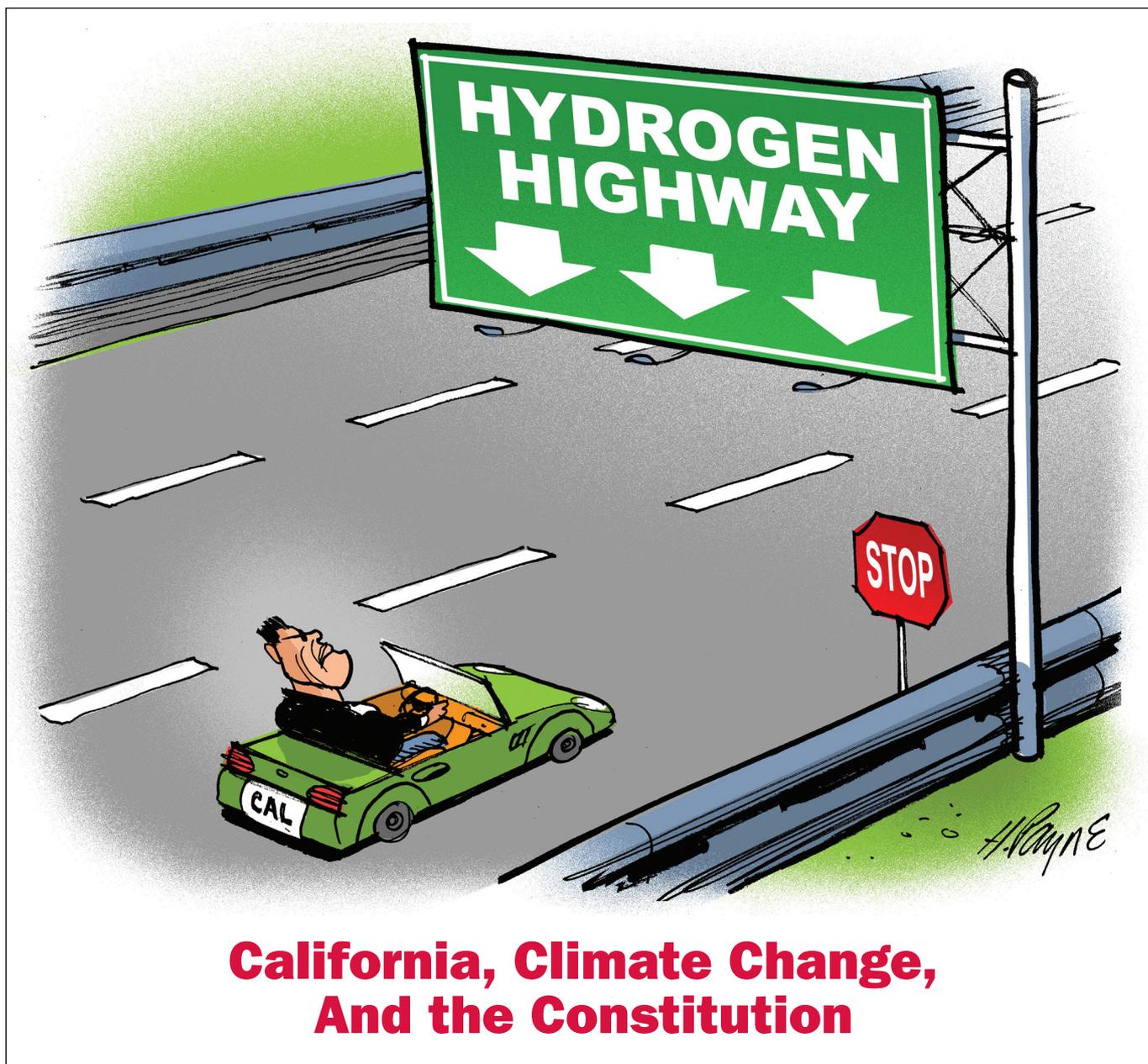


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**California, Climate Change,  
And the Constitution**

**Invasive Species**

*Cooperation and  
Coordination*

**Biofuels**

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AGENDA FOR A SUSTAINABLE AMERICA



John Dernbach, Editor

AGENDA FOR A SUSTAINABLE AMERICA

by John Dernbach

*Agenda for a Sustainable America* is a comprehensive assessment of U.S. progress toward sustainable development in the five-year period since the 2002 World Summit on Sustainable Development, in Johannesburg, South Africa.

Sustainability is quickly becoming a household word. Broad public alarm over climate change has helped to make sustainable development—now morphing into a more general notion of “sustainability”—a major public policy issue and a daily issue for Americans to confront in the way they live their lives. Dernbach and the volume’s contributing authors provide a constructive roadmap of the policy steps to be taken in over 30 sectors of the U.S. economy and society so that present and future generations can live higher quality lives with more opportunities in a sustainable manner. This book builds on the author’s 2002 assessment of U.S. sustainable development efforts in the ten-year period following the 1992 Earth Summit in Rio de Janeiro, *Stumbling Toward Sustainability* (2002; ELI Press).

