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## **“ENVIRONMENTAL FEDERALISM” AND US CLIMATE CHANGE POLICY**

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Prepared for the Meeting:

**Federalism and U.S. Climate Change Policy**  
Business and Policy Implications of US States' Climate Actions

Ifri, Paris -- May 24, 2004

[www.cfe-ifri.org](http://www.cfe-ifri.org)

# “ENVIRONMENTAL FEDERALISM” AND US CLIMATE CHANGE POLICY

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## I. INTRODUCTION

Environmental disputes involving states over the proper state and federal roles have grown in number and magnitude over the last several years, with many disputes engaging dozens of states.<sup>1</sup> States with competing views are fully engaged in the ongoing debate over climate change, a textbook case for testing the contours of environmental federalism. The issue has all the necessary components: transboundary environmental impacts; competing state economic and environmental interests; state self-interest; disagreement on first principles including what is the proper role of the states; and a somewhat ill-defined federal role. With those qualities, one would expect the federal government to step in and regulate. Instead, the federal government has declined to regulate, inviting a national discourse on whether and how to reduce greenhouse gas (GHG) emissions.

As of Spring 2004, twenty-eight states have launched or are planning initiatives, some of which will directly regulate sources of GHG emissions.<sup>2</sup> As these programs take root, pressure will build for a greater federal role. This paper will advance the position that even with this building momentum, the federal government is not likely to emulate state programs that mandate CO<sub>2</sub> emission reductions. In the face of high national cost,

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<sup>1</sup>. The case docket from the present term of the U.S. Supreme Court reveals an extraordinary amount of state interest in the outcome of environmental disputes, even in private-party disputes. 24 states participated in *Alaska Department of Environmental Conservation v. EPA*, a Clean Air Act case between the state of Alaska and the U.S. 26 states and multiple municipalities participated in *South Florida Water Management District v. Miccosukee*, a Clean Water Act case between two private parties. 17 states and territories participated in *Engine Manufacturers Association v. South Coast Air Quality Management District*, a Clean Air Act case between two non-federal, non-state entities (discussed below).

<sup>2</sup>. Pew Center on Global Climate Change, *Climate Change Activities in the United States: 2004 Update*, March 2004, 9.

uncertain environmental benefits, and a history of federal nonregulatory action, federal regulation at this time appears to be a remote possibility. State efforts to address global climate change add value to the debate, but they do not create the cocoon of consensus the federal government seeks before launching mandatory programs of this magnitude.

The more likely scenario is that the federal government will continue on its present course, funding research and development, investing in energy efficient technologies, and supporting voluntary measures. Under this scenario, states and the private sector would continue to function as the “laboratories” to develop new ideas to improve energy efficiency, test new technologies, and assess economic impacts. The federal government will likely continue to repel pressure to mandate reductions until a certain threshold of scientific certainty and technological feasibility are achieved.<sup>3</sup> At that point, the body of knowledge and experience developed by the states will provide a more certain roadmap for any additional federal action,<sup>4</sup> which will probably be some version of a voluntary market-based program.

## II. CLIMATE CHANGE AND FEDERALISM

Federalism describes the philosophical basis in the U.S. Constitution of the limited role for federal government. As history tells us, competition among states for commercial advantage and the inability of Congress to regulate interstate commerce were principal deficiencies of the Articles of Confederation.<sup>5</sup> The Framers of the U.S. Constitution addressed the problem by leaving most power to the states but allocating limited federal power to regulate interstate commerce in the Commerce Clause: “The Congress shall have Power ... to regulate Commerce ... among the several States.”<sup>6</sup> Once the federal government was given this authority, defining its parameters became the challenge.

<sup>3</sup>. Research and development are expected over the very long-term to reduce costs of controlling emissions by providing, for example, innovative means to achieve conservation, energy efficiency, and low-emission energy production. Congressional Budget Office, *The Economics of Climate Change: A Primer*, 41 (April 2003)

<sup>4</sup>. The Pew Center has published a good discussion of how to integrate sub-federal programs within a federal program. John A. Riggs, Ed., *A Climate Policy Framework: Balancing Policy and Politics*, A Report of an Aspen Institute Climate Change Policy Dialogue, Nov. 14-17, 2003, 78. Available at Pew Center's website.

