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Effects of Mandated Reductions in Greenhouse Gasses: Potential Fifth Amendment Taking?

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I. Introduction

Proposed regulations to control “greenhouse gasses” include a cap-and-trade strategy that will significantly intrude into the American lifestyle, potentially resulting in the loss of economic viability of portions in the existing energy sector. The proposed cap is mandatory and will shrink over a time, resulting in radical changes in energy availability and cost. Given the magnitude of intervention into existing property rights, comparisons to the seldom used economic strategy of rationing is fair. The question presented in this analysis is, “will these proposed rules be found to be constitutional?” After further analysis, a more specific question emerges: Will the loss of economic viability within the energy sector constitute a Fifth Amendment taking which requires just compensation? A similar question was postulated but was not answered in *Lucas v. S.C. Coastal Council*: How do you determine the just compensation in a situation where portions of an asset have no viable economic value?\(^1\) Could a greenhouse gas statute be found invalid as effecting a “taking” without just compensation?

The United States Congress has very broad authority to encourage or discourage behavior it deems favorable or not. More to the point, the Preamble of the Constitution states the objectives, and Article I assigns the task to Congress to pass laws to assure the goals expressed therein are achieved. Among the powers granted to the Congress is the power to encourage alternate forms of consumption or protect markets through granting special tax status. For example, tax credits and interest free loans are available to encourage the development of clean

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and renewable energy such as solar, wind, closed loop biomass, geothermal and others.\textsuperscript{2} To discourage consumer demand, Congress may exercise its taxing power, educate the public of its dangers, or prohibit the activity altogether. Alcohol and cigarette consumption is discouraged through the imposition of heavy taxes, also commonly called “sin taxes”. “Although, if the tax is exorbitant, the Supreme Court may strike it down as an unlawful penalty rather than a tax.”\textsuperscript{3} Sometimes the government discourages consumption by placing impediments in the way of acquiring so as to inconvenience the consumer (and lead to lower consumption). One example of such regulation would include alcohol distribution laws. Rationing (limiting availability) and taxes were viewed as a preferable method compared to reducing speech (advertising) as a method to reduce alcohol sales.\textsuperscript{4}

The United States Congress has supported domestic crop prices by compensating farmers not to grow crops (e.g. corn) or by setting tariffs (e.g. sugar) to limit supply.\textsuperscript{5} Outside of a crisis such as world war or the Energy crisis of the 1970’s, Congress has been reluctant to consider accomplishing an objective by directly controlling the supply of a commodity or product through limitations such as rationing. Given that such intervention is counter to the laissez-faire market approach that has long been an important pillar of the United States economy, is the reluctance merely based on political considerations or could constitutional issues exist?

\begin{itemize}
\item \textsuperscript{3} See Dep’t of Revenue v. Kurth Ranch, 511 U.S. 767, 790 (1994).
\item \textsuperscript{5} 7 U.S.C. 7901 (2006).
\end{itemize}
In his article titled “The Tragedy of the Commons”, Garrett Hardin remarked “Prohibition is easy to legislate (though not easy to enforce); but how do we legislate temperance?” Although this paper will focus on the legal precedents as it relates to global warming legislation, this question affects other areas of concern that will affect the general welfare of citizens of the United States including the availability of medical care and the perceived dangers associated with “peak energy.” Some have advocated that the solutions to these concerns require some form of government intervention in the availability of medical care and fuel. One potential solution is rationing.

Rationing is the act or process of distributing commodities as rations in an equitable manner to achieve a particular object. Direct government intervention in the manufacture and distribution of products for the purpose of minimizing the available supply of a product or commodity in order to reach some stated goal (e.g. price support, conservation of supply, emission reductions) is rationing. The method utilized in this paper will be to examine two types of government action which have adversely affected recognized economic values; rationing or production controls and regulatory takings.

**Historical Rationing**

“It has been said that international unrest and domestic uncertainty are bound to produce temptations and pressures to depart from or temporize with traditional constitutional precepts or even short-cut the process of change which the Constitution establishes.” Actions are taken by Congress and the President at times of war which would not be considered in times of peace.

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7 Webster’s Third International Dictionary 1885 (2002)

Given the time to resolve disagreements and the urgent nature of war, some issues are not resolved for years, for example it took decades for the Congress to recognize its mistake in interning the Americans of Japanese descent during World War II.

Rationing during World War I occurred under “an act to provide further for the national security and defense by encouraging the production, conserving the supply and controlling the distribution of food products and fuel,” approved August 10, 1917 and amended October 22, 1919 (also referred to as the Lever Act).\(^9\) Justification for the intervention was clear and unequivocal; “That by reason of the existence of a state of war, it is essential to the national security and defense . . . and to establish and maintain government control of such necessaries during the war.”\(^10\) The Lever Act gave the authority to the President to seize supplies and operating plants for the furtherance of the war effort.\(^11\) However, once the President determined that government possession of the operating plant was “not longer essential for the national security or defense,” it was to be “restored to the person entitled to the possession thereof.”\(^12\) The Act itself called for just compensation for such takings and essentially all the case law relating to this broad exercises of control relate to controversy concerning the level of compensation.

The Lever Act gave the President very broad authority to regulate the price and production of food and fuel, even authority to seize the methods of production including


\(^10\) Id.


\(^12\) Id.
provisions providing for “just compensation” for any seizure. Further, since the President could both establish prices and “requisition” provisions at the government price, the legislation included protective provisions in the event of a lack of consensus of a fair price, establishing payment of 75% of the established price plus the right to sue for any unjust takings. The Fuel Administration exercised its authority during the winter of 1917-1918 by closing non-war industries between January and March 1918 in order to conserve coal. In a separate case, the President’s authority under the Act was upheld in the United States Supreme Court.

