State Dynamism, Federal Constraints: Possible Constitutional Hurdles to Cross-Border Cap-and-Trade

Shelley Welton

The latest round of international climate negotiations took place in December 2011 in Durban, South Africa. Although delegates did not walk away empty-handed, there is no hope of a new binding international agreement to limit emissions before 2015. Moreover, emissions reductions will not be required until 2020 at the earliest. This "agreement to agree" seems utterly inadequate when viewed in the stark light of the latest climate science. In 2010, negotiators in Cancún, Mexico, agreed that countries should limit overall global warming to two degrees Celsius, but there is virtually no chance this goal can be achieved without major action before 2020. And leading climate scientists now suggest that letting the earth warm even two degrees Celsius might have catastrophic consequences. *See* Douglas Fischer, *New Perils Seen to Even Modest Warming*, The Daily Climate, Dec. 6, 2011, *available at* www.dailyclimate.org/tdc-newsroom/2011/12/warming-caution (quoting James Hansen).

In the face of international stagnation, domestic and bilateral/multilateral carbon emissions reductions efforts are, for the time being, our best strategy. But federal climate change action has been meager in the United States, meaning that right now, our country's best hope may lie with the states. States across the country have taken up the mantle of setting and achieving measurable progress on climate change. Along with many commendable efforts to promote energy efficiency and renewable energy occurring across the country, two regions stand out as aggressively pursuing greenhouse gas mitigation strategies: the Northeast and the West. In the Northeast, a group of nine states (previously ten, until New Jersey recently announced its intention to withdraw) has been operating a regional cap-and-trade market since 2009, known as the "Regional Greenhouse Gas Initiative" or "RGGI." In the West, California has recently adopted a cap-and-trade program for carbon dioxide and has launched, in collaboration with several U.S. states and Canadian provinces, the "Western Climate Initiative" or "WCI."

One may question why states would self-impose such restrictions on their economies, given that individual state actions will certainly be inadequate to address the collective action problem posed by climate change. There are several explanations. First, there may be some advantage to being a first mover, and, in fact, a recent study of RGGI suggests the program has boosted participating state economies. RGGI, Inc., Investment of Proceeds from RGGI CO2 Allowances 5–9 (2011). Both RGGI and WCI members have also explained that their hope is ultimately to spur federal action and to serve as prototypes for a federal scheme.

But going it alone is not ideal for these states. Larger cap-and-trade markets function more efficiently and have a greater impact on global emissions. For this reason, as well as likely for more symbolic reasons, the WCI and RGGI have not limited their ambitions to domestic cooperation. Each has announced plans to include Canadian provinces and eventually perhaps Mexican states.

A state-led cross-border cap-and-trade program, thus, seems poised to be the United States' first foray into targets-based international cooperation on climate change. This is arguably a good example of our federal system at work—environmental protection, after all, has often been driven by state innovation that ultimately led to federal action. And neither Congress nor the federal executive branch has disapproved of the WCI's or RGGI's expansion plans. However, the type of international cooperation required by a cross-border cap-and-trade system may nevertheless overstep constitutional limits on subnational players venturing into foreign affairs.

The Supreme Court's landmark decision in *Massachusetts v. Environmental Protection Agency*, 549 U.S. 497, 519 (2007), while generally solicitous of states' rights to engage on climate change, set some obvious boundaries for states: "Massachusetts cannot invade Rhode Island to force reductions in greenhouse gas emissions, [and] it cannot negotiate an emissions treaty with China or India." Beyond this clear parameter, however, the bounds of what extraterritorial steps states can take are murky.

The question of whether a cross-border RGGI or WCI might overstep these bounds is of more than academic interest. Because climate change and cap-and-trade are contentious issues in our country, it is likely that either scheme's efforts to expand will be subject to judicial challenge, including challenges under the constitutional doctrines of preemption, the dormant foreign affairs power, the Compact Clause, or the dormant Commerce Clause. This article examines these four constitutional hurdles that might be raised against cross-border cap-and-trade and considers whether the RGGI and WCI programs may surmount them. Several academic articles have raised the same questions on a theoretical level; this article distills some of the key concerns in these articles and applies them to the particular collaborative formats that RGGI and the WCI have selected. *See, e.g.*, Douglas A. Kysar & Bernadette A. Meyler, *Like a Nation*

Ms. Welton is the deputy director and Earth Institute Climate Law Fellow at Columbia Law School's Center for Climate Change Law in New York City. She may be reached at shelley.welton@law.columbia.edu.

