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### Author

Farber, Daniel

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# Constitutional Restrictions on Regulation by American States

Daniel Farber

Today, both our economy and our ecosystem increasingly must be seen as global. Devoting equal attention to both, the 1992 Rio Declaration called for sustainable development on a global level. More specifically, Principle 12 of the Declaration endorses an open international economic system. Principle 7 requires all states to “cooperate in a spirit of global partnership” to preserve the ecosystem.

Inevitably, the regulatory policies of economically important political jurisdictions, such as California and the European Union, have extra-territorial impacts. These impacts include direct effects on the practices of firms based in one jurisdiction seeking to do business in the other, and indirect effects through policy emulation, learning and coordination. These policies can also impose differential costs on local and outside firms, changing the terms of economic competition and potentially causing economic distortions.

At the same time, policies may also have environmental effects in other jurisdictions, making coordination desirable. Explicit forms of cooperation between American States and other nations have also now begun to emerge. New England Governors have entered an agreement with Eastern Canadian Premiers to set goals for reducing CO<sub>2</sub> emissions and monitor progress.<sup>1</sup> California has also begun a collaborative effort with the United Kingdom to aggressively pursue energy diversity and greenhouse gas limits by investigating and implementing common market-based approaches and sharing technical information and strategies.<sup>2</sup>

In seeking to further cooperation with the EU, California legislation may encounter a variety of constitutional barriers. The purpose of this paper is to explore the constitutional restrictions on state legislation that might limit California cooperation with the EU. For instance, an otherwise desirable innovation may be inconsistent with federal law. California also may be precluded from entering into certain kinds of agreements with the EU because doing so would invade the foreign policy prerogatives of the federal government.

American states are subject to three constitutional restrictions that are relevant to environmental and social regulation. The first is called the dormant commerce clause doctrine. It prohibits states from engaging in regulation that discriminates against interstate or foreign commerce or that unduly burdens such commerce. As we will see, this doctrine is analogous to EU mandates governing the free movement of goods or to WTO trade disciplines. WTO rules may themselves be a limitation on state legislation,

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<sup>1</sup> See Eleanor Stein, *Regional Initiatives to Reduce Greenhouse Gas Emissions*, in Michael B. Gerrard, *Global Climate Change and U.S. Law* 326-327 (2007).

<sup>2</sup> *Id.* at 331.

just as they may be on federal legislation. We will only touch on this issue since it is not constitutional and since WTO rules are not judicially enforceable in the United States.

The second constitutional restriction is statutory preemption. Under the Supremacy Clause of the U.S. Constitution, a state law that conflicts with a federal statute is invalid. Preemption doctrine also invalidates state laws that interfere with the goals of federal statutes less directly. There is no equivalent of the subsidiarity concept in U.S. constitutional law.

A final constitutional restriction may be especially pertinent to EU-California cooperation. Under the doctrine of foreign policy preemption, a state law is invalid if it invades the core foreign-affairs domain that is exclusively reserved to the federal government. Unlike EU member-states, American states do not retain the power to engage in their own foreign policy, although their decisions inevitably have some impact on foreign entities. The line between permissible foreign impact and impermissible foreign policy is far from obvious. The Supreme Court has issued two recent opinions on this subject, which are generally regarded as unclear in their exact meaning but as significantly expanding this doctrine.<sup>3</sup>

This paper will describe the constitutional doctrines and their implications for EU-California cooperation. Some aspects of the doctrine are clear and provide strong warnings about the form of cooperation, such as the need to avoid any discrimination against goods from particular locales or actions that directly contravene U.S. federal legislation. But outside of these “unsafe harbors,” the rules are quite murky. The best defense to possible challenges in these gray areas is to document in depth how California policies address local needs and to coordinate as much as feasible with the federal government.

## I. The Dormant Commerce Clause

In a unified national economy, the existence of a multitude of differing state environmental laws can impede the flow of commerce. Yet, the states have often been in the lead in the environmental area because of pressing local problems. The conflict between the local interest in regulation and the economic interests of other states (and foreign nations) cannot be resolved effectively by the courts of any of the states involved. Obviously, both the state that is engaging in regulation and the states that are affected by the regulation have interests which disable them from providing a completely neutral forum. For this reason, the federal courts have emerged as the tribunals in which these conflicting interests can be assessed. This doctrine traces back to the early years of the

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<sup>3</sup> States are also subject to some explicit constitutional restrictions in the international sphere. The Import-Export Clause, Article I, sec. 10, cl. 2, provides: “No State shall, without the Consent of the Congress, lay any Imposes or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspections Laws.” This clause applies only to international trade. *Woodruff v. Parham*, 8 Wall. 123 (1869).

Nineteenth Century,<sup>4</sup> with perhaps the most influential opinion coming in the decade before the Civil War.<sup>5</sup>

The basis for federal court involvement in these issues is the commerce clause of the Constitution. The commerce clause, on its face, is a grant of power to Congress, not a grant of power to the federal courts or a restriction on state legislation. Yet, since the early 19th century, the Supreme Court has always construed the commerce clause as preventing certain kinds of state legislation even when Congress has not spoken. Various theories have been utilized in an effort to support judicial intervention, focusing on the lack of representation for out-of-state interests in state legislatures, the constitutional goal of creating an internal common market, and the role of freedom of economic movement as a component of national citizenship. The doctrine itself has been subject to changing formulations, in general moving from formalist categorizations to more pragmatic approaches. For present purposes, however, we can ignore the rather tangled history of commerce clause theory and concentrate on the doctrine as it exists today.<sup>6</sup>

At present, there are three strands to commerce clause theory. One test governs state legislation that discriminates against interstate commerce. Such legislation is virtually *per se* unconstitutional. A second test applies to the State's proprietary activities. Such activities are virtually immune from restriction under the dormant commerce clause. The third test applies to the remaining forms of state legislation. These forms of legislation are dealt with by a balancing test, with a "thumb on the scale" in favor of the state regulation.

#### A. *The Ban on Discriminatory State Regulation*

The first test is illustrated by *City of Philadelphia v. New Jersey*.<sup>7</sup> This case involved a New Jersey statute prohibiting the import of most waste originating outside the state. The Supreme Court struck down this restriction. The parties in the case disputed whether the purpose of the restriction was economic favoritism toward local industry or environmental protection of the state's resources from overuse. The Court found it unnecessary to resolve this dispute. According to the Court, the evil of protectionism can reside in legislative means as well as legislative ends: "Thus, whatever

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<sup>4</sup> Early examples include *Gibbons v. Ogden*, 32 U.S. 1 (1824); and *Wilson v. Black Bird Creek Marsh Co.*, 27 U.S. 245 (1829).

<sup>5</sup> *Cooley v. Board of Wardens of the Port of Philadelphia*, 53 U.S. 299 (1851). In *Cooley*, the Court focused on whether there was a need for national uniformity in regulating a particular aspect of some activity (piloting ships into harbor).

<sup>6</sup> For defenses of the doctrine's legitimacy, see Donald Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*; Richard Collins, *Economic Union as a Constitutional Value*, 63 NYU L. Rev. 43 (1988); Mark Tushnet, *Rethinking the Dormant Commerce Clause*, 1979 Wis. L. Rev. 125; Daniel Farber, *State Regulation and the Dormant Commerce Clause*, 3 Const. Comm. 395 (1986).

