

# **First Annual Climate & Energy Law Symposium: Federal Preemption or State Prerogative: California in the Face of National Climate Policy**

## **An Introduction**

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The University of San Diego School of Law's decision to create a new scholarly law journal dedicated to climate and energy issues could hardly have come at a better time. The United States Supreme Court has itself expressly acknowledged that States, local governments, and "respected scientists" believe that global climate change is "the most pressing environmental challenge of our time."<sup>1</sup> The Court in *Massachusetts v. EPA*, ordered the U.S. Environmental Protection Agency (EPA) to consider whether greenhouse gas emissions from motor vehicles warranted regulation under the federal Clean Air Act.<sup>2</sup> And now, prodded by states and environmentalists who sued the EPA to

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1. *Massachusetts v. EPA*, 549 U.S. 497, 505 (2007).

2. *Id.* at 535.

secure such relief, the EPA under the Obama Administration is on the verge of taking truly significant regulatory action as well as working closely with Congress to secure long-overdue, comprehensive federal climate legislation.<sup>3</sup>

The Journal editors, and their faculty sponsor, Professor Lesley McAllister, are also to be commended for their selection of the topic for what promises to be the first of many annual symposia on climate and energy issues: the extent to which federal preemption should or should not be an aspect of new federal legislation. In attendance at the February 2009 symposium were many of the nation's finest legal scholars. The resulting debate and discussion, reflected in the following papers that the speakers produced, should be required reading for those lawmakers both in Washington, DC and in state capitals such as Sacramento, as they craft federal and state laws that seek to address this "most pressing environmental challenge."<sup>4</sup>

I expect that those who attended the symposium and those who will read the excellent articles published in this issue will each come away with different lessons. I came away with three. First, we should not fool ourselves about the lawmaking challenges ahead. They are huge. Second, legal scholarship has the potential to play a critical role in determining how best to meet those challenges. And, third, as large as these challenges are, it would be a serious mistake to view climate change as a federal *or* state law issue, rather than a federal *and* state law issue.

So, what do I mean by the first lesson—the need not to fool ourselves about the huge lawmaking challenges we now face? In the immediate aftermath of the Bush Administration, the first few steps that are now being taken to address climate change are deceptively easy. The reason for the apparent ease is that the Bush Administration offers some low-hanging fruit. The previous Administration has made addressing climate change look easy because the federal government did so little during those eight years, and what little they did, they did poorly. That is why the first few steps of the new Administration can come quickly and provide so much basis for hope, so much reason for optimism.

It is therefore easy to cheer as the first fruit is plucked. There was the withdrawal of the petition for writ of certiorari that sought to defend the ill-fated, hopelessly flawed mercury rule promulgated by the EPA under the Clean Air Act during the Bush years.<sup>5</sup> And, of course, there were also the high-profile, yet carefully-crafted steps taken by the Obama

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3. See *infra* notes 5 to 10 and accompanying text.

4. *Massachusetts*, 549 U.S. at 505.

5. *Court Fight on Mercury*, N.Y. TIMES, Feb. 7, 2009, at A11.

Administration towards reversing the prior Administration's denial of the California application for a waiver under the Clean Air Act to allow California to promulgate its own regulations of greenhouse gas emissions from new motor vehicles. First, the President, within a week of his inauguration, issued a memorandum asking the EPA Administrator to revisit that prior denial,<sup>6</sup> and the EPA Administrator, after providing formal notice of reconsideration in February 2009, granted the waiver application in July 2009.<sup>7</sup> The EPA Administrator also took initial steps to reverse former EPA Administrator Steve Johnson's determination in December 2008 that greenhouse gas emissions from stationary sources were not subject to regulation under the Clean Air Act's program for the prevention of significant deterioration.<sup>8</sup> Finally, in September 2009, EPA's Administrator jointly issued with the Department of Transportation a proposed national program to cut greenhouse gas emissions and improve fuel economy for cars and trucks,<sup>9</sup> and the Agency issued a final rule for mandatory reporting of greenhouse gas emissions that will apply to about 10,000 facilities and cover approximately 85% of the nation's greenhouse gas emissions.<sup>10</sup>

But the apparent ease of the first steps, although they deserve a moment for cheer, should not create an occasion for self-delusion concerning the lawmaking challenges now before us. There are reasons why the Clinton Administration did relatively little during its own eight years to address climate change. To be sure, the Clinton EPA formally concluded that greenhouse gas emissions were an air pollutant within the

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6. John M. Broder & Peter Baker, *Obama's Order Likely to Tighten Auto Standards*, N.Y. TIMES, Jan. 26, 2009, at A1.