<sup>5</sup>. Robert H. Bork and Daniel E. Troy, *Locating the Boundaries: The Scope of Congress's Power to Regulate Commerce*, 25 Harv. J.L. & Pub. Pol'y 849, 857 (Summer 2002).

<sup>6</sup>. U.S. Const. Art. I, § 8, cl. 3.

Federal environmental laws, which derive their legitimacy from the Commerce Clause, establish a variety of federal and state relationships. Depending on the statute and provision, Congress may have retained full authority to the U.S., devolved some portion of authority to the states, granted authority to the states with federal oversight, or created some other power-sharing arrangement. The federal - state balance in environmental laws is often referred to as “cooperative federalism”, connoting an interdependence between the federal and state sovereigns. The climate change issue presents opportunities to test jurisdictional lines between the states and U.S.

### **1. The Federal Government will Continue to Defend Against State Encroachment on Federal Authority**

Significant GHG emissions reductions will be achieved only by controlling the major emitters, in particular, mobile sources (generally cars and light trucks) and major stationary sources (power producers and industrial facilities generally).<sup>7</sup> Controlling these sources raises the federalism question of who has the legal authority to do so, states or federal government. While the federal government has the lion’s share of authority over mobile sources, jurisdiction over stationary sources is shared by federal and state governments. As the states develop their GHG reduction strategies, they are most certain to meet federal resistance where the federal government can assert sole authority to regulate. Recent actions show that the federal government will defend its prerogative to regulate, but then probably not exercise the prerogative to mandate CO<sub>2</sub> emission reductions.

Mandating tailpipe emissions reductions potentially implicates two federal laws: the *Clean Air Act* (CAA) and the *Energy Policy and Conservation Act* (EPCA). Because cars and light trucks are produced for a national market and affect interstate commerce, Congress prohibited states from setting tailpipe emission standards under CAA and fuel efficiency standards under EPCA.<sup>8</sup> New York and Massachusetts tested the outer bounds

<sup>7</sup>. CO<sub>2</sub> emissions derive mostly from fossil fuel combustion, attributed to these sectors, in these proportions: electricity generation 33%; transportation 33%; industry 20%; residential and commercial 12%. Larry Parker, Congressional Research Service, Library of Congress, *Global Climate Change: Market-Based Strategies to Reduce Greenhouse Gases*, 7 (Updated Sept. 10, 2003).

<sup>8</sup>. Section 209(a) of the Clean Air Act expressly preempts state standard-setting for mobile source emissions: «No state or any political subdivision thereof shall adopt a standard relating to the control of emissions from new motor vehicles or new motor vehicle engines subject to this part.» 42 U.S.C. Section 7543(a). Its legislative history reflects that Congress’s intent was to avoid marketplace disruptions from piecemeal state regulation of a national car market. *See, e.g.*, H.R. Rep. No. 90-728 (1967), *reprinted in* 1967 U.S.C.C.A.N. 1938, 1955-1956. (House Committee on Interstate and Foreign Commerce explaining that preemption was "necessary in order to prevent a chaotic situation from

of CAA preemption when they each passed a law requiring industry to manufacture certain percentages of low-emission vehicles (LEVs). Industry challenged the laws as preempted under the CAA. The states argued that requirements to manufacture LEVs were not emission standards under the CAA. The Second Circuit and later the First Circuit struck down the state requirements on manufacturers, reasoning that such requirements were intended to reduce vehicle emissions, which could only be accomplished by the federal government under the CAA.<sup>9</sup>

Federal authority over mobile sources was tested again in a case decided in May 2004 by the U.S. Supreme Court, *Engine Manufacturers Association v. South Coast Air Quality Management District (EMA)*. In *EMA*, the South Coast Air Quality Management District (a political subdivision of California) tried to reduce emissions through a purchase requirement on fleet operators. The law required operators of certain fleets, such as street sweepers, passenger cars, buses, garbage trucks and airport passenger vans, to replace retired vehicles with LEVs. As in earlier cases, the lower federal courts analyzed the plain language of the CAA to determine whether the fleet rules were “standards” under the CAA and therefore preempted. Both the Central District for California and the Ninth Circuit courts distinguished the earlier state manufacturing requirement cases and held that a purchase requirement was not a standard and not preempted.<sup>10</sup>