*Agenda* is a prescient demonstration of how sustainable development in the United States would foster economic development, job creation, environmental protection and restoration, and improved national security. It identifies major areas where the U.S. made significant progress in the past five years and areas where significant progress has been most lacking. The author also includes a short set of key recommendations that are synthesized from the recommendations contained in the various chapters.

Praise for *Stumbling toward Sustainability*

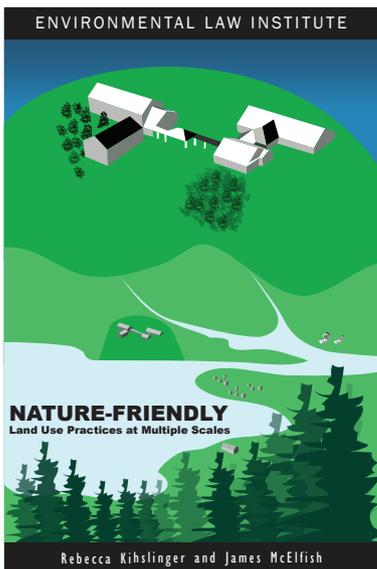
*As the world prepares to evaluate the progress of individual nations in meeting commitments made at the Earth Summit ten years ago, this is an important book for United States policymakers to review. Sustainable development is increasingly important in both developed and developing nations, and our country plays a critical role in fostering and implementing sustainable practices.*

-Senator Russell Feingold, D-WI

*This book could as easily be titled “Stumbling Toward Security”—the two are inextricably linked. As a global leader, the US has too often lagged behind the pack, as this book demonstrates in detail, sector by sector.*

-Paul R. Ehrlich  
Bing Professor of Population Studies  
and Professor of Biological Sciences,  
Stanford University

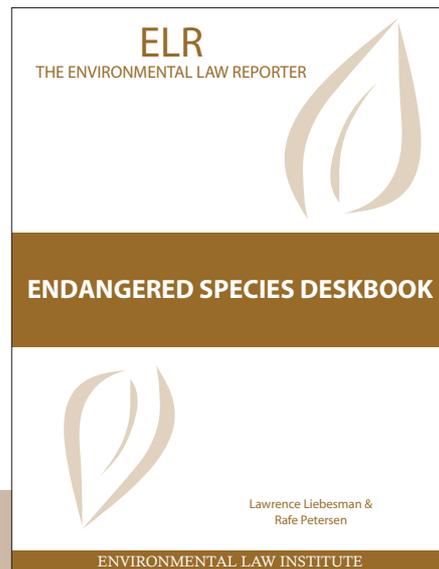
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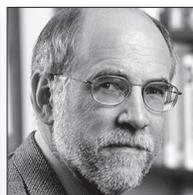
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# California, Climate Change, and the Constitution

*While the United States has of yet not passed meaningful legislation that addresses climate change, several U.S. states are taking steps to reduce the carbon footprints of their industries and citizens. As it has in the past, California is leading the way. But are its actions legal?*

**Erwin Chemerinsky**  
**Brigham Daniels**  
**Brettny Hardy**  
**Tim Profeta**  
**Christopher H. Schroeder**  
**Neil S. Siegel**



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**W**hat happens when two giants, climate change and the Constitution, come into conflict? California is a major case in point. Global warming holds the potential to become the single greatest environmental problem facing the world community. A growing number of states are taking unilateral actions to counter this threat. In its traditional position, California is playing a leadership role. But the Constitution restricts the power of states to address certain problems and particularly limits the strategies states can employ to further the interests of their citizens. Are California's vanguard policies constitutionally legitimate?

The threat of climate change does not hinge on where GHG emissions occur. On the contrary, because these gases quickly assimilate into the global atmosphere, emissions in Florence, Italy, have the same global impact as those released in Florence, California. Yet, even as the problem of climate change is a global one, its solutions are often inherently local. It is only through cumulative efforts of many that we have any hope of addressing the problem.

California has placed itself on the leading edge of state-level climate change action. Most significantly, in September 2006, Governor Arnold Schwarzenegger signed into law California's Global Warming Solutions Act, AB 32.<sup>1</sup> AB 32 requires the California Air Resources Board to set limits to reduce the state's GHG emissions to 1990 levels by the year 2020.<sup>2</sup> This law represents the nation's first mandate to reduce GHG emissions across a state's entire economy. The act does not specify how the board should go about reducing emissions, but instead generally states that the board will adopt regulations "to achieve the maximum technologically feasible and cost-effective greenhouse gas emission reductions" possible.<sup>3</sup> In considering different options, it seems likely that the board will eventually promote a cap-and-trade program. Although the act does not directly call upon the board to use market-based so-

lutions to reduce emissions, it seems that the board, along with many of California's leaders, prefers a cap-and-trade program over other alternatives.

