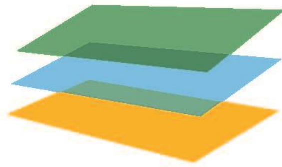

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Act Locally, Link Globally: Overcoming Obstacles to a Joint RGGI-WCI Market

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Augusta Wilson*

INTRODUCTION

Despite strong consensus in the scientific community that climate change requires urgent attention,[1] neither the United States nor Canada has implemented a comprehensive national carbon-pricing regime to reduce greenhouse gas emissions.[2] Into this void have stepped two regional cap-and-trade programs that regulate greenhouse gas emissions in parts of both countries. One, the Regional Greenhouse Gas Initiative ("RGGI"), is a partnership of nine states in the northeastern U.S. The other, the Western Climate Initiative ("WCI"), is a partnership between California and the province of Québec.[3] Both programs have been conducting allowance auctions for several years, demonstrating that cap-and-trade programs can achieve cost-effective emissions reductions.[4]

As the United States begins to roll back federal climate regulations following the 2016 presidential election,[5] these subnational carbon markets will play an increasingly important role in efforts to mitigate U.S. greenhouse gas emissions ("GHGs"), and environmental advocates

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[1] INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, *CLIMATE CHANGE 2014: A SYNTHESIS REPORT* 47 (Core Writing Team, R.K. Pachauri & L.A. Meyer eds.) (2015) (explaining that evidence for human influence on the climate system has only grown since the last assessment report).

[2] Canada has established a Pan-Canadian Framework on Clean Energy and Climate Change that includes carbon pricing as a central component. However, that framework does not institute any comprehensive national carbon-pricing scheme. Rather, it recognizes and encourages carbon pricing schemes – both carbon taxes and cap-and-trade programs – already instituted or under development by individual province or territories. *See* Government of Canada, *Pricing Carbon Pollution*, https://www.canada.ca/en/services/environment/weather/climatechange/pan-canadian-framework/pricing-carbon-pollution1.html.

[3] Ontario plans to begin participating in the WCI auctions in 2018. *See* Press Release, Ministère du Développement Durable,de l'Environnement et de la Lutte Contre les Changements Climatiques, Québec, Ontario Carbon Market Holds its First Auction: a Success! (April 3, 2017).

[4] *See* Michael Hiltzik, *Emissions Cap-and-Trade Program is Working Well in California*, L.A. TIMES, June 12, 2015.

[5] When President Trump took office in 2017 he issued an Executive Order directing the Environmental Protection Agency to review the Clean Power Plan, and he also formally announced plans to withdraw the U.S. from the Paris Agreement.

may pressure them to reduce emissions even further than they already have.[6] One often-cited means for improving the performance of cap-and-trade markets is to link them, in other words for two programs each to recognize allowances from the other for purposes of demonstrating compliance by a regulated source.[7] Indeed, political leaders in both RGGI and WCI jurisdictions have repeatedly called for such a linkage between the two programs,[8] and RGGI is actively soliciting feedback from stakeholders as to how it may expand its reach.[9]

For a linkage between RGGI and the WCI to be effective, the two jurisdictions would need to harmonize their cap-and-trade programs in various respects, and the new joint market would need to achieve a certain level of stability. This introduces some legal risk because the more binding (and therefore stable) such a linking agreement was, and the more closely the two programs coordinated to achieve the necessary harmonization, the more vulnerable the agreement would be to challenge in U.S. courts under various constitutional doctrines, particularly the dormant foreign affairs power and the dormant foreign commerce clause. In other words, there is a degree of inherent tension between the participating jurisdictions' ability to achieve the policy goals that would motivate them to link in the first place on the one hand, and the constitutional limits on states' authority to enter into agreements with foreign jurisdictions on the other. This Article will examine this tension and seek to offer solutions that would allow policymakers to develop a linkage that provided the hoped-for benefits while avoiding constitutional pitfalls. As will be described, while opponents of linkage could raise colorable constitutional claims, it should be possible to design an effective linking agreement that avoids potential legal pitfalls and reduces risk of a constitutional challenge to acceptable levels.

The Article proceeds in four parts. The Article begins, in Part I, by reviewing the arguments in favor of linking RGGI and WCI. Then, in Part II, it draws on interviews with field and academic experts, as well as a review of the relevant literature, to identify key differences between RGGI and the WCI, and challenges to linkage that policymakers would need to overcome to create a successful joint market. Finally, in Parts III and IV the Article assesses the constitutional challenges such a linkage may face, and proposes strategies for insulating the linked market from such claims.

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[6] *See, e.g.*, Alexander Burns, *Going Around Trump, Governors Embark on Their Own Diplomatic Missions*, N.Y. TIMES, JULY 15, 2017.

[7] DANIEL M. BODANSKY, SETH A. HOEDL, GILBERT E. METCALF & ROBERT N. STAVINS, *FACILITATING LINKAGE OF HETEROGENEOUS REGIONAL, NATIONAL, AND SUB-NATIONAL CLIMATE POLICIES THROUGH A FUTURE INTERNATIONAL AGREEMENT*, HARVARD PROJECT ON CLIMATE AGREEMENTS 2 (2014).

[8] In 2006 then-Governors George Pataki of New York and Arnold Schwarzenegger of California announced that they would pursue a partnership between RGGI and the WCI. Assoc. Press, *California May Join Emissions Alliance*, L.A. TIMES, Oct. 17, 2006, *available at*: http://articles.latimes.com/2006/oct/17/business/fi-warming17. In 2015, sitting New York Governor Andrew Cuomo issued another public call for the parties to explore a formal linkage between the two markets. Press Release, Office of Gov. Andrew Cuomo, Governor Cuomo Announces New Actions to Reduce Greenhouse Gas Emissions and Lead Nation on Climate Change (Oct. 8, 2015).

[9] RGGI Program Review, Stakeholder Meeting, June 27, 2017, *available at* http://www.rggi.org/docs/ProgramReview/2017/06-27-17/Program_Elements_Linkages_06_27_17.pdf.

Notably, while other scholars have examined economic theories supporting linkage, as well as the legal issues raised by linkages that cross international borders, this Article appears to be the first to combine a literature review with a series of field interviews with experts charged with administering the programs. This research seeks to offer a new type of pragmatic guide for policymakers considering a linkage.

I. The Argument in Favor of Linkage

In recent years, linkages between cap-and-trade programs around the world have proliferated,[10] indicating that many jurisdictions expect it to yield net benefits.[11] To be sure many of these linkages have taken somewhat different forms from the one proposed here,[12] yet it is safe to say that there is a general trend towards linkage, likely reflecting arguments developed by theorists that linkage can provide a range of economic, political and administrative advantages. This section will briefly review these asserted benefits.