The U.S. Supreme Court had no trouble reversing the lower courts and vacating the fleet rules as preempted.<sup>11</sup> The Court found no distinction between a “standard” and the means of enforcing the standard, be it through a manufacture or purchase restriction: “Clearly, Congress contemplated the enforcement of emission standards through purchase requirements.”<sup>12</sup> In an 8-to-1 opinion penned by Justice Scalia, the Court found that the fleet rule was expressly preempted. The opinion rested on canons of statutory construction, without mention of legislative history, congressional intent, or the policy implications of barring the state air district from choosing this means to address its air problem.

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developing in interstate commerce in new motor vehicles.”) S. Rep. No. 90-403 (1967). (Senate Committee on Public Works expressing concern that allowing each state to set its own standards “could result in chaos insofar as manufacturers, dealers, and users are concerned.”); 42 U.S.C. 6201 (2000).

<sup>9</sup>. *American Automobile Mfrs Ass’n v. Cahill*, 152 F.3d 196 (2d Cir. 1998); *Ass’n of Int’l Automobile Mfrs, Inc. v. Massachusetts*, 208 F.3d 1 (1st Cir. 2000).

<sup>10</sup>. *Engine Mfrs. Ass’n v. South Coast Air Quality Management Dist.*, 158 F. Supp. 2d 1107, 1118 (C.D. Cal. 2001); 309 F. 3d 550 (9<sup>th</sup> Cir 2002).

<sup>11</sup>. *Engine Mfrs. Ass’n v. South Coast Air Quality Management Dist.*, No. 02-1343 (U.S. Apr. 28, 2004).

<sup>12</sup>. *Id.* at 7.

In addition to tailpipe emissions, Congress reserved to the federal government authority to set fuel efficiency standards. Under EPCA, the federal Department of Transportation sets corporate average fuel efficiency standards (CAFE standards) for fleets of cars and light duty trucks. Congress also set a threshold CAFE standard in EPCA. If the Department proposes standards that exceed that threshold, Congress may review and disapprove the standards. CAFE standard-setting is a potent political issue, with impacts on such powerful sectors of the economy as energy and transportation. Tightening CAFE standards is not easily accomplished, given that it requires the federal executive to act and may require Congress to act.<sup>13</sup> Because CO<sub>2</sub> is released whenever fossil fuels are burned, reducing tailpipe CO<sub>2</sub> emissions essentially requires increasing fuel efficiency and tightening CAFE standards. In August 2003, the U.S. Environmental Protection Agency (EPA) said it would not regulate CO<sub>2</sub> emissions from cars in part because that would affect CAFE standards, which only the Department of Transportation has authority to change.<sup>14</sup>

The mobile source experience signals a couple of important points for this discussion. First, the federal government will vigorously protect its jurisdiction over mobile source emission standards and the Supreme Court will take a broad view of federal jurisdiction in this area. States are not likely to be successful at targeting CO<sub>2</sub> tailpipe emissions, even through regulation such as the purchase requirement in *EMA*, which did not set a numeric emission standard per se but nevertheless targeted emissions and could interfere with interstate commerce. Second, even as the federal government asserts its authority and seeks to preempt state regulation, it does not follow that the federal government will then exercise the authority to regulate CO<sub>2</sub>. In the mobile source context, the federal government has determined that it does not have authority to regulate CO<sub>2</sub> for global climate change reasons.

In the broader context of CAA authority over stationary sources, even where federal law does not expressly preempt state law, there is no reason to believe that the federal government will act any differently. If these issues are litigated, environmental federalism and the appropriate federal - state roles will be in full play.<sup>15</sup>

<sup>13</sup>. On April 7, 2003, the National Highway Traffic Safety Administration issued a final rule to increase the CAFE standard of light-duty trucks by 1.5 miles per gallon by model year 2007. 68 Fed. Reg. 16867 (April 7, 2003). It was the first increase in CAFE standards since model year 1996. From 1996 to 2001, Congress inserted provisions in Department of Transportation appropriations bills prohibiting changes in CAFE standards.