<sup>7</sup> 437 U.S. 617 (1978).

New Jersey's ultimate purpose, it may not be accomplished by discriminating against articles of commerce coming from outside the State unless there is some reason, apart from their origin, to treat them differently."<sup>8</sup> Having found that the statute was discriminatory, the Court found it easy to resolve the case:

The New Jersey law at issue in this case falls squarely within the area that the Commerce Clause puts off limits to state regulation. On its face, it imposes on out of state commercial interests the full burden of conserving the State's remaining landfill space. It is true in our previous cases the scarce natural resource was itself the article of commerce, whereas here the scarce resource and the article in the commerce are distinct. But that difference is without consequence. In both instances, the State has overtly moved to slow or freeze the flow of commerce for protectionist reasons. It does not matter that the State has shut the article of commerce inside the State in one case and outside the State in the other. What is crucial is the attempt by one State to isolate itself from a problem common to many by erecting a barrier against the movement of interstate trade.<sup>9</sup>

The Court conceded that certain quarantine laws have not been considered forbidden by the commerce clause even though they were directed against out-of-state commerce. The Court distinguished those quarantine laws, however, on the ground that in those cases the very movement of the articles risked contagion and other evils. According to the Court,

[T]hose laws thus did not discriminate against interstate commerce as such, but simply prevented traffic of noxious articles, whatever their origin." Subject to this very narrow exception, legislation which on its face distinguishes out of state items from domestic items seems likely to be held unconstitutional, in the absence of compelling justification.<sup>10</sup>

As it turned out, *Philadelphia v. New Jersey* was simply the first in a series of cases in which the Court has thwarted efforts by states to control the flow of garbage.<sup>11</sup>

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<sup>8</sup> Id. at 627.

<sup>9</sup> Id. at 628.

<sup>10</sup> Id. Other cases speak of a virtually per se rule of invalidity for discriminatory state laws. *Wyoming v. Oklahoma*, 502 U.S. 437, 454-55 (1992). One of the few exceptions is *Maine v. Tazylor*, 477 U.S. 131 (1986)(allowing Maine to bar the importation of live baitfish, on the ground that there were proven dangers that baitfish parasites would pose to indigenous wild fish). For critiques of the Court's approach, see Kirsten Engel, *Reconsidering the National Market in Solid Waste: Trade-Offs in Equity, Efficiency, Environmental Protection, and State Autonomy*, 73 N.C. L. Rev. 1481 (1997); Lisa Heinzerling, *The Commercial Constitution*, 1995 Sup. Ct. Rev. 217.

<sup>11</sup> In two 1992 cases, the Court struck down two variations on the New Jersey statute. One variation was to impose a tax on garbage imports rather than banning them. In *Chemical Waste Management v. Hunt* 502 U.S. 334 (1992), the Court struck down a special tax imposed on waste generated outside the state. A second variation was to delegate import controls to the local level. In *Fort Gratiot Sanitary Landfill, Inc. v.*

One recurrent issue involves the converse of *Philadelphia v. New Jersey*: rather than attempting to exclude garbage imports, the government was trying to ban garbage exports. Such regulations were known as flow controls.

Many cities adopted flow control ordinances that required all waste generated in the locality to be sent to a designated facility. The main reason for the requirement was to assure a sufficient flow of waste in order to finance expensive new, state-of-the-art waste disposal facilities. A five-Justice majority in *C & A Carbone, Inc. v. Town of Clarkstown*<sup>12</sup> found that flow control was facially discriminatory and struck it down under the *Philadelphia v. New Jersey* test. The majority pointed to several alternatives to flow control, including the use of property taxes to subsidize the local disposal facility. Justice O'Connor concurred in the result. She considered the ordinance to be nondiscriminatory but struck it down as an undue burden on commerce under the balancing test discussed below. Applying the same balancing test, Justice Souter and two other dissenters would have upheld the local ordinance. Justice Souter argued that none of the alternatives to flow control were as desirable, and that the locality should be free to impose on its own residents the increased costs caused by flow control. As *Carbone* illustrates, what constitutes discrimination is sometimes in the eye of the beholder: what five Justices considered to be patent discrimination, the other four did not find to be discriminatory at all.

Thus, any regulation keyed to geography faces the risk that it will be considered discriminatory, even if the regulation merely favors one geographic location over the rest of the world. The lesson of these cases is clear: if possible, state law should avoid referring to the geographic origins or destinations of goods or services. Rather, they should describe goods in geographically neutral terms.

#### *B. The Market Participant Exception*

The second class of state regulations involved proprietary or quasi proprietary activities by the State.<sup>13</sup> Here, the leading case is *Hughes v. Alexandria Scrap Corp.*<sup>14</sup> This case involved a Maryland bounty system for old, abandoned cars. Prior to 1974, no title certificate was needed by the scrap processor in order to claim the bounty. After 1974, Maryland processors needed only to submit an indemnity agreement in which their suppliers certified their own rights to the hulks. In contrast, out-of-state processors were

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*Michigan Department of Natural Resources* 504 U.S. 353 (1992), the Court struck down a state law forbidding landfills from accepting garbage generated elsewhere unless the county's landfill plan authorized them to do so.

<sup>12</sup> 511 U.S. 383 (1994).

<sup>13</sup> For discussion of this issue, see Dan Coenen, *Untangling the Market-Participant Exemption to the Dormant Commerce Clause*, 88 Mich. L. Rev. 395 (1988); Mark Gergen, *The Selfish State and the Market*, 66 Tex. L. Rev. 1097 (1988).

<sup>14</sup> 426 U.S. 794 (1976).

required to submit title certificates or police certificates. The legislation was challenged by a Virginia processor. The Court held that this statute was valid because the State was not exercising a regulatory function but rather had itself entered the market in order to bid up prices. As Justice Stevens noted in his concurrence, the interstate commerce at issue would never have existed except for the state's bounty system. Because the state's failure to create such commerce would have been unobjectionable under the commerce clause, Justice Stevens believed that out of state processors had no grounds for complaint if they were excluded from this commerce. Justice Brennan filed a strong dissent, viewing the proprietary-function exception as an unwarranted contraction of the anti-protectionism principle.

Even when a state law goes beyond the proprietary activity exemption, the involvement of the state as a market participant can help to justify otherwise impermissible restrictions on commerce. The Court's most recent commerce clause decision illustrates how a state's proprietary involvement can be used to limit out-of-state trade. In *United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Management Authority*,<sup>15</sup> a city ordinance required all local waste haulers to bring their waste to a city-owned facility. The proprietary exemption did not apply because the city was restricting sales by third-parties (the waste haulers) to out-of-state buyers, not merely restricting its own purchase and sales. Nevertheless, the city's ownership of the facility was crucial to the result. If the facility had not been city-owned, the ordinance would have been struck down because it favored the in-state facility over out-of-state competitors.

