Duke
NICHOLAS INSTITUTE
FOR ENVIRONMENTAL POLICY SOLUTIONS

Policy Brief
October 2019

Nicholas Institute for Environmental Policy Solutions nicholasinstitute.duke.edu

Using the Old to Solve the New—Creating a Federal/State Partnership to Fight Climate Change

Tim Profeta

Summary

Climate change is a challenge like none other. Its impacts are occurring at a global scale, and any policy solution must take effect at an equivalent scale. Yet the politics of the issue push in precisely the reverse direction, as large efforts fail due to the challenges of collective action across governments and the comprehensive reach of the cost of the policies.

The United States might be the best illustration of this challenge. As the world's second largest current emitter, and the largest historic emitter, the United States' footprint is significant, and domestic action is essential to solve the problem. Yet all efforts to legislate a federal solution to the problem have failed.

This policy brief proposes that there may be another way to solve this riddle. Instead of attempting to settle all concerns about a program's costs and impacts at the federal level, simply let Congress determine the level of ambition needed to achieve our climate goals. And then use the state governments, which are more in touch with the equitable tradeoffs of their populations and directly accountable to their communities, to execute plans to reach those goals.

This may be the best approach to achieve fast and significant climate action and put cooperation and solutions ahead of partisanship and bickering. Our network of state governments has provided politically acceptable solutions to a number of societal problems through our country's history, and perhaps it is time to embrace their role in the climate fight fully.

Such a federal/state partnership, in fact, should sound familiar to scholars of environmental law—it underlies nearly every other successful effort at environmental legislation. For the reasons described below, it may be the best bet to find success legislating on our most dire and pressing environmental challenge—climate change.

Tim Profeta directs Duke University's Nicholas Institute of Environmental Policy Solutions and is an associate professor of the practice at the Sanford School of Public Policy. He has worked for nearly two decades on climate policy, with a particular focus on the use of market forces to reduce greenhouse gas emissions. His expertise also includes adaptive use of current laws to address evolving environmental challenges.

BACKGROUND

There have been few, if any, political challenges in recent American history more difficult to solve than the need to address climate change. Climate change has been called the test of our generation, an existential threat to humankind, and one of the greatest collective action challenges in history. It is a true tragedy of the commons, with the atmosphere as a common resource absorbing all civilization's carbon pollution but no individual or nation having the ability to solve the problem alone.

To address the climate challenge, the most important step society can take is to reduce the amount of greenhouse gases that are emitted to the atmosphere. As the second largest annual emitter today, and the largest historic emitter, the United States is essential to that solution. Accountable for 15 percent of the world's annual greenhouse gas emissions, the United States' pollution constitutes nearly one-sixth of the problem. And having added nearly double the amount of greenhouse gases into the atmosphere as any other country since the Industrial Revolution, the United States' inaction creates a moral challenge and barrier to global collective action, as other nations struggle to justify their efforts to constrain emissions while allowing the greatest emitter to continue its pollution unabated.

The United States also could be the source of the solutions to our problem if its engines of innovation are activated. No nation has driven human inventiveness through history more than the United States, as the home of the greatest economy the world has ever seen. Policymakers need to point this innovative prowess at the climate problem, and to do so, they need to signal that deep greenhouse gas reductions will be required and will find value in markets.

Advocates for climate action have recognized the essential need for U.S. action over the past three decades and have inspired multiple significant political campaigns demanding a federal program for greenhouse gas reductions. Arguably the most significant of these efforts was the attempt from 2001–10 to pass legislation creating a national, economy-wide cap-and-trade system for all greenhouse gases. This effort culminated in the passage of the Waxman-Markey bill in the House in 2009 and its subsequent failure to be acted upon by the U.S. Senate.

After the 2010 midterm elections went poorly for the Democratic majority in Congress, the cap-and-trade legislation was put aside, and federal focus then moved to use existing Clean Air Act authorities to achieve comprehensive greenhouse gas emissions reductions. The flagship of this program, the Clean Power Plan, would have required state-by-state reduction plans for the entire power sector. The plan was finalized in 2015 but never became effective as it was immediately stayed by the Supreme Court and overwritten after the election of President Donald Trump.

The United States now faces the need to start again in its effort to reduce its greenhouse gas emissions, and it needs to act fast. Numerous and increasingly strident warnings from the scientific community create this imperative—the most recent report from the Intergovernmental Panel on Climate Change argued that humankind had little over a decade to act before warming reached unacceptable levels. What is the best option to move fast and far given the urgency of the situation?

To move quickly, the United States must find a path that solves the political pitfalls of past efforts, as well as addresses novel and rising political concerns. And even though many do not believe such a comprehensive plan is politically feasible between now and the 2020 election, the push for such a plan must begin today so that it can enjoy support when the political window opens again.