<sup>14</sup>. Notice of denial of petition for rulemaking, 68 Fed. Reg. 52922, 52929 (Sept. 8, 2003).

<sup>15</sup>. Two observations about the case speak to the larger question of federalism and state regulation of CO<sub>2</sub>. First, Justice Souter opens his dissent with sympathetic reference to California's poor air quality. *Engine Mfrs. Ass'n v. South Coast Air Quality Management Dist.*, No. 02-1343, slip op. at 1 (U.S. Apr. 28, 2004)(Souter, J., dissenting). The state's

## 2. Without General Consensus, the Federal Government Will Probably Not Attempt Any Sort of Mandate

The reticence of the federal government to regulate stems from basic features of the climate change issue, which create obstacles to federal regulation. Two of the highest barriers are 1) the cost/benefit comparison of significantly reducing GHG emissions at this time; and 2) a history of federal decisions not to regulate, reflecting the economic and environmental realities of the issue. These obstacles are presently insurmountable.

The first barrier is the high cost impact of regulation on the national economy with uneven impacts on industrial sectors and no corresponding national environmental benefits from the regulation. The projected impact on the gross domestic product of reducing CO<sub>2</sub> emissions to levels required by the Kyoto Protocol (7% below 1990 emissions during 2008 - 2012) has been estimated by the U.S. Energy Information Administration at actual losses of between \$102 to \$437 billion in 2010.<sup>16</sup> Other estimates show costs at \$150 billion per year<sup>17</sup> and reduction of the gross domestic product by 2 to 4 percent annually.<sup>18</sup> Specific projected impacts include: energy and electrical prices near-doubling, annual household income reduction by \$2700, and state tax revenue reduction of \$93.1 billion.<sup>19</sup> Balanced against this high national cost are environmental benefits that are speculative and help the world, not the nation.<sup>20</sup> U.S. compliance with Kyoto will not stabilize the national pool of CO<sub>2</sub>, reduce national warming or significantly mitigate any negative environmental impacts

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ongoing struggle to comply with federal CAA standards certainly engenders sympathy for California's plight as a state at the mercy of federal mandates, which is then prohibited from using an effective tool to achieve the mandate. Other Justices who joined the 8 - 1 majority in *EMA* may well be more concerned with the facts, in a case not addressing express preemption. A future case over CAA authority to regulate CO<sub>2</sub>, insofar as state law is not expressly preempted, would delve into congressional intent and the policy implications of federal regulation and would not likely be decided 8 to 1.

Second, the *EMA* majority opinion is notable for its clear line-drawing regarding voluntary efforts. The Court made clear that it did not address the voluntary portions of the fleet rules, allowing that these may be constitutional. This bodes well for the eventual test of voluntary efforts to reduce CO<sub>2</sub> emissions. *Engine Mfrs. Ass'n v. South Coast Air Quality Management Dist.*, No. 02-1343, slip op. at 11 (U.S. Apr. 28, 2004) ("Voluntary programs are not at issue in this case, and are significantly different from command-and-control regulation.").

<sup>16</sup>U.S. Energy Information Administration, *What Does the Kyoto Protocol Mean to U.S. Energy Markets and the U.S. Economy*, Oct. 1998 (available at <http://www.eia.doe.gov/oiak/kyoto/kyotobtxt.html>).

<sup>17</sup> Bjorn Lomborg, *The Skeptical Environmentalist* (1998)

<sup>18</sup> Testimony of Margo Thorning, Ph.D., Senior Vice President and Chief Economist of the American Council on Capital Formation, before the Senate Environment and Public Works Committee, Subcommittee on Clean Air, Climate Change, and Nuclear Safety, Jun 5, 2003.

<sup>19</sup> WEFA, *Global Warming: The High Cost of The Kyoto Protocol* (Executive Study), 1998. To be sure, others have estimated much more modest compliance costs, with differences largely attributable to the variables and assumptions used. See, e.g., John P. Weyant, prepared for the Pew Center on Global Climate Change, *An Introduction to the Economics of Climate Change Policy*, July 2000, ii.