In avoiding this result, the Court found this distinction between *United Haulers* and *Carbone* (where the facility had been privately-owned) to be critical:

The only salient difference is that the laws at issue here require haulers to bring waste to facilities owned and operated by a state-created public benefit corporation. We find this difference constitutionally significant. Disposing of trash has been a traditional government activity for years, and laws that favor the government in such areas-but treat every private business, whether in-state or out-of-state, exactly the same-do not discriminate against interstate commerce for purposes of the Commerce Clause. Applying the Commerce Clause test reserved for regulations that do not discriminate against interstate commerce, we uphold these ordinances because any incidental burden they may have on interstate commerce does not outweigh the benefits they confer on the citizens of Oneida and Herkimer Counties.<sup>16</sup>

The Court explained the reasons for drawing this distinction as follows:

The contrary approach of treating public and private entities the same under the dormant Commerce Clause would lead to unprecedented and unbounded

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<sup>15</sup> 127 S. Ct. 1786 (2007).

<sup>16</sup> *Id.* at 7790.

interference by the courts with state and local government. The dormant Commerce Clause is not a roving license for federal courts to decide what activities are appropriate for state and local government to undertake, and what activities must be the province of private market competition. In this case, the citizens of Oneida and Herkimer Counties have chosen the government to provide waste management services, with a limited role for the private sector in arranging for transport of waste from the curb to the public facilities. The citizens could have left the entire matter for the private sector, in which case any regulation they undertook could not discriminate against interstate commerce. But it was also open to them to vest responsibility for the matter with their government, and to adopt flow control ordinances to support the government effort. It is not the office of the Commerce Clause to control the decision of the voters on whether government or the private sector should provide waste management services.<sup>17</sup>

The Court did not exempt the ordinance entirely from judicial review, however, but then went on to consider its validity under the test usually applied to nondiscriminatory state laws. Still, the proprietary status of the facility resulted in a loosening of the usual per se rule against discriminatory regulation of commerce.

The proprietary exemption seems to rest in part on a reluctance to ban states from engaging in market conduct that is open to private parties – in a sense, market conduct is not given full status as a public activity even when the participant is the government. Perhaps the reason for favoring proprietary actions over regulations is that the costs of the actions are more transparent, leading to greater public accountability. In any event, California clearly has greater flexibility in entering into agreements with the EU to the extent the agreement concerns government-owned facilities.

### *C. Nondiscriminatory Regulation*

Most state legislation is neither proprietary nor discriminatory, and thus falls into the third class. State legislation of this kind is not as suspect as legislation that is discriminatory on its face. Nevertheless, there is a real risk that a state may pass legislation without adequately considering its impact elsewhere in the country. In addition, the risk also exists that a state will use what appears to be nondiscriminatory legislation as covert means of burdening out of state businesses. Thus, some degree of judicial scrutiny seems warranted.

In order to guard against these risks, the Court subjects nondiscriminatory state legislation to a balancing test.<sup>18</sup> Under this test, the impact of a statute on interstate commerce is balanced against the state's justifications for the statute. The Seventh

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<sup>17</sup> Id. at 1796.

<sup>18</sup> The test was announced in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970). A leading example of its application is *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662 (1981) (striking down state restrictions on the use of certain extra-long truck-trailer combinations).



Circuit decision in *Procter & Gamble Co. v. Chicago*<sup>19</sup> is a good illustration of the balancing test. The case involved a Chicago ordinance banning the use of detergents containing phosphates. The Seventh Circuit found that the ordinance did place a burden on interstate commerce. Due to the warehousing methods used in the industry, the Chicago ordinance would restrict sales of phosphate detergents in a wide area including parts of Wisconsin, Indiana, and Michigan. Nevertheless, the court found that the possible contribution of the ordinance to controlling the growth of algae in the Illinois River and in Lake Michigan was sufficiently great to justify the burden placed on commerce. Interestingly, the court referred in part to the possible effect of this legislation in encouraging similar rules in other jurisdictions, in addition to the direct beneficial effects of the regulation. In an era in which inter-jurisdictional regulatory learning is commonplace, this is an important point.

Balancing tests are not always predictable in their application. This one is no exception. On the whole, however, environmental laws have fared well in commerce clause litigation. For example, the Supreme Court found that the burden on commerce created by a Minnesota container law was not clearly excessive, even though the Minnesota Supreme Court had found the supposed benefits of the statute to be illusory. *Minnesota v. Clover Leaf Creamery Co.*<sup>20</sup>

This balancing test has been attacked by Justice Scalia, some lower court judges, and several scholars.<sup>21</sup> These critics have assembled several arguments against the use of a balancing test to assess nondiscriminatory legislation. If a state law does not discriminate against interstate commerce, they argue, the federal courts should not second guess the state legislature about the balance between a statute's costs and benefits. Moreover, ill-advised but nondiscriminatory statutes are subject to a built in political check, because the adversely affected local industry will lobby for repeal. Thus, these laws can be handled by the political process without judicial intervention. Finally, these critics argue, the judicial balancing in these cases is unhappily reminiscent of the era in which courts routinely overturned statutes they considered unwise.

Although these arguments against the balancing test have some force, so far they have failed to make much headway on the Court. The counterarguments are that inattention to foreign interests can be just as harmful as an actual intent to discriminate and that seemingly neutral, nondiscriminatory laws can be carefully designed to harm out-of-state firms or help local ones. Thus, the balancing test can weed out both unreasonable state regulations and those that have a covert discriminatory motivation.

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<sup>19</sup> 509 F.2d 69 (7th Cir.1975)

<sup>20</sup> 449 U.S. 456 (1981).

<sup>21</sup> See *CTS Corp. v. Dynamics Corp.*, 481 U.S. 69 (1987) (Scalia, J., concurring). For academic criticism, see Julian Eule, *Laying the Dormant Commerce Clause to Rest*, 91 *Yale L.J.* 425 (1982); Richard Sedler, *The Negative Commerce Clause as a Restriction on State Regulation and Taxation: An Analysis in Terms of Constitutional Structure*, 31 *Wayne St. L. Rev.* 885 (1985).

The Court's most recent application of this test was the *Oneida* case discussed above. The Court held that the benefits of the flow-control regime clearly outweighed any possible burden on interstate commerce:

The ordinances give the Counties a convenient and effective way to finance their integrated package of waste-disposal services. While "revenue generation is not a local interest that can justify *discrimination* against interstate commerce," we think it is a cognizable benefit for purposes of the *Pike* test.

At the same time, the ordinances are more than financing tools. They increase recycling in at least two ways, conferring significant health and environmental benefits upon the citizens of the Counties. First, they create enhanced incentives for recycling and proper disposal of other kinds of waste. Solid waste disposal is expensive in Oneida-Herkimer, but the Counties accept recyclables and many forms of hazardous waste for free, effectively encouraging their citizens to sort their own trash. Second, by requiring all waste to be deposited at Authority facilities, the Counties have markedly increased their ability to enforce recycling laws. If the haulers could take waste to any disposal site, achieving an equal level of enforcement would be much more costly, if not impossible. For these reasons, any arguable burden the ordinances impose on interstate commerce does not exceed their public benefits.<sup>22</sup>

Because of its unpredictability, this balancing test is a challenge to local government officials. The best response seems to be preventative: design laws carefully to prevent unnecessary impacts on interstate commerce and fully document why they are needed to protect the public interest.