7. California State Motor Vehicle Pollution Control Standards; Greenhouse Gas Regulations; Reconsideration of Previous Denial of a Waiver of Preemption, 74 Fed. Reg. 7,040-02 (Feb. 12, 2009).

8. Letter from EPA Administrator Lisa Jackson to David Bookbinder, Chief Climate Counsel, Sierra Club (Feb. 17, 2009) (granting Sierra Club's petition for reconsideration of former EPA Administrator Johnson's December 2008 memorandum decision), *available at* <http://www.epa.gov/nsr/documents/20090217LPJlettertosierraclub.pdf>; California State Motor Vehicle Pollution Control Standards; Notice of Decision Granting a Waiver of Clean Air Act Preemption for California's 2009 and Subsequent Model Year Greenhouse Gas Emission Standards for New Motor Vehicles, 74 Fed. Reg. 32,744 (proposed July 8, 2009).

9. Proposed Rulemaking To Establish Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards, 74 Fed. Reg. 49,454 (proposed Sept. 28, 2009).

10. EPA FINALIZES THE NATION'S FIRST GREENHOUSE GAS REPORTING SYSTEM/ MONITORING TO BEGIN IN 2010 (2009), <http://yosemite.epa.gov/opa/admpress.nsf/d0cf6618525a9efb85257359003fb69d/194e412153f6ffea8525763900530d75!OpenDocument>.

meaning of the federal Clean Air Act,<sup>11</sup> something that the Bush Administration was not even able to do prior to the Supreme Court's ruling in *Massachusetts v. EPA*.<sup>12</sup> But even the Clinton EPA sat on its own threshold determination. The Agency undertook no meaningful implementation of a climate-change program under the Clean Air Act. And that was when both the Vice President was Al Gore, who wrote a book on the compelling nature of climate change before becoming Vice President,<sup>13</sup> and when the EPA Administrator was Carol Browner, who has certainly displayed no tendency to walk away from a tough political battle.<sup>14</sup>

Of course, the Intergovernmental Panel on Climate Change (IPCC) had not yet declared that the evidence that humankind was causing significant global change was "unequivocal," which did not happen until 2007.<sup>15</sup> But for those who have been following the underlying scientific research, including federal agency personnel, the IPCC's formal declaration could hardly have been big news. The declaration was preceded by years of published, peer-reviewed scientific research. This was not the equivalent of an unexpected scientific discovery out of nowhere. The climate change alarm had been ringing loudly for at least two decades, and the federal government had repeatedly responded only by pressing the lawmakers' equivalent of the snooze button.

There are, moreover, significant consequences of our nation's doing so little to address climate change for the past several decades. The first is that it is going to be even harder to induce the United States to take the steps necessary to reduce greenhouse gas emissions to the degree required to address climate change in a meaningful way. Not just hard for Republicans. Not just hard for Democrats. And not just hard for industry. It will be hard for Americans—all of us. It will be hard for Americans to now make the needed changes in order to avoid harms that will occur generations from now. It will be hard for Americans to come to terms with the fact that their own wealth is the product of policies that are the primary cause of global climate change and, therefore, of the true devastation—human and environmental tragedies—that will soon unavoidably visit the poorer and more vulnerable nations in the world as a result of our choices. It will be profoundly difficult to get Americans

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11. *Massachusetts v. EPA*, 549 U.S. 497, 510 (2007).

12. *Id.* at 511.

13. See AL GORE, *EARTH IN THE BALANCE: ECOLOGY AND THE HUMAN SPIRIT* (Plume 1993).

14. See, e.g., John. H. Cushman Jr., *On Clean Air, Environmental Chief Fought Doggedly and Won*, N.Y. TIMES, July 5, 1997, at A8.