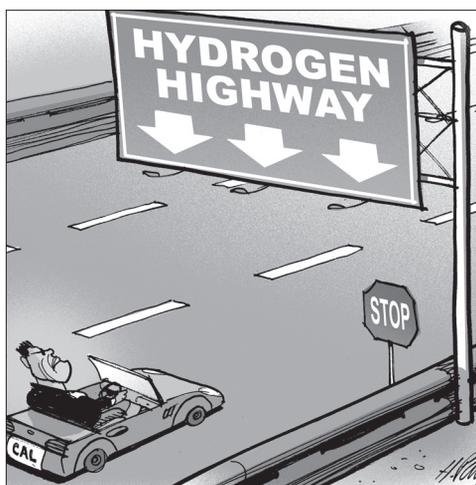
It is easy to characterize AB 32 as a logical progression of California's past actions related to climate change. The legislature has previously passed pioneering legislation that attempts to regulate GHG emissions from its automobile fleet.<sup>4</sup> Additionally, about two months before signing AB 32, Schwarzenegger signed an agreement with Prime Minister Tony Blair providing for the state and the United Kingdom to work cooperatively to address climate change.<sup>5</sup>

The governor has issued an executive order that sets out an aggressive timeline for California to reduce its GHG emissions.<sup>6</sup> The state's bureaucracy has taken some steps to address the issue: the California Public Utility Commission has instituted a process to cap GHG emissions for electricity generators.<sup>7</sup> California has also gone to great lengths to invest in research to help the state understand the stakes it has in the climate change debate and the policies it could pursue to address the problem.<sup>8</sup>

Perhaps due to the stark contrast between California and the dearth of federal action on climate change, AB 32 has attracted the spotlight of the international stage. As Schwarzenegger signed the legislation, national and international leaders showed their support and praised AB 32. Blair noted that the signing ceremony represented a "historic day for the rest of the world as

well."<sup>9</sup> Indeed, the backdrop for the signing ceremony — more than 100 flags of the world's nations — highlights the global fanfare surrounding AB 32.

Given California's role as a state, extraordinary circumstances surround AB 32. Outside of the media's spotlight, it is easy to imagine that many others have wondered how AB 32 might impact them. Presumably the shadow of the act has created discomfort for the president and others in Washington, D.C., who have advocated only modest and voluntary action to address climate change. Indeed, comments such as Schwarzenegger's criticism of the federal government rang out loud and clear in the press: "California will not wait for our federal government to take strong



*What happens when two giants, climate change and the Constitution, come into conflict?*

action on global warming.”<sup>10</sup> Those charged with negotiating our nation’s treaties may have wondered if California’s actions complicated the U.S. position. Additionally, those inside and outside the state who rely on the bounty of the California economy had to wonder whether they would help bear the cost of AB 32.

Because both the benefits and the costs of California’s actions at least have the potential to extend beyond state lines, it should not be surprising that its actions raise some serious questions about whether the state has overstepped or will overstep its bounds. Depending on how the board implements AB 32, California’s enactment may raise constitutional concerns, particularly if it settles on a cap-and-trade system that impacts interstate commerce or attempts to broaden the relevant GHG market by coordinating the state’s GHG markets with those created in other countries.

This article is meant to provide California with some sound advice on the extent to which potential federal constitutional pitfalls surround the state’s action. We also understand that a growing number of states are on track to follow California’s steps. Given this, we highlight the fact that

the analysis contained in this article has practical value for those outside the state.

## The Problem of Leakage and the Dormant Commerce Clause

**D**espite the simplicity of the goal, the state faces some significant challenges in creating an effective cap-and-trade system. One such barrier is that those outside California might undo any progress California makes inside its borders. In confronting a global problem, the fluid nature of the global economy can make it difficult to achieve and assess progress.

In order to ensure that any reductions within California translate to actual reductions of GHGs in the global atmosphere, the state’s implementing agencies will need to design a program that takes precautions to guarantee that gains from such reductions are not lost through GHG increases elsewhere. The danger in proceeding with indifference to such leakage is that it could undermine California’s goals.

Leakage is a common challenge for policies attempting to reduce undesirable activities. For example, when a municipal police force institutes an aggressive attack on illegal drug sales, drug sellers may relocate to

other jurisdictions and continue their illegal business. Within the electricity sector, relocating generating facilities to escape global warming regulation is implausible, at least in the short term, but the electrical grid and the interchangeable nature of generated electricity means the market may respond by shifting production to unregulated facilities outside the state. The risk of leakage grows out of several factors including transportation costs, the pollution intensity of the product, the ability of out-of-state producers to create similar products, the regulatory burden outside California, and the capacity of out-of-state producers to fill California reductions.

The term leakage can have unfortunate connotations. While it captures the concern that efforts within California may be undone by the response of the broader economy, it can also suggest that California will attempt to reach out beyond its borders to target troublemakers outside of the state. Instead, anti-leakage measures should be thought of as devices to plug holes in California’s regulatory program to prevent the benefits of that program from dissipating. So long as these measures are applied evenhandedly and without discriminatory effects on economic activity outside the state, they are appropriate measures for it to enact. The more that California looks outward or aims its program at outsiders, the more likely it is that the dormant Commerce Clause will cause problems.

