COMMENTARY

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I bring greetings from a place that many of the participants in this conference apparently think of as the dark side—Detroit, home of the American automobile industry. As I listened to the speakers at the Conference, I was reminded of an expression from a Peanuts cartoon in which Linus exclaimed, "I love mankind . . . it's people I can't stand!"[1] There seems to be a consistent view that people love their cars, trucks, and SUVs—it's the auto makers they can't stand. So, in this Commentary, I will briefly inject into this discussion a level of practicality in the hopes that the well-meaning participants in this conference might get a better understanding of the perspective and reality that auto makers face.

Many of the presenters defended increased state regulation of greenhouse gases in addition to increasingly stringent federal fuel economy standards as a contemporary example of Louis Brandeis' observation that "[i]t is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."[2] One need not disagree with this sentiment to note that, sometimes in laboratories, mistakes are made, experiments go wrong, or unintended consequences result. And even when the experiments go well, we should as a society take the knowledge we have gained and apply it more broadly, rather than acting as if we have learned nothing from our efforts and continuing to experiment.

The Brandeis metaphor, therefore, while a useful starting point, takes us only so far. We must not conclude that a collection of laboratory experiments in the states is the right policy just because there is a catchy metaphor that we can use

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1. CHARLES M. SCHULZ, THE COMPLETE PEANUTS, 1959–1960, at 136 (2006).

2. New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

to declare that all is well. Indeed, that way of thinking, while certainly part of our constitutional fabric, is, if taken too far, also in serious tension with the very existence of our Federal Constitution and government. As our founding generation discovered when it tried to operate under the Articles of Confederation, a collection of uncoordinated "laboratories" can be a recipe for chaos and inefficiency.

From my perspective, the potential threat of state greenhouse gas regulations has helped to spur a serious national debate about the policy issues surrounding automotive emissions, and in this way the states have already served as laboratories of democracy. I commend California for being particularly effective in raising the public consciousness on an issue that its Governor, its government, and its citizens obviously care deeply about.

The question remains, however, whether it is ultimately best to make greenhouse gas policy at the state level, or to have a policy that is developed and implemented on a nationwide basis. The Conference presenters seem to share the view that having a national solution is ideal, if only Congress would act. What everyone fails to acknowledge, or at least has not expressly stated, is that Congress *has* acted. Congress acted more than three decades ago with respect to fuel economy and emissions from automobiles when it enacted the Corporate Average Fuel Economy (CAFE) standards in 1975.[3] At that time, Congress also decided that the United States does, indeed, need a national approach. From the start, the Energy Policy and Conservation Act contained an express preemption provision prohibiting states or political subdivisions of states from adopting or enforcing a law or regulation "related to fuel economy standards."[4] This is a clear and broad express preemption clause of the type that the Supreme Court recently interpreted to mean exactly what it says—the term "related to" is fairly sweeping.[5]

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3. Energy Policy and Conservation Act, Pub. L. No. 94-163, 89 Stat. 871 (1975) (current version codified as amended at 49 U.S.C. § 32901 et seq. (2006)).

4. 49 U.S.C. § 32919(a) (2008) ("When an average federal fuel economy standard prescribed under this chapter is in effect, a State . . . may not adopt or enforce a law or regulation related to fuel economy standards or average fuel economy standards for automobiles covered by an average fuel economy standard under this chapter.").

5. *See* Rowe v. N.H. Motor Transp. Ass'n., 128 S. Ct. 989, 993 (2008) (holding that a federal statute prohibiting state laws "related to" motor carrier prices, routes, or service preempts a Maine law regulating the delivery services that tobacco retailers may use); Riegel v. Medtronic, Inc., 128 S. Ct. 999, 1001 (2008) (holding that a federal statute prohibiting any state requirement which "relates to" the safety or effectiveness of medical devices preempts common-law claims challenging that safety or effectiveness of a medical device approved by the Federal Food and Drug Administration). Both *Rowe* and *Riegel* cite *Morales v. Trans World Airlines, Inc.*, which addressed the meaning of phrases such as "related to" in the context of express preemption clauses in federal statutes:

> For purposes of the present case, the key phrase, obviously, is 'relating to.' The ordinary meaning of these words is a broad one—'to stand in some relation; to have bearing or concern; to pertain; refer; to bring into association or connection with,'—and the words thus express a broad pre-emptive purpose.

