addressed to the President or, perhaps, Congress." *Garamendi*, 539 U.S. at 427. Separation of powers principles and the principle of federal supremacy require that the nation speak with one voice on foreign policy issues such as global climate change. Because state programs mandating reduction of greenhouse gas emissions to address global climate change conflict with United States foreign policy, they are preempted by federal law.

Conflict with Domestic Policy. State CO_2 reduction mandates also conflict with the domestic policy established by Congress to address global climate change. Congress's approach to global climate change consistently has been: (1) to direct the Executive Branch to pursue international negotiations and cooperation; and (2) to authorize research, study, and other nonregulatory programs to enable Congress to understand better the relationship between greenhouse gas emissions and global climate change. Congress repeatedly has decided against binding regulatory controls on domestic CO_2 emissions. Examples of its policy choices in this area include the Global Climate Protection Act of 1987, the Energy Policy Act of 1992, and the Energy Policy Act of 2005.

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The Global Climate Protection Act directs the Secretary of State to coordinate U.S. negotiations on global climate change and directs EPA to develop and propose to Congress a coordinated national policy on the issue. 15 U.S.C. § 2901. This statute's legislative history cautions that "[n]othing" in the Act "should be construed . . . as authorizing or requiring the adoption of any regulatory or control measures." H.R. Conf. Rep. No. 100-475, at 171 (1987), *reprinted in* 1987 U.S.C.C.A.N. 2370, 2432.

The Energy Policy Act of 1992 instructs the Secretary of Energy to report to Congress on "the feasibility and economic, energy, social, environmental, and competitive implications, including implications for jobs, of stabilizing" and then achieving specified reductions in CO_2 emissions. 42 U.S.C. § 13381(1). This statute also requires the Department of Energy to assess "alternative policy mechanisms for reducing the generation of greenhouse gases" and to examine the "costs and benefits" of various regulatory options including emission caps, trading programs, efficiency standards, and voluntary incentive programs. *Id.* § 13384. The Act's legislative history expresses Congress's intent that "more dramatic and possibly higher cost actions . . . should be undertaken only in the context of concerted international action." H.R. Rep. No. 102-474, pt. I, at 152 (1992), *reprinted in* 1992 U.S.C.C.A.N. 1954, 1975.

Recently, in enacting the Energy Policy Act of 2005, Congress reaffirmed its policy decision not to regulate CO_2 emissions. After the Senate rejected, for the second time, a CO_2 cap-and-trade proposal by Senators McCain and Lieberman — and after "sense of the Senate" language was deleted that had called for eventual mandatory emission controls, subject to certain conditions — Congress included in the Act only provisions designed to promote global climate change research, development of greenhouse gas reduction technologies, and sharing those technologies with developing countries. Pub. L. No. 109-58, Title XVI, §§ 1601, 1611.

Congress also addressed global climate change when it last enacted major amendments to the Clean Air Act in 1990. In those amendments, Congress expressly declined to authorize regulation of CO_2 emissions and instead authorized only nonregulatory strategies on CO_2. Indeed, in 2003 EPA concluded that no authority exists under the Clean Air Act to limit or regulate CO_2 emissions for global climate change purposes. 68 Fed. Reg. at 52925; *see also Massachusetts v. EPA*, 415 F.3d 50, 56 n.1. (D.C. Cir. 2005) (declining to express a view on EPA's "no authority" determination).

Conclusion. State laws that impose binding regulatory limits on CO_2 emissions result in an actual conflict with federal foreign and domestic policy regarding global climate change, undermining "the full purposes and objectives" and "natural effect" of the federal government's choices. *Crosby*, 530 U.S. at 373-74 (internal quotations omitted); *see also Geier v. American Honda Motor Co.*, 529 U.S. 861, 881-82 (2000). State laws that impose regulatory controls on CO_2 emissions conflict with the "research, negotiate, and report" method Congress has chosen to address domestic CO_2 emissions and global climate change — a method that complements the President's foreign policy on the subject. Accordingly, such state laws are preempted. That states may share with Congress and the President the same general goal in addressing global climate change is immaterial; the relevant point is that state laws are precluded if they are at odds with the means chosen by the federal government. *Crosby*, 530 U.S. at 379 (existence "of a common end hardly neutralizes conflicting means"); *accord Garamendi*, 539 U.S. at 425.

States that disagree with federal global climate change policy may seek changes to that policy from Congress or the President. States are precluded, however, from making laws that interfere with the federal government's foreign and domestic policy in this area. In the coming months and years, court decisions may begin to provide guidance on the limits of permissible state policies to address global climate change.

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