A. *Economic benefits of linkage*

One benefit of linkage often cited in the literature is that it can reduce the cost of achieving desired emissions reductions.[13] This is because different jurisdictions have different marginal costs of reducing carbon pollution depending on the mix of electricity generation technologies they employ and their specific economies.[14] Sources in the jurisdiction with the higher marginal cost of pollution abatement can purchase relatively low-cost reductions from the

[10] Matthew Ranson & Robert N. Stavins, *Linkage of Greenhouse Gas Emissions Trading Systems: Learning From Experience*, 16 CLIMATE POLICY 284, 286 (2016).
[11] *Id.*
[12] For example, some have been unilateral, with only one jurisdiction recognizing allowances from a new jurisdiction, as opposed to the bilateral linkage proposed here whereby RGGI and the WCI would each agree to recognize the other's allowances for compliance purposes. Similarly, a more limited kind of linkage has developed whereby countries recognize offsets from joint offset programs, such as the Clean Development Mechanism. *See* Partnership for Market Readiness, Overview of Carbon Offset Programs: Similarities and Differences 2 (2015), *available at:* https://www.thepmr.org/system/files/documents/PMR%20Technical%20Note%206_Offsets_0.pdf
[13] *See* Brian C. Murray, Peter T. Maniloff & Jonas Monast, *Design Issues for Linking Carbon Markets*, *in* CLIMATE CHANGE POLICY IN NORTH AMERICA 246, 250 (Neil Craik, Isabel Studer & Debora Vannijnatten eds., Univ. of Toronto Press) (2013); David V. Wright, *Cross-Border Constraints on Climate Change Agreements: Legal Risks in the California-Québec Cap-and-Trade Linkage*, 46 ENVTL L. REP. NEWS & ANALYSIS 10478, 10484 (2016); Dmitry Fedosov, *Linking Carbon Markets: Development and Implications*, 10 CARBON & CLIMATE L. REV. 202, 204 (2016); MARKET ADVISORY COMMITTEE, RECOMMENDATIONS FOR DESIGNING A GREENHOUSE GAS CAP-AND-TRADE SYSTEM FOR CALIFORNIA: RECOMMENDATIONS OF THE MARKET ADVISORY COMMITTEE TO THE CALIFORNIA AIR RESOURCES BOARD 72 (2007).
[14] For example, Québec's electricity sector is dominated by (fossil fuel-free) hydropower, making abatement costs there relatively high, whereas California, by comparison, has many low-cost abatement options. This means that actual emissions abatement is more likely to occur in California, with Québec will likely purchase more permits. Jason Dion, *Unpacking the WCI: Thinking Linking*, CANADA'S ECOFISCAL COMMISSION, June 29, 2016, https://ecofiscal.ca/2016/06/29/unpacking-wci-thinking-linking/. California saw the potential influx of revenue as a benefit of linking, and, while the potential for net outflow of revenue caused some concern in Québec, it was ultimately outweighed by the appeal of lower compliance costs. *Id.*

other jurisdiction, allowing them to achieve emissions reductions at a lower cost.[15] Conversely, sources in the jurisdiction with the lower marginal cost of abatement can sell their allowances at higher prices, thus gaining an influx of revenue, while implementing emissions reductions at a lower cost than the price of the permits they sell.[16]

It is important to note that these economic benefits of linkage are likely to be unevenly distributed among participants. Depending on the quantity and distribution of low-cost abatement opportunities, the jurisdiction with the lower marginal cost of abatement may well experience an increase in the cost of compliance for its covered sources following linkage.[17] Nonetheless, when the influx of capital resulting from sources in the higher-cost jurisdiction buying allowances is taken into account, analyses generally conclude that linking allows both participating jurisdictions to experience at least moderate economic gains.[18]

Linking can also improve market efficiency by increasing liquidity.[19] By increasing the number of regulated sources participating in the market, linking makes it easier for participants to trade allowances on the market quickly and at desirable prices, lowering transaction costs.[20] More market participants and a larger portfolio of options for reducing emissions can also reduce price volatility by providing a buffer against uncertainties such as weather.[21]

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[15] Ranson & Stavins, *supra* note 10, at 288. *See also*, Wright, *supra* note 13, at 10483-84; CANADA'S ECOFISCAL COMMISSION, THE WAY FORWARD: A PRACTICAL APPROACH TO REDUCING CANADA'S GREENHOUSE GAS EMISSIONS 30 (2015).

[16] Ranson & Stavins, *supra* note 10, at 289.

[17] ECOFISCAL COMMISSION, THE WAY FORWARD, *supra* note 15, at 30.

[18] *Id. See also* California Air Resources Board, General Summary of Comments and Preliminary Agency Responses, Proposed Linkage of California's Cap-and-Trade Program With the Canadian Province of Québec's Cap-and-Trade Program 12 (Feb. 21, 2013), *available at* https://www.arb.ca.gov/cc/capandtrade/linkage/summary-comments-prelim-response.pdf (explaining that the Air Resources Board expected the linkage to have no effect or only a slight effect on allowances prices in California, and to result in "a small increase in revenues."). Notably, the economic effect may have been bigger in Québec, where "permits were estimated to cost Québec emitters 21-57% less than they would have in a Québec-only system." Dion, *Thinking Linking*, *supra* note 14.

[19] "'Liquidity' in this context means trading liquidity, and reflects the ability to transact quickly without exerting a material effect on prices." Juliet Howland, *Not all Carbon Credits are Created Equal: The Constitution and the Cost of Regional Cap-and-Trade Market Linkage*, 27 U.C.L.A. J. ENVTL. L. & POL'Y 413, 425 (2009) (quoting Kevin Warsh, Fed. Reserve Bd. of Governors, Speech at the Institute of International Bankers Annual Washington Conference, Washington D.C., Market Liquidity: Definitions and Implications (March 5, 2007)).

[20] *See* INTERNATIONAL EMISSIONS TRADING ASSOCIATION, IETA REPORT ON LINKING GHG EMISSIONS TRADING SYSTEMS 17 (2007). Multiple field experts argued that improved market liquidity is a significant benefit of linkage. Interview with Program Staff, California Air Resources Board, April 3, 2017; Interview with Luke Wisniewski, Maryland Department of Environmental Protection, May 25, 2017; Interview with William Lamkin, Massachusetts Department of Environmental Protection, April 27, 2017.

[21] Dallas Burtraw, Karen Palmer, Clayton Munnings, Paige Weber, & Matt Woerman, *Linking by Degrees: Incremental Alignment of Cap-and-Trade Markets* 2 (Resources For The Future, Discussion Paper No. 13-04, 2013). *See also* Ranson & Stavins, *supra* note 10, at 289 ("In principle, by increasing and diversifying the number of buyers and sellers in a carbon market, linkage can provide the dual benefits of increased liquidity and reduced price volatility."); BODANSKY ET AL., *supra* note 7, at 6.

