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COMMENT

Executive Power and Regional Climate Change Agreements

CONOR J. WALLINE*

I. INTRODUCTION

The growing threat of climate change has, over the past twenty years, spurred numerous unsuccessful attempts to generate comprehensive binding international agreements aimed at reducing greenhouse gas emissions. The reluctance of the United States and other countries to commit to the reduction targets set forth in the Kyoto Protocol—by far the most progressive international initiative—as well as the more recent disappointments at Copenhagen, Cancun, Durban, and Rio, exemplify the difficulty in achieving a global agreement on climate change mitigation.

In response to these tepid efforts and the lack of political action at the domestic level, certain U.S. states have begun to create regional agreements with one another. In particular, the use of the executive authority of the Governor of New York to arrange regional agreements like the Regional Greenhouse Gas Initiative, Transportation and Climate Initiative, and Mid-Atlantic Governors' Agreement on Ocean Conservation, underscores the potential for effective regional approaches to climate change mitigation. Created by executive order, each of these agreements circumvented the time-consuming and contentious process of legislative enactment in Albany, and has

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subsequently provided a coordinated framework for addressing climate concerns.

This Article explores the potential for such agreements to address climate change on a regional level by analyzing the parallels between the agreements, the nature and limits of the executive power used to create them, and the scope of enforcement available under them. Section II briefly examines the present state of climate warming and its attendant impacts, while Section III highlights the relative failure of current national and international approaches to mitigating climate change. Section IV focuses on the recent rise of environmental regional agreements in the United States, specifically those agreements to which the State of New York has been integral. Section V then explores how the use of executive authority by the Governor of New York has engendered limited success—primarily through the greenhouse gas reductions committed to and realized—in these agreements. The Article concludes by considering the way these achievements can serve as examples for the creation of a federal or, ideally, international agreement to combat climate change.

II. A WARMING STATUS QUO

Unequivocal scientific data confirm that the earth's climate system is warming.¹ According to the United Nations Intergovernmental Panel on Climate Change ("IPCC"), "Eleven of the last twelve years. . .rank among the twelve warmest years in the instrumental record of global surface temperature (since 1850)."² Currently, the concentration of carbon dioxide ("CO₂") in the atmosphere is 392 parts per million ("ppm"), 42 ppm more than "what many scientists, climate experts, and progressive national governments are now saying is the safe upper limit for CO₂ in our atmosphere."³ What's more, the effects of climate change on human beings are already apparent. In the past two years alone, the eastern seaboard of the United States has

1. IPCC, CLIMATE CHANGE 2007: SYNTHESIS REPORT 30 (2007), *available at* www.ipcc.ch/pdf/assessment-report/ar4/syr/ar4_syr.pdf.

2. *Id.*

3. Bill McKibben, *350 Science*, 350.ORG, *available at* <http://www.350.org/en/about/science>.

experienced two extreme weather systems (Hurricane Irene and Superstorm Sandy) that, some scientists speculate, but for the warming climate and subsequent melting arctic sea ice, likely would not have made landfall so far north.⁴ In fact, with Superstorm Sandy, the melting arctic sea ice helped to create a “rare late October high pressure area over Greenland. . . [b]y heating up the Arctic, altering the temperature difference between the equator [and] the poles, and forcing the jet stream to slow down and get stuck in big looping meanders. . .”⁵ This altered weather pattern helped cause upwards of \$50 billion in damage to the eastern seaboard alone.⁶ Worst of all, this is not expected to be an isolated event: as New York Governor Andrew Cuomo acknowledged in an op-ed immediately following Sandy, “Extreme weather is the new normal.”⁷ Essentially, extreme weather events—including not only hurricanes, but also heat waves, heavy rains, and snowstorms—are now more likely than ever to occur because of anthropogenic greenhouse gas (“GHG”) emissions.⁸

Experts agree that a dual approach is necessary to address this truly global problem.⁹ First and foremost, countries must agree to limit their GHG emissions. The IPCC, in no uncertain

4. Larry O'Hanlon, *How Much Climate Change Was in Hurricane Sandy?*, DISCOVERYNEWS, Nov. 2, 2012, available at <http://news.discovery.com/earth/sandy-and-the-record-arctic-sea-ice-melt-121102.html>.

5. *Id.*

6. Chris Isidore, *Sandy's cost to economy: Up to \$50 billion*, CNN MONEY, Nov. 2, 2012, available at <http://money.cnn.com/2012/11/02/news/economy/sandy-economic-impact/index.html>.

7. Andrew Cuomo, Op-Ed., *We will lead on climate change*, N.Y. DAILY NEWS (Nov. 15, 2012), <http://www.nydailynews.com/opinion/lead-climate-change-article-1.1202221>.

8. See Morgan Bettex, *Study sees changing intensity of storms from warming*, MIT NEWS (Oct. 25, 2010), <http://web.mit.edu/newsoffice/2010/weaker-summers-1026.html>; see also Justin Gillis, *Study Finds More of Earth is Hotter and Says Global Warming Is at Work*, N.Y. TIMES, Aug. 6, 2012, available at http://www.nytimes.com/2012/08/07/science/earth/extreme-heat-is-covering-more-of-the-earth-a-study-says.html?hp&_r=0; see also Nick Cumming-Bruce, *U.N. Agency Says 2012 Ranks Among Hottest Years*, N.Y. TIMES, Nov. 28, 2012, available at <http://www.nytimes.com/2012/11/29/science/earth/un-agency-says-2012-ranks-among-hottest-years.html?hp&gwh=B7176927CD5D9746F8B764CCE827503A>.

9. See generally Alison G. Kwok & Nicholas B. Rajkovich, *Addressing climate change in comfort standards*, 45 BUILDING & ENV'T 18 (2010), available at <http://www.sciencedirect.com/science/article/pii/S0360132309000456>.

terms, has stated that “unmitigated climate change would, in the long term, be *likely* to exceed the capacity of natural, managed and human systems to adapt.”¹⁰ As a result, fairly radical measures—possibly including a 60% net reduction in GHG emissions by 2050—will need to be implemented “[t]o stabilize atmospheric GHG concentrations at close to current levels.”¹¹ Second, the world is going to have to adapt to the changing climate and its effects. While some adaptive measures have certainly occurred, much more comprehensive adaptation will be necessary to decrease vulnerability to the myriad effects of climate change, a fact demonstrated by the devastating impacts of Superstorm Sandy on both New York and New Jersey.¹² The onus of achieving effective adaptation measures will be primarily on state and local governments, since factors like location, geographical features, weather patterns, and current infrastructure will play a critical role in determining which measures to implement.¹³ Efforts to mitigate GHG emissions, on the other hand, must be made on a more comprehensive basis.