During World War II, the President again had substantial authority to control the United States economy under various acts including the “War and National Defense Emergency Price Control Act of 1942.” President Roosevelt took his obligation as Commander in Chief very seriously and expressed his willingness to move forward with his recommendations whether or not Congress approved them. In his September 7, 1942 “fire side chat” he stated, in reference to some of his unapproved initiatives, “In the event that Congress should fail to act, and act adequately, I shall accept the responsibility, and I will act”. Further he explained that he had the authority under the Constitution and under Congressional Acts “to take measures necessary to

13 Id. § 12
14 Id. § 10
avert a disaster which would interfere with the winning of the war.” Similar to the Food and Fuel Act of 1917, the legislation was declared by Congress to “be in the interest of national defense and security and necessary to the effective prosecution of the present war” as it was deemed necessary to stabilize prices and prevent market reactions that would destabilize the economy and thus the war effort.  

Americans had come to see gasoline consumption as a right. Early attempts were made to get industry to switch from oil to coal, and to get the general public to voluntarily temper their use of gasoline and fuel oil. In the spring of 1942, a complete ban on automobile racing was imposed, followed in May by gasoline rationing in the East Coast.

The situation changed as the Japanese captured the East Indies and Malaya, resulting in the loss of 90 percent of the natural rubber exported to the United States. Voluntary gasoline rationing, intended to result in the effort to conserve rubber, was replaced with what turned out to be a very unpopular mandatory gasoline rationing plan despite significant congressional opposition.

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19 Id.
21 Id. (Homeowners were encouraged to keep their homes no higher than sixty-five degrees during the day and fifth-five degrees at night. The government encouraged unlocking the natural gas resources still in the ground as an alternative).
22 Id. at 380. (Roosevelt was initially reluctant to implement a nationwide gasoline rationing requirement, given concerns about the need in the western part of the country (great distances). States that were tourist destinations were also concerned about such plans. This will remain to be a concern in the future).
23 Id.
disapproval from the western states.\textsuperscript{24} The plan was put into effect immediately at the end of 1942, following the congressional elections. Authority for rationing was achieved through The Second War Powers Act of 1942.\textsuperscript{25} In addition to rationing, a maximum speed limit of thirty-five miles per hour was implemented and an (unenforceable) prohibition on “nonessential driving” was implemented and abandoned.\textsuperscript{26}

The Emergency Price Control Act of 1942\textsuperscript{27} was established so that merchants had little recourse to challenge the determinations of the Administration. Although the process was skewed in favor of the government, its purpose was to assure just compensation. Among the challenges made to this law was the denial of due process and improper delegation,\textsuperscript{28} whether the Act could compel the Judiciary to issue an injunction based on the Administrator’s request\textsuperscript{29} and whether a violator could be prevented from receiving future supplies.\textsuperscript{30} An interesting discussion which borders on an economic justification for rationing during the war can be found in Steuart v. Bowles. As the argument goes, middlemen who violated and disregarded the quotas were an inefficient and wasteful conduit, thwarting the President’s ability to route supplies where they are needed. This in turn hurt the war effort by hurting the factory owner whose resources have been

\textsuperscript{24} Id.


\textsuperscript{27} Pub. L. No. 77-421, 56 Stat. 23.

\textsuperscript{28} Yakus v. United States, 321 U.S. 414 (1944).

\textsuperscript{29} See Hecht Co. v. Bowles, 321 U.S. 321 (1944) (The Judiciary did not concede any authority).

diverted. Under normal circumstances he could sue for lost profit. “But in these times of war the national interest cannot wait on individual claims to preference”.

On June 18, 1977, Jimmy Carter, the 39th President of the United States declared “Our decision about energy will test the character of the American people and the ability of the President and the Congress to govern. This difficult effort will be the "moral equivalent of war" - except that we will be uniting our efforts to build and not destroy.”32 As crisis and war tend to justify actions that otherwise would not be considered absent crisis and war, legislation was passed which authorized gasoline rationing during a time of peace. Section 203 of the Energy Policy and Conservation Act33 required a rationing plan be ready in the event of a severe disruption. This plan was never implemented. Conversely, quasi-rationing of gasoline on a “License Plate” basis occurred in sixteen states during the 1973 Oil Embargo.34 Gasoline rationing based on vehicle license plates has been implemented on a large scale in Mexico City, Bogotá and Sao Paulo.35

31 Id.


33 42 U.S.C. 6263


35 See Congestion Mitigation Commission Technical Analysis, License Plate Rationing Evaluation, prepared for New York City Economic Corporation, New York City Department of Transportation, December 10, 2007,
When not faced with a war (or equivalent war situation) the justification for “temperance” shifts to an economic / social question. The situation can occur where each, in an attempt to maximize their utility of a common resource, damages the resource such that the “maximizer” and all who also “drink from the same well” find themselves collectively poorer.

This phenomenon was described by Garrett Hardin as the “Tragedy of the Commons.”36 Hardin examines the appropriateness of utilizing the traditional laissez-faire assumption, i.e., “the tendency to assume that decisions reached individually will, in fact, be the best decision for an entire society” in the quest to solve problems that he describes as having “no technical solution”.37 Three examples are raised, population growth, herdsman in an open common space and pollution, and the question relative to these examples asked, can the “goal of the greatest good for the greatest number be realized?”38

https://www.nysdot.gov/portal/page/portal/programs/repository/Tech%20Memo%20on%20License%20Plate%20Rationing.pdf (Although studies following the implementation of these programs indicated short term benefits, the long term benefits were much harder to demonstrate. The rationing in Bogotá had a greater impact as it was coupled with significant infrastructure improvements such as mass transit and improved pedestrian / cycling paths. Further, studies find that travelers find ways to cheat, primarily by buying additional automobiles. Site last visited Oct. 8, 2008).


