COMMENTARY

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INTRODUCTION

Global warming is a problem of international dimensions. One might therefore expect that our national government, which has responsibility for international relations, would have taken the lead in addressing this problem. But this has not happened. Instead, state and local governments, most notably California, have taken the lead. The initiatives of the states present interesting issues of federalism. I will address two such issues.

First, should the federal government, rather than the states, take the lead in addressing global warming? Second, what are the constitutional constraints on actions by the states in addressing global warming?

I. SHOULD THE FEDERAL GOVERNMENT TAKE THE LEAD?

We are accustomed to looking to the federal government to address national and international problems. But those whose goal is vigorous government action to reduce greenhouse gas emissions may wish to hesitate before asking the federal government for any kind of comprehensive regulatory response.

First, we are still at the early stages of scientific and technological research and development. We know that global warming is real and accelerating. We also know that the level of greenhouse gases, particularly carbon dioxide, in the atmosphere is high and rising. And we know that developing countries, particularly China, are rapidly increasing their production of greenhouse gases. But we are only at the beginning, as we try to devise ways to produce and consume energy more efficiently and otherwise to reduce the level of greenhouse gases.

One of the things the federal government knows how to do is to set nationally uniform standards. To the degree that national standards or goals would encourage scientific and technological development, this would be useful. Another thing the federal government knows how to do (or at least once knew how to do) is

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to provide large amounts of research money. To the degree that the federal government provides research money directed to the problem of global warming, this would be extremely useful. But to the degree that the federal government might act now to set a national standard for greenhouse gas emissions, or to require a particular technology, this would be an enormous mistake.

There is a second reason to think twice before asking for federal regulation. Our national experience has been that when the federal government regulates in an area where the interests of powerful economic entities are at stake, those entities do very well. My point is new wine in old bottles. It is familiar both to historians and to modern political observers.

An old example is the passage of the Interstate Commerce Act in 1887.[1] You might think that the Act was a triumph of those who sought uniform and efficient regulation of railroads. To some extent, you would be right. But the most important achievement of the Act was to give the railroads national regulatory control over those pesky midwestern farmers who wanted low shipping rates and who had been able to persuade their state legislators to act on their behalf.[2] Uniform freight rates did not mean low rates (just as uniform criminal sentences do not mean low sentences).[3] A version of the same story played out in the federal judiciary, where the United States Supreme Court, acting under the due process clause, repeatedly struck down state regulation of railroad rates as "confiscatory."[4]

A modern example is the ongoing fight over the federal Corporate Average Fuel Economy (CAFE) standards, regulating fuel efficiency of motor vehicles. American automakers have preferred (to state it mildly) no governmental regulation of the mileage of the cars they sell. State regulators, particularly in California, have had authority under the Clean Air Act to regulate pollution from vehicle emissions, but have not been given authority to regulate mileage. Regulation of pollution from vehicle emissions, however, unavoidably overlaps with regulation of mileage. This tension was apparent in a recent proposal by the federal Department of Transportation to increase CAFE standards to 31.6 miles per

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1. Interstate Commerce Act, ch. 104, 24 Stat. 379 (1887) (codified as amended in scattered sections of 49 U.S.C.).

2. *See* Samuel P. Huntington, *The Marasmus of the ICC: The Commission, the Railroads, and the Public Interest*, 61 YALE L.J. 467, 470–71 (1952); GABRIEL KOLKO, RAILROADS AND REGULATION 1877–1916 (1965).

3. *See* Sentencing Reform Act of 1984 (Act), Pub. L. No. 98-473, tit. II, 98 Stat. 1837, 1987 (codified as amended in 18 U.S.C. § 3551 *et seq* (2006)); U.S. Sentencing Guidelines Manual, § 3E1.1 (2007); *see also* Frank O. Bowman III, *The Failure of the Federal Sentencing Guidelines: A Structural Analysis*, 105 COLUM. L. REV. 1315, 1328 (2005) ("Incarcerative sentences are imposed far more often than they were before the guidelines, and the length of imposed sentences has nearly tripled.").

4. N. Pac. Ry. v. Dep't of Pub. Works, 268 U.S. 39, 42–45 (1925); Vandalia R.R. v. Schnull, 255 U.S. 113, 118–22 (1921); Groesbeck v. Duluth, S. Shore & Atl. Ry., 250 U.S. 607, 611–15 (1919); Rowland v. Boyle, 244 U.S. 106, 107–11 (1917); Norfolk & W. Ry. v. Conley, 236 U.S. 605, 608–14 (1915); N. Pac. Ry. v. N. D. *ex rel*. McCue, 236 U.S. 585, 595–605 (1915); The Missouri Rate Cases, 230 U.S. 474, 507–09 (1913); The Minnesota Rate Cases, 230 U.S. 352, 433–73 (1913); *Ex parte* Young, 209 U. S. 123, 155 (1908); Smyth v. Ames, 169 U.S. 466, 526 (1898).

gallon by 2015.[5] Groups favoring an aggressive reduction in greenhouse gas emissions initially welcomed this increase. Their response turned to alarm, however, when they discovered that the proposed federal regulation, deep in the fine print, provided that state regulations governing CO_2 tailpipe emissions are "equivalent in effect to fuel economy standards," and are therefore "expressly and impliedly preempted" by the federal CAFE standards.[6]

II. CONSTITUTIONAL CONSTRAINTS

The topic for this panel is constitutional constraint on the states. So far, however, our panel has been discussing statutory preemption. That is, we have so far been discussing how we should construe particular federal statutes that may, or may not, preempt state action. I will discuss something that is closer to a true constitutional constraint—the dormant Commerce Clause.