15. Elizabeth Rosenthal & Andrew C. Revkin, *Science Panel Says Global Warming is "Unequivocal"*, N.Y. TIMES, Feb. 3, 2007, at A1.

to modify things, including lifestyle, for future generations as well as distant parts of the globe

Second, because of our two-decade-plus delay, many serious, adverse environmental harms will occur due to increased emissions during those years. As explained by Professor Dan Farber in his presentation at the Conference, those consequences are too late to avoid. For many of those affected, especially in other parts of the world, we can only mitigate the harm that will in fact occur during the next several decades. And we can promote adaptation techniques. But we cannot otherwise stop climate change from happening. The next several decades of change are already set in motion, based on the atmospheric greenhouse gas concentrations now existing.

Third, because of the delay, it will be that much harder to reduce greenhouse gas emissions to sustainable levels. As Mary Nichols aptly put it at the Conference, it will require “wrenching reductions.” The longer we permit rates of greenhouse gas emissions to increase, as they dramatically have during the past two decades, the exponentially harder it will be to bring overall atmospheric emissions down to the levels necessary to allow atmospheric concentrations to decrease. The absolute decreases necessary are that much larger, as is the settled nature of the economic expectations dependent within the United States on those higher emission rates.

Finally, and no less important, we have unwittingly promoted other developing nations to replicate our behavior during the past several decades. China and India of 20 years ago are not the China and India we find today. Following our own blueprint for economic growth, they are mirroring and surpassing our greenhouse gas emission rates. It is very hard to persuade countries like China and India to change their economies after we have ourselves reaped the economic rewards associated with filling the atmosphere with heightened greenhouse gas concentrations. Yet, it is very hard, if not practically impossible, to achieve our climate change goals if we do not.

So how do a bunch of law professors talking about federal preemption and state prerogatives in addressing climate change fit into this picture? The answer is the second lesson drawn from this conference. For better, and for worse, the role for legal scholarship is potentially front and center. The marketplace is not going to do the heavy lifting necessary. The enormous spatial and temporal dimensions of global climate change defy market forces. Change will require an extraordinarily creative and

ambitious system of laws. To transform our economy. To promote profound changes in the way we lead our lives. Not by defying our human nature, but by working with it. It will require a lawmaking moment that will rival in significance what happened in the early 1970s.<sup>16</sup>

In 1970, lawmakers embraced a series of lawmaking innovations that have proved enormously successful. They embraced “technology-forcing standards,” rooted in the wholly-counterintuitive notion that we could best achieve environmental protection goals by basing regulation on less information rather than more.<sup>17</sup> Lawmakers understood that sometimes information can be skewed, imperfect. And we, therefore, could better achieve water quality objectives by *not* basing regulation on water quality but, instead, by deliberately ignoring water quality in the first instance.<sup>18</sup> What a crazy idea! But it was also an idea that, with the benefit of hindsight, we know was fundamentally brilliant.

Lawmakers in the 1970s also developed the notion of “cooperative federalism,” consisting of a carefully-crafted partnership between federal and state governments—with the federal government playing a critical role in setting environmental standards and with state agencies playing a no-less-critical role during the implementation and enforcement of those standards.<sup>19</sup> These laws generally used the power of federal preemption as a floor, not a ceiling.<sup>20</sup> But the laws also used the power of preemption in nuanced ways, for instance, allowing for the potential of preemption waivers, as in the Clean Air Act,<sup>21</sup> and for the possibility of multiple states piggybacking on a non-preempted state law without having the authority to enact their own, distinct, third legal requirement.<sup>22</sup>

The 1970s lawmaking artisans in Congress also deliberately deputized the courts to engage in judicial oversight of executive branch implementation. They imposed a barrage of statutory deadlines on federal agency officials.<sup>23</sup> They provided aggrieved citizens with the right to sue for an agency’s lack of implementation of federal environmental mandates or their under-implementation.<sup>24</sup> Congress, in effect, deputized

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16. See RICHARD J. LAZARUS, *THE MAKING OF ENVIRONMENTAL LAW 67-75* (Univ. of Chi. Press 2004) (describing the 1970s as “a revolution in law”).