#### *D. International Analogies to the Dormant Commerce Clause*

The dormant commerce clauses addresses tensions between local regulation and an open national economy. This issue is not unique to the United States. For example, the European Court of Justice has evolved its own set of doctrines analogous to the dormant commerce clause. The ECJ has struck down regulations of member nations that act as trade barriers. One well-known case is *Commission v. Kingdom of Denmark*,<sup>23</sup> which is better known as the "Danish beer case." Denmark had imposed rigorous requirements that beverage containers be not only recyclable but actually reused. The ECJ applied a balancing test not unlike *Pike* to uphold much of the measure, while invalidating provisions that were unnecessarily burdensome for foreign manufacturers. The ECJ has also sometimes reached results interestingly different from U.S. law. For

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<sup>22</sup> 127 S. Ct. at 1798.

<sup>23</sup> 1988 ECJ Rep. 4607.

instance, it has allowed member states to ban the import of solid waste, on the theory that waste disposal is a responsibility of the member generating the waste.<sup>24</sup>

Another fruitful source of comparison involves the trade disciplines of the WTO.<sup>25</sup> Like U.S. law, GATT allows consideration of the strength of a regulation's benefits. GATT's prohibitions are qualified by GATT Article XX, which authorizes exceptions whenever trade barriers are found to be required by other widely-accepted government regulatory objectives such as health, safety or law-enforcement.

Application of Article XX requires GATT tribunals to analyze the extent to which claimed regulatory objectives are served by a particular trade-restricting measure. (Recent additions to GATT incorporate this analysis into the test for establishing a violation, rather than making it part of an affirmative defense.) A similar analysis of regulatory objectives is built into certain supplemental GATT rules that deal with facially neutral measures, such as the 1994 Standards Code prohibition of measures that create "unnecessary obstacles to international trade."

Like the Standards Clause, GATT law imposes the greatest restraints on trade-restricting measures that explicitly discriminate between domestic and foreign goods. Under GATT, the main items in this category would be border measures such as quotas and other restrictions that limit the volume of foreign goods entering the national market, and "internal" taxes or regulations that explicitly provide more onerous treatment of foreign goods. The U.S. case law often suggests that such explicitly discriminatory measures are all but *per se* prohibited under the Commerce Clause, but in practice does recognize some exceptions. Under GATT, such discriminatory measures are *prima facie* outlawed by Article III. However, Article XX permits even explicitly discriminatory measures when such discrimination is necessary to legitimate regulatory objectives.

Like U.S. doctrine, the GATT law also deals with facially neutral measures that may have a trade-restricting effect. For example, a different tax or regulatory burden may be placed on products with certain characteristics; it "just happens" that all or most foreign products fall into the disadvantaged category. An example might be emission controls that impose less burdensome requirements for large-bore engines used in domestic automobiles than for small-bore engines normally used in foreign autos.

Almost by definition, facially neutral regulations are invariably "internal" measures—taxes or other regulatory measures that are imposed on imported goods (together with domestic goods) after the imported goods have cleared customs and

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<sup>24</sup> For discussions of this case and other aspects of EU law, see Rod Hunter and Coen Muylle, "European Community Environmental Law: Institutions, Law Making, and Free Trade," 28 *Env.L.Rep.* 10477 (1998); Richard Stewart, "International Trade and Environment: Lessons from the Federal Experience," 49 *Wash. & Lee L.Rev.* 1329, 1339 (1992); Ray Hartwell and Lucas Bergkamp, "Environmental Trade Barriers and International Competitiveness," 24 *Env.L.Rep.* 10109 (1994).

<sup>25</sup> For discussion of these rules, see David M. Drisen, *What is Free Trade? The Real Issue Lurking Behind the Trade and Environment Debate*, 41 *Va. J. Int'l L.* 2 (2001); John O. McGinnis and Mark L. Movesian, *The World Trade Constitution*, 114 *Harv. L. Rev.* 511 (2000); Steve Charnovitz, *The Environment v. Trade Rules: Defogging the Debate*, 23 *Entl. L.* 475 (1993).

entered domestic commerce. GATT Article III requires that internal taxes and internal regulations treat foreign goods “no less favorably” than the “like” domestic goods. This is the so-called “national treatment” rule. Any measure found in violation of Article III would be a *prima facie* violation, and thus in the same category as explicitly discriminatory measures. Any regulatory justification for such a measure would have to comply with the strict rules of GATT Article XX.

Both the Standards Code and the SPS Agreement avoid the seemingly bifurcated approach of Articles III and XX. Both allow tribunals to weigh a measure’s trade-restricting effects and its regulatory justification at the same time. Article 2.2 of the Standards Code provides as follows:

Members shall ensure that technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade. For this purpose, technical regulations shall not be more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfillment would create. Such legitimate objectives are, *inter alia*, national security requirements; the prevention of deceptive practices; protection of human health or safety, animal or plant life or health, or the environment. In assessing such risks, relevant elements of consideration are, *inter alia*, available scientific and technical information, related processing technology or intended end use of products.

This text clearly calls for an analysis and evaluation of the regulatory purpose of the measure.

The SPS Agreement contains a rather lengthy and convoluted set of legal standards, but the basic provisions are similar to those of the Standards Code. Paragraphs 6 and 7 of the Agreement provide:

6. Members shall ensure that any sanitary or phytosanitary measure is applied only to the extent necessary to protect human, animal or plant life or health, is based on scientific principles and is not maintained without sufficient scientific evidence [with some exceptions].

7. \* \* \* Sanitary and phytosanitary measures shall not be applied in a manner which would constitute a disguised restriction on international trade.

The details of the EU and WTO free trade rules differ in important ways from U.S. judicial doctrine under the dormant commerce clause. There is, however, a clear family resemblance.<sup>26</sup> Moreover, the WTO rules may provide an additional constraint on state regulations, since state laws as well as federal ones are subject to these trade agreements. Obviously, agreements between the EU and California are subject to WTO

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<sup>26</sup> For further discussion of the resemblances, see Daniel A. Farber and Robert E. Hudec, *Free Trade and the Regulatory State: A “GATT’s-Eye” View of the Dormant Commerce Clause*, 47 Vand. L. Rev. 1401 (1994).

requirements. In any WTO proceeding, the state is not an actual party, leaving the federal government (which may be hostile to the state's position) as the only authorized advocate before the tribunal.

## II. Preemption Problems

The dormant commerce clause is an implicit constitutional limitation on state authority. It applies regardless of whether Congress has legislated in the same areas as the state or whether the President has taken a position on a subject. State authority is also subject to additional restrictions when the federal government has acted. Typically, these restrictions take effect when Congress has enacted relevant legislation that in some way conflicts with state law. More rarely, a presidential or congressional action relating to foreign affairs may also preempt a state. When the state's position deviates from the federal government, preemption is a particularly troublesome issue.

### A. *Statutory Preemption*

In this section we will be concerned with the validity of state regulations in areas where Congress has acted. It is clear, of course, that in cases of direct conflict, the state statute must give way. The Supremacy Clause of the Constitution provides:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the authority of the United States, shall be the Supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.<sup>27</sup>

Congress has the power to preempt state laws simply by enacting an express statutory provision to that effect.<sup>28</sup> The presence of a conflict between federal and state law, however, is often less than obvious.

The Supreme Court has set forth various factors which are to be considered in preemption cases. First, the federal regulatory scheme may be so pervasive and detailed as to suggest that Congress left no room for the state to supplement it. Or the statute enacted by Congress may involve a field in which the federal interest is so dominant that enforcement of state laws is precluded. Other aspects of the regulatory scheme imposed by Congress may also support the inference that Congress has completely foreclosed state legislation in a particular area. (This is often called "field" preemption.)<sup>29</sup> Even where

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<sup>27</sup> U.S. Constitution, Article VI.