III. TEPID DOMESTIC AND INTERNATIONAL EFFORTS

Given the scientific unanimity that anthropogenic climate change is occurring, and the threat it poses to the continuing survival of the planet as well as our way of life, it would not be unreasonable to think that far-reaching international efforts are in the process of combatting it. Yet, this is not the case. As of summer 2013, there was still no truly global agreement aimed at mitigating GHG emissions. In fact, even the November-December 2012 round of climate talks in Doha, Qatar did not

10. IPCC, *supra* note 2, at 73.

11. ZYGMUNT J.B. PLATER ET AL., ENVIRONMENTAL LAW AND POLICY: NATURE, LAW, AND SOCIETY 631 (Aspen, 4th ed. 2010).

12. IPCC, *supra* note 1, at 73.

13. Elizabeth C. Black, *Climate Change Adaptation: Local Solutions for a Global Problem*, 22 GEO. INT’L L. REV. 359, 360 (2010) (arguing that, “[u]nlike mitigation, adaptation efforts largely involve local decision-making, making it difficult to ensure that those responsible for creating the problem also play a role in solving it.”).

produce anything more than modest gains.¹⁴ In 2011, the 17th Conference of the Parties (“COP”) in Durban, South Africa yielded an agreement that only the European Union (“EU”) and a small group of other countries, which combined accounted for less than fifteen percent of global GHG emissions, could agree to.¹⁵ The Kyoto Protocol, adopted and ratified by much of the international community in late 1997—though not becoming effective until 2005—is the closest the world has come to setting binding emissions reduction targets for the top GHG emitters.¹⁶ Unlike the United Nations Framework Convention on Climate Change (“UNFCCC”), which merely encourages the stabilization of GHG emissions levels, the Kyoto Protocol actually *binds* countries to reductions targets.¹⁷

The United States refused to ratify the Protocol for two reasons. First, Kyoto was perceived as being largely futile because it does not bind countries like India and China, two of the world’s largest GHG emitters,¹⁸ to any strict reductions targets. Though the U.S. was still the largest emitter at the time, the prospect of nonbinding obligations on two of the world’s most significant sources of GHG emissions and economic competition did not improve the Protocol’s image. Second, the George W. Bush Administration thought that the commitments in the Protocol, if rigidly adhered to, would “wreck” the U.S. economy.¹⁹ This resulted in the Senate objecting to the Protocol and ultimately

14. Justin Gillis, *With Carbon Dioxide Emissions at Record High, Worries on how to Slow Warming*, N.Y. TIMES (Dec. 2, 2012), <http://www.nytimes.com/2012/12/03/world/emissions-of-carbon-dioxide-hit-record-in-2011-researchers-say.html?hp>.

15. Karl Ritter, *UN Climate Change Conference Opens in Doha, Qatar*, HUFFINGTON POST, Nov. 26, 2012, *available at* http://www.huffingtonpost.com/2012/11/26/un-climate-change-conference-doha_n_2189959.html?utm_hp_ref=green.

16. United Nations Framework Convention on Climate Change (UNFCCC), *Kyoto Protocol* (2012), *available at* http://unfccc.int/kyoto_protocol/items/2830.php.

17. *Id.*

18. U.S. Env’tl. Protection Agency, *Global Emissions* (last updated June 14, 2012), <http://www.epa.gov/climatechange/ghgemissions/global.html>.

19. Associated Press, *Bush: Kyoto Treaty Would Have Hurt Economy*, MSNBC, June 30, 2005, *available at* http://www.msnbc.msn.com/id/8422343/ns/politics/t/bush-kyoto-treaty-would-have-hurt-economy/#.ULQfROOe_Kg.

passing a resolution to block U.S. involvement in it.²⁰ While false dichotomies like ‘environment or economy’ are in disrepute,²¹ appealing to them has proven a highly effective means by which to defeat or delay action on environmental concerns, this being but one example.

Following Kyoto were several more relative failures, including the Copenhagen Summit of 2009, out of which came pledges—but no binding agreement—by the U.S. and China to reduce emissions,²² the 2010 Cancun Climate Summit,²³ the 17th COP in Durban, South Africa,²⁴ and Rio+20.²⁵ Though these are the most significant climate summits resulting from the Kyoto process, COPs have occurred almost annually since 1997, often without heads of state in attendance. Unfortunately, the obvious lack of political will in these interim conferences has resulted in nothing of significance. The absence of mandatory reduction targets has been a constant theme in the international context and continues to plague global efforts to mitigate climate change.

But the United States’ failure to address climate change has not been limited to the international context. Congress has also been unsuccessful in enacting any comprehensive national

20. S. Res. 98, 105th Cong. (1997) (enacted).

21. See generally F. Michael Willis, *Economic Development, Environmental Protection, and the Right to Health*, 9 GEO. INT’L L. REV. 195 (1996); For an argument that cap-and-trade programs will actually benefit the global economy, see Aaron Ezroj, *How Cap and Trade will Fuel the Global Economy*, 40 ENVTL. L. REP. NEWS & ANALYSIS 10696 (2010).

22. Sarah Terry-Cobo, *Timeline: The Road to Climate Change Policy*, PBS FRONTLINE, May 11, 2010, available at <http://www.pbs.org/frontlineworld/stories/carbonwatch/2010/05/timeline-the-road-to-climate-change-policy.html>.

23. See Suzanne Goldenberg, *Cancun Agreement Rescues UN Credibility But Falls Short of Saving Planet*, The Guardian, Dec. 12, 2010, available at <http://www.guardian.co.uk/environment/2010/dec/12/cancun-agreement-rescues-un-credibility>.

24. See Ritter, *supra* note 16; Durban’s failure is primarily a result of the inability of existing signatories to agree to an extension of all of Kyoto’s targets, which ultimately led to an agreement that has done little to change the current projections of nearly a four degree Celsius temperature hike over the next ten years. Richard Black, *Climate talks end with late deal*, BBC NEWS (Dec. 11, 2011), <http://www.bbc.co.uk/news/science-environment-16124670>.

25. See Bryan Walsh, *What the Failure of Rio+20 Means for the Climate*, TIME, June 26, 2012, available at <http://www.time.com/time/health/article/0,8599,2118058,00.html>.

legislation addressing GHG emissions.²⁶ Both the House of Representatives' Waxman-Markey bill and the Senate's Kerry-Boxer bill, while championed by climate experts as "essential to establishing a regulatory system that would achieve real emissions reductions, while still considering the needs of the energy industry," were ultimately rendered impotent by Congressional inaction.²⁷ Interestingly, the State of California passed legislation in 2006 that "established emissions caps in line with those agreed on in Kyoto—chiefly, to reduce greenhouse gas emissions to 1990 levels by 2020 and to bring those 1990 levels down by a further 80 percent by 2050."²⁸ In addition to those caps, the Golden State has developed a carbon market for emissions trading, one of the first of its kind in the U.S.²⁹ However, while California's progressive actions are laudable, the State cannot successfully solve the problem on its own. As a consequence of the United States' (and other countries') refusal to commit to Kyoto or any other binding international framework, overall reductions in global GHG emissions have not been achieved at a level sufficient to truly combat the current rate of climate change.