504 U.S. 374, 383 (1992) (citation omitted).

California and other states that have enacted greenhouse gas regulations defend their regulations in the face of this expansive preemption clause by contending that their regulations are not fuel economy-related. This position is not sustainable. It is a scientific fact, grounded in the nature of combustion, that the only way to decrease greenhouse gases from the tailpipe is to increase fuel economy.[6]

So, the problem discussed by the speakers at this Conference, and in these papers, is one that has long been addressed in a federal law with a broad express preemption provision. We therefore have the national approach that the speakers uniformly suggest is needed.

Unfortunately, the approach of setting fleet average fuel economy standards is a failure on its own terms. While the automobile manufacturers have indeed increased fuel economy dramatically over the past three decades, CAFE has neither reduced emissions nor decreased our dependence on foreign oil because, in the end, it does not affect individual behavior. In fact, during the time that CAFE has been in force, vehicle miles traveled have increased dramatically,[7] and the percentage of oil that is imported from other countries has also increased dramatically.[8] So, while our nation is collectively increasing fuel economy, we are not affecting the behavior that we actually claim to want to affect—reducing fuel

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6. The National Highway Traffic Safety Administration (NHTSA) addressed the relationship between fuel economy and greenhouse gases in its 2006 final rule setting average fuel economy standards for light trucks in model years 2008–2011:

> [Carbon dioxide (CO_2)] emissions are always and directly linked to fuel consumption because CO_2 is the ultimate end product of burning gasoline. The more fuel a vehicle burns or consumes, the more CO_2 it emits. Viewed another way, fuel economy is directly related to emissions of greenhouse gases such as CO_2. Fuel consumption and CO_2 emissions from a vehicle are two 'indissociable' parameters.

Average Fuel Economy Standards for Light Trucks Model Years 2008–2011, 71 Fed. Reg. 17,566, 17,659 (Apr. 6, 2006) (citations omitted). About 6–7% of vehicle greenhouse gas emissions result from the operation of the air conditioning system, and less than 1% result from methane and nitrous oxide emissions unconnected to fuel economy; therefore, CO_2 emissions account for over 92% of the greenhouse gases covered by California's greenhouse gas regulations. *Id.* at 17,665–66. NHTSA concludes that a state CO_2 emissions standard "functions as a fuel economy standard, given the direct relationship between a vehicle's fuel economy and the amount of CO_2 it emits." *Id.* at 17,670 (citations omitted).

7. Estimated vehicle miles traveled in the United States increased from approximately 1.328 billion in 1975 to approximately 3.237 billion in 2007. *See* U.S. Department of Transportation, Federal Highway Administration, http://www.fhwa.dot.gov/environment/vmttext.htm (last visited July 31, 2008).

8. The percentage of net U.S imports of crude oil and petroleum products, relative to total consumption, increased from approximately 36% in 1975 to approximately 60% in 2006. *See* U.S. ENERGY INFO. ADMIN., ANNUAL ENERGY REVIEW, PETROLEUM OVERVIEW, SELECTED YEARS, 1949–2007, http://www.eia.doe.gov/emeu/aer/pdf/pages/sec5_5.pdf.

consumption, decreasing our dependence on imported oil, and curbing greenhouse gas emissions.[9]

Nevertheless, when Congress recently revisited the issue, it chose to continue the federal fuel economy program, mandating substantial increases in the fuel economy standards themselves.[10] Despite the talk about federal inaction (which appears to be grounded largely in hostility toward the current Administration in Washington) as the basis for state action, the truth is that federal inaction is a myth.