<sup>28</sup> See *Shaw v. Delta Airlines*, 463 U.S. 85 (1983). Administrative agencies may also have this power where authorized by Congress. See *Hillsborough County v. Automated Medical Laboratories*, 471 U.S. 85 (1983). Similarly, if Congress determines that state regulation should not be preempted by a federal statute, Congress may expressly say so in a "savings clause" in the statute.

<sup>29</sup> This form of preemption is discussed in *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

Congress has not completely foreclosed state regulation, a state statute is void to the extent that it actually conflicts with a valid federal statute. Such a conflict can be found where compliance with both the federal and state regulations is impossible, or more often, where the state law interferes with the accomplishment of the full objectives of Congress.<sup>30</sup>

These factors are obviously rather vague and difficult to apply. The Supreme Court has done little to create any more rigorous framework for analysis. Therefore, the only way to get some degree of understanding of the field is to examine particular cases in order to see what kinds of situations have been found appropriate for application of the preemption doctrine.

One controversial preemption issue involved nuclear energy. In a 1971 case, *Northern States Power Co. v. Minnesota*,<sup>31</sup> the court held that the state lacked the authority to impose conditions on nuclear waste releases stricter than those imposed by the AEC. The court relied heavily on a provision of the Atomic Energy Act which allows the federal government to delegate regulatory authority to the states over certain categories of nuclear materials. Radioactive releases from nuclear power plants did not fall within any of these categories, which the court considered the exclusive areas in which states may regulate with respect to radiation hazards. The court concluded that state regulation would interfere with the Congressional objectives expressed in the 1954 Act:

Thus, through direction of the licensing scheme for nuclear reactors, Congress vested the AEC with the authority to resolve the proper balance between desired industrial progress and adequate health and safety standards. Only through the application and enforcements of uniform standards promulgated by a national agency will these dual objectives be assured. Were the states allowed to impose stricter standards on the level of radioactive waste releases discharged from nuclear power plants, they might conceivably be so overprotective in the area of health and safety as to unnecessarily stultify the industrial development and use of atomic energy for the production of electric power.<sup>32</sup>

In contrast, the Supreme Court upheld a California nuclear moratorium in a later decision, *Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Commission*.<sup>33</sup> In an opinion by Justice White, the Court upheld a California statute prohibiting nuclear plant operation until the federal government approved a permanent method of waste disposal. The Court found that the state statutes

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<sup>30</sup> One example is *McDermott v. Wisconsin*, 228 U.S. 1215 (1913), where following federal labeling rules would have resulted in food being mislabeled under state law.

<sup>31</sup> 447 F.2d 1143 (8th Cir.1971), 405 U.S. 1035 (1972).

<sup>32</sup> 447 F.2d at 1154.

<sup>33</sup> 461 U.S. 190 (1983).

were not aimed at radiation hazards, but instead at economic problems posed by the failure of the federal government to approve a permanent method of waste disposal. The Court concluded that Congress had not intended to promote nuclear power at all costs. Rather, Congress had decided to leave the choice as to the necessity or economic benefits of a nuclear plant to the state through its utility regulatory powers. Thus, it appears that if the state casts its legislation in the form of utility regulation, it may indirectly accomplish what federal law would not allow it to do directly—that is, impose its own views as to the safety of nuclear reactors under various circumstances. So long as it can reasonably be argued that a possible safety risk would have repercussions on the economic desirability of nuclear energy, the Supreme Court would apparently allow the state to regulate.

A year after the *PG & E* case, the Court again displayed a permissive attitude toward state laws dealing with the nuclear industry. In *Silkwood v. Kerr-McGee Corp.*,<sup>34</sup> the Court upheld an award of punitive damages against a utility for an employee's radiation injuries. As the dissent pointed out, the jury was told it could impose punitive damages even if the defendant had complied with all federal regulations. Thus, the state was allowed to hold the defendant to higher standards of conduct in the handling of radioactive materials than those imposed by the federal government. Together with *PG & E*, *Silkwood* makes it clear that the Court's enthusiasm for preemption in the nuclear area had waned considerably since it affirmed *Northern States Power* in 1972.

A recent Supreme Court case illustrates the continuing relevance of preemption doctrine to environmental regulation. In the *Engine Manufacturers* case,<sup>35</sup> the California agency with authority over air pollution in the L.A. region had issued "fleet rules" that required certain operators of vehicle fleets, such as street sweepers and taxi companies, to purchase alternative fuel vehicles and low or zero emissions vehicles already approved for sale in California and commercially available. A provision of the Clean Air Act prohibits any state or political subdivision from adopting a "standard relating to the control of emissions from new motor vehicles or new motor vehicle engines." (There is a special exception for certain California laws that did not apply in this case.) In an opinion by Justice Scalia, the Court held that the Southern California rule was invalid on the basis of the plain statutory language: the rule related to emission characteristics of a vehicle or engine, which thus constituted a "standard" preempted by the federal statute. The Court was unmoved by the fact that mobile source emissions were the leading contributor to air toxic and air pollution in the region. Similar preemption issues may be raised by state laws addressing emission of greenhouse gases by vehicles.<sup>36</sup>

Every preemption case in a sense is unique. Apart from some vague and usually unhelpful maxims, little can be said about this area of law that is of much help in deciding individual cases. The question before the court in each case is whether

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<sup>34</sup> 464 U.S. 238 (1984).

<sup>35</sup> *Engine Manufacturers Ass'n v. South Coast Air Quality Management District*, 541 U.S. 246 (2004).

<sup>36</sup> See Ann E. Carlson, *Federalism, Preemption, and Greenhouse Gas Emissions*, 37 U.S. Davis L. Rev. 281 (2003).

Congress in passing a particular statute would have been willing to allow the state to impose certain kinds of regulations in the same area. This is essentially an issue of statutory construction. It can only be resolved by close attention to the language of the federal statute, to its legislative history, and to its purposes. Thus, the best advice for lawyers in analyzing preemption problems is to probe the legislative materials and the extent to which the state statute would have a practical effect on the implementation of the federal statute.

The Supreme Court has enunciated a presumption against preemption. For example, in a decision dealing with state tort remedies against cigarette companies, the Court said that it “start[s] with the assumption that the historic police powers of the States [are] not to be superseded by . . . Federal Act unless that [is] the clear and manifest purpose of Congress.”<sup>37</sup> It is not clear, however, how significant this presumption is in practice, since the Court does quite often find that states laws are preempted by federal statutes even where reasonable minds might disagree with that conclusion.

Critics argue that the Court’s application of preemption doctrine is driven by its substantive views of particular forms of regulation rather than federalism concerns. Notably, some conservatives who favors states’ rights in other contexts are aggressive in applying preemption, while liberals who are otherwise indifferent to states’ rights tend to support the validity of state regulation. Congress can channel disputes over preemption either by including explicit preemption language or “savings clauses” that expressly limit preemption. Even when such provisions are included in federal statutes, however, there are frequently disputes about the interpretation of the language, leaving the preemption issue up in the air.