You may have noticed that I said only "closer to" a true constitutional constraint. While there is a commerce clause, there is no dormant Commerce Clause. In dormant Commerce Clause cases, the Supreme Court strikes down state regulation that, in its view, improperly interferes with the free flow of interstate commerce. The Court does not do so because there is a direct constitutional prohibition on such state regulation. It does so as a surrogate for Congress. Congress, if it so chooses, can authorize state regulation that interferes with interstate commerce. But in dormant Commerce Clause cases, Congress has not acted either to authorize or to forbid the state regulation in question. Recognizing the institutional factors that make it difficult for Congress to act, the Court acts on its behalf.

Because the Court acts as a surrogate for Congress in dormant Commerce Clause cases, clear and consistent principles in its dormant Commerce Clause jurisprudence are sometimes hard to discern. Given the nature of Congress, we can hardly expect otherwise. Probably the best article ever written on the dormant Commerce Clause is Professor Donald Regan's 1986 article, in which he tries to make sense of the Court's dormant Commerce Clause decisions after 1935 and to illuminate their guiding principles.[7] You can get a sense of the difficulty of the task from the fact that the article is 196 pages long. Professor Regan shows that, at least in movement-of-goods cases, one governing principle is that, in the absence of congressional authorization, the states are forbidden to regulate in a manner that advantages in-state actors to the disadvantage of out-of-state actors.[8] That is the lesson of such cases as *Dean Milk*,[9] the California avocado case,[10] the Arizona cantaloupe case,[11] the North Carolina apple case,[12] and the recent wine-shipping

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5. *See* Average Fuel Economy Standards, Passenger Cars and Light Trucks; Model Years 2011–15, 73 Fed. Reg. 24,352-01 (proposed May 2, 2008) (to be codified at 49 C.F.R. pts. 523, 531, 533, 534, 536, 537).

6. *Id.* at 24,478–79.

7. Donald H. Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 MICH. L. REV. 1091 (1986).

8. *See id.* at 1094–95.

9. Dean Milk Co. v. Madison, 340 U.S. 349, 354 (1951).

10. Fla. Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 153–56 (1963).

11. Pike v. Bruce Church, Inc. 397 U.S. 137, 142–45 (1970).

case.[13] There are other principles, too. For example, the Court has held that when a State acts as a market participant, the previous principle does not apply.[14] But I do not want to turn this into a seminar on the dormant Commerce Clause. I have given you enough to enable me to make the following point.

Why are the states taking the lead in addressing global warming? This morning we heard why the states may think that regulating greenhouse gases provides economic advantages to their own citizens. I confess that I found those economic reasons largely unconvincing. But, as Professor Stewart has suggested, along with possible economic reasons, the states may be trying to limit greenhouse gases for reasons of psychological satisfaction.[15]

Professor Stewart is right, but he may not go far enough. Voters in California—and likely in other states as well—almost certainly do not support reductions of greenhouse gases primarily because they think their own economic self interest will be served. Rather, their motivation is rooted in moral values. Some would couch it in religious values. Others would couch it in secular values. These voters in California and elsewhere are not acting to protect or to advantage themselves. They are acting to protect their children, to protect their children's children, and to protect other people's children.

What does the dormant Commerce Clause have to say about altruistic actions by states? Nothing at all, except by negative inference. The Court has consistently struck down state regulation that advantages in-staters at the expense of out-of-staters. But the rationale for striking down such regulation does not apply to state regulation that seeks to serve not merely (or not even) the good of the state, but the greater good of the country as a whole, and perhaps of the world.

CONCLUSION

Our federal system is remarkably malleable. It was used by the Progressives in the 1920s to fight against what they viewed as regressive and oppressive federal law. It was used by the Supreme Court in the 1970s and 1980s to return power to the states. Today, the states are beginning to act, seriously and with great ingenuity, in trying to solve the potentially catastrophic problem of global warming. The question before us is whether the federal system will allow them to continue to do so. I am pleased to suggest, here at the Rehnquist Center, that Chief Justice Rehnquist—that great advocate for state power and, as we have heard today, that great and enthusiastic weatherman—would likely have said "yes."

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12. Hunt v. Wash. State Apple Adver. Comm'n, 432 U.S. 333, 348–54 (1977).

13. Granholm v. Heald, 544 U.S. 460, 472–76 (2005).

14. *See* Reeves, Inc. v. Stake, 447 U. S. 429, 440–41 (1980).

15. Richard B. Stewart, *States and Cities as Actors in Global Climate Regulation: Unitary vs. Plural Architectures*, 50 ARIZ. L. REV. 681, 688–93 (2008).