17. See, e.g., Clean Water Act, 33 U.S.C. §§ 1311(b), 1314(b) (2000) (establishing and imposing a series of technology-based water pollution control standards).

18. See *EPA v. Cal. State Water Res. Control Bd.*, 426 U.S. 200, 202-04 (1976).

19. Richard B. Stewart, *Pyramids of Sacrifice: Problems of Federalism in Mandating State Implementation of National Environmental Policy*, 86 YALE L.J. 1196, 1196-97 (1977).

20. See, e.g., Clean Air Act, 42 U.S.C. § 7610 (1970); 33 U.S.C. § 1370.

21. See 42 U.S.C. § 7543(b).

22. *Id.* at § 7507.

23. Richard J. Lazarus, *The Tragedy of Distrust in the Implementation of Federal Environmental Law*, 54 LAW & CONTEMP. PROBS. 312, 323-24 (1991).

24. *Id.* at 334.

the courts to provide for the judicial oversight necessary to meet the inevitable resistance that would arise from efforts to implement and enforce tough, new environmental protection laws.<sup>25</sup> As Judge Skelly Wright famously wrote in *Calvert Cliffs Coordinating Commission v. Atomic Energy Commission*,<sup>26</sup> Congress understood the potential for these “important new federal policies” “to be lost or misdirected in the vast hallways of the federal bureaucracy” and, to counter that tendency, provided for a judicial “role” to guard against that exact occurrence.<sup>27</sup>

As it happens, I spent much of the spring of 2008 holed away in the National Archives, reading internal committee memoranda and debates surrounding the congressional enactment of the landmark Federal Water Pollution Control Act Amendments of 1972. Those historical legislative materials reveal phenomenal thinkers and legislative tacticians: Senators Edmund Muskie, Howard Baker, Jennings Randolph, and their leading staffers, such as Leon Billings and Tom Jorling, among others. These individuals and their peers truly debated and crafted, bit-by-bit, the legislation that ultimately emerged. The conference committee process, alone, lasted more than six months and included 39 meetings.<sup>28</sup> It was an extraordinary lawmaking process that led to an extraordinary law.<sup>29</sup>

That is what the nation desperately needs today: the same kinds of path-breaking lawmakers. I am hopeful that some of the necessary creativity and inspiration, if not the individuals themselves, were in the room at the San Diego Climate Conference—whether law professors, public servants, entrepreneurs, or current students.

It is, to be sure, a challenge to use our nation’s normal pathways for lawmaking. Much within our current systems stymies lawmaking for climate change. Fragmentation of lawmaking authority—both vertical and horizontal—makes legal change hard. Separation of powers makes it hard. Short-term election cycles make it hard. Substantive constitutional limitations on lawmaking, especially as applied to federal lawmakers,

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25. *Id.*

26. *Calvert Cliffs Coordinating Comm’n v. Atomic Energy Comm’n*, 449 F.2d 1109 (D.C. Cir. 1971).

27. *Id.* at 1111.

28. Statement of Senator Muskie, found in LEGISLATIVE HISTORY OF THE FEDERAL WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972, as prepared by the Congressional Research Service of the Library of Congress and Arnold & Porter LLP under Legislative History: P.L. 92-500.

29. See generally PAUL CHARLES MILAZZO, UNLIKELY ENVIRONMENTALISTS—CONGRESS AND CLEAN WATER, 1945-1972 (Univ. Press of Kan. 2006).

make it harder still. Each of these limitations, substantive and procedural, furthers important policies, but that does not diminish their practical import for climate-change lawmaking.<sup>30</sup>

The good news I heard at the San Diego Conference is the third lesson I learned. We currently have before us an opportunity for the kind of truly extraordinary lawmaking moment we now need. So what will the new law look like? It will be far different from the existing Clean Air Act.<sup>31</sup> As Professor Cliff Rechtaffsen explained in his talk at the Conference, no one truly thinks that the existing Act provides the answer. There is a reason why the EPA during the Clinton Administration did very little under that Act to address climate change. There is a reason why the EPA during the Bush Administration did very little. The easy explanation that the Administration did not believe in climate change or was “captured” by industry is simply that—too easy—and does not come to grips with the full scope of actual lawmaking challenges presented by addressing climate change through the current Clean Air Act. Not all good ideas for law are necessarily lawful under existing law. Nor are all bad lawmaking proposals necessarily unlawful.