Further complicating the process of achieving a binding international agreement on climate change is the underlying problem shared by many environmental issues: the tragedy of the commons.³⁰ Originally recognized by Garrett Hardin, the tragedy of the commons is the result of individuals externalizing costs when engaged in strategic, rational decision-making regarding shared resources.³¹ Because the commons is collectively owned and thus available for general use, each entity's rational self-

26. Terry-Cobo, *supra* note 22.

27. *Id.*

28. *Id.*

29. See generally Christopher Burt, *CO₂ and Regulation Authority: The Legal and Policy Implications of California's Proposed Cap-and-Trade Program and Clean Air Act National Ambient Air Quality Greenhouse Gas Regulation*, 44 URB. LAW. 429 (2012); see also Sarah Terry-Cobo, *Timeline: The Road to Climate Change Policy*, PBS FRONTLINE, May 11, 2010, available at <http://www.pbs.org/frontlineworld/stories/carbonwatch/2010/05/timeline-the-road-to-climate-change-policy.html>.

30. Stephen M Gardiner, *The Real Tragedy of the Commons*, 30 PHIL. & PUB. AFF. 387 (2001); See also Barton H. Thompson, Jr., *Tragically Difficult: The Obstacles to Governing the Commons*, 30 ENVTL. L. 241, 253 (2000).

31. Garrett Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243 (1968).

interest militates against preservation since the cost of exploitation to the individual is less than the (short-term) benefit gained.³² To the self-interested, rational actor, the choice is clear. The current state of climate change, being the result of the accumulation of many individual state actions, exemplifies this mindset: the perceived economic benefit associated with not reducing GHG emissions outweighs, to many of the most substantial emitters, the attendant cost of climate warming. However, as Harden predicted, this individual rationality can be collectively destructive: “Ruin is the destination toward which all men rush, each pursuing his own best interest in a society that believes in the freedom of the commons. Freedom in a commons brings ruin to all.”³³

In particular, climate change—because of its intergenerational component—presents what Stephen Gardiner argues is the “real tragedy of the commons.”³⁴ The effects of CO₂ emissions on global temperature will not be fully realized until after the turn of the twenty-second century, making them most pressing for generations still unborn.³⁵ Yet, the present generation benefits greatly from the energy produced by readily available and relatively cheap GHG-emitting fuel sources. Thus, “the present generation both causes the environmental damage and reaps the rewards” while “most of the costs fall on future generations.”³⁶ Gardiner’s ultimate conclusion is less than optimistic: “So, what happens is completely up to the present generation. And it has powerful self-interested incentives to exceed the capacity and thereby alter the climate. . . [O]ther things being equal, it is reasonable to expect that the commons will be deeply harmed by the present generation.”³⁷

Yet this view is arguably too pessimistic. While the governments of the world have thus far been unable to reach a comprehensive international agreement, and the U.S. has also lagged domestically in passing legislation, not every level of government has been idle and ineffectual.

32. *Id.* at 1244.

33. *Id.*

34. Gardiner, *supra* note 30, at 387.

35. *Id.* at 402-03.

36. *Id.* at 403.

37. *Id.* at 404.

IV. THE RISE OF REGIONAL RESPONSES TO CLIMATE CHANGE

The response in the United States to the muted national and international efforts has been for states—in particular, New York—to form regional agreements with one another to address climate change. These agreements range in scope from the cap-and-trade program of the Regional Greenhouse Gas Initiative (“RGGI”)³⁸ to the promotion of transit-oriented development in the Transportation and Climate Initiative (“TCI”)³⁹ to the wide-ranging sea level rise adaptation measures of the Mid-Atlantic Governors’ Agreement on Ocean Conservation (“MAGAOC”).⁴⁰ So far, regional approaches have been particularly effective, especially given their relatively limited reach, in addressing certain aspects of climate change, and ultimately can serve as a viable alternative to national and international action for the foreseeable future.

A. The Regional Greenhouse Gas Initiative

New York State has arranged or signed onto several regional agreements. By far the most widely known is RGGI. Developed by former New York Governor George Pataki in conjunction with several other northeastern states,⁴¹ and agreed to in 2005, RGGI’s primary contribution to the fight against climate change has been a successful cap-and-trade program on power plants among the Northeastern and Mid-Atlantic states of New York, Connecticut, Delaware, Maine, Maryland, Massachusetts, New Hampshire, Rhode Island, Vermont, and (formerly) New Jersey.⁴² The success of RGGI has to do with the fact that “the combined greenhouse gas output of the group [of states comprising RGGI] is

38. See generally RGGI, *An Initiative of the Northeast and Mid-Atlantic States of the U.S.*, available at <http://www.rggi.org/>.

39. See generally Georgetown Climate Center, *Transportation and Climate Initiative*, available at <http://www.georgetownclimate.org/state-action/transportation-and-climate-initiative>.

40. See generally Mid-Atlantic Regional Council on the Ocean, available at <http://www.midatlanticocean.org/press-materials.htm>.

41. Kirsten H Engel, *Mitigating Global Climate Change in the United States: A Regional Approach*, 14 N.Y.U. L.J. 54, 69 (2005).

42. RGGI, *Memorandum of Understanding* (2005), available at <http://www.rggi.org/>.

14 percent of U.S. emissions and 3.2 percent of world emissions.”⁴³ RGGI, therefore, “has the capacity to reduce a substantial portion of U.S. emissions and to serve as an example for a national emissions trading regime.”⁴⁴

Included among the commitments made by RGGI member states are developing and maintaining individualized “CO₂ Budget Trading Programs,” tracking CO₂ allowances, monitoring the newly-created carbon market, and providing technical assistance programs designed to assist member states in the process of improving the Initiative.⁴⁵ The Initiative has been relatively successful to date, with analysts projecting that the “investments made between 2009 and 2011 using proceedings from the allowance auctions. . . will help avoid the emission of 12 million short tons of carbon dioxide pollution.”⁴⁶ Moreover, RGGI also has helped utility customers save over one billion dollars in energy costs, has “channeled over \$617 million into the region’s clean energy economy,” and has generated thousands of clean energy sector jobs in the region.⁴⁷

However, one of the primary shortcomings of RGGI is the fact that the agreement itself lacks any truly binding enforcement mechanisms.⁴⁸ As a result of the agreements voluntary nature, several state legislatures—including Delaware, Maine, and New Hampshire—have attempted (unsuccessfully) to pass bills removing their respective state from RGGI’s cap-and-trade program.⁴⁹ In November 2011, however, New Jersey Governor Chris Christie provided notice to the other states in the Initiative that New Jersey would be withdrawing from its agreement to the

43. Engel, *supra* note 41, at 66.

44. *Id.* at 66.

45. RGGI, *Mission Statement* (2005), available at <http://www.rggi.org/rggi>.

46. *RGGI Investments Cut 12M Tons of CO₂*, ENVTL. LEADER, Nov. 27, 2012, available at <http://www.environmentalleader.com/2012/11/27/rggi-investments-cut-12m-tons-of-co2/>.