### *The Problem of Leakage in the Electricity Sector*

Of all the sectors that a cap-and-trade program will likely cover, the utility industry faces the greatest challenges in curbing leakage. Transmission lines make transporting electricity simple and inexpensive and electrons on the grid are indistinguishable from each other. California already purchases about one-quarter of its electricity from outside its borders. Because its in-state electricity production facilities largely rely on sources of power other than coal and gas, the imported power accounts for one-half of the GHG emissions attributable to California’s electricity use.<sup>11</sup> Meanwhile, many out-of-state generators have excess capacity. If the state increasingly comes to rely on electricity produced outside of California, total GHG emissions for electricity used by Californians most likely will increase.

In evaluating California’s cap-and-trade program with the dormant Commerce Clause in mind, the constitutionality of any government action that implicates interstate commerce will in large part

*Leakage is a common challenge for policies attempting to reduce undesirable activities*

*Because benefits and costs of California’s actions extend beyond state lines, questions arise as to their propriety*

turn on its objectives and whether the provisions of California's cap-and-trade program can be defended as an effective and non-discriminatory means of achieving those objectives. The state's basic objectives for the program were defined by the California Legislature in AB 32:

The Legislature finds and declares all of the following:

(a) Global warming poses a serious threat to the economic well-being, public health, natural resources, and the environment of California. The potential adverse impacts of global warming include the exacerbation of air quality problems, a reduction in . . . the Sierra snowpack, a rise in sea levels . . . , damage to marine ecosystems and the natural environment, and an increase in . . . human health-related problems.

(b) Global warming will have detrimental effects on some of California's largest industries. . . . It will also increase the strain on electricity supplies. . . .

(c) California has long been a national and international leader on energy conservation and environmental stewardship efforts. . . . The program established by this division will continue this tradition. . . .

(d) National and international actions are necessary to fully address the issue of global warming. However, action taken by California to reduce emissions of greenhouse gases will have far-reaching effects . . . .

(e) By exercising a global leadership role, California will also position its economy . . . to benefit from . . . efforts to reduce emissions of greenhouse gases . . . and will provide an opportunity for the state to take a . . . leadership role in reducing emissions of greenhouse gases.<sup>12</sup>

These goals contrast starkly with the major concern behind the dormant Commerce Clause, which is to prevent economic protectionism. Rather than protecting its internal economy, California aims to lead the way in taking actions that will help the world reduce the threat of climate change.

To understand why the state is justified in worrying about leakage, it is useful to think about how leakage implicates its stated purposes in enacting AB 32. Put into the context of energy production and consumption, California's purposes boil down to three recurring themes:

- Taking responsibility for emissions caused by the energy it produces and consumes;
- Reducing externalities related to its production and consumption of energy; and

- Showing leadership as an environmental steward.

Leakage directly undermines all three of these objectives. California wants to take responsibility for the emissions that constitute its global warming footprint; leakage undermines that goal. Similarly, leakage undercuts the objective of reducing the externalities associated with its consumption and production of electricity; displacing its emissions with emissions outside the state leaves the global warming problem unaffected — or worsened. Finally, it is hard for California to show environmental leadership if leakages make the state's regulatory structure ineffective.

The Constitution limits how California may go about negating the adverse effects of leakage. Just as a police chief cannot investigate and arrest drug dealers who have moved out of the chief's municipality and started up business somewhere else, states face limits in what they can do to minimize the adverse effects of leakage. So long as the cap-and-trade program places legal responsibilities on entities that remain in California or on sales of electricity to users in California, and so long as it does not place burdens on the entities or transactions that differ according to whether the electricity involved was generated inside or outside the state, its efforts ought to be sustained.

### *The Dormant Commerce Clause*

Under the Constitution, the Congress has the power to regulate interstate commerce. The dormant Commerce Clause is an unwritten logical extension of Congress's power that prevents states from usurping Congress's authority to regulate interstate commerce.

At the heart of the dormant Commerce Clause is the principle that states are not allowed to discriminate against citizens of other states "simply to give a competitive advantage to in-state businesses."<sup>13</sup> The concern that states had erected trade barriers among them

reflect[s] a central concern of the Framers that was an immediate reason for calling the Constitutional Convention: the conviction that in order to succeed, the new union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the colonies and later among the [s]tates under the Articles of Confederation.<sup>14</sup>

Undoubtedly, the free flow of commerce among the

*The Constitution limits how California may go about negating the adverse effects of leakage*

states is one of the chief aspects of U.S. economic strength.

In reviewing dormant Commerce Clause challenges, courts first look to whether the law discriminates against out-of-staters or attempts to regulate beyond a state's jurisdiction. If a law does either of these, courts apply a strict scrutiny standard which is extremely difficult for a state to satisfy.<sup>15</sup> If a law regulates evenhandedly and only attempts to regulate within its borders, it still receives dormant Commerce Clause scrutiny, but the courts apply a balancing test that is much more favorable to the state law.<sup>16</sup>

If a state law receives strict scrutiny, it is subject to a "virtually per se rule of invalidity."<sup>17</sup> Few laws — exactly one, in fact — have survived the strict scrutiny that the Court applies to discriminatory laws. Under the balancing test that courts apply to evenhanded laws — sometimes called the Pike balancing test — laws have much greater chances for success. In all cases, courts examine the terms of the law, the information before the state when it made the law, and the real-world impact of the law.