The new legislation will need to go beyond traditional emission controls. As Professor Ann Carlson explained in her talk at the Conference, we will need land use controls. There will need to be product regulation, efficiency regulations, and related building codes. We may also need laws aimed more at individual behavior, such as laws designed to modify consumer behavior, by reducing certain kinds of consumer product demand in favor of other kinds far less prone to promote greenhouse gas emissions.<sup>32</sup>

New federal legislative approaches will also need to include, as Mary Nichols stressed, “new models for collaborative federalism like never seen before.” The legal reach of climate change law is too great in its breadth and depth for any other approach to be both politically viable and practically effective. At the Conference, Professor Victor Flatt surveyed the need for both federal *and* state laws. We will most certainly need preemption of floors to avoid the possibility of races to the bottom

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30. See generally Richard J. Lazarus, *Super Wicked Problems and Climate Change: Restraining the Present to Liberate the Future*, 94 CORNELL L. REV. 1153 (2009) (discussing the challenges of climate change lawmaking at great length).

31. Clean Air Act, 42 U.S.C. § 7401 *et seq.* (2009).

32. See Michael Vandenburgh & Anne C. Steinmann, *The Carbon Neutral Individual*, 82 N.Y.U. L. REV. 1673, 1700 (2007) (“Low-hanging fruit” makes it possible for individuals to reduce greenhouse gas emissions by 60%); John C. Dernbach, *Harnessing Individual Behavior to Address Climate Change*, 26 VA. ENVTL. L.J. 107, 144-56 (2007).

by states. And most certainly, we will need no sweeping preemption of ceilings to avoid races to the bottom by the national government, too.

To that end, we will need to think about the role of preemption in a more nuanced way, as Professor Bill Buzbee persuasively contended at the Conference. Not just in terms of ceilings and floors. Not just in terms of state *competition* but also in terms of state *collaboration*, as Professor Lesley McAllister articulated. Preemption, including the threat of preemption or non-preemption, can and should be used creatively. Federal climate legislation need not treat all state laws alike. There are frequently real differences in state laws, and federal law can recognize those differences in future climate change legislation, just as the Clean Air Act has recognized the legitimacy of such differences in the past by singling out California for differential treatment.<sup>33</sup>

Preemption can also be used affirmatively, not just as a laboratory for state experimentation but also as a catalyst for law reform or even as an overseer. For instance, federal legislation could use non-preemption triggers to guard against federal agency failure to implement federal climate change legislation in a timely or effective manner.<sup>34</sup> A related procedural innovation, outlined by Professor Buzbee at the Conference, would be to provide for the creation of a committee formally assigned the task of determining whether and to what extent federal law should preempt state law in climate change. There could, moreover, be representatives of the States themselves on such a committee. There is no ready reason simply to acquiesce in the notion that federal courts should be the exclusive arbiters of the scope of federal preemption. This is the kind of novel and creative thinking about lawmaking for climate change that is now necessary and for which legal scholarship may well be an invaluable crucible for ideas.

The lawmaking challenges we now face as a nation, as a world, are daunting. We will need to craft a legal regime that can simultaneously accomplish three things: (1) relatively swift congressional passage, (2) significant greenhouse gas emission reductions as well as adaptation and mitigation measures necessary to avoid or minimize the adverse consequences of now-unavoidable climate change, and (3) maintenance of reductions over time. The problem with lawmaking moments is just

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33. 42 U.S.C. § 7543(b)(1).

34. See Lazarus, *supra* note 30, at 1206.

that: they are momentary. And in order for global climate change law to be successful, it cannot be merely momentary; it must be longstanding.

Like many in attendance at the Conference, I have been studying and working with environmental law for decades. I do not recall any issue at any time so challenging, even overwhelmingly so. But the challenge is also incredibly exciting. And conferences such as the one held at the University of San Diego School of Law in February 2009, for the purpose of celebrating the law school's new Center and publication of the inaugural issue of this Journal, provide an occasion to be not only excited by the challenge but also hopeful about the associated opportunities.