B. Additional benefits of linkage

In addition to economic efficiencies, linkage can also offer administrative and political benefits. It can allow for streamlining of compliance procedures,[22] and provide opportunities for regulators to share best practices with one another.[23] It may also provide increased regulatory consistency and stability for affected sources.[24]

Finally, linkage may be appealing for political reasons. Linking demonstrates cooperation and mutual trust, and builds momentum for other jurisdictions to make their own commitments to reduce GHG emissions.[25] A linkage between RGGI and WCI could indeed send a strong political message. New York and California by themselves represent over 20% of the U.S.'s GDP.[26] Québec and Ontario, which recently launched a cap-and-trade program and plans to link with WCI next year, collectively represent more than half of Canada's GDP.[27] For all these jurisdictions to participate in a joint carbon market would send a powerful signal that the political will exists in large parts of the U.S. and Canada to reduce GHG emissions.

II. Challenges in Linking RGGI with the WCI

Because RGGI and the WCI developed independently, there are some significant differences between the two programs. For example, RGGI only regulates electricity generators,[28] whereas the WCI applies to multiple sectors of its member states' economies.[29] RGGI also only covers carbon dioxide emissions, while the WCI also covers other greenhouse gases. Commentators and field experts suggest that these differences are technical and not especially problematic for a linkage, although aligning them could be beneficial.[30] Some differences, however, present more

[22] Burtraw et al., *supra* note 21, at 3.
[23] *Id.* at 2-3.
[24] *See* BODANSKY ET AL., *supra* note 7, at 6
[25] *See id.*; Burtraw et al., *supra* note 21, at 2; Ranson & Stavins, *supra* note 10, at 290 (all making similar points about linkage supporting global cooperation and providing a sign of momentum for increased participation in similar or compatible systems). *See also* Richard B. Stewart, *States and Cities as Actors in Global Climate Change Regulation: Unitary vs. Plural Architectures*, 50 ARIZ. L. REV. 681, 685-86 (2008) (arguing that state climate change initiatives such as RGGI "have made it appreciably more likely that Congress will enact climate regulation," which would in turn promote U.S. participation in international climate negotiations).
[26] Matthew Speiser, *This Chart Shows How Much Each State Contributes to the US Economy*, Business Insider, Sep. 3, 2015, http://www.businessinsider.com/how-much-each-state-contributes-to-the-us-economy-2015-9.
[27] Statistics Canada, *Gross Domestic Product, Expenditure-Based, by Province and* Territory, Government of Canada, http://www.statcan.gc.ca/tables-tableaux/sum-som/l01/cst01/econ15-eng.htm (Nov. 9, 2016).
[28] Regional Greenhouse Gas Initiative, Revised Model Rule, Part XX: CO_2 Budget Trading Program, § XX-1.4 (2013).
[29] *See* Western Climate Initiative, Design Recommendations for the WCI Regional Cap-and-Trade Program 1 (2008).
[30] Interview with Program Staff, California Air Resources Board, April 19, 2017. *See also* Burtraw et al., *supra* note 21, at 27. If the political will existed to expand the scope of RGGI to cover more sectors of the economy and other GHGs, a linkage with the WCI would be an opportune moment. Interview with Dale Beugin, EcoResources, April 20, 2017. In addition to making the program more environmentally stringent, such an expansion would help the linkage to function more smoothly.

significant challenges and would likely need to be harmonized for a joint market to function effectively.

A. *Stringency of emissions cap*

One key area to prioritize for alignment is the comparability of the two programs' emissions caps.[31] Similar stringency levels are central to successful linkage for two primary reasons. First, if one program is significantly less stringent than the other, concerns about compromising the environmental integrity of the first program may make the linkage politically untenable. Second, because a program's stringency is the main determinant of the price of its allowances, differing stringencies translate into differing prices in the two markets.[32] While the price will harmonize following linkage, if the markets' initial price points are substantially different there will generally be an influx of capital into the market with the less stringent cap and lower prices, while emissions themselves shift to the more stringent market with higher prices.[33] This, too, may pose a political challenge in the more stringent market.

RGGI and the WCI are arguably far apart in this respect. At the most recent WCI auction in August 2017 the clearing price for allowances was $14.75 USD,[34] while at the most recent RGGI auction in September of 2017 the clearing price was $4.35 USD.[35] Thus, a linkage between the WCI and RGGI would likely involve a substantial wealth transfer from the WCI participants to the RGGI participants.[36] This could well mean that a proposed linkage would meet with vocal opposition in California and Québec unless the two programs agreed to harmonize their caps.[37]

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[31] One immediately apparent technical issue associated with harmonizing the RGGI and WCI caps is that RGGI's cap is measured in short tons, while the WCI's is measured in metric tons. This difference should not be an insurmountable obstacle to linkage, but it does mean that the programs would need either to harmonize their unit of measurement or establish an "exchange rate" between short an metric tons to ensure equivalency. Burtraw et al., *supra* note 21, at 27.
[32] *Id.*
[33] *Id.* at 28.
[34] CALIFORNIA AIR RESOURCES BOARD, CALIFORNIA CAP-AND-TRADE PROGRAM SUMMARY OF JOINT AUCTION SETTLEMENT PRICES AND RESULTS 1 (2017), *available at:* https://www.arb.ca.gov/cc/capandtrade/auction/results_summary.pdf.
[35] MARKET MONITOR REPORT FOR AUCTION 37, PREPARED FOR RGGI, INC. BY POTOMAC ECONOMICS 8 (2017), *available at:* http://www.rggi.org/docs/Auctions/37/PR090817_Auction37.pdf.
[36] Burtraw et al., *supra* note 21, at 28.
[37] If, for whatever reason, harmonization with respect to stringency was not politically viable – if, for example, the RGGI states were concerned about diluting the environmental integrity of their program – it might also be possible to establish some kind of exchange rate between the two program's allowances to enable them both to continue trading at their current prices. This would, however, likely require giving up most of the economic efficiencies that would make linkage appealing in the first place. Interview with Dale Beugin, EcoResources, April 20, 2017.

B. Auction reserve price

Another high priority for harmonization is the auction reserve price, the mechanism for preventing the price of allowances from dropping too low.[38] Harmonization on this point is important because, if the two programs have substantially different auction reserve prices, in periods of low demand when allowances were selling near that price the lower reserve price would essentially “seep” into the other market once the two linked.[39] The WCI’s auction reserve price for 2017 is $13.57,[40] while RGGI’s is $2.15.[41] This significant discrepancy between RGGI’s reserve price and the WCI’s could potentially interfere with the effective functioning of the market if it was not harmonized prior to linking.