POLITICAL PROBLEMS WITH CURRENT SUITE OF PROPOSALS

Most current debate regarding a federal legislative solution to climate change involves an effort to "put a price on carbon," or create a system where a payment is required in order to emit greenhouse gases. These proposals either create a cap-and-trade system, in which overall greenhouse gas emissions are limited and emitters are allowed to purchase and trade the right to emit, or a carbon tax or fee, in which emitters have to pay a set price for the right to emit a greenhouse gas.

According to nearly all economic projections, such carbon pricing proposals promise the most economically efficient paths to greenhouse gas reductions. They also are incredibly comprehensive, infusing a new pricing structure into nearly all energy production and usage in the country. A risk-averse body politic therefore creates barriers to their passage. In particular, based on the experience of the effort to pass cap-and-trade legislation in the 2000s and more recent efforts to

design carbon tax proposals, there are at least four major political barriers to their adoption, even among those who are willing to accept the imperative to act:

- A general apprehension about the cost of any climate program, particularly with regard to communities that might be disproportionately affected.
- A lack of agreement on the mechanism to price carbon. Advocates of cap-and-trade and carbon tax quarrel over the choice between the mechanisms, diluting the political strength of their voice between one or the other.
- The prospect of a new significant source of federal revenue. For many conservatives, the hundreds of billions of dollars of revenue to the federal government from either the auction of emission permits under a cap-and-trade system or collection of carbon taxes is frightening and creates the prospect that the program will create a great expansion in the federal government.
- The prospect of federal preemption of state climate efforts. With the vacuum of federal leadership, many state governments have moved forward on their own climate policies—policies that have created state pride in leadership as well as state dependence on revenues from their own carbon pricing regimes. As the appeal of a federal program is to achieve a uniform program across states, it is often assumed that the state programs will be preempted in any federal proposal. But such a preemption proposal will face increasingly strident opposition from states that have led for the past decade.

The four challenges promise to make any newly initiated effort to establish a federal price on carbon a daunting political task. With sufficient public support, such an effort can be successful, and perhaps in the end, it promises the most effective and efficient policy. Given the shortness of time to act, however, a federal/state partnership may be better suited to overcome the barriers to legislation.

In particular, a federal/state partnership would allow the federal government to do what it is best suited to do—set the level of ambition necessary for the United States as a whole to do its share in the fight against climate change. This inquiry is part scientific and part political. Science can provide a sense of what the overall target should be, within bounds of uncertainty. But the federal political process can decide how much risk to accept, how much of the global challenge is equitable for the United States to address, and how the obligations should be divided amongst the states.

After the federal government sets the targets—both overall for the nation and individually for the states—then state governments would be empowered to do what they have done well through history—design policies that fit with the culture and economies of their states. In this way, the program will respect the leadership of the states that have been active over the past decades, empowering each of these leadership states to carry their programs forward as long as they can reach the federally designated target.

The proposal also should not fall to the infirmities of federal comprehensive legislation. Relying on the states to execute their plans ensures that the states may design programs to minimize distributional effects with which they are more intimate. In addition, this approach does not require the federal government to define the mechanism and does not generate a large growth in the federal budget, as any revenue is left to the states. Finally, instead of fighting early acting states through preemption, it allows them to continue their good work under their own plans.

More specifically, a federal/state proposal could benefit from the political force that has risen among progressive voters without alienating more moderate and conservative thinkers. By allowing each state to design its plan, the progressive voices can advocate for many of their policies in the state capitols that will fully embrace them. A second political force for climate action—the leadership of state governments—also could align behind this proposal, as state leaders will feel encouraged by the approach rather than threatened.

A program devolved to the states also will have the advantage of being familiar to the professionals responsible for its implementation. Throughout environmental statutes, states are given the task of achieving federally delineated targets for pollution control. In particular, for nearly all of the major air pollutants, states are responsible for achieving federally designated air quality targets through state plans. And many states have already created proposals to reach greenhouse gas reduction targets on their own—these proposals will just have to be evaluated, and perhaps tightened, when given a federal target. (Other states that have not made such a commitment may have already started to assess their options under the

Clean Air Act.) A federal/state proposal that uses a state planning approach will have the advantage of running a familiar path for all and the ability to harvest the early work of many.

Finally, by creating a new proposal, a federal/state partnership can solve some of the legal questions that were raised about a state planning process under the Clean Air Act. For example, many of the states hoped to pool their obligations under that plan to create multistate regulatory programs. The legality of such linkages was not certain at the time but could be made certain under a new proposal.

A federal/state partnership, therefore, may promise the means to create the quickest, most effective system of putting the United States on track to address climate change. If a leader wanted to flesh out such a proposal more fully, this brief will outline a possible structure below.

PROPOSAL IN CONCEPT

A federal/state partnership proposal would need to cover, at a minimum, the following concepts: (1) level and distribution of state obligations; (2) process to assess the sufficiency of the state plans; (3) provisions to allow for multistate efforts and other desired mechanisms; and (4) provisions to ensure action for states that opt not to act on their obligations. The outline below provides a first effort for how such concepts could be developed.