The first-order question for dormant Commerce Clause analysis is what level of scrutiny a court should apply. In order to ferret out a law that burdens interstate commerce, courts first look to whether a state regulation is discriminatory.

Discriminatory laws fall into two categories. Facially discriminatory laws are those that differentiate between in-state and out-of-state entities in terms of the laws themselves. Facially neutral laws do not draw a distinction in terms of the law between in-state and out-of-state entities, but they are found to be discriminatory either because of their effects or their purposes.<sup>18</sup>

If a law is facially neutral, a court will review a law based on its impacts on interstate commerce.<sup>19</sup> Whether a court deems a facially neutral state law discriminatory or neutral in application largely depends on how the court characterizes the law's application. Here, courts focus primarily on the law's practical effect, although a

discriminatory purpose can also subject a law to strict scrutiny.<sup>20</sup> If a facially neutral law does not create barriers to trade, prohibit the flow or increase the costs of interstate commerce, or distinguish between in-staters and out-of-staters, courts will find a law nondiscriminatory.<sup>21</sup>

Although strict scrutiny is usually reserved for discriminatory laws, there is also the special case of laws that attempt to "control conduct beyond the boundary of the state," or extraterritorial legisla-

tion.<sup>22</sup> Again, courts will look to see if a law explicitly is extraterritorial or has the "practical effect" of being extraterritorial. In evaluating whether a law has the practical effect of regulating conduct beyond state boundaries, courts consider the consequences of the law, how the challenged law interacts with other states' regulations, and what would happen if many or all states adopted similar legislation.<sup>23</sup> After weighing these specific considerations, if the court finds that a state regulation would produce "inconsistent legislation," it will apply strict scrutiny and consistently strike down such laws.<sup>24</sup>

Once a court determines that it should apply strict scrutiny, what does this mean? As a practical matter, it means that the state will almost certainly lose. The Court has upheld only one state law that was deemed to be a discriminatory state law<sup>25</sup> and no state law that attempts to control conduct beyond the state's boundaries.

From a more doctrinal perspective, in order to uphold a discriminatory or extraterritorial law, courts conduct a two-pronged inquiry: first, to find that the law has a legitimate and substantial purpose and, second, to find that there are no less discriminatory means of accomplishing that purpose. While courts look critically at both prongs, the burden of showing that there are no less discriminatory means is an especially heavy one.<sup>26</sup> If a court finds that there is any potentially less discriminatory way for a state to accomplish its purposes, the statute fails.<sup>27</sup> Litigants and courts have proven to be very capable of finding less discriminatory means.<sup>28</sup> As Justice Thurgood Marshall famously explained in another context: "Strict scrutiny is strict in theory but fatal in fact."<sup>29</sup> While that aphorism has not held true in the context of equal protection jurisprudence,<sup>30</sup> it remains true in the context of the dormant Commerce Clause.

When a state law is not discriminatory or extraterritorial, courts apply the Pike balancing test. The Supreme Court articulated the standard for a balancing test for dormant Commerce Clause challenges in *Pike v. Bruce Church, Inc.*<sup>31</sup>: "Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits."<sup>32</sup>

The Pike test requires courts to make a number of relatively subjective evaluations: whether the claimed local interest is "legitimate"; whether any "less burdensome" regulatory alternatives are available; and, ultimately, whether the alleged benefits of the regulation outweigh the burdens on inter-

*Few laws — exactly one, in fact — survive the strict scrutiny that the Court applies to discriminatory laws*

state commerce.<sup>33</sup> Because of the subjective nature of this test, the outcome is often difficult to predict.<sup>34</sup>

The Supreme Court has found that protecting the business reputation of in-state producers is a fairly insignificant interest.<sup>35</sup> In contrast, the Court has found a wide range of purposes to be legitimate, including public safety,<sup>36</sup> consumer protection,<sup>37</sup> resource conservation, and environmental quality.<sup>38</sup> While courts have found many purposes legitimate, some interests may receive more weight than others. For example, while the Supreme Court has recognized environmental protection as a legitimate local interest, it has done so on limited occasions and seems to prefer such interests be articulated in terms of public safety. This may particularly be the case with the current makeup of the Supreme Court.

*Four dissenting justices would have held that the state challengers did not have standing to sue over climate change*

In the Supreme Court's recent environmental decision *Massachusetts v. EPA*,<sup>39</sup> four dissenting justices would have held that the state challengers did not have standing to sue over harm caused by climate change<sup>40</sup> and would have allowed the Environmental Protection Agency to reject GHGs as pollutants under the Clean Air Act.<sup>41</sup> Similarly, in *Rapanos v. United States*,<sup>42</sup> the same four justices dissented and read the Clean Water Act in a way that would have sharply limited the reach of the act. Taken together, these cases suggest the wisdom of framing the threats of climate change more broadly than environmental problems. Indeed, this is what the California legislature did in laying out its purposes for enacting AB 32.