### *B. Foreign Affairs Preemption*

The Constitution gives various organs of the federal government the authority to enter into treaties, receive ambassadors, and go to war. Other provisions ban the states from making war or entering treaties. Thus, it is not difficult to discern a constitutional purpose to give the federal government control over foreign affairs. History confirms that the federal government was designed to provide a unified voice abroad. The extent to which states retain some authority to deal with matters having an international impact remains controversial. Given globalization, it seems to be increasingly common for states to reach out beyond national borders in their regulatory activities. Recent Supreme Court decisions create uncertainties about the constitutional validity of such efforts.

The Supreme Court has issued two recent opinions dealing with implied restrictions on state regulatory authority affecting foreign affairs. The first case was *Crosby v. National Foreign Trade Council*.<sup>38</sup> In 1996, the state of Massachusetts passed a law that prohibited state or local governments from doing business with companies that

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<sup>37</sup> *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992).

<sup>38</sup> 530 U.S. 363 (2000).



were themselves doing business with Burma. The Court held that the state law was preempted by federal legislation imposing sanctions on Burma. The Court concluded that the state law interfered with a provision of the federal law that gave the President discretion to control economic sanctions against Burma. Congress had enacted initial sanctions but gave the President the power to end the sanctions if he certified that Burma had made progress on human rights; he also had the power to re-impose sanctions in case of back-sliding and to suspend sanctions in the interest of national security. The Court found it implausible that Congress would have given such broad authority to the President while allowing states to undermine the effect of his decisions. Also, the state sanctions went further than the federal sanctions.

Finally, in the Court's view, the state law conflicted with the congressional directive for the President to help develop a multinational Burma strategy, since it would undermine the President's ability to engage in effective diplomacy. Indeed, the state law had already resulted in WTO complaints against the United States, causing conflict rather than promoting international cooperation in dealing with Burma. As the Court said, the state laws "compromise the very capacity of the President to speak for the Nation with one voice in dealing with other governments."<sup>39</sup>

The Court's more recent ruling in *American Insurance Ass'n v. Garamendi*,<sup>40</sup> is more difficult to interpret. The state of California had passed legislation dealing with World War II-era insurance policies held by European Jews, many of which were either confiscated by the Nazis or dishonored by insurers who denied the existence of the policy or claimed that it had lapsed from unpaid premiums. Ultimately, the Allied governments had mandated restitution to Nazi victims by the West German government. Unfortunately, although a large numbers of claims were paid, many others were not, and large-scale litigation resulted after German reunification.

The U.S. government entered into negotiations to try to resolve the dispute, as a result of which Germany entered into an agreement with Germany. Under the agreement, the German government agreed to establish a foundation with 10 billion deutsch marks of funding to compensate the victims of insurance company recalcitrance, while the federal government pledged to try to get state and local governments (and courts) to respect the agreement as a complete settlement.

In the meantime, California passed a law requiring any insurer doing business in the state to disclose information about all policies sold in Europe between 1920 and 1945. California officials were unmoved by a protest from the federal government that the statute would possibly derail its agreement with Germany.

The Court divided 5-4 about the validity of the California law. Interestingly, the line-up did not correspond to the usual liberal-conservative split on the Court. The

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<sup>39</sup> 530 U.S. at 381.

<sup>40</sup> 539 U.S. 396 (2003).

majority included a conservative (Chief Justice Rehnquist) and four of the Court's centrist judges (Souter, O'Connor, Kennedy, and Breyer), while the dissent contained two liberals (Ginsburg and Stevens) as well as the Court's two most conservative members (Scalia and Thomas).

The majority found the California law invalid as an interference with presidential foreign policy. According to the majority, the consistent presidential policy had been to encourage voluntary settlement funds in preference to litigation or coercive sanctions. California sought to place more pressure on foreign companies than the president had been willing to exert. This clear conflict between express foreign policy and state law was itself a sufficient basis for preemption. As the Court said, California was using an iron fist where the President had consistently chosen kid gloves. The majority found the preemption issue particularly clear, given the weakness of the state's interest in terms of traditional state legislative activities.

Justice Ginsburg's dissent made several cogent points. First, the state law only mandated information disclosure rather than coercing payment of claims. Second, the President had not entered into any formal executive agreement purporting to settle the claims of American holocaust survivors or their descendants against foreign insurance companies. Third, Justice Ginsburg said, upholding the state law "would not compromise the President's ability to speak with one voice for the Nation"; "[t]o the contrary," by declining to do so, "we would reserve foreign affairs preemption for circumstances where the President, acting under statutory or constitutional authority, has spoken clearly to the issue at hand."<sup>41</sup>

The scope of implied foreign affairs preemption is left unclear by these two recent decisions. *Garamendi* in particular contains broad language about the need to preserve presidential bargaining chip and the exclusive federal role in foreign affairs. It also exhibits a willingness to find preemption even though the state's action did not conflict with any binding legislation or international agreement. Thus, *Garamendi* casts a shadow on state enactments having international implications.

On the other hand, the facts in *Garamendi* suggest a narrower reading. The state action had large international repercussions compared to the state's slim domestic interest in protecting its own citizens: a small in-state tail was wagging a large international dog. The state's action was also clearly intended to have a coercive effect on specific international entities, and coercive efforts are the most likely to cause negative repercussions for the federal government. Finally, the state's action was a response to earlier events taking place wholly within foreign countries, many of them in war-tim. Thus, *Garamendi* could be read narrowly to apply only to coercive state legislation when the international impact is disproportionate to the state's domestic interest. It is too soon to know, however, how the Supreme Court will develop this doctrine.

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<sup>41</sup> Id. at 442.

A related issue is the restriction on “extra-territorial” legislation under the dormant commerce clause. In *Carbone*, for example, the Supreme Court said that it would be illegitimate for a state to ban the export of waste for the purpose of protecting the environment outside of its borders. In a case dealing with liquor pricing, the Court struck down a state law requiring liquor wholesalers to give “most favored nation” treatment to New York retailers, on the ground that this indirectly constrained the prices that the wholesalers could charge outside of the state, thereby “projecting” its law into other states.<sup>42</sup> (If the wholesaler cut its prices to an out-of-state firm, it would have to cut its price for the New York firm, providing an incentive to maintain higher prices even for out-of-state transactions.) The Court has not, however, done much to explain this rule or justify it.<sup>43</sup> Where the commerce clause does not apply, the rule about extraterritoriality is much more lenient and allows state regulation except where the state has no meaningful connection with the regulated activity.<sup>44</sup>

The special extraterritoriality ban under the domestic commerce clause has never been clearly explained and seems vulnerable to criticism. The problem is that the ban on extraterritoriality is logically incoherent. None of the cases in which the Court has discussed this issue involved explicit regulation of out-of-state activities. Rather, they involved either regulations that strongly impacted competition in out-of-state markets or that were purportedly designed in part to create out-of-state benefits. The problem is that in a unified national market, any important state regulation is likely to have some spillover effects on other markets. (Consider, for example, how Delaware’s dominant role in corporate law affects the activities of corporations that do business around the world, many of which actually have no connection with Delaware except for their charters.) This will be especially true of a state with California’s economic clout. Moreover, it seems artificial to count the out-of-state harms of a regulation against the state law, but not to count the out-of-state benefits in its favor. Extraterritorial impacts are the justification for having a balancing test, rather than some unusual circumstance that warrants the creation of special rules. Rather than forming a basis for a per se rule, it would be better to consider these effects on out-of-state markets as simply part of the balancing test. Failing that, the extraterritoriality concept should be confined to the cases of direct interference with the regulatory authority of other states, lest it swallow up the balancing test.