<sup>20</sup> National Center for Policy Analysis, *Global Warming Policy: Some Economic Implications*, Policy Report No. 224, Mar. 1999 (available at <http://www.ncpa.org/studies/s224.html>).

in the U.S. predicted to result from global warming.<sup>21</sup> This is because GHG concentrations are relatively stable across the globe and do not obey geopolitical borders. Reduction of GHG emissions in California, for example, will have no discernable effect on the air in California or in any other state in the nation.<sup>22</sup> The national cost of regulating CO<sub>2</sub> is great with no corresponding direct national environmental benefits.

U.S. industry will pay the cost, to its international competitive disadvantage. And costs are borne irregularly across sectors and regions. Some industries such as suppliers of energy-efficient and renewable energy technologies, or silviculture and agricultural firms that engage in carbon sequestration, may benefit financially from CO<sub>2</sub> reduction regulations. Others have invested in energy-efficient technologies or have helped develop market-based proposals that will buffer them against cost impacts of any future required reductions. Yet a significant portion of U.S. industry would find costs threatening. Any regulatory program would divide industry and create turmoil for sectors most subject to cost impacts or most vulnerable to international competition. If regulatory objectives are not feasible for major economic sectors, especially where there is no direct environmental benefit, federal regulation is very impractical and very difficult to achieve.

The second barrier is that the federal government has consistently opted not to regulate, acknowledging the inviability of that approach, in favor of greater certainty and more pragmatic solutions. The U.S. Congress has consistently opposed mandating CO<sub>2</sub> reductions. In 1997, the U.S. Senate voted 95 to 0 to oppose binding the U.S. to GHG reductions under the Kyoto Protocol. Senate opposition was based on negative impacts to the U.S. economy and failure of the Protocol to bind developing nations to future reductions at the same rate as U.S.<sup>23</sup> In the years following Kyoto, Congress prohibited in successive appropriations bills the expenditure of any funds to implement Kyoto.<sup>24</sup> In October 2003, the U.S. Senate defeated the *Climate Stewardship Act of 2003* (S. 139),

<sup>21</sup>. Bjorn Lomborg, *The Truth About the Environment*, *The Economist*, Aug. 2, 2001 (available at <http://www.economist.com/science/displaystory.cfm?story-ID=718860>).

<sup>22</sup>. Even the Union of Concerned Scientists concedes that "Californians cannot act alone to stabilize the state's climate." Union of Concerned Scientists, *Global Environment: Confronting Climate Change in California* (available at [http://www.ucsusa.org/global\\_environment/global\\_warming/page.cfm?pageID=961](http://www.ucsusa.org/global_environment/global_warming/page.cfm?pageID=961)).

<sup>23</sup>. S. Res. 98 (July 25, 1997), "A resolution expressing the sense of the Senate regarding the conditions for the United States becoming a signatory to any international agreement on greenhouse gas emissions under the United Nations Framework Convention on Climate Change."

<sup>24</sup>. See, e.g., Consolidated Appropriations Act 2000, H.R. 3194, 106th Cong. § 583 (1999) (enacted); Department of Transportation and Related Agencies Appropriations Act, 2001, H.R. 4475, 106th Cong. § 346 (2000) (enacted); Foreign Operations, Export Financing, and Related Programs Appropriations Act, 2001, H.R. 4811, 106th Congress § 577 (2000) (enacted); Foreign Relations Authorization Act, Fiscal Year 2003, H.R. 1646, 106th Cong. § 113 (2002) (enacted).

which would have capped U.S. GHG emissions at 2000 levels and established an emissions trading program, effective after 2010. Introduced by Senators John McCain (R-AZ) and Joseph Lieberman (D-CT), the bill was defeated by a vote of 43 to 55.