47. *Id.*; see also Joanna Zelman, *RGGI Cap-And-Trade Boosted State Economies: Report*, HUFFINGTONPOST, Mar. 1, 2011, available at http://www.huffingtonpost.com/2011/03/01/rggi-cap-and-trade_n_829734.html.

48. *Mission Statement*, *supra* note 45.

49. Sam Wurzelmann, *RGGI’s Benefits, Costs, and Why It Should Stay*, THE ENERGY COLLECTIVE, June 16, 2011, <http://theenergycollective.com/wurzelmann/59328/rggi-s-benefits-costs-and-why-it-should-stay>.

Memorandum of Understanding,⁵⁰ citing the lack of regulation on states like Pennsylvania as part of its reason for doing so.⁵¹ But this is not the end of the story. In June 2012, several environmental groups, including the Natural Resources Defense Council, sued the Christie Administration for the unilateral withdrawal from RGGI, claiming that it violated a Notice and Comment requirement imposed by administrative rules.⁵² Whether this lawsuit will force New Jersey to remain a temporary member of RGGI until proper administrative procedures have been followed is yet to be seen, but regardless of how it is resolved, RGGI's targets and programs are still legally unenforceable.

B. The Transportation and Climate Initiative

Focused on altogether different sources of GHG emissions, TCI's efforts are aimed at mitigating emissions from tailpipes rather than factory smokestacks. Created by the Georgetown Climate Center at Georgetown University in June 2010, TCI is directed by transportation, energy, and environmental agency heads from New York, Maine, Connecticut, Delaware, Massachusetts, Pennsylvania, New Hampshire, Rhode Island, Maryland, New Jersey, Vermont, and the District of Columbia.⁵³ The Initiative "seeks to stimulate sustainable economic development and improve the environment by supporting innovative technologies and smart planning, and through finding greater efficiencies within the transportation sector."⁵⁴ TCI's

50. BOB MARTIN, COMM'R NEW JERSEY DEP'T OF ENVTL. PROT., NOTICE OF WITHDRAWAL OF AGREEMENT TO THE RGGI MEMORANDUM OF UNDERSTANDING (Nov. 29, 2011).

51. *New Jersey Quits RGGI, Bans Coal Plants*, ENVTL. LEADER, May 27, 2011, available at <http://www.environmentalleader.com/2011/05/27/new-jersey-pulls-out-of-rggi-bans-coal-plants/>.

52. Andrew Harris, *New Jersey Sued Over Greenhouse Gas Initiative Pull-Out*, BLOOMBERG, June 6, 2012, available at <http://www.bloomberg.com/news/2012-06-06/new-jersey-sued-over-greenhouse-gas-initiative-pull-out.html>.

53. Georgetown Climate Center, *supra* note 39.

54. GEORGETOWN CLIMATE CENTER, TRANSPORTATION AND CLIMATE INITIATIVE OF THE NORTHEAST AND MID-ATLANTIC STATES: BUILDING THE CLEAN ENERGY ECONOMY AND REDUCING GREENHOUSE GAS EMISSIONS IN THE NORTHEAST 1, available at <http://www.georgetownclimate.org/sites/default/files/TCI%20brochure.pdf>.

primary focus is on “developing clean vehicles and alternative fuels,” “creating sustainable communities” through transit-oriented development, and “advancing more efficient freight movement.”⁵⁵ Mixed-use and transit-oriented development (or, collectively, “smart growth”⁵⁶) can help to reduce annual vehicle miles traveled (“VMT”), a key indicator of transportation-related GHG emissions.⁵⁷

Because GHG emissions from the transportation sector represent nearly thirty percent of total U.S. emissions, regional cooperation in the realm of mass transit has the opportunity to be incredibly successful in reducing overall GHG emissions.⁵⁸ While federal environmental statutes like Title II of the Clean Air Act provide the U.S. Environmental Protection Agency (“EPA”) with authority to regulate non-stationary sources and impose light-duty vehicle emissions standards,⁵⁹ cooperation and regulatory oversight with respect to development of mass transit systems and promotion of efficient regional freight movement is still inadequate.⁶⁰ In the absence of a fully coordinated federal approach, TCI has provided—at least for the Northeast and Mid-Atlantic regions—an effective approach to these transportation-related issues. One of its most significant achievements has been the creation of the Northeast Electric Vehicle Network, a group of northeast states committed to working together to regionally plan for expanded use of electric vehicles, particularly with respect to

55. *Id.*

56. Former Maryland Governor Parris Glendening is credited for coining the phrase “smart growth.” Karen O’Keefe, *Smart Growth’s Governor Parris N. Glendening*, 6 THE TOWN PAPER 1 (2004), available at http://www.tndtownpaper.com/Volume6/parris_glendening.htm.

57. PETER HAAS ET AL., TRANSIT ORIENTED DEVELOPMENT AND THE POTENTIAL FOR VMT-RELATED GREENHOUSE GAS EMISSIONS GROWTH REDUCTION 2 (Center for Transit Oriented Development 2010) available at <http://www.cnt.org/repository/TOD-Potential-GHG-Emissions-Growth.FINAL.pdf>.

58. NICHOLAS M. BIANCO & FRANZ T. LITZ, REDUCING GREENHOUSE GAS EMISSIONS IN THE UNITED STATES: USING EXISTING FEDERAL AUTHORITIES AND STATE ACTION 12 (World Resources Institute 2010).

59. *Id.*

60. Joanna D. Malaczynski & Timothy P. Duane, *Reducing Greenhouse Gas Emissions From Vehicle Miles Traveled: Integrating the California Environmental Quality Act with the California Global Warming Solutions Act*, 36 ECOLOGY L. Q. 71, 79 (2009).

siting charging stations.⁶¹ Promoting use of non-fossil fuel burning vehicles can have a significant impact on reducing GHG emissions, and TCI has made a coordinated effort on this front possible.

C. The Mid-Atlantic Governors' Agreement on Ocean Conservation

Both RGGI and TCI are regional initiatives focused on mitigating GHG emissions. The MAGAOC, on the other hand, is oriented toward adaptation to the inevitable impacts of climate change. Recognizing that “the economy, environment and quality of life of the Mid-Atlantic region will be significantly impacted by climate change and associated sea level rise in the coming decades,” the MAGAOC’s concern is with arguably the greatest of all commons: the Atlantic Ocean.⁶² Created in 2009 by the Governors of New York, New Jersey, Delaware, Maryland, and Virginia, the MAGAOC formed the Mid-Atlantic Regional Council on the Ocean (“MARCO”) with the express intent of “[maintaining] and [improving] the health of our ocean and coastal resources, and [ensuring] that they continue to contribute to the high quality of life and economic vitality of our region’s communities well into the future.”⁶³

The MAGAOC recognizes the interrelationship between communities and economies, and hopes to capitalize on that understanding through coordinated efforts aimed at protecting sensitive habitats and populations from climate change-related risks like flooding and erosion.⁶⁴ As of 2011, the MAGAOC’s largest contributions to effective climate change adaptation have been the development of “targeted messaging of the risks of

61. *Northeast states form electric vehicle network*, WALL STREET JOURNAL (Oct. 19, 2011), <http://online.wsj.com/article/APd8e72ba90ab5493fa4c6bcfd5f1319d1.html>.