While we suggest that states should cast a fairly wide net in framing their purpose, they need to understand that overstating the case may prove harmful in the course of litigation. One reason for this is that it is critical that a state build a robust record justifying its purposes for action. Hollow reasons for action will make it difficult to build an adequate record. States should take time to draw a clear relationship between the state regulation and the harm it seeks to prevent. Additionally, it hurts states to concoct rationales out of thin air, because in parsing a state's purpose, courts are often skeptical about its purported interests, because enumerated reasons may actually be merely dressed up rationales that cloak economic protectionism. Our assessment is that the given purposes for enacting AB 32 are substantial and justifiable rationales for regulatory action. California should attempt to back up these rationales with an administrative record that shows a clear connection between the regulatory measures

it chooses and the purposes set forth by the legislature.

We can apply these dormant Commerce Clause principles to the leakage issue. If California aims to stop leakage by treating electricity generated outside of the state differently than electricity generated inside its borders, the state will almost certainly lose when facing a lawsuit based on dormant Commerce Clause grounds. This means that California should avoid making regulatory distinctions between in-state energy and out-of-state energy and create a process that is blind to the location of energy production. Similarly, if California attempts to stop leakage by attempting to regulate outside of California, the state will likely lose. This means that the incidence of regulation — the events upon which regulatory requirements are imposed — ought to be easily describable as occurring within California. For example, the state might be tempted to require those generating energy to install costly equipment to monitor emissions. Imposing this burden outside of the state might invite the argument that California is regulating beyond its boundaries. In contrast, California might require that anyone selling electricity in the state of California be able to provide assurance that certain GHG-related standards are being met. Such assurance might be provided by continuous emissions monitors, but these would not have been directly mandated.

Given the stringency of the strict scrutiny test, California's only viable option is to regulate in such a way that courts will apply the Pike balancing test, or in other words, to create laws that do not discriminate or have extraterritorial effects.

*California's only option is to create laws that do not discriminate or have extraterritorial effects*

With regard to the first component of the Pike balancing test, a reviewing court will evaluate California's legitimate interests in enacting a GHG cap-and-trade program. The state's interests as well as how those interests are served by the measures it is taking should be substantiated by a record of evidence. Assuming that California builds a proper record to support its decision, a reviewing court should find that its interests are substantial. However, California can help a potential reviewing court see the policy in its most favorable light. To do so, the state will want to highlight those factors that receive greater recognition from reviewing courts.

With the justifications California has already laid out in AB 32,<sup>43</sup> the state has started out on the right foot. In moving forward, we suggest that California keep four principles in mind when crafting its regulations.

First, it should create a process and rationale for action that focuses on regulating California. Not only should the state document its desire to regulate its own internal consumption and production of GHGs, its actions should back this up. This means finding ways to run its program — including its attempt to control leakage — that focus on actors operating within the state.

Second, California should identify and stress the benefits that accrue specifically to the state. Even though California is attempting to lessen the impact of a global problem, its strongest justification for taking state action is that this global problem has severe localized impacts. California's record should explain how the actions that it takes are aimed at helping the state and should describe the local factors at risk. Again, the groundwork for this approach is already in place in the legislative purposes found in AB 32.<sup>44</sup>

In a related vein, California should anticipate the argument that its efforts are futile. In other words, opponents in litigation might argue that regardless of what California does, it will suffer the harm it seeks to avoid. In passing AB 32, California has emphasized its desire to show environmental leadership.<sup>45</sup> Its desire to inspire others to act is important. The state should also make the case that the only way to solve international problems is for many to do their part. If every government had to wait for the world to agree before taking action, nothing would be done. California's efforts to reduce the challenge make others more likely to act.

Third, California needs to take special pains to avoid even the appearance that its program is motivated by punishing out-of-staters. While we have no reason to anticipate that this would be any part of its motives, the record ought to reflect clearly that California is solely interested in taking responsibility for its share of the global warming problem, and not out of any desire to go after out-of-state bad guys. If such motivation became an important element in its decision, even if only because rhetorically it is a way to generate in-state support, this will put the state on much less solid ground.

Fourth, in crafting its policy, California should avoid indicting the federal government for its lack of action. It should take care not to frame its efforts as an attempt to override federal policies on GHG regulation.<sup>46</sup> While California can legitimately note that it is dissatisfied with national policies, it needs to walk a fine line so that it does not appear that the overriding motivation for the state's action is to put

a stick in the eye of the federal government.

With regard to the second prong of the Pike balancing test, a reviewing court will weigh California's benefit against the burden its policies place on interstate commerce. Again, California can assist itself by intelligently designing its regulatory system. While it is impossible to assess the burden of an unknown program, we do wish to provide two benchmarks that would lessen the impact on the interstate economy.

One benchmark policymakers should keep in mind is the more squarely that California can place the regulatory burden on in-state actors the better. For example, it could place its burden on load-serving entities that transport electricity within the state, utilities that generate or sell electricity within the state, or consumers that consume within the state. Of course, in making its decision, California will want to reduce leakage, and it will somehow need to track both the energy produced outside the state but sold in California along with the electricity produced in the state but exported elsewhere.