State, 55 UCLA L. Rev. 1621 (2008); Daniel A. Farber, *Climate Change, Federalism, and the Constitution*, 50 Ariz. L. Rev. 879 (2008). I conclude that although courts might plausibly read the relevant lines of precedent to invalidate these cross-border cap-and-trade schemes, there are more compelling reasons to find them constitutionally permissible.

The Design of RGGI and the WCI

RGGI and the WCI have similar structures but are at different stages of implementation and differ on some important rules. RGGI was established by a Memorandum of Understanding (MOU) executed among the participating states in 2005 (a few states signed on later). This MOU establishes a regional emissions trading market, sets a CO2 "budget" for each participating state and secures each state's commitment to pursue necessary implementing legislation or regulations. It also outlines a schedule of reductions from these starting budgets and sets forth general program rules. A more detailed explanation of program rules is contained in RGGI's Model Rule—a draft rule on which states agreed to substantially base their own independent legislation and regulations. *See* RGGI, Model Rule, *available at* www.rggi.org/docs/Model%20Rule%20 Revised%2012.31.08.pdf. Additionally, the participating states have formed a nonprofit corporation, RGGI, Inc., to run an emissions tracking and reporting system, auction CO2 allowances, and provide technical assistance to the states. *See* RGGI, Inc., www.rggi.org/rggi. RGGI has been fully operational for three years and is scheduled to reduce greenhouse gas emissions by 10 percent from 2009 levels by 2018, although there is discussion about whether the reduction target should be increased in light of the Northeast's precipitous decline in emissions over the past several years.

The critical point about RGGI's structure for present purposes is that although participating states have established an ongoing administrative body to oversee the trading market, its state members do not delegate any of their sovereign power to this body. Nor are participating RGGI states given any powers they could not exercise in RGGI's absence, and each state is free to withdraw at any time.

Although RGGI has several Eastern Canadian provinces claiming "observer" status—Québec, New Brunswick, and Ontario—it has been slow to act on any potential expansion to Canada. Presumably, any expansion would occur through an amendment to the MOU to add a Canadian province as a member of RGGI, along with the province adopting its own version of the Model Rule.

The WCI has been slower than RGGI to coalesce into a functional program, but has been more aggressive in its plans to operate across the U.S.-Canadian border. This eagerness to look internationally is no doubt driven in part by its waning progress on the domestic front. The WCI began in 2007 as a collaboration among Arizona, California, New Mexico, Oregon, and Washington and expanded to include Montana and Utah as well as the Canadian provinces of British Columbia, Manitoba, Ontario, and Québec. But Arizona formally withdrew from the initiative in late 2011 and most other states have informally halted their collaboration. California is now the sole U.S. signatory state moving forward with the implementation of a greenhouse gas trading program, in collaboration with the participating Canadian provinces.

These remaining participants have announced a form for the WCI that is less unified than RGGI. Whereas RGGI participants each agreed to base their state regulations on a shared model rule, the WCI provides design recommendations and has announced plans to "link" WCI jurisdictions once individual programs are formed. *See* WCI, Design for the WCI Regional Program 22 (July 2010). But linkage, which would occur through "WCI Partner jurisdictions . . . recognizing each other's allowances for compliance purposes," can only occur after Partner jurisdictions have "the opportunity to review each jurisdiction's program to assess its consistency with the program design." *Id.* The WCI has also chosen to regulate more sectors (RGGI regulates only the electricity generation sector, whereas the WCI will also include major industrial sources and, eventually, natural gas and fuel suppliers) and design a more complicated program so as to prevent emissions "leakage." Like RGGI, the WCI recently announced the creation of "WCI, Inc.," a nonprofit corporation that will coordinate allowance auctions and track allowances.