C. Offset protocols

Another important difference between RGGI and the WCI is their policies regarding the use of offsets for compliance. In the context of cap-and-trade, an offset means a reduction, avoidance, or sequestration of emissions from a source not covered by the program that is accepted for purposes of compliance with the program.[42] If linked programs accept different offset credits, or one accepts substantially more offset credits than the other does, this can create a “free-up” effect, whereby the sudden availability in one jurisdiction of offset credits that were not available prior to linkage effectively frees up room under the emissions cap.[43] This can result in allowance prices falling without any drop in total emissions.[44] Harmonizing offset policies can therefore be important in order to avoid undermining environmental integrity.[45]

RGGI and the WCI have adopted somewhat different offset policies. For example, RGGI allows offset projects relating to reduction in sulfur hexafluoride (SF_6) emissions in the electric power sector, and emissions reductions due to end-use energy efficiency, neither of which are

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[38] This means the minimum acceptable bid price per metric ton for current allowances in the primary auction. *See* Dion, *supra* note 15 (explaining that “[t]he relative stringency of jurisdictions’ caps can . . . be an important driver of how permits flow between them); Fedosov, *supra* note 13, at 211 (“A potential to undermine the environmental integrity of linked systems normally emerges from a situation when the emissions cap in one of the systems is lax . . . .).

[39] Interview with Program Staff, California Air Resources Board, April 19, 2017. *See also* Fedosov, *supra* note 13, at 211 (explaining that price management mechanisms are particularly prone to “automatically propagate” into a linked system).

[40] 2017 Annual Auction Reserve Price Notice, California Cap-and-Trade Program and Québec Cap-and-Trade System (Dec. 1, 2016).

[41] Auction Notice for CO2 Allowance Auction 36 on June 7, 2017, 2 (April 11, 2017).

[42] Center for Climate and Energy Solutions, Congressional Policy Brief Series, *Greenhouse Gas Offsets in a Domestic Cap-and-Trade Program* 2 (2008), *available at:* https://www.c2es.org/publications/greenhouse-gas-offsets-domestic-cap-trade-program.

[43] Burtraw et al., *supra* note 21, at 28-29.

[44] *See* Center for Resource Solutions, *Renewable Energy Certificates, Carbon Offsets and Carbon Claims, Best Practices and Frequently Asked Questions* 6 (April 9, 2012), *available at*: https://resource-solutions.org/wp-content/uploads/2015/08/RECsOffsetsQA.pdf.

[45] Interview with Program Staff, California Air Resources Board, April 3, 2017 (indicating that offset protocols were something the two programs focused on closely to avoid political backlash).

recognized by the WCI partners. Conversely, California and Québec recognize offsets from capture and destruction of methane relating to mining, and from destruction of ozone depleting substances, neither of which RGGI recognizes. The two programs also differ in the percentage of a covered entity's compliance obligation that can be met using offsets. California and Québec both allow up to 8%, while RGGI only allows up to 3.3%.[46]

This discrepancy could give rise to concerns in partner jurisdictions that linkage might dilute the environmental integrity of the program. It would therefore appear advantageous for RGGI and the WCI to bring their offset policies into closer alignment before linking.

III. Legal Barriers to Cross-Border Linkage

As the foregoing section illustrates, there are a variety of program elements that RGGI and the WCI would need to harmonize prior to linkage to ensure that the new joint market was successful and that both programs realized the hoped-for benefits of the linkage. To achieve the necessary alignment, the two programs would need to engage in extensive dialogue and close collaboration across an international border. As will be detailed below, however, the more involved the coordination with foreign jurisdictions, and the more binding the agreement, the greater the risk of conflict with U.S. constitutional law. The following sections will examine this inherent tension and assess the strength of potential challenges based on the three constitutional arguments most likely to be invoked by linkage opponents in challenging a RGGI-WCI linking agreement: the dormant foreign affairs preemption doctrine, the dormant Commerce Clause, and the Compacts Clause. These constitutional principles could pose material challenges to the proposed linkage agreement, and policymakers in RGGI and the WCI should give careful consideration to their implications in designing any linkage.

Notably, although the WCI itself crosses an international border, it has not yet been subject to any legal challenges based on its international character,[47] and some commentators examining this issue have concluded that a linkage that crosses international borders in this way would likely survive constitutional challenge.[48] However, those conclusions depend on assuming

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[46] Regional Greenhouse Gas Initiative Offset Categories, http://www.rggi.org/market/offsets/categories (last visited Aug. 1, 2017); California Air Resources Board Compliance Offset Program, https://www.arb.ca.gov/cc/capandtrade/offsets/offsets.htm; Gouvernement du Québec, Carbon Market Offset Credits, http://www.mddelcc.gouv.qc.ca/changements/carbone/credits-compensatoires/index-en.htm#current-offset. *See also* BRIAN M. JONES, CHRISTOPHER VAN ATTEN & KALEY BANGSTON, M.J. BRADLEY & ASSOC., A PIONEERING APPROACH TO CARBON MARKETS: HOW THE NORTHEAST STATES REDEFINED CAP AND TRADE FOR THE BENEFIT OF CONSUMERS, 8-9 (2017). Despite the benefits of harmonization on this point, it bears noting that there are commonalities and differences among all three programs' offset policies, and California and Québec's protocols are not perfectly harmonized; CALIFORNIA AIR RESOURCES BOARD, LINKAGE READINESS REPORT 14 (Nov. 2013). ("California and Québec have committed to continue collaborating on the development of the offset components of their programs, including offset protocols.").
[47] There have been legal challenges on other grounds not related to the international character of the linkage.
[48] *See, e.g.*, Note, *Foreign Affairs Preemption and State Regulation of Greenhouse Gas Emissions*, 119 HARV. L. REV. 1877, 1877 (2006); Nancy Shurtz, *Carbon Pricing Initiatives in Western North America: Blueprint for Global*

debatable positions in several particularly nebulous areas of constitutional law.[49] Moreover, a RGGI-WCI linkage would involve both California and New York, which collectively represent a much more significant portion of the U.S. economy than has ever been covered by a single cap-and-trade market before.[50] In addition, some of the states participating in RGGI are considerably more politically conservative than California, the only U.S. state currently participating in the WCI. Being suddenly associated with California's program could potentially generate strong opposition in some of those states.[51] For these reasons, it seems plausible that a RGGI-WCI linking agreement could encounter substantially more political resistance — including a more robust legal challenge — than the California-Québec linkage encountered. A fresh examination of these issues is therefore warranted.

Ultimately, this analysis concludes that, although would-be challengers of the proposed linkage could present colorable constitutional arguments against it, a successful challenge would generally require a court willing to push the relevant constitutional doctrines past their traditional limits. Moreover, there are some specific steps RGGI and the WCI could take in designing a linkage that would help to keep it from straying too close to the edges of constitutionality, and that should reduce the risk of successful legal challenge to acceptable levels.