The second benchmark is that the simpler California makes it for out-of-staters to comply with the state's regulations, the better. The more burdensome the regulation, the more likely it is that a court will find that the state fails the Pike balancing test. This is important enough that it is not unreasonable for the state to seriously consider making small concessions of the program's effectiveness in order to accommodate this goal. Similarly, California will want to make sure that its policy will place out-of-staters that want to participate in California's market on equal footing with in-staters. The theme should be that out-of-staters are only asked to do their fair share and that the burdens and processes that they encounter are no different from those of in-state producers.

In sum, we think that California's legislation will survive a legal challenge under the dormant Commerce Clause if it avoids strict scrutiny, attaches regulatory obligations on events that can readily be described as in-state activities, and compiles a record documenting the effectiveness of its regulatory measures in accomplishing the state's legitimate objectives. That said, California can do much to help its cause in the instance that a reviewing court weighs its regulation under the Pike balancing test. Climate change looms large in California's future, as it does for the entire world. To build a strong record, the state needs to tie its actions to, and explain its policies in light of, those threats. Additionally, it should avoid vilifying out-of-state interests or the federal government. Additionally, the state will help its cause if it makes it easy to comply with

*California needs to avoid even the appearance that it is motivated by punishing out-of-staters*

its regulations and takes pains to assure that out-of-staters do not have different burdens or have to comply with different processes than those required of in-staters.

## Emissions Trading and the Dormant Foreign Policy Power

California needs to remain aware of another federal constitutional matter. The state has taken steps to initiate linkages between its own future cap-and-trade program and trading systems of foreign governments, which may implicate the Constitution's dormant foreign relations power, a legal principle which holds that the federal government is the ultimate authority with respect to U.S. foreign policy. Even though the federal government has declined to take action against global warming explicitly, California may still be precluded from taking such action on its own because an agreement between California and foreign nations arguably undermines the nation's foreign policy.

*An agreement between California and foreign nations arguably undermines foreign policy*

Under the 2006 agreement making California and the United Kingdom partners in the war against global warming, the two will share best practices on market-based systems and jointly investigate new technologies. The agreement has been heralded as a beachhead for those who hope to reduce GHGs and as a first step toward linking California's market with the EU. Additionally, just this year, Schwarzenegger has entered into similar agreements with the state of Victoria in Australia, as well as the Canadian provinces of British Columbia, Manitoba, and Ontario.

In all the fanfare, the legal implications of such international connections have received little attention. In particular, the question remains whether the Constitution would even allow California to enter into an agreement with another foreign nation.

### *Extra-Jurisdictional Trading*

As California considers adopting a cap-and-trade program, it will have to consider whether the system will issue credits for offsets made outside of the state. In considering this question, it will likely have to balance the purposes of its program. On one hand, allowing extra-jurisdictional offsets provides opportunities for California to lower the cost of reducing emissions; larger markets generally increase diversity, which would lead to increased reductions

and a more economically efficient program. On the other hand, extra-jurisdictional offsets reduce the incentives for California to reform its own dependence on fossil fuels. Extra-jurisdictional offsets are also more difficult to monitor effectively, which decreases certainty that claimed reductions are actual reductions.

Particularly in light of concerns regarding monitoring, California may consider limiting offsets to other states and even foreign governments that have reliable GHG markets in place. For example, California could limit its program to those states that have joined with California — at least in principle — to create the Western Regional Climate Action Initiative or perhaps expand its reach to the several northeastern and mid-Atlantic states that currently are developing a regional strategy to reduce carbon dioxide emissions, a program known as the Regional Greenhouse Gas Initiative. If California could allow entities in its program to trade with other states, this larger domestic market could benefit both California and the other states by providing more opportunities for low-cost reductions and more stability in trading markets.

California may also decide to look outside of the United States. International cooperation to reduce GHG emissions has already begun to take place. In 1992, 180 countries signed the United Nations Framework Convention on Climate Change.<sup>47</sup> Negotiations under the climate convention led to the Kyoto Protocol, which entered into force in 2005. It requires member nations to achieve an averaged 5.2 percent reduction in 1990 GHG levels by 2012.<sup>48</sup> In order to meet these requirements, the EU has recently initiated the largest GHG trading market in the world, the Emissions Trading Scheme, covering 25 countries and 6 major industrial sectors.<sup>49</sup> California may find great program savings if it honored offsets in the ETS market (beyond that required by Kyoto) to count toward California's program. Furthermore, the agreement by Schwarzenegger and Blair and those signed with other jurisdictions subsequently hint that California is seriously considering a market-based cap-and-trade program to reduce GHGs, which could potentially be linked to the ETS or to other carbon markets outside the United States.<sup>50</sup>

At this point, it is only speculation whether the ETS or other foreign carbon markets would incorporate outside actors — particularly those governments that are part of a nation that has not ratified the Kyoto Protocol, such as a U.S. state. The

*The state can limit offsets to other states and foreign governments that have reliable markets in place*