62. ACTIONS, TIMELINES, AND LEADERSHIP TO ADVANCE THE MID-ATLANTIC GOVERNORS’ AGREEMENT ON OCEAN CONSERVATION 9 (June 4, 2009), *available at* <http://www.midatlanticocean.org/summary-actions.pdf>.

63. Mid-Atlantic Regional Council on the Ocean, *Mid-Atlantic Governors’ Agreement on Ocean Conservation*, June 4, 2009, *available at* <http://www.midatlanticocean.org/agreement.pdf>.

64. *Id.*

climate change and sea level rise to communities” and the collection of comprehensive data necessary to “create a regional sea level rise inundation map.”⁶⁵ While these achievements may appear limited at this time, they are a first and necessary step to implementing more comprehensive climate change adaptation measures.

V. GUBERNATORIAL EXECUTIVE AUTHORITY

Common to each of the three aforementioned regional agreements is the source of authority used to create them. Gubernatorial executive authority generally is greater in scope than its federal analog, which is restricted by the U.S. Constitution.⁶⁶ This is the case because “state governments[,] acting through their state legislatures[,] are presumed to have broad, residual, almost plenary governmental power’ except insofar as these are limited by state constitutions,” and often gubernatorial executive authority is conferred by statute.⁶⁷ Since “all of the states have made statutory changes. . .and/or constitutional changes to grant their governors more formal powers,” gubernatorial executive authority is maximally provided for throughout the United States.⁶⁸ In particular, the unique powers afforded the Governor of New York have been instrumental in the creation and development of the three regional agreements at the heart of this Article.

In New York, the constitutional provision providing for gubernatorial executive power was added in 1821 “in apparent emulation of the vesting clause in the United States Constitution.”⁶⁹ This was not the final word on gubernatorial

65. MID-ATLANTIC REGIONAL COUNCIL ON THE OCEAN, HIGHLIGHTS: MOVING IN THE RIGHT DIRECTION 7 (2011), available at <http://www.midatlanticocean.org/mitrd.pdf>.

66. U.S. CONST. art. II, § 1, cl. 1 (stating that “the executive Power shall be vested in a President of the United States of America. He shall hold his Office during the Term of four Years...”).

67. Gerald Benjamin & Zachary Keck, *Executive Orders and Gubernatorial Authority to Reorganize State Government*, 74 ALB. L. REV. 1613, 1614 (2010).

68. Margaret R. Ferguson, *Roles, Functions, and Powers of the Governors*, CTR ON THE AM. GOVERNOR (2013), available at http://governors.rutgers.edu/usgov/gov_intro_chpt2.php.

69. Benjamin & Keck, *supra* note 67, at 1615.

authority in New York, however. Over the next hundred or so years, the New York Constitution would be revamped several times leading to, among other changes, amendments that provided for a more powerful Governor with a four year term and expanded authority over all state agencies and the budget process.⁷⁰ While the roles and responsibilities of all state governors are basically the same, the scope of authority of each state's governor varies in accordance with the respective state constitutions and laws.⁷¹ New York's current Constitution provides that the Governor shall "expedite all such measures as may be resolved upon by the legislature" and "take care that the laws are faithfully executed."⁷² Moreover, when the Governor of New York issues an executive order pursuant to lawful authority, "his or her actions are largely beyond judicial review."⁷³ Therefore, according to New York Jurisprudence, a leading source on New York law:

[J]udicial review of a governor's action by executive order pursuant to a valid grant of discretionary authority is generally limited to determining whether the state constitution or legislature has empowered the governor to act, and does not include the manner in which the governor chooses to discharge that authority. For abuse of lawful discretionary authority, the remedy as a rule lies with the people at the polls, or with a constitutional amendment, or with corrective legislation.⁷⁴

Ultimately, the Governor of New York has broad authority to issue executive orders and otherwise exercise executive power, including through control of administrative agencies. That authority, however, is not without its limits.

Several times since the mid-Twentieth Century, the New York Court of Appeals—the court of last resort for the State—has invalidated the Governor's use of executive power as "[going]

70. John T. Buckley, *The Governor—From Figurehead to Prime Minister: A Historical Study of the New York State Constitution and the Shift of Basic Power to the Chief Executive*, 68 *Alb. L. Rev.* 865, 867 (2005).

71. Nat'l Governors Ass'n, *Governors' Powers and Authority* (2011), <http://www.nga.org/cms/home/management-resources/governors-powers-and-authority.html>.

72. N.Y. CONST. art. IV, § 3.

73. 96 N.Y. Jur. 2d State of New York § 12.

74. *Id.*

beyond state legislative policy and [prescribing] a remedial device not embraced by the policy.”⁷⁵ However, in giving definition to what “going beyond” state legislative policy means, the Court, in *Clark v. Cuomo*, said, “It is only when the executive acts inconsistently with the legislature, or usurps its prerogatives, that the doctrine of separation [of powers] is violated.”⁷⁶ Thus, “the purposes of the executive order[,] however desirable, may be achieved only through proper means. No single branch of government may assume a power, especially if assumption of that power might erode the genius of that system. The erosion need not be great.”⁷⁷

Understanding the basic strictures of gubernatorial executive authority in New York is crucial to an analysis of that power as it was used to create and join the three regional agreements discussed in this Article. This is so because, as John Cahill noted regarding his involvement in environmental issues in New York, the development of environmental law and policy “really came down to the executive utilizing the powers that he has, through executive orders, through control of the regulatory agencies that are under his domain, as well as his authorities to use market powers to help change and help drive the environmental policy.”⁷⁸

Gubernatorial executive authority has proven particularly invaluable in the realm of environmental law and policy in New York State. First, it has allowed for relatively quick responses to pressing environmental concerns by avoiding expressly dealing with the New York State legislature, a tremendous advantage when immediate and decisive action is necessary.⁷⁹ Moreover, executive authority has allowed for incremental, small-scale changes to environmental policy and law.⁸⁰ While landmark court cases and legislation concerning environmental matters are important, these smaller, more frequent actions have a significant impact as well. By creating continuity in progress,

75. *Rapp v. Carey*, 44 N.Y.2d 157, 163 (1978); see also *Oneida Cnty v. Berle*, 49 N.Y.2d 515 (1980).

76. 66 N.Y.2d 185, 189 (1985).

77. *Rapp*, 44 N.Y.2d at 167.

78. John P. Cahill, *Environmental Law in New York State: The Past as Prologue to the Future*, 25 PACE ENVTL. L. REV. 441, 441 (2008).

79. *Id.* at 444.