A. *Dormant foreign affairs preemption*

One significant potential obstacle to a cross-border linkage between RGGI and WCI is the dormant foreign affairs preemption doctrine. The jurisprudence on foreign affairs preemption is so sparse and vague that it has been described as "a murky undersea world."[52] Nonetheless, in *American Insurance Association v. Garamendi*, Justice Souter offered some guidance, suggesting that courts should analyze foreign affairs preemption using a two-step analysis.[53]

Climate Change Policy, 7 SAN DIEGO J. CLIMATE & ENERGY L. 61, 125 (2015-2016); David R. Hodas, *State Law Responses to Global Warming: Is It Constitutional to Think Globally and Act Locally?*, 21 PACE ENVTL. L. REV. 53, 79 (2003); Jeremy Lawrence, *Where Federalism and Globalization Intersect: the Western Climate Initiative as a Model for Cross-Border Collaboration Among States and Provinces*, 38 ENVTL. L. REP. NEWS & ANALYSIS 10796, 10797 (2008); Katie Maxwell, *Multi-State Environmental Agreements: Constitutional Violations or Legitimate State Coordination?*, 15 PENN ST. ENVTL. L. REV. 355, 372 (2007).

[49] Douglas A. Kysar & Bernadette A. Meyler, *Like a Nation State*, 55 U.C.L.A. L. REV. 1621, 1624-25 (2008); *see also* Wright, *supra* note 13, at 13.

[50] Bureau of Economic Analysis, U.S. Dep't of Commerce News Release Feb. 2, 2018, https://www.bea.gov/newsreleases/regional/gdp_state/2017/pdf/qgsp0217.pdf

[51] A brief aside on standing: regulated sources of GHGs, affected utilities, or NGOs focused on electricity ratepayers are all examples of entities that could conceivably seek to challenge the proposed agreement. Would-be challengers who wished to bring claims based on alleged interference with the federal government's authority in the realm of foreign affairs or foreign commerce would presumably need to show that their harm stemmed from the agreement's international character in order to establish standing. This could be a difficult showing to make. Even if entities within the regulated states did not have standing to bring such claims, the federal government likely would.

[52] Hannah Chang, *Foreign Affairs Federalism: The Legality of California's Link with the European Union Emissions Trading Scheme*, 37 ENVTL. L. REP. NEWS & ANALYSIS 10771, 10771 (2007) (citing Edward T. Swaine, The Undersea World of Foreign Relations Federalism, 2 CHI. J. INT'L L. 337 (2001)).

[53] 539 U.S. 396, 419 n.11 (2003).

First, they should ask whether the state action at issue is in a traditional area of state responsibility. If it is not, it will be preempted even if there is no demonstrated conflict with federal policy.[54] If, however, the state is acting within a traditional area of state responsibility, then the state law will only be preempted if there is "a conflict, of a clarity or substantiality that would vary with the . . . importance of the state concern asserted."[55]

It is not entirely clear whether courts would consider linking carbon markets to fit within an area of traditional state responsibility. Environmental protection is often considered to be within states' traditional purview.[56] By entering into the linking agreement, the participating states would arguably be allowing the cap-and-trade market to operate more cost-effectively and reducing the overall cost of reducing GHG emissions, ultimately enabling greater emissions reductions. This in turn would mitigate the environmental and public health impacts of climate change in the participating states. Indeed, the Supreme Court has specifically acknowledged that GHG regulation is a state interest.[57] The states could also point to the reduction in co-pollutants emitted along with GHGs. Moreover, climate change policy inevitably affects a variety of other arenas of unquestioned "traditional state authority," including states' regulation of their economies, of land use decisions, and of retail electricity distribution.[58]

There are, however, a number of counterarguments that linkage opponents could advance. First, opponents could argue, as some scholars have, that linkage in and of itself may not lead to overall reductions in GHG emissions.[59] In addition, as discussed above, the impacts of linkage are likely to be unevenly distributed, and some jurisdictions may well experience an increase in emissions. With respect to co-pollutants, then, linkage opponents could argue that some states participating in the proposed linkage were exposing their environments and the health of their citizens to greater potential harm, rather than protecting them.[60] Moreover, opponents could

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[54] *Id.*
[55] *Id.*
[56] *See, e.g. Hughes v. Alexandria Scrap Corp.* 426 U.S. 794 (1976) (emphasizing that actions by the state of Maryland to enhance its environment represented a legitimate state purpose); *see also* Kysar & Meyler, *supra* note 48, at 1649; James R. May, *of Happy Incidents, Climate, Federalism, and Preemption*, Widener Law School Legal Studies Research Paper Series No. 08-75, Vol. 17:2 465, 470 (Spring 2008) (emphasizing that "[c]hief among sovereign rights of states, of course, is to protect public health, welfare and property," and that it is well-accepted that climate change will pose special problems for states on all these fronts).
[57] *Massachusetts v. Envtl. Protection Agency*, 549 U.S. 497, 520-21 (2007).
[58] Kysar & Meyler, *supra* note 47, at 1649.
[59] *See, e.g.,* Judson Jaffe, Matthew Ranson & Robert N. Stavins, *Linking Tradable Permit Systems: A Key Element of Emerging International Climate Policy Architecture*, 36 ECOLOGY L.Q. 789, 800 (2009) (arguing that linking can, under some circumstances, increase global emissions and increase leakage).
[60] Importantly, however, in the particular case of the proposed RGGI-WCI linkage the RGGI states would be unlikely to experience such an increase in emissions. This is because RGGI's allowance prices are significantly lower than the WCIs, and there would therefore likely be upward pressure on the price of RGGI allowances following a linkage, as those in WCI jurisdictions sought to purchase the comparatively cheap allowances. As a result, one would expect to see fewer emissions in the RGGI states as emissions abatement became relatively less expensive compared to the cost of allowances.

point out that local regulation of GHG emissions does not necessarily translate directly into mitigation of the local consequences of climate change.

It is, thus, difficult to predict whether a court would find that the RGGI states and California were operating in an area of traditional state authority. Certainly, though, given the Court's previous recognition of states' interest in regulating GHGs, and the fact that states have been participating in carbon markets for years without courts striking them down as outside the states' authority, proponents of the linkage could mount a strong argument on this point.

Were a court to find that such a linking agreement was within an area of the states' traditional authority, thus requiring an actual conflict with federal policy for a finding of preemption, the states could contend that the federal government has not established any discernable foreign policy on climate change with which their actions could conflict. The current U.S. presidential administration has taken various actions signaling that climate change is no longer a priority of the U.S. government,[61] including announcing that the U.S. will withdraw from the 2015 Paris climate accord.[62] However, most of those actions have taken the form of Executive Orders that simply call for a review of various environmental programs and regulations, and a formal withdrawal from the Paris agreement will likely take years to accomplish. The states could therefore reasonably argue that federal government still does not have any coherent, affirmative foreign "policy" on climate change with which a RGGI-WCI linking agreement could potentially conflict.