The first intra-WCI linkage will almost certainly be between California and Québec, which became the first Canadian province to adopt a cap-and-trade program in December 2011, with compliance required beginning in 2013. Québec's program is overall quite similar to California's, except that it has adopted stricter emissions targets: Whereas California's suite of policies aims to return the state to its 1990 levels of emissions by 2020 and the WCI has set a goal of 15 percent cuts from 2005 levels by 2020, Québec calls for reductions of 20 percent below 1990 levels in the same time frame. *Compare* Cal. Air Res. Board, Resolution 07-55 (Dec. 6, 2007), *with* WCI, Design for the WCI Regional Program 1 (July 2010), *and* Philippe Teisceira-Lessard, *Quebec Goes It Alone with Cap-and-Trade Climate Plan*, The Globe and Mail, Dec. 15, 2011, at A6. This discrepancy in targets could present a challenge for linking Québec's and California's markets, but the WCI announced in January 2012 that it hoped to complete linkage between the two by summer 2012, and California has begun the process of amending its regulations to make linkage possible. WCI, *WCI Emissions Trading Program Update* (Jan. 12, 2012), *available at* www.westernclimateinitiative.org/document-archives/Partner-Meeting-Materials/Jan-12-Stakeholder-Update-Presentation/%20; Cal. Air Res. Bd., *Draft Amendments to the California Cap on Greenhouse Gas Emissions and Market-Based Compliance Mechanisms to Allow for the Use of Compliance Instruments Issued by Linked Jurisdictions* (Mar. 30, 2012).

Possible Constitutional Challenges: Field and Conflict Preemption

Adding Canadian provinces to either the WCI or RGGI would benefit participating states and provinces and would signify progress forward on international climate cooperation. But these potentially positive consequences cannot save the schemes from constitutional scrutiny, and several doctrines derived from the U.S. Constitution may bar these collaborations.

The first constitutionally derived doctrine that might be raised as a barrier to a cross-border program is conflict or field preemption—via the Supremacy Clause—by federal policy. It is also, in my view, the weakest argument against expansion. Field preemption exists only where Congress has spoken so thoroughly on an issue that it must have meant to occupy the field. A field preemption argument against a cross-border cap-and-trade program would have difficulty gaining traction.

Simply put, there is no comprehensive federal scheme in place for international climate change policy at the present time.

Conflict preemption presents a more plausible critique, though still likely an unavailing one. Classically, conflict preemption invalidates a state policy only where the state policy stands as an obstacle to accomplishment of a congressional objective. The conflict preemption doctrine arguably now stretches a bit further in the foreign affairs context. In 2003, the Supreme Court controversially held, in *American Insurance Association v. Garamendi*, 539 U.S. 396, that a California law requiring insurers to disclose outstanding Holocaust-era claims was preempted not by any federal statute but by executive branch policy alone. But even under the *Garamendi* version of conflict preemption, a litigant must point to *some* executive branch policy with which the challenged state law allegedly conflicts.

A litigant challenging a cross-border cap-and-trade program might argue that the program conflicts with both Congress' position and the executive branch's negotiating stance on climate change. Plaintiffs in a few Bush-era cases advanced this argument in seeking to invalidate aggressive state actions. As evidence, they pointed to the executive branch's international negotiating posture and the Senate's rejection of binding emissions reductions in the Byrd-Hagel Resolution—a unanimous resolution, S. Res. 98, 105th Cong. (1997), passed in response to the Kyoto Protocol that declared that the United States would not adopt binding emissions limitations until developing countries did the same. Courts were not persuaded. In two cases, *Green Mtn. Chrysler Plymouth Dodge Jeep v. Crombie*, 508 F. Supp. 2d 295 (D. Vt. 2007) and *Central Valley Chrysler-Jeep, Inc. v. Goldstene*, 529 F. Supp. 2d 1151 (E.D. Cal. 2007), district courts concluded that even during the Bush administration the federal government viewed state actions as an important part of the overall U.S. climate change strategy.