80. *Id.* at 447.

these changes have allowed the private sector to confidently invest in new technologies and processes. Finally, the use of gubernatorial executive authority also has allowed the Governor to take action on controversial environmental issues that were unlikely to be addressed by the more politically-minded state legislature. While the general public may support action on certain matters, “there’s always the issue of dealing with particular legislators in both houses to try to accomplish anything in the New York Legislature.”⁸¹ This is particularly the case in Albany, where achieving progress through the legislative process can seem impossible at times.⁸²

A great example of effective use of executive power to tackle a politically-charged environmental problem is Governor Pataki’s response to dirty air in New York City. In 2000, the Metropolitan Transit Authority (“MTA”)—which provides all of the mass transit services in New York City—was the largest purchaser of buses in the world and needed to submit a new five year capital plan.⁸³ Governor Pataki decided that the diesel buses, whose emissions of significant amounts of particulate matter, nitrogen oxide, and sulfur oxide were creating a public health crisis, needed to be redesigned to improve air quality.⁸⁴ To accomplish this, the Governor helped develop a capital plan that required MTA to convert to natural gas and hybrid buses, which led to significant improvements in air quality in the city.⁸⁵ Had this been attempted in the state legislature, there is no telling how much more time and political capital would have been necessary to achieve the result ultimately obtained through unilateral executive action. Immediate action was necessary, and executive authority allowed the Governor to decisively address the problem. This is but one example of the Governor utilizing the Office’s great potential.

Another example involves the creation and maintenance of RGGI’s cap-and-trade program. As noted, RGGI originated in 2001 when Governor Pataki announced the formation of the Greenhouse Gas Working Group, a coalition of Northeast states

81. *Id.* at 443-44.

82. *Id.* at 443.

83. Cahill, *supra* note 78, at 444.

84. *Id.*

85. *Id.* at 444-45.

committed to addressing climate change.⁸⁶ In 2003, “the Governor sent a letter to all of the northeastern states asking them to join in a cap-and-trade program for the northeast [because the United States was] not going to see action on a federal level and [] the region needed to do something.”⁸⁷ RGGI was officially agreed to in a Memorandum of Understanding in 2005,⁸⁸ which led to further statewide commitments by then-Governor David Patterson in Executive Order No. 24 in 2009.⁸⁹ In part, the Governor committed the State to reductions of “current greenhouse gas emissions from all sources within the State eighty percent (80%) below levels emitted in the year nineteen hundred ninety (1990) by the year two-thousand fifty (2050).”⁹⁰

TCI is also the product of executive authority, albeit through the proxy of administrative agencies. The heads of the transportation, environmental, and energy agencies in each of the state signatories to the Initiative are tasked with evaluating current infrastructure and transportation options and creating regional policies to promote sustainable development and smart growth.⁹¹ The Initiative is meant to build on the progress of RGGI by focusing on vehicle emissions as a supplement to RGGI’s efforts to reduce power plant emissions.⁹² Representing New York were Commissioner Alexander B. Grannis of the New York Department of Environmental Conservation, Acting Commissioner Stanley Gee of the New York Department of Transportation, and Chairman Garry A. Brown of the New York

86. *Id.* at 446.

87. *Id.*

88. RGGI, *Memorandum of Understanding* (2005), available at <http://www.rggi.org/design/history/mou>.

89. State of New York, Exec. Order No. 24 (2009).

90. *Id.*

91. Transportation & Climate Initiative, *Agreement of the Northeast and Mid-Atlantic States to Support Sustainable Communities* (June 7, 2011), available at [http://www.georgetownclimate.org/sites/default/files/TCI_Sustainable_Communities_June2011\(1\).pdf](http://www.georgetownclimate.org/sites/default/files/TCI_Sustainable_Communities_June2011(1).pdf).

92. Georgetown Climate Center, *Northeast and Mid-Atlantic States Launch Major Climate and Transportation Initiative* (June 16, 2010), available at <http://www.georgetownclimate.org/northeast-and-mid-atlantic-states-launch-major-climate-and-transportation-initiative>.

Public Service Commission.⁹³ These agency heads set as the goal for New York State a reduction in VMT of 10%.⁹⁴ Such a commitment likely would have required significantly more time and capital to pass the legislature, and may well never have occurred.

The MAGAOC, which formed MARCO, was created in a manner more similar to RGGI than TCI. New York Governor David Paterson, along with New Jersey Governor Jon Corzine, hosted the Mid-Atlantic Governors' Ocean Summit in June 2009.⁹⁵ The summit resulted in the signing of the MAGAOC by five eastern and mid-Atlantic coastal states.⁹⁶ The governors of the member states agreed to, among other things, "[c]oordinate protection of important habitats and sensitive and unique offshore areas on a regional scale," "[c]ollaborate on a regional approach to support the sustainable development of renewable energy in offshore areas," and, importantly, "[p]repare the region's coastal communities for the impacts of climate change on ocean and coastal resources."⁹⁷ Noting that much of the infrastructure in the Northeast and mid-Atlantic regions is unprotected, the Council further agreed to "[i]dentify key infrastructure that is vulnerable to sea level rise" and initiate "adaption measures to collectively reduce the region's vulnerability to climate change and sea level rise."⁹⁸ These far-reaching efforts on adapting to the realities of climate change on a regional level likely would not have been possible to achieve in the legislatures of each of the five participating states. Rather than wait for more aggressive action, Governors Paterson and

93. Transportation & Climate Initiative, *Declaration of Intent* (), available at <http://www.georgetownclimate.org/sites/default/files/public-documents/TCI-declaration.pdf>.

94. Transportation & Climate Initiative, *Summary of Policy Options in State Climate Action Plans* (), at 6, available at <http://www.georgetownclimate.org/sites/default/files/public-documents/TCI-SummaryofPolicyOptionsinClimateAction.PDF>.

95. *Actions, Timelines, and Leadership to Advance the Mid-Atlantic Governors' Agreement on Ocean Conservation* (2009), at 1, available at <http://www.midatlanticocean.org/summary-actions.pdf>.

96. *Id.*

97. Mid-Atlantic Regional Council on the Ocean, *supra* note 63.

98. *Actions, Timelines, and Leadership*, *supra* note 95, at 1.

Corzine took the initiative to develop and promote another successful regional environmental organization.

This desire for decisive action is a common theme among many regional agreements. Gubernatorial executive authority has allowed for these agreements (and countless others) to be created and entered into by states across the U.S. without wading into the gridlock of state legislative action. But the ease and relative flexibility provided by regional agreements is not without its limitations.

VI. CONSTITUTIONAL LIMITS ON EXECUTIVE AUTHORITY

Each of the three agreements discussed herein was created and has been maintained through the exercise of gubernatorial executive authority. However, the United States' federalist system of governance includes certain limiting characteristics that check the power of its competing bodies, including the power of individual states. The Compact Clause of the U.S. Constitution and the doctrine of separation of powers limit, respectively, the ability of states to engage in binding agreements with one another to the exclusion of the federal government and the power of the executive. Regional climate change agreements must be evaluated in light of each of these characteristics of the U.S. system.