One of the strongest counter-arguments the Trump Administration could potentially advance on this issue would take the form of what is known as the "bargaining chip" theory. Specifically, the Administration could assert that it planned to continue negotiations on an international climate change regime, and that, by entering into their own agreements with foreign jurisdictions, the states were reducing the Administration's leverage in those future negotiations. This type of argument has persuaded the Supreme Court in the past.[63] Notably, though, in these

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[61] President Trump signed an Executive Order on March 28, 2017 rescinding various actions taken by the Obama Administration intended to combat climate change and calling on the EPA Administrator to review the Clean Power Plan. That Order also lifted the moratorium on coal leasing on federal land, and ordering a review of rules regulating emissions from the oil and natural gas sector and hydraulic fracturing on federal lands. The Trump Administration has also released a proposed budget that "would eliminate climate change research and prevention programs across the federal government . . . ." Coral Davenport, *Trump Lays Plans to Reverse Obama Climate Change Legacy*, N.Y. TIMES, March 21, 2017, *available at:* https://www.nytimes.com/2017/03/21/climate/trump-climate-change.html. As Mick Mulvaney, the director of the White House Office of Management and Budget, said in explaining the Administration's proposed budget, "As to climate change, I think the President was fairly straightforward: We're not spending money on that anymore." *Id.*

[62] Michael D. Shear, *Trump Will Withdraw U.S. from Paris Climate Agreement*, N.Y. Times, June 1, 2017, available at https://www.nytimes.com/2017/06/01/climate/trump-paris-climate-agreement.html

[63] *See, e.g.*, *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 377 (2000) (finding that a Massachusetts law was preempted because it reduced the President's economic and diplomatic leverage in working with the world's nations to develop a comprehensive strategy with respect to Burma); *Garamendi*, 539 U.S. at 424 (state statute was

cases the federal government has generally had a relevant, pre-existing policy, clearly defined by an executive agreement. For the Trump Administration to advance a "bargaining chip"-type argument against the proposed RGGI-WCI linkage without any such explicit policy in place would be a fairly aggressive stance. While the Administration could certainly make a plausible "bargaining chip" argument, for a court to accept such an argument would be to push the limits of the conflict preemption doctrine even past where *Garamendi* took it.[64]

In sum, the foreign affairs preemption clause could present a significant challenge to a RGGI-WCI linkage, with the outcome dependent on how courts were inclined to characterize various facts in a multi-factored analysis. Overall, though, there would be a strong basis for arguing that by entering into a linking agreement with Canadian carbon markets the participating states were acting well within their authority to regulate GHG's.

B. Dormant foreign Commerce Clause

The dormant foreign Commerce clause could also potentially pose a constitutional obstacle to a RGGI-WCI linkage. However, as with the dormant foreign affairs analysis, proponents of a linkage have some strong arguments on their side that could be marshaled to help protect the agreement from attack on these grounds.

The dormant foreign Commerce Class is an extension of the more-familiar domestic Commerce Clause doctrine, which prevents states from burdening or discriminating against interstate commerce, even where the federal government has not regulated it.[65] The central rationale for this rule "is to prohibit state or municipal laws whose object is local economic protectionism . . . ."[66] The Supreme Court has indicated that its dormant foreign Commerce Clause inquiry contains all the same elements as the parallel domestic inquiry and, in addition, considers the special need for the federal government to speak with "one voice."[67]

The Court's dormant foreign Commerce Clause cases examine whether there is an existent federal policy relevant to the state action at issue, and thus a potential threat to the federal government's ability to "speak with one voice."[68] It then examines whether there is a discernable

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preempted because "if the California law is enforceable, the President has less to offer and less economic and diplomatic leverage as a consequence").

[64] Shelly Welton, *State Dynamism, Federal Constraints: Possible Constitutional Hurdles to Cross-Border Cap-and-Trade*, 27 NATURAL RES. & ENV'T 36, 38 (2012).

[65] *See Barclays Bank PLC v. Franchise Tax Bd.*, 512 U.S. 298, 310 (1994); *Wardair Canada, Inc. v. Florida Dep't of Revenue*, 477 U.S. 1, 7 (1986).

[66] *C & A Carbone, Inc. v. Town of Clarkstown. N.Y.*, 511 U.S. 383, 390 (1994).

[67] *See Wardair*, 477 U.S. at 8 (quoting *Japan Line, Ltd. v. Los Angeles County*, 441 U.S. 434, 451 (1979); Kysar & Meyler, *supra* note 47, at 1654-55.

[68] *See Wardair*, 477 U.S. at 9-10 (finding that there was no dormant Foreign Commerce Clause violation because the appellant had failed to present evidence demonstrating any federal policy on which the federal government had

intent on the part of Congress to preempt (or, conversely, to assent to) the state behavior at issue.[69] Finally, even in the absence of any specific federal action or any direct conflict with federal policy, the Court asks whether the state statute at issue encroaches on what should be federal authority "to speak for the United States among the world's nations."[70] In other words, a state action may be invalid simply because it implicates foreign policy issues that should properly be left to the Federal Government, even where the federal government has taken no action.[71]

The dormant foreign Commerce Clause jurisprudence is particularly concerned with the dangers of a state becoming an independent *economic* actor vis-à-vis other nations.[72] This may present a difficulty for a linkage between RGGI and the WCI; for such a linkage to yield the hoped-for economic efficiencies without undermining the environmental integrity of either program, the RGGI states would arguably need to behave as an independent economic entity with respect Canadian jurisdictions in myriad ways. They would need to negotiate about which sectors of their respective economies to regulate and to what degree, about price ceilings and floors, about the development of offset programs, and various other related issues. As other commentators have pointed out, the more a state attempts to engage in negotiations with a foreign jurisdiction in order to harmonize discrepancies between carbon markets, the more likely it is to stray into the arena of foreign policy reserved for the federal government.[73]

Notably, because the dormant foreign Commerce Clause analysis also includes all the factors that make up the domestic dormant Commerce Clause analysis, the traditional dormant commerce clause considerations, including whether a state law discriminates against out-of-state interests and the severity of the burden it imposes on interstate commerce, could also be used to challenge the proposed linking agreement.[74] This could have implications for the design of any provisions in the linking agreement intended to address leakage. For example, the parties might wish to include provisions in the linking agreement or in the implementing statutes that attempt to prevent leakage by limiting or prohibiting the importation of electricity from adjacent

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spoken with "one voice," and also because Congress had not remained silent but had affirmatively demonstrated its assent to the kind of state tax that was at issue).

[69] *Id. See also Barclays Bank PLC*, 512 U.S. at 324-25 (finding no dormant Foreign Commerce Clause violation because it could discern no "specific indications of congressional intent" to preempt the state action being challenged, and because it found that "Congress implicitly has *permitted* the States" to engage in the action at issue).

[70] *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 380 (2000).

[71] *Container Corp. of Am. v. Franchise Tax Bd.*, 463 U.S. 159, 194 (1983).

[72] *Wardair*, 477 U.S. at 12 ("For the dormant Commerce Clause, in both its interstate and foreign incarnations, only operates where the Federal Government has not spoken to ensure that the essential attributes of nationhood will not be jeopardized by States acting as independent economic actors.").

[73] *See, e.g.*, Erwin Chemerinsky et al., *California, Climate Change, and the Constitution*, 25 ENVTL. FORUM 50, 61 (Envtl. L. Inst.) (2007); Kysar & Meyler, *supra* note 47, at 1653-54.