Another related restriction on state authority is the compact clause, which provides that “No State shall, without the Consent of Congress . . . enter into any

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<sup>42</sup> *Brown-Forman Distillers Corp. v. New York State Liquor Autho.*, 476 U.S. 573 (1986). The Court held a similar law applying to beer sales to be per se invalid because “the practical effect of the regulation is to control conduct beyond the boundaries of the State,” preventing brewers for engaging in competitive pricing in a neighboring state based on prevailing market conditions. *Healy v. Beer Inst.*, 491 U.S. 324 (1989).

<sup>43</sup> For discussion of the extraterritoriality rule, see Daniel A. Farber, *Stretching the Margins: The Geographic Nexus in Environmental Law*, 48 *Stan. L. Rev.* 1247 (1996).

<sup>44</sup> *Allstate Ins. Co. v. Hague*, 449 U.S. 302 (1981).

Agreement or Compact with another State, or with a foreign Power.”<sup>45</sup> As applied to the interstate agreements, the Supreme Court has not construed this provision to ban all agreements between states, but only those that are “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.”<sup>46</sup> On this basis, the Court upheld the formation of a multi-state tax commission formed to develop tax policy for individual states, when that policy would be adopted separately by each state.<sup>47</sup> The commission had the power to conduct audits using subpoenas in any of the member states’ courts, including audits of multinational corporations. Nevertheless, because of its inability to issue rules or assess taxes, the Court found that the commission’s activities did not violate the compact clause.

It is not clear whether the same rules would apply to a compact between a state and a foreign nation or province. Another provision of the Constitution prohibits “treaties” between states and foreign powers, with no provision for congressional waiver of the prohibition. Thus, there are four categories of international cooperation: (1) informal undertakings that do not rise to the level of explicit intergovernmental obligations, (2) explicit arrangements that are not sufficiently sweeping to constitute “compacts,” (3) “compacts” that are invalid unless approved by Congress, and (4) “treaties” that are invalid even with congressional approval. The cases dealing with agreements between states are instructive regarding the distinctions between the first three categories. As to the fourth category, we might by analogy consider that “treaties” must be ratified by the U.S. Senate while executive agreements are not subject to ratification. Thus, the category of agreements that can be subject to unilateral executive agreement may provide guidance about the category that can be subject to state agreement (at least with the consent of Congress).

### III. Current Federalism Issues: California Climate Regulation

This rather abstract set of rule may be more readily understood in a specific factual setting. Recent climate change initiatives provide a good example of potential federalism barriers to innovative state regulations.

California’s efforts to address climate change have focused on two key sectors: electrical power and transportation. These sectors lend themselves to different regulatory approaches. Power generation and distribution are industrial activities that are already regulated through public utility laws and have a relatively few, large-scale emission sources. There are also choices between fuels of varying carbon intensities. Transportation in the United States is largely in the hands of individual consumers, and the only available fuel for nearly all of them is currently gasoline.

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<sup>45</sup> Article I, sec. 10, cl. 3.

<sup>46</sup> *Virginia v. Tennessee*, 148 U.S. 503, 519 (1893).

<sup>47</sup> *United States Steel Corp. v. Multistate Tax Comm’n*, 434 U.S. 452 (1978).

Electricity regulation can produce significant federalism issues.<sup>48</sup> Consequently, in adopting utility regulation for greenhouse gases, the California Public Utility Commission has been very conscious of potential federalism issues. Its *Interim Opinion on Phase I Issues: Greenhouse Gas Emissions Performance Standards*,<sup>49</sup> discusses an array of potential legal objections to the standards. The rulemaking involves environmental performance standards for long-term supply contract entered into by California power systems, which are based on the theory that future greenhouse limitations could imperil supplies or require costly retrofits which would be charged to consumers. Much of California's electricity comes from out of state, so the regulation clearly affects sales by out-of-state generators.

Opponents of the rule raised several preemption arguments. They suggested that the California rule would conflict with a presidential policy of avoiding unilateral reductions in U.S. CO2 emissions in favor of multilateral agreements that would include developing nations. The PUC believed, however, that the foreign policy would be more accurately characterized as a refusal to enter into multilateral agreements that lacked binding restrictions on developing companies. The PUC considered it "unclear how California, which is not proposing to sign any international agreement here, could be undermining such a policy."<sup>50</sup>

Opponents also claimed the proposed rule was preempted by various federal statutes.<sup>51</sup> In particular, they contended that the rule could interfere with the federal government's exclusive jurisdiction over electricity wholesalers. But the federal government does not regulate retail electrical firms, and the proposed regulation applied only to those firms (though it did limit their contracts with some generators via wholesalers.)

Finally, opponents argued that the regulation would violate the dormant commerce clause.<sup>52</sup> The PUC rejected the claim that the rule would have a discriminatory effect on out-of-state coal-fuel generation plants. In the PUC's view, this claim failed because the rule "does not discriminate based on geographic origin."<sup>53</sup>

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<sup>48</sup> For an overview of these federalism issues, see Kirsten H. Engel, *The Dormant Commerce Clause Threat to Market-Based Environmental Regulation: The Case of Electricity Deregulation*, 26 Ecology L.Q. 243 (1999).

<sup>49</sup> Order Instituting Rulemaking to Implement the Commission's Procurement Incentive Framework and to Examine the Integration of Greenhouse Gas Emissions Standards into Procurement Policies, Decision 07-01-039 (January 25, 2007), available at [http://ww.cpuc.ca.gov/PUBLISHED/FINAL\\_Decision/64072.htm](http://ww.cpuc.ca.gov/PUBLISHED/FINAL_Decision/64072.htm).

<sup>50</sup> Id. at 193.

<sup>51</sup> Id. at 199.

<sup>52</sup> Id. at 206.

<sup>53</sup> Id. at 207.

Moreover, the regulation did not unduly burden interstate commerce. It had substantial local benefits because of the potential harm to California from climate change and the “potential exposure of California consumers to future reliability problems in electricity supplies.”<sup>54</sup> The burden on some out-of-state producers – mostly those in the Southwest, since hydropower producers in the Northwest would be unaffected<sup>55</sup> -- was reasonable in comparison with benefits, at least in the Commission’s mind.<sup>56</sup>

Another major California initiative involves automobiles. Beginning with the 2009 model year, the California Air Resources Board has a mandate to reduce CO2 emission from new car models by 30 percent on a fleet average basis. A statute known as A.B. 1493 directs the California Air Resources Board to adopt regulations that achieve “the maximum feasible and cost-effective reduction of greenhouse gas emissions from motor vehicles.” The CARB may not, however, impose fees or taxes, ban SUVs or light trucks, or impose speed limits.<sup>57</sup>

Federalism has been a significant issue in terms of vehicle regulation, particularly regarding the new car regulations authorized by A.B. 1493. The state’s regulatory scheme has been challenged on several grounds. To begin with, the Clean Air Act prohibits any state from adopting concerning emissions from new vehicles. The sole exception is for California, which can be granted a waiver from preemption if the EPA determines that the state standards are at least as stringent as the federal standards. As Ann Carlson explains in her contribution to this symposium:

California first enacted mobile source emissions standards without federal involvement. But in 1967, Congress preempted all states from regulating mobile source emissions except California. Under federal law, California could continue to regulate on its own so long as its standards were at least as protective of public health as the federal standards. And other states could choose either to follow California standards or could follow federal standards. The result is that the U.S. is a “two car” economy in terms of auto emissions. About a third of the country

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<sup>54</sup> Id. at 213.