A. Compact Clause

One of the primary shortcomings of regional agreements in general—and of RGGI, TCI, and MAGAOC in particular—is the fact that they lack regulatory enforcement authority. This is the case not only for political reasons, but also because of the limits imposed by the Compact Clause of the U.S. Constitution. Article I, section 10 of the U.S. Constitution dictates that “[n]o State shall, without the Consent of Congress. . . enter into any Agreement or Compact with another State, or with a foreign Power.”⁹⁹ This Constitutional prohibition on cooperative state action severely limits the potential impact that regional

99. U.S. CONST. art. I, § 10, cl. 3.

agreements can have on interstate issues. However, the prohibition is not as absolute as it appears.

The U.S. Supreme Court first addressed the scope of the Compact Clause before the turn of the Twentieth Century in *Virginia v. Tennessee*. There, the Commonwealth of Virginia and the State of Tennessee disputed the location of a boundary line that had been established by legislative decree nearly a century before.¹⁰⁰ In the course of determining the validity of the boundary line, the Court analyzed whether the agreement between the states constituted a constitutionally-prohibited compact. After giving examples of the kinds of agreements and compacts that would not require Congressional consent, Justice Field declared that by “[l]ooking at the clause in which the terms ‘compact’ or ‘agreement’ appear, it is evident that the prohibition is directed to the formation of any combination tending to the increase of political power in the states, which may encroach upon or interfere with the just supremacy of the United States.”¹⁰¹ He further clarified that Congress can consent to compacts both expressly and by implication, such as when Congress enforces an agreement between states.¹⁰² Ultimately, the Court held that Congress had implicitly consented to the agreement between Virginia and Tennessee fixing the boundary line, and that it therefore was valid and constituted the legal boundary between the states.

More recently the Supreme Court has given further guidance on this definition of prohibited compacts. In *U.S. Steel Corporation v. Multistate Tax Commission*, at issue was the validity of an agreement between multiple states to form a tax commission to facilitate uniformity in state taxation in the region.¹⁰³ The Court there held that the “number of parties to an agreement is irrelevant if it does not impermissibly enhance state power at the expense of federal supremacy.”¹⁰⁴ Despite the fact that the compact may result in an “incremental increase in the bargaining power of the member States [in relation to] the corporations subject to their respective taxing jurisdictions,” the

100. *Com. of Va. v. State of Tenn.*, 148 U.S. 503, 504 (1893).

101. *Id.* at 519.

102. *Id.* at 521.

103. 434 U.S. 452, 456 (1978).

104. *Id.* at 472.

Court held that the agreement did not enhance the political power of the states at the expense of the federal government enough to violate the Compact Clause.¹⁰⁵ In so holding, the Court carefully enumerated two key considerations leading to this conclusion: first, that “each State retain[ed] complete freedom to adopt or reject the rules and regulations of the Commission”; and second, that “each State [was] free to withdraw at any time.”¹⁰⁶ In other words, so long as agreements between states are largely voluntary, the Compact Clause likely will not pose a problem.

The regional agreements at the heart of this Article are largely insulated from challenges under the Compact Clause because of their unenforceability, a constitutionally required yet severely limiting feature. Kirsten Engel, Professor of Law at the University of Arizona, agrees, arguing that “[a]s a result of the Compact Clause. . . regional action on climate change is ‘safest’ constitutionally if limited to voluntary, nonbinding efforts among participating states.”¹⁰⁷ RGGI provides the prime example of how this constitutionally-required unenforceability can limit the potential positive impact of regional climate change agreements. New Jersey Governor Christie’s decision to unilaterally withdraw from RGGI in 2012, a decision currently embroiled in litigation, was only feasible because of this limitation.¹⁰⁸ Citing the unenforceability of the agreement, as well as the perceived notion that “RGGI does nothing more than tax electricity, tax our citizens, tax our businesses, with no discernible or measurable impact upon our environment,”¹⁰⁹ Governor Christie engaged in the very conduct that plagues voluntary agreements like RGGI, TCI, and MAGAOC. By withdrawing the State of New Jersey from the Initiative, Governor Christie singlehandedly reduced the overall impact on emissions reductions in the region and the bargaining power of RGGI member states.

The unenforceability of compacts that otherwise would challenge federal supremacy is a necessary feature to survive

105. *Id.* at 472-73.

106. *Id.* at 473.

107. Engel, *supra* note 41, at 73.

108. *See infra* Section IV.

109. Mireya Navarro, *Christie Pulls New Jersey From 10-State Climate Initiative*, N.Y. TIMES, May 26, 2011, available at http://www.nytimes.com/2011/05/27/nyregion/christie-pulls-nj-from-greenhouse-gas-coalition.html?_r=0.

judicial scrutiny, but it also severely limits the efficacy of regional agreements. Ultimately, as long as regional climate change agreements are based on voluntary compliance or consented to by Congress, the Compact Clause does not pose a significant legal barrier.¹¹⁰ The advantage to seeking and receiving congressional consent is that the states involved could ensure enforceability and simultaneously comply with constitutional strictures. Congressional action, however, is more easily discussed than achieved, and it is for that reason that the doctrine of separation of powers is also a necessary component of the U.S. system of governance.

B. Separation of Powers

The Compact Clause is not the only constitutional limit affecting regional agreements. The doctrine of separation of powers applies to these agreements as well. The doctrine demands that each branch of government—executive, legislative, and judicial—exercise only those powers granted to it by the governing charter. For the purposes of this Article, that governing charter is the New York Constitution.

Separation of powers in New York is “included by implication in the pattern of government adopted by” the state.¹¹¹ Generally, the legislature is authorized to make laws—and the “critical policy decisions” that inform them—while the governor is delegated the authority to enforce those laws.¹¹² However, New York’s lawmaking department is not as discretely defined as most. In New York, the legislature is not the sole lawmaker; rather, the legislature, in conjunction with the governor, fills that role.¹¹³ Therefore, while the executive cannot directly legislate, the Governor of New York has substantial power over administrative rulemaking, a process that can be difficult to differentiate from lawmaking.¹¹⁴ Importantly, however, any

110. See Engel, *supra* note 41, at 73-75.

111. *Principles of separation, generally*, 20 N.Y. Jur.2d Constitutional Law § 152.

112. *Limitations with respect to legislature*, 20 N.Y. Jur.2d Constitutional Law § 158; see also 16 C.J.S. Constitutional Law § 250.

113. *Limitations with respect to legislature*, 20 N.Y. Jur.2d Constitutional Law § 158.

114. *Id.*

exercise of power by a branch not accorded that power constitutes a violation of the doctrine, such as “when the executive acts inconsistently with the legislature, or usurps its prerogatives.”¹¹⁵ It is just this potential scenario, the executive overstepping its defined limits, that is of concern for regional climate change agreements.