[74] Daniel K. Lee & Timothy P. Duane, *Putting the Dormant Commerce Clause Back to Sleep: Adapting the Doctrine to Support Renewable Portfolio Standards*, 43 ENVTL L. 295, 300-301 (2013).

jurisdictions that have not put any price on GHG emissions.[75] The stronger these provisions, the greater the risk that would-be challengers could successfully argue that the provisions were protectionist and placed an undue burden on interstate commerce.

Linkage opponents could thus potentially present a colorable argument based on the dormant foreign Commerce Clause. However, many of the same responses referenced above in the foreign affairs preemption context would undercut their claims. For instance, proponents of the linkage could argue that there is no coherent federal policy on climate change for the states' actions to interfere with, that Congress has never attempted to preempt states from regulating GHGs using cap-and-trade markets, and that indeed states have been doing so for many years. Linkage proponents could also use the argument outlined above in the foreign affairs context that, by regulating GHGs in their territories, states are simply exercising traditional sovereignty over their local environments and economies and are not intruding into foreign policy. Moreover, the proposed linking agreement would not be animated by any intent to burden foreign commerce or institute protectionist policies, and any extraterritorial economic effects would be merely incidental. These are factors that incline courts towards leniency in the traditional dormant commerce clause jurisprudence,[76] and they would bolster an argument that the linkage did not violate the dormant Foreign Commerce Clause.

C. Compact Clause

Finally, the Compact Clause could present a barrier to a linking agreement between the WCI and RGGI if the relevant agreement were not designed with care.[77] The Compact Clause prohibits states from entering into "any Agreement or Compact," either with other states or with foreign powers, without Congressional consent.[78] The Supreme Court has articulated several "classic indicia" of such a compact, including: reciprocal limitations on state action; cooperation among legislators or other officials in the participating jurisdictions in developing the agreement; the establishment of a joint organization or body to regulate implementation of the agreement; conditioning of the agreement's implementing statutes in one jurisdiction on action by other

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[75] The proposed linking agreement could raise some new concerns about leakage that the WCI and RGGI have not already individually addressed. For example, Québec, geographically adjacent to the RGGI states but not previously participating in a joint carbon market with them, might have new concerns about RGGI's policies for dealing with leakage.

[76] Thomas Alcorn, *The Constitutionality of California's Cap-and-trade Program and Recommendations for Design of Future State Programs*, 3 MICH. J. ENVTL. & ADMIN. L. 87,132 (2013).

[77] Linkage opponents could also potentially raise claims under the Treaty Clause of Art. I, § 10, cl. 1, which imposes a blanket ban on states entering into treaties. While the Treaty Clause contains the strongest language of all the relevant Constitutional provisions, jurisprudence interpreting this provision is not well developed. Courts have generally tended to invoke the political question doctrine when executive authority with respect to treaties is at issue. *See e.g.*, *Goldwater v. Carter,* 444 U.S. 996, (1979); *Terlinden v. Ames,* 184 U.S. 270 (1902); *Wang v. Masaitis* 416 F.3d 992, 1002-03 (9th Cir. 2005); *Made in the USA Found. v. United States*, 242 F.3d 1300, 1302 (11th Cir. 2001).

[78] U.S. CONST. art I, § 10, cl 3.

participating jurisdictions; and the inability of each participant to modify or repeal its implementing statute unilaterally.[79]

No court has ruled on whether the WCI or RGGI themselves constitute a compact, but some litigants and commentators have argued that they do,[80] suggesting that a RGGI-WCI linkage could face Compact Clause claims. The strength of such claims would depend on how the agreement was structured. While it would be difficult to establish the envisioned linkage without incorporating some of the indicia of a compact (significant degrees of reciprocity and cooperation would likely be impossible to avoid, for example), the parties could design around several other indicia. For example, the parties need not create a joint regulatory organization or body to oversee administration of the agreement.[81] Similarly, each party's implementing statutes need not be conditioned on the action of any other jurisdiction. In addition, each participant could be allowed to modify or withdraw from the agreement unilaterally. While these design choices would help to avoid a Compact Clause challenge, policy makers would have to weigh that benefit against the likely negative impacts on the stability and effective operation of the market.

Critically, even if a court were to find that the proposed linking agreement constituted a compact, the Supreme Court has long held that not all compacts require Congressional approval.[82] Rather, approval is only required when a compact increases state power at the expense of federal supremacy.[83] Because the inquiry in the Court's jurisprudence on this issue substantially parallels the analyses described above with respect to the foreign affairs power and the dormant foreign Commerce Clause, this Article will not examine in detail the strengths and weaknesses of a potential argument that a linking agreement would require congressional approval. As with the foreign affairs doctrine and the dormant foreign Commerce Clause, whether such an argument could prevail would largely depend on whether the court considered the linking agreement to be an instance of states regulating local environmental and economic

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[79] *North East Bancorp, Inc. v. Bd. of Gov. of the Fed. Reserve System*, 472 U.S. 159, 175 (1985); see also Todd Jefferson Hartley, *Handshake Deals: The Future of Informal State Agreements and the Interstate Compacts Clause*, 22 U. FLA. J. L. & PUB. POL'Y 91, 105 (2011).

[80] *See Thrun v. Cuomo*, 112 A.D.3d 1038 (N.Y. App. Div. 2013). *See also* Hartley, *supra* note 77, at 115.

[81] It is true that both RGGI and the WCI currently have such organizations, RGGI Inc. and WCI Inc. respectively. However, it may well be possible for these two existing organizations to regulate the linked market effectively without the need to establish a new overarching regulatory body.

[82] *Virginia v. Tennessee*, 148 U.S. 503, 518 (1893) ("There are many matters upon which different States may agree that can in no respect concern the United States.").

[83] *See, e.g.*, *U.S. Steel Corp.*, 434 U.S. at 471 (reaffirming Justice Field's rule from *Virginia v. Tennessee* that the Compact Clause only applies to agreements "tending to the increase of political power in the States, which may encroach upon or interfere with the just supremacy of the United States," and finding that this ___); *see also* Michael S. Smith, *Murky Precedent Meets Hazy Air: the Compact Clause and the Regional Greenhouse Gas Initiative* 34 B.C. ENVTL AFF. L. REV. 387, 389

issues,[84] or an instance of states attempting to establish their own foreign policy on climate change.

Finally, even if the proposed linking agreement were found to be a compact requiring congressional approval, it is not a foregone conclusion that it has not received such approval. The Court's Compact Clause cases have long held that congressional consent may be implicitly given.[85] Further, the Court has acknowledged arguments in the legal literature that congressional consent should be inferred from congressional silence in the manner of a statute of limitations.[86] Interstate agreements regulating the emission of GHGs have existed in the U.S. for years, and in particular, the WCI linking agreement has been operating across an international boundary for years without any congressional response. There is, therefore, a viable argument to be made that the "statute of limitations" has effectively run, and that by failing to take any action to prevent this kind of agreement from operating Congress has implicitly given its consent.