The recent actions by the federal government are, moreover, not simply window dressing, despite the questionable effectiveness of a CAFE-based approach. The federally mandated increases in fuel economy will impose tremendous costs on an already-struggling automotive industry. Ford Motor Company lost $12.5 billion in 2006, and nearly $3 billion in 2007.[11] At the same time, Ford invests billions of dollars every year in research and development for new products and technologies, and will now also have to invest additional funds and redouble its efforts to comply with the significant increase in federal fuel economy standards. The California standards, of course, would be significantly more stringent (and thus even more costly) than the new federal standards.[12]

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9. To the extent that vehicle fuel economy standards are a flawed policy, vehicle greenhouse gas standards would suffer from the same defects. Among other problems, both approaches focus exclusively on increasing the efficiency of vehicles. This reduces the cost of driving and tends to encourage increases in vehicle miles traveled—a phenomenon known as the "rebound effect." Alternative policies, such as gasoline taxes or carbon taxes, would increase the cost of driving and reduce vehicle miles traveled—as recent changes in consumer behavior in the face of rising prices at the pump have made clear. As fuel prices rose during the early months of 2008, the Federal Highway Administration reported that U.S. vehicle miles traveled fell by 4.3%, or 11 billion miles, in March 2008 as compared with March 2007. U.S. Department of Transportation, Federal Highway Administration Traffic Volume Trends, http://www.fhwa.dot.gov/ohim/tvtw/tvtpage.htm (last visited July 31, 2008). For a general discussion of the pros and cons of fuel economy standards, including the rebound effect, and other policy alternatives for reducing fuel consumption, see COMM. ON THE EFFECTIVENESS AND IMPACT OF CORPORATE AVERAGE FUEL ECON. (CAFE) STANDARDS, NAT'L RESEARCH COUNCIL, EFFECTIVENESS AND IMPACT OF CORPORATE AVERAGE FUEL ECONOMY (CAFE) STANDARDS (2002); Paul R. Portney et al., The Economics of Fuel Economy Standards (Resources for the Future, Discussion Paper No. RFF DP 03-44, Nov. 2003), *available at* http://www.rff.org/Documents/RFF-DP-03-44.pdf.

10. The Energy Information and Security Act of 2007 requires NHTSA to set annual national fuel economy standards that increase over time, such that the average fuel economy of light duty vehicles reaches at least 35 miles per gallon (mpg) by the 2020 model year. Energy Independence and Security Act of 2007, Pub. L. No. 110-140, § 102, 121 Stat. 1492, 1499 (2007).

11. FORD MOTOR CO., PROGRESS AND PRIORITIES: ANNUAL REPORT 17 (2007), *available at* http://www.ford.com/doc/2007_ar.pdf.

12. The California Air Resources Board (CARB) published a report comparing the stringency of its greenhouse gas regulations to the federal fuel economy standards under EISA. CARB estimated that its standards would result in a light duty fleet average fuel economy of 35.7 mpg in the 2016 model year; by comparison, EISA sets a minimum target of 35 mpg for the 2020 model year, four years later. The CARB report speculated that a

When thinking about the California standards, then, the real question is whether this is an appropriate area for a set of long-term laboratory experiments in the states, particularly when the ink is barely dry on legislation imposing new and challenging nationwide standards. I contend that the federal government has spoken several times now, has increased the standards, and has mandated a uniform national approach. Let the industry take the relatively brief time it has been given to comply with that demanding standard and then continue the conversation.