37 Id. at 1243-44 (In Hardin’s article a “technical solution” excludes any change in human values or ideas of morality).

38 Id.
Hardin was considering these questions at a time (the late 1960’s) that many were realizing that significant action was needed to control pollution. Concluding that morality was a function of time and place, he concluded that prohibitions were not appropriate and that control was most appropriate through administrative law. Finally he concludes that “Individuals locked into the “logic of the commons” are free only to bring on universal ruin; once they see the necessity of mutual coercion, they become free to pursue other goals.” Responses to this type of concern have led to oil field unitization (to prevent rapid and counterproductive overproduction), fishing (to prevent depletion of fish populations) and grazing restrictions (to prevent loss of vegetation and causing erosion). Not all agree with Hardin’s gloomy conclusion of inevitability.

In conclusion, government control, in the form of rationing commodities occurred during the two world wars. However, at all times, the government gave (what they deemed to be) just compensation for all commandeered materials. Further, mechanisms were established to allow

39 Id. at 1245-46 (Hardin wrestles with the lack of accountability associated with administrated law quoting the ancient saying, Quis custodient ipsos custodies? – “Who shall watch the watchers themselves?” and John Adam’s quote “ a government of laws and not men”, a quote which found itself as the last line in the Declaration of Rights found in the Massachusetts Constitution of 1780).

40 Id. at 1248.

41 See Jacquelin Lang Weaver, The Tragedy of the Commons From Spindletop to Enron, 44 HOUS. L. REV. 1455 (The lack of unitization in Texas Oilfields is used as an example to extrapolate to more contemporary problems involving commons).

an aggrieved claimant to exercise his right of due process. Given these conditions, the courts upheld Congressional authority to implement these laws, temporarily ceding significant authority to the President to manage economic markets. More typically, Congress encourages or discourages demand by some form of price adjustment (taxes or credits). In other situations government has exercised authority to set quotas on production or harvest of resources so as to assure its efficient utilization or to protect it so that it will be sustained for future generations.

II. Caselaw

Not surprising, the majority of the case law concerning maximum governmental exercise of control over market supply occurred during the two world wars. With the country locked into bitter and costly military campaigns, it required the sacrifice of all that remained home to maintain the effort. This and other caselaw will be examined to determine the constitutional considerations. This examination will occur in evaluating possible conflicts with Congress’s authority under the Commerce Clause and the Fifth Amendments.

II. A. Regulation of Commerce

Where there is a rational basis for regulation of interstate commerce, the Supreme Court will not typically interfere with the judgment of the Congress. The Supreme Court has identified activities Congress may regulate under the Commerce Clause; the use of the channels of interstate commerce, the protection of the instrumentalities of interstate commerce and those activities having a substantial relationship to interstate commerce.\(^43\) Energy restricting

regulations would affect all three; as travel will be curtailed, changes in interstate pipeline utilization will occur and the interstate economy will be substantially affected.

The Supreme Court has distinguished taxes that destroy commerce from those that merely resulted in an increased cost of business. State taxes which destroy commerce are unconstitutional as they are an obstruction to commerce.44 In a case that was reversed and remanded for mootness, the Ninth Circuit Court of Appeals rejected the argument that the Commerce Clause could not be the source of power that destroys commerce.45 City of Santa Rosa, et. al. v. USEPA involved a challenge to a plan to ration gasoline in the San Francisco area as a means of achieving ambient air standards mandated by the Clean Air Act. Both sides in the case acknowledged that imposition of such a plan would result in “extreme social and economic

45 City of Santa Rosa, et. al. v. USEPA, 534 F.2d 150, 154-55, (1976) vacated as moot, 429 U.S. 990 (1976); Also see Selby v. J. A. Jones Const. Co., 175 F.2d 143, 146 (6th Cir. Tenn. 1949) (Caselaw that holds the concept that the Commerce Clause does not allow the federal government to destroying commerce is sparse at best. In the referenced case, workers (constructing buildings in the effort to develop the atomic bomb) rights under the fair Labor Standards Act of 1938 were denied saying “The use of the bomb as a weapon of war is the antithesis of the regulation of Commerce with Foreign Nations. Such use is not intended to regulate but to destroy commerce”); Also see NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 36-37 (1937) (The Supreme Court stated “the fundamental principle is that the power to regulate commerce is the power to enact all appropriate legislation for its protection and advancement.” This statement become meaningless if it were to also include all appropriate legislation to destroy commerce. )
In essence, the petitioners claimed that congressional action which resulted in “extreme social and economic disruption” is inconsistent with the authority granted by the Commerce Clause. In contrast, rationing under the Emergency Energy Conservation Act of 1979 would have only been implemented under Section 103, in the case of a severe energy supply interruption with the intent of minimizing economic and social disruption associated with a supply shortfall. In *City of Santa Rosa*, the Ninth Circuit Court of Appeals based its rejection of petitioner’s argument concerning the Commerce Clause on the holdings of *Brown v. EPA*, a case which was also vacated by the Supreme Court based on Tenth Amendment concerns. As such, the question of rationing, as a means of achieving pollution control has not been examined by the Supreme Court.