The federal executive has likewise been reluctant to regulate. The Clinton Administration affirmatively moved toward regulation in 1998 when President Clinton signed the Kyoto Protocol, and again that year, when the Clinton EPA issued a legal opinion finding that the CAA provides EPA legal authority to regulate CO<sub>2</sub> as a pollutant.<sup>25</sup> However, the same administration never took actions that would have launched a regulatory program of GHG emission reductions. After signing Kyoto, the President failed to submit it to the U.S. Senate for ratification, an implicit acknowledgment that the Senate would reject the Protocol and its implications for the U.S. economy. Further, while it legally opined that the CAA provided regulatory authority, the administration also reassured Congress that it had not made the legal findings under the CAA that are prerequisites to exercising the authority to regulate CO<sub>2</sub>.<sup>26</sup> The same administration passed up another opportunity to regulate CO<sub>2</sub> when it failed to act on a Petition filed with EPA in 1999 asking the Agency to regulate CO<sub>2</sub> from mobile sources.<sup>27</sup>

The present Bush Administration has openly opposed regulation of CO<sub>2</sub>, opting instead to propose voluntary reduction goals. In August 2003, the Bush EPA finally answered the 1999 Petition seeking federal CO<sub>2</sub> tailpipe standards by denying the relief sought. EPA concluded that the Agency could not and should not regulate tailpipe CO<sub>2</sub> emissions.<sup>28</sup> The Petition Denial was accompanied by a legal opinion contradicting and superseding the prior Administration's legal opinion, concluding that the CAA does not give EPA legal authority to regulate CO<sub>2</sub> for global climate change purposes.<sup>29</sup>

<sup>25</sup>. Jonathan Z. Cannon, U.S. EPA General Counsel, Memorandum to U.S. EPA Administrator Carol M. Browner re EPA's Authority to Regulate Pollutants Emitted by Electric Power Generation Sources, Apr. 10, 1998.

<sup>26</sup>. Testimony of U.S. EPA General Counsel Gary Guzy before the House Subcommittee on Energy and the Environment of the House Committee on Science, Oct. 6, 1999.

<sup>27</sup>. *International Center for Technology Assessment v. Hon. Carol Browner*, No. A-2000-04(Petition for Rulemaking and Collateral Relief Seeking the Regulation of Greenhouse Gas Emissions From New Motor Vehicles Under § 202 of the Clean Air Act)(U.S. EPA, Oct. 20, 1999).

<sup>28</sup>. Notice of denial of petition for rulemaking, 68 Fed. Reg. 52922, 52929 (Sept. 8, 2003).

<sup>29</sup>. Robert E. Fabricant, U.S. EPA General Counsel, Memorandum to U.S. EPA Acting Administrator Marianne L. Horinko re EPA's Authority to Impose Mandatory Controls to Address Global Climate Change under the Clean Air Act, Dec. 11, 2003.

### **3. Federal Forbearance from Regulating has Created the Opportunity for Additional Study of the Science, Technology and Alternatives to Top-Down Regulation**

In contrast to their decisions not to regulate CO<sub>2</sub>, both legislative and executive branches have fully supported non-regulatory CO<sub>2</sub> programs, including monitoring, technology development, scientific research, energy efficiency project development, and other programs that do not regulate emissions. Billions of federal dollars are spent on the issue annually. Federal funds support a spectrum of private sector partnerships, state grants, and other programs, including a program to encourage companies to establish long-term emission reduction strategies; partnership initiatives with the private sector to develop hydrogen automotive technologies; a private sector and international project to develop coal-fired zero emissions electricity generation technology; assistance to developing countries for energy efficiency and land use efforts; and climate change science research.<sup>30</sup> In fiscal year 2003, Congress provided \$3.8 billion for climate change programs.<sup>31</sup> Of that amount, \$1.7 billion was dedicated to climate research at ten federal Departments or Agencies on research and development projects on energy conservation, renewable energy resources, carbon sequestration, bioenergy, nuclear energy, energy efficiency systems, weatherization and GHG reduction.<sup>32</sup>

In the meantime, the federal government's longstanding approach – refraining from regulating while fully funding research and development – has created a national forum with unprecedented levels of participation among national, regional, state and local governments, private sector, think tanks and non-governmental organizations. Government investment in science and technology development, conservation, and energy efficiency has had a multiplier effect on research efforts. Industry leaders are voluntarily reducing emissions, funding the search for market-based solutions and other feasible alternatives, and encouraging others by example to proactively address the issue.<sup>33</sup> States are acting as

<sup>30</sup>. Office of Management and Budget, *Fiscal Year 2004 Report to Congress on Federal Climate Change Expenditures*, Aug. 2003, 17 (available at [http://www.whitehouse.gov/omb/legislative/fy04\\_climate\\_chg\\_rpt](http://www.whitehouse.gov/omb/legislative/fy04_climate_chg_rpt)).