Compared to the other relevant constitutional provisions, a Compact Clause challenge seems relatively easy for the states to overcome; even if linkage opponents could convince a court that the proposed linking agreement constituted a compact, they would still have substantial hurdles to overcome in demonstrating that congressional approval was required and that such approval had not already been tacitly given.

IV. Solutions

In order to link the WCI and RGGI successfully, the parties would need to strike "the difficult balance of staying clear of constitutional constraints while maintaining a stable carbon market linkage that has integrity over the long term."[87] Are there steps that the WCI and RGGI partners could take in developing a joint market that could make it more likely to survive potential constitutional challenges?

Chemerinsky et al. have examined this issue in the context solely of California's cap-and-trade program, and have discerned several relevant principles. First, the proposed linkage would be less vulnerable to claims under the dormant foreign affairs preemption doctrine and the dormant Foreign Commerce Clause if it emphasized that the program was intended to address

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[84] *U.S. Steel Corp. v. Multistate Tax Comm'n*, 434 U.S. 452, 468 (quoting Justice Field in *Virginia v. Tennessee*, 148 U.S. 503, 517-18 (1893), who cited interstate border issues and an agreement between states to drain a malarial district on their mutual border as other examples of interstate compacts that would not require congressional approval because they did impact the interests of the United States).

[85] *Virginia v. Tennessee*, 148 U.S. at 521-22 ("The approval by Congress of the compact entered into between the States upon their ratification of the action of their commissioners is fairly implied from its subsequent legislation and proceedings).

[86] *U.S. Steel Corp.*, 434 U.S. at 496 n.8. ("A statute-of-limitations type of approach to the necessary duration of congressional silence before consent may be inferred has been suggested by one commentator.") (citing Robert M. White, *The Constitutionality of the Multistate Tax Compact*, 29 VAND. L. REV. 453, 460 (1976)).

[87] David Wright, *supra* note 13, at 10494.

local harms, and stressed the benefits that would accrue specifically to the participating states.[88] Grounding the program in legitimate state concerns about the environmental and health impacts of GHG emissions and their co-pollutants, about land use, regulation of state electricity markets, and other local issues would strengthen the argument that the program falls within the realm of traditional state authority. In particular, given that recent Supreme Court environmental cases have tended to be 5-4 decisions, the states would be well advised to provide a basis for their action beyond environmental concerns.[89] That said, Chemerinsky et al. point out that presenting hollow reasons for the action will make it difficult for states to present an adequate administrative record justifying it; they should ensure that they can point to a clear relationship between the decision to link and harm to their citizens they claim it will prevent.[90] The states should also avoid framing the agreement as a way of correcting for the federal government's failure to act. The more the states highlight the inadequacies of the federal approach, the more they suggest a conflict between their actions and federal policy, and the easier an argument that they have strayed into the realm of foreign affairs and violated federal supremacy.[91]

In addition, the likelihood of a successful dormant Commerce Clause challenge would be greatly reduced if the states were careful to avoid any appearance that they were motivated by a desire to punish states that did not participate in the program.[92] This would be particularly relevant with respect to any attempt the linking agreement might make to prevent leakage. If the states agreed to limit leakage by imposing a fee on electricity generated in non-participating jurisdictions, for example, or otherwise treating electricity generated outside the borders of participating states differently, a dormant Commerce Clause challenge would likely be successful.[93] The more clearly the states can place the regulatory burden of the program within their own borders the less vulnerable they will be to a claim that they were violating the dormant commerce clause.[94]

There are also several steps policy makers could take to mitigate the likelihood of a successful challenge under the Compact Clause. First, as is the case with both the WCI and RGGI, the joint market could be implemented through reciprocal legislation passed by each participating state. This would allow the two programs to harmonize their policies with respect to issues such as cap stringency, price collars, monitoring and tracking systems, and offset programs – the areas identified above as being among the most important to align – without making the agreement so binding that it could be considered a compact or a treaty.[95]

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[88] Chemerinsky et al., *supra* note 71, at 56.
[89] *Id.* at 55.
[90] *Id.*
[91] *Id.* at 60.
[92] *Id.* at 56.
[93] *Id.* at 55.
[94] *Id.* at 55-56.
[95] Wright, *supra* note 13, at 10494.

Another area to focus on is the process for participants to withdraw from the agreement. Policymakers would need to strike a delicate balance here. If it were too easy for a party to withdraw from the agreement, there would be a risk of the market disintegrating with little notice, and it could struggle to achieve the stability necessary for efficient functioning. If, on the other hand, it were too difficult for parties to withdraw, the agreement could be so binding that it arguably interfered with the federal government's ability to bargain with other foreign powers on climate change issues.[96] The proposed linkage agreement would do best to seek a middle ground. For example, it could adopt a provision allowing any party to withdraw with twelve months' notice. In this way, the proposed agreement could allow parties to withdraw, while ensuring that the market will not simply dissolve abruptly.

Finally, the proposed linking agreement could simply state that it is not binding. It could explain that it does not limit each party's right to modify or repeal its own regulations put in place for purposes of the program, nor does it limit the U.S. sovereign rights.[97] Similarly, in an approach that both RGGI and the WCI have taken, it could include language expressly indicating openness to other jurisdictions linking in the future. Such language would help to diffuse an argument that the agreement impermissibly intruded on the federal government's sovereignty or limited its ability to bargain with foreign governments.[98]

CONCLUSION

If well-constructed, a formal linkage between RGGI and the WCI could offer numerous economic, political, and administrative benefits to both markets. The two programs would need to work together closely ahead of linkage to ensure that the markets were sufficiently aligned to allow them to function effectively together. Officials in both jurisdictions should pay particular attention to aligning the programs with respect to their overall stringency, their price floors, their systems for monitoring compliance and tracking allowances, and the offsets they accept.

In creating a joint market, both RGGI and the WCI would need to weigh the efficiency benefits of harmonizing their programs against the potential legal risks that harmonization could bring. The more closely the two programs coordinated, and the more binding their linking agreement, the more susceptible they would be to claims that the agreement encroached on federal authority under the foreign affairs power, the dormant Foreign Commerce Clause, and the Compacts Clause. These constitutional provisions could certainly pose very real challenges for a linkage between RGGI and the WCI, and policymakers in both jurisdictions would do well to consider their implications carefully. That said, it seems that a successful challenge under any one of these provisions would require not only fairly aggressive stances on the part of the federal

[96] *Id.* at 10491.
[97] *Id.*
[98] *Id.* at 10494.

government, but courts that were willing to push the limits of these constitutional doctrines. In addition, there are a variety of specific steps the states could take in designing the linking agreement that would reduce the likelihood of a successful constitutional challenge. On the whole, it seems quite possible for the parties to design a linking agreement that allowed them to receive the benefits of linkage while simultaneously mitigating the risk of legal challenge to tolerable levels.