Those urging the Brandeis laboratory metaphor as a defense for state standards in this area also overlook an express limitation on the Brandeis formulation—it assumes that the "novel social and economic experiments" that are encouraged will be "without risk to the rest of the country." In the case of greenhouse gas regulation, however, that assumption is demonstrably false. In adopting their regulatory regimes, California and the states that have followed its lead are visiting many of the costs of that regime on other states—precisely the sort of thing that our Federal Constitution aims to prevent. States that adopted the California fuel economy standards, in the guise of greenhouse gas regulation, have collectively about 16,000 auto manufacturing jobs; six of them have virtually no connection to auto manufacturing at all. By contrast, the states that have not adopted greenhouse gas standards have nearly 200,000 auto manufacturing jobs in the aggregate. The collective number of manufacturing jobs at risk in the thirteen "greenhouse gas" states is fewer than the number in any of the four largest automotive manufacturing states individually.[13] Plain and simple, the California states are imposing the cost of their chosen regulation on the citizens of other states. But it is fundamentally the function of the national government to balance the competing economic and social interests of various states.

I agree with the speakers that this country needs and deserves a national conversation on this important topic, and that California deserves credit for helping make this subject part of our national dialogue. But we also ought to have a national solution. In fact, we do have a national solution; it is a recently considered and revised solution. If we conclude as a society that it is insufficient or ineffective, however, I suggest that the way to address that deficiency is not through a cluster of state regulations but through a revised national standard or

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second wave of California greenhouse gas regulations would result in a light duty fleet average fuel economy of 42.5 mpg by the 2020 model year. The explicit conversion of gram-per-mile greenhouse gas standards to miles-per-gallon fuel economy levels only serves to reinforce the direct relationship between motor vehicle greenhouse gas emissions and motor vehicle fuel economy. *See* CAL. AIR RES. BD., COMPARISON OF GREENHOUSE GAS REDUCTIONS FOR THE UNITED STATES AND CANADA UNDER U.S. CAFE STANDARDS AND CALIFORNIA AIR RESOURCES BOARD GREENHOUSE GAS REGULATIONS 7–8 (2008), *available at* http://www.arb.ca.gov/cc/ccms/reports/pavleycafe_reportfeb25_08.pdf.

13. Based on vehicle manufacturing employment data contained in WARD'S AUTO. GROUP, VEHICLE AND EQUIPMENT MANUFACTURING EMPLOYMENT BY STATE (2005). Apart from California, the states that have adopted vehicle greenhouse gas standards include Connecticut, Maine, Maryland, Massachusetts, New Jersey, New Mexico, New York, Oregon, Pennsylvania, Rhode Island, Vermont, and Washington. The four largest automotive manufacturing states are Michigan, Ohio, Missouri, and Kentucky.

approach. By keeping a broad express preemption provision in the revised CAFE law, Congress apparently agrees.

Finally, Judith Resnik questioned why automobile manufacturers would want a standard that is national and static. The answer is simple: national standards allow the manufacturers, as businesses responsible to shareholders, a level of certainty as to how they plan and invest capital and secure returns for shareholders. National standards also dramatically reduce costs and administrative burdens. For example, permitting states to impose a different standard than the federal government requires the manufacturers to manage vehicle fleets to achieve specific fleet average fuel economy targets in multiple jurisdictions. The mix of vehicles sold differs considerably from state to state. Even if all states adopt the same numerical standards, the task of achieving those standards would require a unique set of actions in each state to rebalance the mix. Forcing manufacturers to manage fleet mixes in various states, in addition to the nationwide fleet management necessary to ensure compliance with CAFE standards, would not only impose an incredible administrative burden, but would also likely result in product restrictions in some states. The requirement would be dramatic, costly, and cumbersome.

While a single set of national fuel economy standards may seem restrictive to the states, I believe that it is Congress's job to balance the many factors that should be taken into account, including the efficiency of a national approach. It has done this—there was a national debate in Congress and its members adopted a new and challenging set of fuel economy standards that apply nationwide. From this point, the industry needs to redouble its efforts to meet those standards, and while it is doing that, society might well look at other parts of the economy for comparable greenhouse gas reductions from other sectors.