<sup>31</sup>. *Id.* at 4.

<sup>32</sup>. *Id.* at 3.

<sup>33</sup>. See Pew Center on Global Climate Change, *Climate Change Activities in the United States: 2004 Update*, March 2004, 21 (discussing corporate actions, including 1) establishing greenhouse gas reduction targets and achieving decreased emissions; 2) improving energy efficiency; 3) investing in the development of clean and renewable energy technologies; 4) increasing the use and production of renewable energy; 5) improving waste management; 6) investing in carbon sequestration; 7) participating in emissions trading; and 8) developing energy-saving products. The Pew Center points out that "companies are demonstrating that GHG emissions can be reduced significantly and cost-effectively - with substantial ancillary benefits, including improved competitive positioning." *Id.* at 21.

laboratories for testing new ideas. As of Spring 2004, over half the states had or planned strategies to reduce GHG emissions. Among their efforts are mandatory emissions reductions, voluntary reduction programs, greenhouse gas emissions inventories, carbon sequestration, incentivizing energy efficiency and renewable energy use.<sup>34</sup>

These are desirable circumstances from the perspective of lawmakers who believe that it would be precipitous to mandate CO<sub>2</sub> reductions in the face of so much uncertainty surrounding climate change. Many strongly believe that the government's present response is the most appropriate model for dealing with global climate change. They take the view that the affirmative decision to not regulate is not a failure to act. Rather, it is a decision to seek solutions that correspond to the unique challenges of climate change, and reflects a belief that the technology-forcing of other air regulation will harm the economy but not quicken the pace of technology development.

Under these circumstances, the federal government is not likely to reverse course and mandate CO<sub>2</sub> reductions. The federal government is more likely to repel efforts by states to unilaterally mandate reductions rather than succumb to pressure to regulate.

### III. CONCLUSION

In the face of strongly divided public opinion on the issue, Congress and the executive branch have struck a balance in favor of federal non-regulatory leadership on the issue. The obstacles to federal regulation remain. State initiatives certainly raise federalism questions but they do not ameliorate the barriers that would make it possible for the federal government to abandon its position and mandate GHG emissions reductions.

If and when the federal government does take action, the likely first step will be a voluntary market-based trading program. Recent events have indicated that the federal government is now thinking more about this. The Bush Administration has taken baby steps in this direction. The Administration is now revising the decade-old Section 1605(b) voluntary emissions registry under the *Energy Policy Act* to provide credits to companies that report emissions, to ensure they are properly credited for reductions if a trading

<sup>34</sup>. *Id.* at 9.

program is eventually established.<sup>35</sup> The Administration also has stated that it would consider a trading program if not enough progress is made toward reducing CO<sub>2</sub> emissions intensity by 2012.<sup>36</sup>

Congress has shown signs of greater acceptance of some federal program as well, witnessed by the Senate vote on the McCain-Lieberman emissions trading bill: 55 opposed, 43 in favor. The bill had an array of features to garner support. It was bipartisan; was authored by senior, respected members with national reputations; set the emissions baseline at the year 2000, rather than the 1990 Kyoto Protocol baseline; and would not become effective for seven years. Members certainly gave this CO<sub>2</sub> program, framed in a trading program, more support than they gave the Kyoto Protocol (defeated by 95 - 0 vote).

These recent federal actions signal a softening, but probably not a change of heart. Even a market-based trading program is founded on an emissions cap, which is viewed by opponents of regulation as the first step toward mandated reductions. Until public opinion coalesces around an accepted environmental goal and program of shared sacrifice, the federal government will not likely regulate CO<sub>2</sub>.

<sup>35</sup>. *U.S. Climate Change Strategy: A New Approach* (available at [www.whitehouse.gov/news/releases/2002/02/climatechange.html](http://www.whitehouse.gov/news/releases/2002/02/climatechange.html))

<sup>36</sup>. *Id.*