A more traditional Commerce Clause analysis can be found in *FERC v. Mississippi*. Mississippi sought to have Titles I, III and § 210 of Title II of the Public Utilities Regulatory Policy Act of 1978 (PURPA) declared unconstitutional. This Act was part of a larger response to the nationwide energy crisis. The purpose of the Act was to encourage conservation of oil and gas through optimization of resources and facilities and to encourage equitable rates for electricity. The United States District Court for the southern District of Mississippi relied on

46 Id. at 152.


50 Id. at 745.

51 Id. at 746 (The legislation in most cases was advisory. In general, the recommended practices were aimed at increasing efficiency).
Carter v. Carter Coal Co.\textsuperscript{52} to conclude that the Commerce Clause cannot be used to authorize or justify federal regulatory action as it relates to public utilities.\textsuperscript{53} The Supreme Court disagreed and in the process stated the following; “A court may invalidate legislation enacted under the Commerce Clause only if it is clear that there is no rational basis for a congressional finding that the regulatory activity affects interstate commerce or that there is no reasonable connection between the regulatory means selected and asserted ends.”\textsuperscript{54} The Court found persuasive the extensive legislative history that both houses of Congress were very concerned about the effects of the “energy crisis” on public health, safety, and welfare and of course national security and that the legislation was crafted to address these concerns.\textsuperscript{55} Although the Supreme Court had little trouble determining that the Commerce Clause argument had little merit, considerably more analysis was required to dismiss the claim that the legislation was unconstitutional based on the Tenth Amendment.

II. B. Relation to Fifth Amendment - Rationing

At times it is necessary for the government to seize property for use by the public, or for implementation of regulations that affect the value of various assets. To this regard, the Fifth Amendment to the Constitution provides two protections. First in the “due process clause”; nor be deprived of life, liberty, or property. Second, in the Takings Clause; that such deprivation shall not be “without just compensation”.

\textsuperscript{52} Carter v. Carter Coal Co., 298 U.S. 238 (1936).

\textsuperscript{53} Id. at 752.

\textsuperscript{54} Id. at 754.

\textsuperscript{55} Id. at 755.
As shall be discussed in greater detail below, during both world wars, Congress passed and the Supreme Court upheld laws which authorizing rationing and seizures laws that allowed the government to set the price and requisition material at the government established price. Congress realized that such provisions would lead to situations that would result in an unjust transaction and established a procedure to allow the transaction to proceed and preserve the claim of the aggrieved. Most of the case law that followed was merely related to injured parties claiming restitution.

During World War I, the government seized the railroads and either “requisitioned and commandeered” or “diverted” (depending on whose side was argued in trial) for use by the government. The district court ultimately held that an “agreement” between the plaintiff and the government constituted a fair compensation and ordered the defendant to pay such. The district court added;

It is a plausible thing to say that the government should pay what other purchasers would be compelled to pay. It is impossible to have a law of general application which does not hurt someone. If embargoes and price fixing does injustice to anyone, it is to be regretted; but it is nonetheless to be regretted to have the public and the public treasury held to the payment of extortionate prices.

57 Id. at 43 (The plaintiff made an agreement with the government and then refused to perform because there was no consideration. The plaintiff had a better offer from overseas and attempted to make a better bargain. In the end the district court decided that the plaintiff made a substantial profit anyway, and further determined that the legal remedy, if imposed would not be much better).
58 Id.
59 Id. at 43.
The Supreme Court affirmed the district court’s decision against defendant’s [United States] claim (that the district court lack jurisdiction) by holding that §10 of the Lever Act conferred “jurisdiction without qualifications upon district courts to hear and determine controversies directly resulting from such actions.”

In another case, it was held that the Lever Act did not violate the Fifth Amendment, as the Act was “supported by a strong presumption of validity” and could not “be set aside unless clearly shown to be arbitrary and repugnant to the Constitution.”

Unlike the Lever Act of World War I, the Emergency Price Control Act of 1942 was established so that a merchant’s recourse to challenge the determinations of the Administration was more tenuous. The legislation established the Office of the Price Administrator under the direction of a Price Administrator appointed by the President. This office fixed the price of commodities based on his judgment as to what constituted fair and equitable. Any person could file a protest with the Administrator concerning a determination, and the Administrator would be obliged to answer within a reasonable time. Appeals could be made to the Emergency Court of Appeals and ultimately the Supreme Court.

The Supreme Court rejected


61 Highland v. Russell Car & Snow Plow Co., 279 U.S. 253, 262 (1929) (“plaintiff was free to keep his coal, but it would have been liable to seizure by the government”).


64 Id. at 420.

65 Id. at 428.

66 Id.
that the provisions were so onerous as to deny them the due process of law guaranteed by the Fifth Amendment.\(^{67}\) The Court went on to say “In considering these asserted hardships, it is appropriate to take into account the purpose of the Act and the circumstances attending its enactment and application as a wartime emergency measure”.\(^{68}\) Apparently constitutional rights are relative.\(^{69}\)

In response to unstable farm prices during the great depression, Congress passed The Agricultural Adjustment Act of 1938.\(^{70}\) During the effective time period of the program, producers who cooperated with the Agricultural Adjustment program received a subsidy assuming they did not plant more than their acreage allotment.\(^{71}\) The Agricultural Conservation Payment would be determined by multiplying the “allotted acres” times “the normal yield for the crop” (bushels per acre) times “the rate of payment” ($/bushels). Those that complied would receive their subsidy.\(^{72}\)

\(^{67}\) *Id.* at 431.

\(^{68}\) *Id.*

\(^{69}\) *See* Wilson v. Brown, 321 U.S. 414, 460 (1944) (Roberts, J., dissenting, saying “as the Act is an exercise of the war power and therefore does not deprive citizens of property without due process, has, nevertheless, weighed provisions of the Act as against the guaranty of the Fifth Amendment”).