One of the advantages to the regional agreements discussed herein is the ability of the executive branch to circumvent the legislature, either through executive order or direction to the commissioners of the many state agencies. This not only saves time and resources, but also preserves political capital that the executive needs to effectively promote his or her agenda. However, it is this very characteristic of RGGI, TCI, and MAGAOC that could result in the agreements’ invalidation on grounds of violation of separation of powers.

The New York Court of Appeals, in *Saratoga County Chamber of Commerce v. Pataki*, addressed the separation of powers issue in the context of casinos on Native American reservations. Former Governor Cuomo entered into a compact between the St. Regis Mohawk Tribe and the State of New York to allow the tribe to continue providing gambling services, an action challenged by Chamber of Commerce as violating separation of powers.¹¹⁶ The Court held that because there was no legislative authorization for the state agencies to regulate casino gambling, the Governor’s actions constituted a usurpation of the legislature’s power.¹¹⁷ Critically, however, the Court also held, in *Bourquin v. Cuomo*, that “[l]egislative inaction, because of its inherent ambiguity, ‘affords the most dubious foundation for drawing positive inferences’” of hostile legislative intent.¹¹⁸ In other words, simply because the legislature has not yet acted on a matter does not necessarily remove it from the realm of executive control or render executive action on it *ultra vires*.

Nevertheless, *Saratoga County* could prove problematic for regional climate change agreements like RGGI, TCI, and

115. *Principles of separation*, *supra* note 112.

116. *Saratoga Cnty Chamber of Commerce v. Pataki*, 100 N.Y.2d 801, 808-09 (2003).

117. *Id.* at 823.

118. 85 N.Y.2d 781, 787-88 (1995) (*quoting* *Clark v. Cuomo*, 66 N.Y.2d 185, 190-91 (1985)).

MAGAOC. Each of these agreements was executed precisely because of the lack of legislative will to address the problems of power plant emissions, vehicle emissions, and insufficient coastal adaptation measures. Therefore, it would not be surprising if a New York court were to find that any of the three agreements was the result of the executive overstepping its constitutionally-defined role by promulgating agreements outside of what is legislatively authorized. However, given the Court's caution in *Bourquin* that legislative inaction is not necessarily indicative of adverse legislative intent, there is room for argument that RGGI, TCI, and MAGAOC are not the result of the Governor usurping legislative authority. If and when this is found to be the case, the scope of executive action available as a result could lead to an increase in the prominence of regional agreements.

VII. REGIONAL AGREEMENTS AND THE WAY FORWARD

Regional agreements have much to offer in the way of mitigating and adapting to climate change. This is so for several reasons. First, "a regional program is likely to encompass a larger geographic area and more centers of population, and thus is likely to have the potential to result in a larger contribution to climate change mitigation than an approach limited to a single state. . . ."119 Therefore, when compared to the emissions-reduction potential of individual state or municipal actions, a regional approach is more likely to cast a wider emissions reduction net, thereby more dramatically affecting overall GHG emissions.

Second, because regional approaches to emissions reductions employ uniform standards of regulation within the respective region, greater emissions reductions should be achievable because the predictability of a uniform standard is likely to "overcome industry resistance to greenhouse gas regulation."¹²⁰ Admittedly, a uniform federal standard would be ideal; but regional approaches at least offer consistency on a greater level than mere state or municipal initiatives. Consequently, though the

119. Engel, *supra* note 41, at 68.

120. *Id.* at 69.

proverbial “race to the bottom”¹²¹ is a common occurrence in the context of disparate, localized environmental law, it is probable that the “benefits of a uniform regional approach [are] likely to outweigh the benefits of particular ‘pockets’ of less stringent regulation.”¹²² Moreover, many resources are regionally located (e.g., the coal deposits of Appalachia and the natural gas reserves of the Marcellus Shale region), so the existence of regional standards guiding how those resources are harnessed and used can, to an extent, combat the race to the bottom.

Finally, and most important, is the fact that regional approaches to climate change “allow states to develop a joint strategy to reduce greenhouse gases, and, at the same time, ensure reliable energy sources for the region.”¹²³ For example, because electricity is provided for on a regional basis in the U.S., and because electricity production in the form of fossil-fuel-fired power plants contributes over one-third of annual U.S. GHG emissions,¹²⁴ regional approaches to reductions are likely to substantially affect the electricity sector’s GHG emissions.¹²⁵ The wider the emissions reductions net cast, the greater the impact that can be realized, and at this time regional agreements provide the largest feasible net.

Yet, regional agreements suffer from their own imperfections. Adding to the complexity of achieving successful regional cooperation is the notion that, in such multi-actor paradigms, states are aligned against one another in a macroscopic version of the prisoner’s dilemma.¹²⁶ The concept of a prisoner’s dilemma “illustrates a conflict between individual and group rationality,” where “it is difficult to get rational, selfish agents to cooperate for their common good.”¹²⁷ Because regional agreements must be

121. The “race to the bottom” is a phenomenon wherein individual jurisdictions with disparate environmental regulatory systems seek to attract industry with increasingly relaxed laws.

122. *Id.*

123. *Id.* at 70.

124. NICHOLAS M. BIANCO & FRANZ T. LITZ, REDUCING GREENHOUSE GAS EMISSIONS IN THE UNITED STATES: USING EXISTING FEDERAL AUTHORITIES AND STATE ACTION 10 (World Resources Institute 2010).

125. Engel, *supra* note 41, at 70-71.

126. See Engel, *supra* note 41, at 74; see also Gardiner, *supra* note 30.

127. Steven Kuhn, *Prisoner’s Dilemma*, THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., 2009), <http://plato.stanford.edu/archives/>

voluntary in order to avoid Compact Clause problems,¹²⁸ individual ‘state rationality’ can override the collective interest embedded in strict compliance with the requirements of the agreement. Such individual self-interest overtaking the collective good can—much like Governor Christie’s decision to unilaterally withdraw from RGGI in 2012 did—compromise the efficacy of an agreement that otherwise has great potential.

VIII. CONCLUSION

Regional agreements aimed at addressing the causes and effects of climate change are being used by states like New York to address environmental concerns that have yet to gain national traction. These agreements have yielded remarkable results, but they are not ideal. Aside from the potential constitutional hurdles they face, their scope is inherently limited to the region in which they apply. For a truly global problem like climate change, this scope may not be broad enough to prevent the long term catastrophic consequences of a warming planet.

Ultimately, regional agreements best serve as stopgaps until effective national—and eventually international—approaches to mitigating and adapting to climate change can be implemented. Such a model of localized effort resulting in more far-reaching action is not unprecedented. In fact, “[m]any U.S. federal environmental laws and multilateral international environmental agreements came about partly in reaction to the regulatory measures implemented by lower-level jurisdictions.”¹²⁹ This trend, as well as the existing cooperative framework of most federal environmental law, allows for ready integration by Congress of regional agreements into a more unified national approach. Yet, until the political will to effectuate national legislation appears, regional agreements will continue to play a vital and central role in addressing climate change.

spr2009/entries/prisoner-dilemma/.

128. See *infra* Section VI.

129. Engel, *supra* note 41, at 64.