It is not likely that a different result would be reached in 2012. The Obama administration has been even more generous toward state actions. Going into the Durban negotiations, the United States took the position that "the most effective thing we can do to address climate change is for all relevant countries to act vigorously at home." *See* John M. Broder, *At Meeting on Climate Change, Urgent Issues but Low Expectations*, N.Y. Times, Nov. 27, 2011, at A8. And in its most recent communication to the United Nations Framework Convention on Climate Change, the United States applauded efforts such as RGGI, noting that they "serve as a model for countries that are beginning to formulate their response to climate change because they can be tailored to local and regional conditions, are often scalable, and can create economic opportunities and job growth through the promotion of clean energy." U.S. Dept. of State, Climate Action Report 2010: Fifth National Communication of The United States of America Under the United Nations Framework Convention on Climate Change 61 (2011), *available at* www.state.gov/documents/organization/140636.pdf.

To be sure, cross-border collaboration might threaten a unitary national climate negotiating strategy more than domestic state actions do, and, thus, an expanded WCI or RGGI might be more vulnerable to a conflict preemption challenge than past state actions. In *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363 (2000), the Supreme Court made clear that when a national policy has been set on a matter of foreign affairs, states cannot take measures that conflict with that policy by reducing the federal government's "bargaining chip[s]" in terms of "economic and diplomatic leverage." But by touting state initiatives and calling for vigorous action at home, the federal government has to a certain extent negated the argument that an expanded RGGI or WCI would reduce its bargaining chips on the international stage. In sum, given the federal government's current position, it may be difficult to convince a court that a cross-border cap-and-trade program would directly conflict with current U.S. international climate policy.

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However, it is a presidential election year, and a new, more conservative administration would likely be more hostile toward climate change action. If a new executive position that explicitly disfavored state-foreign collaborations on climate were announced, such a policy might, under the precedent set by *Garamendi*, preempt an expanded WCI or RGGI. Thus, while RGGI and the WCI are safe from conflict preemption for now, they may be in a more tenuous long-term position.

Possible Constitutional Challenges: Interference in Foreign Affairs and Commerce

Other doctrines that might be raised against a cross-border cap-and-trade scheme are more persuasive, and all implicate similar concerns. The first of these is dormant foreign affairs preemption. *Zschernig v. Miller*, 389 U.S. 429 (1968), is the leading case establishing this form of preemption, and, indeed, the only case in which the Supreme Court has invalidated a state law on this ground. In *Zschernig*, the Court struck down an Oregon probate statute prohibiting inheritance by a nonresident alien unless certain conditions were met by the alien's home country, finding because the policy had a "direct impact on foreign relations" it was forbidden by the Constitution, which "entrusts [such matters] solely to the Federal Government." Notably, the *Zschernig* majority did not think it necessary for the federal government to have taken any action in the subject area of the state law in order for the state law to be preempted. This strong stance has the potential for innumerable applications if read broadly, and whether its reasoning still obtains is debatable. In its 2003 *Garamendi* decision, the Supreme Court majority discussed *Zschernig*, but did not rest its decision on its logic (finding conflict preemption instead). Justice's Ginsburg's dissent pointed out that the Supreme Court "ha[s] not relied on *Zschernig* since it was decided."

Garamendi's discussion of *Zschernig* did, however, create uncertainty about its possible resurrection. If dormant foreign affairs preemption were raised against cross-border cap-and-trade, a court would have considerable leeway in deciding how broadly to construe the doctrine. Justice Ginsburg reads *Zschernig* as applying only when "a state action reflects a state policy critical of foreign governments and involves sitting in judgment on them." Alternatively, some courts focus on *Zschernig's* statement that a state law cannot stand when it "has a direct impact upon foreign relations and may well adversely affect the power of the central government to deal with those problems." The issue of how a cross-border WCI or RGGI might fare under these two enumerations of the *Zschernig* test is considered below.