\(^{70}\) 7 U.S.C.S. § 1281.

\(^{71}\) *D. Jerome Tweton, The New Deal at the Grass Roots* 122 (1988)

\(^{72}\) *Id.* at 123
In the often cited case of *Wickard v. Filburn*, the offending harvest from the farmers land was not sold but instead fed to his livestock.\(^{73}\) Congress had authorized the control of home-grown (in this case wheat) crops in order to reach a stated goal (price stabilization) and the Supreme Court upheld their authority to do so.\(^{74}\) At first glance, this case would seem to have similarities to the question at hand, can Congress limit the production of fuels (which result in greenhouse gasses) in an effort to reach a stated goal (environmental protection). However *Wickard v. Filburn* is easily distinguished from the given question.

First, the Court noted that the “government gave the farmer a choice”, and the Government may “regulate that which it subsidizes.”\(^{75}\) “The farmer who planted within his allotment was in effect guaranteed a minimum return much above what his wheat would have brought if sold on a world market basis.”\(^{76}\) In this case, the farmer had alternatives available which he could have followed, but chose not to.\(^{77}\) Proposed legislation to control greenhouse gasses will not be voluntary. Second, consistent with the subtopic being discussed, farmers who were denied the uses of their non-allotment land were compensated for that sacrifice. Although *Wickard v. Filburn* stands for broad congressional authority over the aggregation of intrastate economic activity (under the Commerce Clause) it must be noted that it occurred concurrently with just compensation.


\(^{74}\) *Id.* (as the farm consumed crop comprised a large component of the overall crop and thus had a substantial effect on the stabilization of national crop prices).

\(^{75}\) *Id.* at 130-31

\(^{76}\) *Id.* at 126.

\(^{77}\) *Id.* at 130.
II. C. Relation to Fifth Amendment – Regulatory Takings

The Supreme Court has recognizes two general types of *per se* regulatory takings; where “government requires an owner to suffer a permanent physical invasion of her property” and where the owner is deprived of “all economically beneficial use”. Given a legitimate state interest the Supreme Court recognizes the need of the State to exercise its right to take property, however the question of compensation may depend on the original possession of the right and the degree to which the property owner is harmed.

In *Lucas v. S.C. Coastal Council*, the Supreme Court stated, “A statute regulating the uses that can be made of property effects a taking if it denies an owner economically viable use of his land.” Whereas the Court establishes a *per se* rule where the economic taking is complete, it struggles with the question of degree, saying “Regrettably, the rhetorical force of our deprivation of all economical feasible use rule is greater than its precision.” Questions remain how to evaluate the taking when it is partial. Justice Scalia, in a majority decision, states criticism by the dissent is in error. The referenced note dismisses the assertion that deprivation which “is one step short of complete is not entitled to compensation” and further


80 *Id.* at 1019.

81 *Id.* n.7.

82 *Id.* at 1063 (that the “deprivation of all economic beneficial use rule” is “wholly arbitrary”).

83 *Id.* n.8.
draws from *Penn Central Transp. Co. v. New York City* in repeating “the economic impact of the regulation on the claimant . . . the extent to which the regulation has interfered with distinct investment-backed expectations are keenly relevant to takings analysis generally.” ⁸⁴ In *Penn Central*, the owners of Grand Central Station objected to a New York City law which prevented the owners from constructing a building in the air space above the station. ⁸⁵ The Court stated that as it relates to a taking consideration, the property must be examined as a whole, that individual rights within a specific segment of the property are irrelevant. ⁸⁶ The Court found relevant, in denying that the city law affected a taking, that the law neither interfered with the current use of the terminal property, profit, nor prevented the owners from obtaining a “reasonable return on its investment.” ⁸⁷

Caselaw summary

During the two world wars, due process and compensation for takings continued to exist, however under a process that was much more favorable to the government than would be accepted during peacetime. Since the mid-1930’s, notwithstanding questions about other constitutional issues, Congress’ authority to legislate under the Commerce Clause has seldom been denied. Unsuccessful challenges to its application as it applies to rationing of gasoline as a method to control air pollution have occurred. These decisions have all been overturned by the Supreme Court on different causes. Government seizure of personal property is protected under

⁸⁴ Id. n.8 (citing *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978)).


⁸⁶ *Id.* at 130-31

⁸⁷ *Id.* at 136.
the Fifth Amendment. This protection is also afforded under certain circumstances when a loss of economic viability is the result of regulation.

III. Greenhouse Gases: Legislating temperance

The question presented in this paper is whether proposed legislation limiting the emission of greenhouse gasses would be constitutional. It is evident from the review of historical caselaw that during the two world wars, the Congress had the authority to control the supply of petroleum products (as well as many other supplies). This control was always coupled with the owner of the commodity receiving compensation for his loss. Additionally, judicial uncertainty exists where a taking of a properties economic viability is less than complete. Proposed greenhouse gas reduction legislation will be examined with these findings in mind.

III. A. Alternative Greenhouse Gas Reduction Methods

The subject of controlling greenhouse gasses is active on many fronts. In response to the Supreme Court decision in Massachusetts v. EPA\textsuperscript{88}, the EPA has published an advanced notice of proposed rulemaking to solicit public comment concerning the appropriate response to the decision.\textsuperscript{89} This notice included a discussion of four types of market-oriented approaches. The approaches listed for consideration included 1) cap-and-trade, 2) an average mass-based emission rate method and 3) an emission fee (carbon tax) and finally 4) a hybrid approach. The implementations of these variations have significance that, at a minimum, affects the rational for determining constitutionality.

\textsuperscript{88} 127 S.Ct. 1438 (2007).