<sup>55</sup> Id. at 217-218.

<sup>56</sup> Id. at 220. See also Peter Carl Norbert [student note], *Excuse Me, Sir, But Your Climate’s on Fire: California’s S.B. 1368 and the Dormant Commerce Clause*, 82 Notre Dame L. Rev. 2067 (2007) (similar analysis of dormant commerce clause issues); Margaret Tortorella, *Will the Commerce Clause “Pull the Plug” on Minnesota’s Quantification of the Environmental Externalities of Electricity?*, 79 Minn. L. Rev. 1547 (1995) (defending constitutionality of Minnesota law favoring utility contracts with renewable sources). An alternative to the California scheme would be for the state to act as exclusive purchasing agent for electricity, thereby taking advantage of the “market participant exception” discussed later in this article. See Brian H. Botts, *Regulating Greenhouse Gas “Leakage”: How California Can Evade the Impending Constitutional Attacks*, 19 Electricity Journal (June 2006).

<sup>57</sup> Ann E. Carlson, *Federalism, Preemption, and Greenhouse Gas Emissions*, 37 U.C. Davis L. Rev. 281, 294 (2003).

follows the California standards and the remaining states sell federally certified cars.<sup>58</sup>

EPA has resisted granting a waiver or regulating tailpipe CO<sub>2</sub> itself. Before the Supreme Court rejected its position, EPA contended that CO<sub>2</sub> was not an “emission” within the meaning of the statute, creating some puzzles about the application of the preemption and California waiver provisions.<sup>59</sup> Those issues have now been resolved, but EPA nevertheless rejected the waiver requirement due to an absence of “compelling and extraordinary circumstances.”<sup>60</sup> California immediately filed suit to challenge the waiver denial, and many observers believe that its chances of prevailing are good.

California also faces a claim that, even if it obtains a waiver under the Clean Air Act, its regulations are preempted by the federal CAFE (fuel efficiency) standards. The statute establishing the federal standards also preempts states from issuing any regulations that “relate to fuel economy standards.”<sup>61</sup> Reducing CO<sub>2</sub> from automobiles requires burning less gasoline; the question is whether the CARB can craft regulations that may indirectly have this effect without falling into the forbidden category. The state’s argument against preemption finds at least indirect support in *Massachusetts v. EPA*,<sup>62</sup> where the federal government used a similar argument in support of its claim that EPA lacked jurisdiction over CO<sub>2</sub> under the Clean Air Act. The Court responded:

EPA finally argues that it cannot regulate carbon dioxide emissions from motor vehicles because doing so would require it to tighten mileage standards, a job (according to EPA) that Congress has assigned to DOT. But that DOT sets mileage standards in no way licenses EPA to shirk its environmental responsibilities. EPA has been charged with protecting the public’s “health” and “welfare,” a statutory obligation wholly independent of DOT’s mandate to promote energy efficiency. The two obligations may overlap, but there is no reason to think the two agencies cannot both administer their obligations and yet avoid inconsistency.<sup>63</sup>

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<sup>58</sup> [cite Carlson paper for this symposium]]

<sup>59</sup> Carlson, *supra* note , at 295-296.

<sup>60</sup> For a discussion of this factor, see *id.* at 296-297.

<sup>61</sup> *Id.* at 304.

<sup>62</sup> 127 S. Ct. 1438 (2007).

<sup>63</sup> 127 S. Ct. at 1461-1462.

Obviously, this does not speak directly to the issue of state preemption, but it does suggest that the Court views fuel efficiency rules and limitations on CO2 emissions as two very different matters.<sup>64</sup>

The first judicial ruling on the validity of the California program came in *Green Mountain Chrysler Plymouth Dodge Jeep v. Crombie*.<sup>65</sup> The court considered that the federal agencies involved could work out any tensions between federal fuel economy standards and California's right to a waiver from EPA.<sup>66</sup> The court also found that the greenhouse gas regulations encompassed much more than a fuel economy mandate, particularly as concerned hydrocarbon and carbon monoxide emissions, and because the regulations encompassed upstream emissions from refineries and other fuel sources.<sup>67</sup> The court also found that the challengers had failed to prove that the rules were technologically or economically infeasible.<sup>68</sup> Finally, the court rejected the argument that the California rules improperly intruded into the field of foreign affairs.<sup>69</sup> The court noted that the State Department had in fact praised state and local efforts in its reports to international agencies.<sup>70</sup> From the state's point of view, this is a promising initial ruling, but obviously the issue will not be settled for some time to come.

Even if the CARB turns out to be unable to adopt across-the-board restrictions on CO2 from vehicles, it may still be able to do so on a more limited basis. The Ninth Circuit recently upheld a requirement that state and local governments with large vehicle fleets purchase only low-emission vehicles, despite the fact that the Supreme Court had previously struck down a similar rule that covered private buyers.<sup>71</sup> Because the rules were adopted by a regional California authority rather than the state itself, they were not eligible for the "California waiver" discussed above.

#### IV. Conclusion

The Supreme Court's decisions on the limits of state regulation seek to balance the benefits of local governmental initiative with the value of uniform national policies (including the free trade policy of the dormant commerce clause). The Court has used

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<sup>64</sup> The Congressional Research Service concluded that California should qualify for a waiver, particularly in light of *Massachusetts v. EPA*. See *Report Finds California Has Strong Case to Get Approval of Vehicle Emissions Rules*, 38 Env. Rep. (Sept. 7, 2007).

<sup>65</sup> 508 F. Supp. 2d 295 (D. Vt. 2007).

<sup>66</sup> *Id.* at 356.

<sup>67</sup> *Id.* at 352.

<sup>68</sup> *Id.* at 352.

<sup>69</sup> *Id.* at 357.

<sup>70</sup> *Id.* at 395.

<sup>71</sup> *Engine Mfrs. Ass'n v. South Coast Air Quality Management District*, 498 F.3d 1031 (9<sup>th</sup> Cir. 2007).



some relatively formalist rules such as the prohibition on discriminating against interstate commerce, but many of the cases seem to involve a more pragmatic balancing of the state and national interests. Unfortunately, this means that the ultimate balance can be driven by the general attitude of some judges toward government regulation (or even their policy views regarding particular issues). This makes decision-making in this case inherently unpredictable and prone to ideological influence.

Given the American propensity to litigate, regulatory initiatives by California and other states are likely to face legal challenge if they threaten to impose serious costs on industry. This is simply a fact of life that California officials must recognize and that outsiders such as the EU need to be aware of. The best way to ensure that the regulations are upheld is to avoid any obvious collision with federal law and carefully document the benefits of the regulation. It is also helpful to couch cooperation agreements as being process rather substance oriented, and when appropriate, to position the state as a market participant rather than a regulator. In the end, however, there may be little alternative to rolling the litigation dice.