Level and Distribution of State Obligations

The overall national commitment to greenhouse gas reduction should be equivalent to the amount needed to avoid the worst effects of climate change. Given the long-term planning horizons of many affected industries, a long-term target would be desirable. With the dire warnings of scientists, an aggressive target seems to be justified. Policymakers could inquire as to what level and date is necessary for the United States to carry its weight in avoiding the worst of human-caused climate change. A linear reduction path to that target could provide a place to begin the political conversation.

Once the overall targets are created, the cumulative national target will need to be divided among the states. As was the case in the creation of the acid rain program of the 1990 Clean Air Act, such a division will be a political exercise. Fairness arguments will be made for the leadership states to receive targets that do not disadvantage them for their early action, while equity arguments will be made on behalf of states in which reductions may cause the most economic distress. Fortunately, this type of horse-trading and balancing of equities is what a legislature is designed to do.

Assessment of Plan Sufficiency

Once each state has its own emissions target, the proposal will require the state to design a plan that projects to meet that target. It will be the role of the federal government to judge the sufficiency of the state plan. How it will be judged should be clear and transparent to all parties from the beginning.

Given the likely diversity of plan approaches—governors could choose to design a cap-and-trade system, implement a carbon tax, impose flexible emissions standards, or select any number of other options or combinations—the sufficiency of a plan should likely be assessed by a general economic model or the combination of several. As a result, the proposal should allow the federal government to designate a particular independent model, or combinations of such models, that will be used to determine sufficiency of a state plan. Any plan that meets the state's target using the designated models will be deemed sufficient.

Removing Legal Barriers to State Leadership

State governments, and the businesses that bridge their borders, likely will want to pursue the most economically efficient means of achieving greenhouse gas reductions in the development of their plans. In past efforts, however, there have been some legal uncertainties about their ability to pursue all such options. Regional compacts between states have been challenged, although thus far unsuccessfully, under the U.S. Constitution's Compact Clause. Efforts by states to prevent leakage—or the export of operations and their associated emissions—to states without greenhouse gas constraints have been challenged as violating the U.S. Constitution's Dormant Commerce Clause with some, but not universal, success. And efforts to pool the obligations of multiple states or multiple sectors of the economy were argued to be outside the limitations of the Clean Air Act.

A new legislative proposal for the federal/state partnership could clarify and secure the needed legal authority for these efforts. As most, if not all, of the constitutional objections are based in an argument that states are acting in the realm given to the federal government, federal legislation could clearly authorize such efforts. A new law could also make clear that the efficient grouping of states—say, all of those that share a common electric grid—or the merging of sectoral targets are explicitly permitted so that the system could seek the most efficient reductions across the economy.

Federal Backstop

One common concern about this proposal is the possibility that a state simply would refuse to create or enforce its plan for greenhouse gas reductions, thereby undercutting the effectiveness of the program. Under traditional environmental law, such a circumstance has been solved by giving the Environmental Protection Agency (EPA) the authority to impose a federal plan on the recalcitrant state. While EPA's experience under the Clean Air Act is valuable, and the capacity to assist states with such planning should not be ignored, it is hard to see Republican members finding comfort with a rule that would allow EPA to impose environmental restrictions across the entire economy in lieu of a state plan. As a result, some alternative of backstopping the effort will likely need to be identified.

One alternative approach would embrace the simplicity of a carbon fee system. For many economists, a simple, upstream carbon price that would affect behavior across the state's economy would be the most efficient means to achieve the state's carbon target. Such a system could become the backstop proposal for every state. A carbon fee system also could be administered out of the Treasury Department, which has more prowess in executing such an effort than EPA. And to ensure that there is no fear that this proposal would once again grow the federal budget, the approach could recycle the carbon fee revenue back to the governor of the affected state, where he or she could put it to use on issues of the greatest importance.

§

Climate change demands action now, and the United States' ability to act may determine whether a sufficient global response is possible. There are many very elegant proposals to tackle the problem. Novel proposals, however, require a risk-averse public to be willing to accept the risk of unproven approaches. We may not have the ability to wait for the public's willingness to act on such proposals to catch up with our need to act.

This brief, therefore, proposes a way to begin to act by using an approach that has worked through the years. Federal/state partnerships permeate environmental law, as well as many other areas of government action. The federal voice ensures that the policy reaches national goals, and it protects against adverse competition among the states undercutting the national objective. Meanwhile, the state leadership allows the creation of programs that account for the cultural and political heterogeneity of the states, and enables citizens to engage more local leaders, in whom they usually have more trust, in the creation of the solutions.

There is no reason that such a federal/state partnership cannot work to address climate change as it has in numerous instances before. Given the political uncertainty of our ability to achieve any other alternatives, the urgency of climate change demands that we consider it as the path of least resistance to achieve our climate objectives.

Published by the Nicholas Institute for Environmental Policy Solutions in 2019.
Publication Number: NI PB 19-06