\textsuperscript{89} 73 Fed. Reg. 44514.
Cap-and-trade has been used to limit sulfur dioxide from the power industry (electricity) and it was to be used to limit mercury. A very significant distinction exists between these examples and what has been proposed to control greenhouse gasses. Sulfur and mercury are impurities found in hydrocarbons in varying degrees. A power utility has options for control from an existing facility; it can purchase coal with lower levels of the impurities, it can switch to natural gas, it can add controls such as scrubbers. All this adds to the cost of business, but business goes on. Carbon is not an impurity in gasoline or coal. It is the product. Cap-and trade programs for greenhouse gasses coupled with decreasing allotments are to a large degree, a prohibition of a product.

The second and third alternative methods to control greenhouse gasses (listed in the EPA’s Notice of Proposed Rulemaking) are proven congressional/regulatory methods for regulating an activity. The second method is described as a “Rate-Based Emission Credit Program.”\textsuperscript{90} This strategy essentially sets an expected level of efficiency, and those industries that perform better than the standard are rewarded, those that perform worst, must pay. As an analogy, imagine that the CAFE standard for personal automobiles was 30 mpg\textsuperscript{91}. Those who drove cars that achieved 35 mpg would receive credits that they could then sell to those that only

\textsuperscript{90} Id. at 44515-16.

\textsuperscript{91} The analogy using CAFE standards was given, because it was one that most are familiar with. Other such standards are common in industrial settings as the EPA has been setting such standards since the early 1970’s. These include New Source Performance Standards (NSPS), Maximum Achievable Control Technology (MACT), Best Achievable Control Technology (BACT) as well as others. Standards are established which represent realistic objective and are specific to various industries and equipment.
achieved 25 mpg. These credits could have a fixed price or could be auctioned as in the proposed cap-and-trade method. Significantly, the producer of greenhouse gasses is incentivized to perform efficiently, to replace inefficient equipment and to minimize operating cost. The main difference between this approach and the cap-and-trade (with a shrinking cap) method is that this approach does not set a hard limit to the actual emissions. Under a cap-and-trade (with a shrinking cap) system, effectively, the total number of miles driven will also be limited.

The third method listed by EPA in the Advance Notice of Proposed Rulemaking would be simple taxation, such as the proposed carbon tax. A system where carbon emissions are treated equally (coal versus petroleum versus natural gas) produces the least distortions in the market and a more transparent solution. A well know example of this strategy would be excise taxes on cigarettes and alcohol. Once again, the method is to influence demand, not control supply.

Legislative bills to reduce greenhouse gasses have been under consideration in both the House of Representatives and the Senate. The cornerstone of these bills is the previously mentioned “cap and trade” strategy. If a cap-and-trade method is used, the distribution of “allowances” will be hotly contested. The allocation amounts to a very large transfer of income from one party to another. Some credits are distributed to industry and some are held by the government for auction. Environmentalists prefer to call the allowances “permits” and object to

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92 Id. at 44516.

giving any to industry. These difference are essentially political questions to be decided by the Congress and do not affect the following analysis of the basic structure (since both rely on the cap-and-trade).

The stated goal in the Senate Bill is to “establish the core of a federal program to reduce U.S. greenhouse gas emissions substantially enough between 2008 and 2050 to avert catastrophic global warming.” This is to be accomplished while also accomplishing a long list of desirable outcomes; preserving a robust economy, creating jobs, avoiding hardship, reducing dependence on foreign oil, all at no extra cost to the Federal Government. The Act Establish an allowable emission level (called an Emission Allowance Account) starting in the year 2012 (going through 2050). The Emission Allowance Account decreases a fixed amount each year until 2050.

Competing bills follow this same general pattern. Cap-and-trade programs (as proposed in both the Senate and draft House bills), require that those who currently sell products (that produce greenhouse gasses) forfeit the right to sell those products and pass those rights to the government. To implement the objective, manufactures, utilities, etc., must purchase these

94 Andrew Revkin, McCain, Obama Both Aim to Tackle Global Warming, N.Y. TIMES, October 18, 2008.

95 See http://lieberman.senate.gov/documents/lwcsaonpage.pdf (One page summary found on Senator Lieberman’s web page of S. 3036 § 3).

96 S. 3063 § 201 (The Emission Allowance Account in 2012 is equivalent to the emission level in 2005).

97 Id. (Thus, resulting in a decrease of emissions of approximately 70% over 2005 levels).

98 Id. at 44514-15.
allowances back from the government, so that they may sell the product that they formally sold.

Those who favor a cap-and-trade program find desirable that the outcome (emission reduction) is determined by caveat, not by the market. A direct carbon tax would reduce emissions, but the level of reduction would be market driven. The strategy to reduce tobacco sales would be comparable to a carbon tax. If cigarette sales followed the cap-and-trade bills, it would be illegal to sell more than 113 billion cigarettes in 2050 (80 billion under the draft House bill), regardless of the population or the public’s desire to buy at any cost (which would likely be substantially affected by the scarcity of the product)\textsuperscript{99}. Functionally, the proposed cap-and-trade programs have more in common with rationing than programs to decrease demand for cigarettes. Many would consider this un-American, but is it unconstitutional?

The “advantage” to the cap-and-trade method, is that (if followed) by 2050 the country will have a known level of emissions. The downside is the loss of the market stabilizing effects of economic choice. The advantage of the average mass-based emission rate and the carbon tax method is that greenhouse gas emissions will decrease\textsuperscript{100} and the individual choice will still exist (just be more expensive). Business activity will settle at the level found economic under the

\textsuperscript{99} Consumer Affairs. Com, Cigarette Sales Fall Sharply in 2005, http://www.consumeraffairs.com/news04/2006/03/cigarette_sales_2005.html (last visited Nov. 9, 2008) (sales in 2005 were 378 billion cigarettes, which as the result of primarily state government action, i.e., the Tobacco Master Settlement Agreement was 21\% lower than in 1998, the year of the settlement).