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A cross-border scheme could also be challenged under the Compact Clause, which prohibits states from entering "into any Agreement or Compact with another State, or with a foreign Power" without the consent of Congress. U.S. Const., art. 1, § 10. Despite the "any" language cited above, not all compacts are, in fact, prohibited. At least for state-state compacts, the critical question, as formulated by the Supreme Court in *U.S. Steel Corp. v. Multistate Tax Commission*, 434 U.S. 452 (1978), is whether the agreement 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." Under this test, the domestic versions of RGGI and the WCI are generally thought capable of withstanding a Compact Clause challenge because, as described above, they do not delegate any sovereign authority to RGGI, Inc., or WCI, Inc., and states retain the power to withdraw at any time.

The Compact Clause may, however, be more strictly applied in the case of state-province compacts. Because of the foreign affairs concerns potentially implicated, Supreme Court precedent suggests that "certain additional protections apply to foreign compacts." Edward T. Swaine, *Does Federalism Constrain the Treaty Power?*, 103 Colum. L. Rev. 403, 506–09 (2003). What these protections might be is unclear—no foreign compact has yet been struck on these grounds. Presumably, the analysis would be similar to the one applied under the dormant foreign affairs power, as any additional concerns raised by a foreign compact would revolve around the impacts it might have on the federal government's foreign affairs powers.

Another basis for a cross-border cap-and-trade challenge is the dormant foreign Commerce Clause. Just as the Commerce Clause has been read to prevent states from discriminating against or placing undue burdens on other states' commerce, the dormant foreign Commerce Clause imposes limits on states' ability to interfere in foreign commerce. In *Japan Line, Ltd. v. Cty. of Los Angeles*, 441 U.S. 434 (1979), the Supreme Court struck down a state's imposition of *ad valorem* taxes on shipping containers of a foreign corporation whose home government (Japan) imposed similar taxes, reasoning that the state tax resulted in double taxation and impeded the federal government's ability to speak with "one voice" in regulating foreign trade. While multiple taxation is not likely to be an issue in the case of an expanded WCI or RGGI, the broader "one voice" test may well be. Although this test has been relaxed in the years since *Japan Line*, for example, in *Barclays Bank PLC v. Franchise Tax Board*, 512 U.S. 298 (1994), where the Supreme Court indicated that it will not necessarily invalidate state policies that have even tacit congressional approval, Congress has not signaled such tacit approval in the case of cross-border state-level cap-and-trade programs.

The "one voice" prong of the dormant Foreign Commerce Clause does not, however, raise unique concerns for cross-border cap-and-trade's validity. Instead, it implicates issues similar to those raised by dormant foreign affairs preemption and the foreign Compact Clause, although the latter two doctrines center more on matters of diplomacy than commerce. The final section of this article offers some thoughts on why courts should allow an expanded WCI or RGGI to survive under all of these doctrines.

Letting State Dynamism Flourish

At their core, inquiries under dormant foreign affairs preemption, the dormant foreign Commerce Clause, and the Compact Clause all focus on whether an expanded RGGI or WCI would impede the federal government's ability to act internationally on climate change and, thereby, in the language of *Japan Line*, "frustrat[e] the attainment of federal uniformity," or give states undue power by allowing them, to use Justice Ginsburg's words in *Garamendi*, to "sit in judgment" of foreign states.

A court sympathetic to the constitutional challenges presented by an expanded RGGI or WCI probably could find reason enough to invalidate the schemes. For one, RGGI and the WCI have some unabashed foreign affairs-related ambitions. Although certainly motivated in part by the disastrous effects climate change might have upon their own lands and citizens, the WCI and RGGI states are also motivated to expand because they hope it will spur federal and international action. This alone might be enough to fail a capacious interpretation of *Zschernig* that would bar state action with "a direct impact upon foreign relations."

An expanded RGGI or WCI might also fail under a "federal uniformity" or "one voice" theory. Although there is no current federal hard-line strategy, such as "promise no domestic progress until like promises are exacted from the other major emitters," an expanded cap-and-trade program would diminish the federal government's ability to take this stance in the future. An expanded program, therefore, might be considered state action on climate change that, as phrased in *Zschernig*, "adversely affect[s] the power of the central government to deal with those problems."