\textsuperscript{100} The magnitude of the decrease will depend on the emission standards and the size of the tax. The downside compared to the cap-and-trade (with a shrinking cap) system is that there would be a lack of certainty as to the amount of greenhouse gas decreases.
added burdens, not be forced to fit an artificial level. The effects of the technology standards and a carbon tax would be transparent, i.e., the public will understand why they are paying more for their energy. The political question of allocation can be replaced with economic decisions made reflecting scientific realities; natural gas creates less carbon dioxide per kilowatt of electricity produced.  

III. B. Sources of Greenhouse Gasses to Control

To consider possible Fifth Amendment taking concerns, it would be helpful to understand where current emissions occur, as that is where the limitations will land. The electricity generation industry produces 34% of U.S. greenhouse gasses primarily through combustion of coal and natural gas. This sector of the economy sells electricity, a product that itself does not produce carbon dioxide. The industries “demand” for credits will be determined by the “demand” for electricity and their choice as how to produce the power. Although alternatives exist for production of electricity, hydroelectric, fossil fuel, nuclear, wind, solar, etc., conversion from one form to another is not practical or economical. Greenhouse gas legislation will have the effect of leaving significant capital stranded.

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101 Natural Gas 1998 Issues and Trends, EIA, http://www.eia.doe.gov/oil_gas/natural_gas/analysis_publications/natural_gas_1998_issues_and_trends/it98.html (last visited Nov. 9, 2008) (For the major fossil fuels, the amount of carbon dioxide produced for each billion Btu of heat extracted are: 208,000 pounds for coal, 164,000 pounds for petroleum product, and 117,000 pounds for natural gas).
The petroleum industry only emits 3% of U.S. greenhouse gasses. The products they sell (gasoline, diesel, etc) account for 28% of the U.S. greenhouse gasses. As a result of the structure of the program, petroleum refiners must purchase allowances for both its emissions (3%) and, in addition, it must purchase the allowances for the entire transportation sectors emissions (28%). One of the listed benefits of a cap-and-trade program is that “it provides economic incentives for industry to find the lowest cost method of achieving the desired emission reductions, encouraging and rewarding innovation that might not otherwise occur under more traditional regulatory government research programs." Given that refiners have control (and emit) only 10% of the allowances they must acquire, this benefit cannot occur. As discussed previously, significant capital investment will become uneconomical stranded as a result of proposed legislation.

IV. Historical Caselaw Applied to Greenhouse gas Legislation

Having briefly described the various proposals that are being pursued to limit greenhouse gasses and the doctrinal history as it relates to rationing, the focus of the remainder of the paper will be an evaluation of the constitutional considerations. The evaluation will cover applicability under the Commerce Clause and the Fifth Amendments. As will be seen, this author’s primary concern will be with the Takings Clause.

102 Climate Change Legislation Design White Paper, Scope of Cap-and Trade Program, Committee on Energy and Commerce,

103 Id. at 3-4.
IV. A. Commerce Clause: Is the destruction of commerce relevant?

It has been shown, that during the world wars, the Supreme Court might accept an act that it might not have accepted during time of peace. Where Congress has recognized a social wrong and deliberately and seriously debated the issue, the Supreme Court has not often invalidated a law based on lack of authority under the Commerce Clause. The effects of the proposed legislation will result in a quantum shift in American life: It will affect life, liberty and property. In response to EPA’s advance notice of proposed rulemaking, the Departments of Agriculture, Commerce, Transportation and Energy all expressed serious concerns that the environmental objectives can be reached without adverse effects on commerce.\footnote{73 Fed. Reg. 44359.} A balance must take place; \textit{to what extent may Congress knowingly destroy current commerce in an effort to thwart perceived future threats to commerce?}

Currently a vigorous debate is proceeding in Congress. The issue of global warming cannot be rationally decided in isolation to other issues. The United States lacks a focused Energy Policy. Is it rational for Congress to decide how to minimize energy usage, when it won’t agree where the energy will come from?\footnote{The various plans call for expanded use of nuclear power, yet many supporting the bills object to expansion of nuclear.} Is it rational to alter the economy of the country on the hope that technology (which does not exist) will arrive in time?\footnote{Everyone’s plan assumes the development of carbon capture and sequester technology. A bill has been submitted to the House of Representatives to fund research in this very area. H.R. 6258, 110th Cong. (2008).} Until these
issues are resolved, the proposed legislation would be irrational but it will certainly “rationally relate to commerce”.

IV. B. Fifth Amendment: What is the relevance of the Fifth Amendment?

During the two world wars, merchants / industries received just compensation for requisitioned goods or expropriated industries. How is ordering a factory to under produce or close different from seizure? If Mr. Filburn had followed the rule, he would have received just compensation for letting his excess acres sit idle. The courts have said where a regulation denies the owner an economically viable use of his land, that a taking has taken place. Given the historical opposition by the carbon based energy production industry (i.e., utilities, oil companies, coal producers) to greenhouse gas legislation, it should not be a stretch to postulate that such legislation would result in a change of position for these companies. To what degree must the loss of economic viability be to become a taking? As mentioned previously, in Lucas v. S.C. Costal Council, the Supreme Court tussled with the question of degree, stating that an open question remains as to amount of compensation when the taking is partial. The various congressional plans reduce the amount of greenhouse gasses by approximately 70 - 80% by 2050. United States oil refinery capacity currently stands at about 17.3 million barrels per day. The product produced at a petroleum refinery is primarily carbon. The concept of low carbon gasoline or diesel is not meaningful. This means, if petroleum refining is to take its


108 Id. n.7 & n.8.

109 Source, Energy Information Agency

“share of the burden”, refining capacity will drop to as little as 3.5 million barrels per day.\textsuperscript{110} Significant capacity will become “economically nonviable” as a result of proposed regulation. The effect would be no different if the government nationalized 13.8 million barrels per day of capacity and shut it down.

The Court in \textit{Penn Central} seems to have made a clear distinction between the loss of profitability from (previously) economical assets and the loss due to the inability to exercise a (previously unexercised) property right (as the result of a regulatory action).\textsuperscript{111} This creates some interesting questions. Given that the energy production industry is an ongoing venture, does the question of taking depend on the position of the assets within its lifecycle? For example, would an existing oil field which has become less economical, i.e., not met the “distinct investment-back expectations” because of a regulation preventing the full utilization of the asset, be considered differently than a discovered oil field, for which the full investment has not yet been made (to bring to completion)? Compare further to an oil field for which the government has granted exploration rights (with the implicit assumption that the oil may be produced if any found).\textsuperscript{112} Petroleum refiners have invested billions of dollars in the last few years to produce

\textsuperscript{110}This brings up an interesting thought. If refining capacity drops to such a low production, where will the military get aviation fuel to fight wars, biofuels? Will we have electric tanks? Or will we just stop fighting wars?


\textsuperscript{112}This example is not academic. In 2000, lessees of the Destin Dome field sued the United States claiming that the government had materially breached the lease contract or taken value without just compensation through improper delays and other regulatory actions. In 2002, the U.S. Department of the Interior settled the litigation for $120 million. See, Interior Reaches
low sulfur gasoline and diesel and gasoline. Refiners are investing significantly in producing low benzene gasoline. All have been implemented at the demand of the EPA. What if greenhouse gas legislation effects “distinct investment-back expectations”?

V. Conclusion

Is the proposed regulation constitutional? Caselaw shows us that in the past, when the government has commandeered the wheels of industry, they were compensated. Even government programs that subsidize farmers (for not planting their land) receive compensation. Why not energy companies?

Loss of economic viability as the result of a regulation is a taking. Each industrial site emitting greenhouse gasses is not a nuisance in itself. To the point, the proposed legislation does not prohibit the emission producing activities; it merely attempts to collectively reduce their size. Thus the concern is an aggregate. This has two ramifications; first, compensation should not be denied under Hadacheck v. Sebastian113 as the injured individual seeking just compensation is not a nuisance, and second, consistent with Wickard v. Filburn, where individuals give up rights in the aggregate market for a legitimate end, compensation should occur.

Complicating this analysis, the loss of economic viability will not happen the day that the law becomes effective. Inevitability, many facilities will become less profitable and eventually go out of business (and further, not meet their “distinct investment-back expectations”). Claims for just compensation could suffer for ripeness as the loss of economic viability will be similar to


a slow death. The unanswered question from *Lucas v. S.C. Coastal Council*: “How do you determine the just compensation in a situation where portions of an asset have no viable economic value” become very relevant.

In a market driven economy, no activity is guaranteed to be economical. Even where a venture seem to be profitable, external events can change that reality. Increased cost of raw materials, diminished demand and alternative products can all adversely impact an investment based decision. The fundamental question is, if government action is the force that upends investment based decisions, does it matter (from a takings evaluation) how it is accomplished? The government may simply reduce demand for product “A” by giving incentives to the production of product “B”. The government may be more intrusive by adding taxes; the heavier the taxes the more intrusive. Next, the government can “cap” the amount of product you may produce and sell. Finally, the government may just nationalize the industry and take control. Each step logically brings the government action closer to a taking.

Let’s not forget, that to a large extent, the size of greenhouse gas emissions is a direct result of government action. Transportation emissions increased significantly as a result of construction of interstate highways. President Carter stated what many felt, that the energy crisis was the greatest challenge our country would face during our lifetimes. As a result of the energy crisis of the late 1970’s, government compelled the conversion of natural gas fired industries to coal firing. Although the decision of three decades ago turned out to be the wrong one for greenhouse gasses, it was good for energy policy.

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But government is not without the ability to create new opportunities to unwind the carbon based economy they took a hand in creating. Consistent with the spirit of *Massachusetts v. EPA*, legislation, building on what we already know, can start immediately to ensure reductions in emissions through improved efficiency. While getting our “house in order” (i.e., development of a viable energy policy and research into carbon capture and sequester), EPA can develop, and industry and consumers can implement efficiency improvements to meet an average mass-based emission rate (including enhanced CAFE standards). As Congress encouraged the mobile economy by building interstate highways, it can encourage a mass transportation alternative. A fifty cent per gallon tax (on transportation fuel) would both discourage consumption and provide approximately $100 billion per year in revenue to develop alternative transportation options. Likewise, a carbon tax on fuel to create electricity will encourage production of non carbon based energy. Funds generated can fund research into carbon capture and sequester. The stark reality is that this county needs energy from coal to survive. When alternatives exist, it then becomes possible to “close the barn door” on the consumption of carbon based fuels. Premature mandates will only create severe inefficiencies in the economy.

In conclusion, it would be irrational to pass a comprehensive law, covering forty-two years of requirements in advance of a consensus energy policy and the massive research effort required to keep coal an option. Will the latest “challenge of our lifetime” allow for the legislation of the temperance of demand, or must we accomplish the goal with prohibitions in supply and economic choice?