Similarly, if the question is whether an expanded RGGI or WCI would allow states to "sit in judgment," the answer might be yes. The WCI's design requires linking jurisdictions to assess each other's programs for compliance with program design. And RGGI states would have to ensure that a province's adopted version of the model rule comported with existing versions. But in my opinion, to consider this review tantamount to "sitting in judgment" would overinflate the states' role in RGGI and WCI review. Any province linked through the WCI or joining RGGI would have precommitted itself, by signing on, to attempting to design a scheme that conforms to program rules. State review is simply to ensure compliance with what the parties have already agreed upon, not to impose an independent judgment of what the state views as right or wrong.

I believe that the better way to view an expanded WCI or RGGI would be as a dynamic and commendable attempt by states to solve a new problem—in other words, as a representation of what's best in our federalist system. To be sure, these programs push the boundaries of past state experimentation. But they represent efforts quite different from those that are typically invalidated under the dormant foreign Commerce Clause or dormant foreign affairs preemption. These are not efforts to exact something from a foreign state, or to condemn a foreign state's actions, or to enlarge state power. To the contrary, these are collaborative efforts that bring together innovators from the United States and Canada to improve upon both countries' efforts. Far from being critical of foreign states, a cross-border RGGI or WCI would celebrate the efforts occurring on each side of the border.

It is also important to keep in mind that the constitutional doctrines discussed above are "judicially created federalism doctrines derived from the structure of the Constitution, not its explicit language." David R. Hodas, *State Law Responses to Global Warming: Is It Constitutional to Think Globally and Act Locally?*, 21 Pace Envtl. L. Rev. 53, 67 (2003). The Compact Clause, as a textual restraint, might be viewed as an exception to this statement, but expanding it to impose additional requirements for foreign compacts would be a judicial determination as well. While the judicial precedents establishing these doctrines cannot be ignored, courts might rightly hesitate to extend them to RGGI or the WCI, particularly given the apparent lack of federal concern over these schemes. Unlike in past cases where a foreign state or the national government has expressly denounced certain state actions, there is no indication that an expanded WCI or RGGI would have any negative effect on foreign affairs. To the contrary, the current federal silence on RGGI's and the WCI's expansion plans may indicate a national view that a cross-border scheme would *positively* affect the federal government's negotiating power by acting as a prototype for future international collaborations and demonstrating serious U.S. progress. Even if the lack of federal comment on these schemes represents mere disinterest, it would still appear that there is no concern that the schemes are interfering with the national climate negotiating strategy.

There are also practical reasons to uphold these schemes as constitutional. Climate change may represent the most massive collective action problem the world has ever faced, not only because of its scale, but because it implicates issues of equity and blame, historical contributions and future ones, and unevenly and unfairly distributed impacts. These intractable difficulties have led to an international standoff, with the United States and Canada unwilling to proceed without securing firm commitments from major developing country emitters.

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It would only be logical for subnational actors to hesitate to act on their own as well because they have even less ability to impact worldwide emissions. But despite having no guarantees that much will be gained from forging ahead, the RGGI and WCI states and provinces have proven themselves willing to undertake firm greenhouse gas reduction commitments. Knowing that they are not moving forward completely alone, though, is important for these subnational actors. Allowing cross-border collaboration enhances each scheme's chances of success and each participant's willingness to undertake rigorous targets. Given how challenging international, or even national, progress on climate change has been, a court would be wise to take a "frankly instrumentalist" approach to the question of whether RGGI and the WCI are constitutionally permissible, allowing the regimes to proceed so long as they do not obviously impair the interests of national unity. *See* Richard B. Stewart, *States and Cities as Actors in Global Climate Regulation: Unitary v. Plural Architectures*, 50 Ariz. L. Rev. 681, 693 (2008). Right now, these state-province collaborations are fostering the only firm emissions reduction targets and trading markets in North America. And two degrees of global warming are getting ever closer.