ETS, however, does allow members to participate in international emissions trading with any party included in Annex B of the Protocol.<sup>51</sup> Annex B includes the United States, so the EU could potentially link with individual U.S. states as subsidiaries of an Annex B nation.<sup>52</sup> Again, it is at least plausible that California and the EU nations could benefit from such an international partnership.<sup>53</sup>

### *The Dormant Foreign Relations Power*

If the California Air Resources Board decides to adopt a cap-and-trade program to reduce GHGs that is linked to the ETS or some other foreign carbon market, there might be significant legal implications. In Article I, the Constitution provides Congress the power to “regulate commerce with foreign nations.”<sup>54</sup> The Court has read that to mean

that the federal government has authority to conduct foreign relations.<sup>55</sup> Furthermore, the president has extensive foreign relations powers<sup>56</sup> and speaks with the country’s supreme voice on foreign policy.<sup>57</sup> The president also has the authority to enter into treaties with the advice and consent of the Senate.<sup>58</sup>

All this is not to say that a state government does not have any way to engage in agreements with international partners or to conduct business with firms from other nations. Rather, it means that a state cannot interfere with the federal government’s ability to create foreign policy — in other words, federal statutes dealing with foreign affairs, international treaties, and federal executive agreements preempt state regulations that interfere with them.<sup>59</sup>

Article VI states that federal law, including treaties, is the “supreme law of the land.”<sup>60</sup> State laws that conflict with federal action must yield to federal power. The preemption of state laws can be either express or implied. Express preemption occurs when a federal statute explicitly says a state may not pass a law addressing a particular issue. Alternatively, implied preemption can occur in three different ways. First, a state statute can be preempted if it invades a field of federal law that is “so pervasive”<sup>61</sup> that there is no room for state regulation. This is called “field preemption.”<sup>62</sup> Second, a state statute that is in direct conflict with federal law is preempted.<sup>63</sup> Finally, a state statute that “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress”<sup>64</sup> can also be preempted.

At times, the Court has interpreted the field of foreign policy to be so broad that some state stat-

utes which conflict with federal diplomacy have been deemed preempted without contradicting specific foreign agreements — the dormant foreign relations power.<sup>65</sup> While the Court has employed it sparsely, this broad power has been used to preempt state laws even if there is not an express treaty on the matter, even if the state law is not in direct conflict with foreign treaties, and even if the state law does not impede federal objectives directly.

Undercurrents of a dormant foreign relations power first surfaced in 1968 in *Zschernig v. Miller*.<sup>66</sup> In that case, the Court evaluated an Oregon probate statute that allowed foreign nationals to inherit property in Oregon only if their country of citizenship recognized a reciprocal right for American citizens to inherit property and only if there was proof that the country of the foreign national would not confiscate the property in question.<sup>67</sup> Even though the statute did not directly conflict with federal law or treaties, the Court concluded it was “an intrusion by the state into the field of foreign affairs which the Constitution entrusts to the president and the Congress.”<sup>68</sup> It developed a direct effects test which meant state statutes directly affecting foreign policy in a negative way would be preempted.<sup>69</sup>

A 2003 case, *American Insurance Association v. Garamendi*,<sup>70</sup> is the only other one in which the Court has expressly relied on the dormant foreign relations power to preempt a state statute. *Garamendi* dealt with a California statute called the Holocaust Victim’s Insurance Relief Act of 1999. The Court found that the Constitution forbade California from using HVIRA because it compromised the president’s diplomatic relations and on this basis struck down the law. The Court concluded foreign policy interests outweighed state interests in the matter of “vindicating victims” of war crimes.<sup>71</sup>

In *Garamendi*, the Supreme Court set up a two-step analysis, the first of which determined whether the state statute in question involved a traditional state interest. If a state law affecting foreign policy did not fall under traditional state competence, the Court suggested the state law should be preempted whether or not the federal government had already acted.<sup>72</sup> While the Court has yet to employ this type of preemption, it seems quite similar to that of the dormant Commerce Clause’s strict scrutiny standard. If a state law did address a topic of traditional state competence, the Court held that state laws were to be reviewed under a balancing test. In such a circumstance, the Court explained that it would weigh the strength of the foreign policy in-

*If California adopts a cap-and-trade program linked to the EU trading system, there might be legal implications*

*In Garamendi, the Court relied on the dormant foreign relations power to preempt a state statute*

terest against the importance of the state concern.<sup>73</sup> While this line of case law is far from completely developed, it appears to work very similarly to the balancing test used for dormant Commerce Clause challenges.

To be sure, states are usually not precluded from acting unless the federal government has directly spoken to an issue through statute or treaty, or unless the state action would directly conflict with federal action. But *Garamendi* illustrates a narrow exception to that general rule. In cases like *Garamendi*, state action can be preempted if it interferes with federal diplomatic efforts. As a result, California, or any other state, should take care when embarking on international agreements.

#### *California's ability to expand its market to include offsets outside of the United States*

Starting with the premise that states can act as long as the federal government has not acted, it would seem that states are not precluded from developing international trading agreements for GHG emissions. Although the federal government has expressed various positions on climate change through a number of different channels, none of them directly preempts California from incorporating offsets outside of the United States into its state program.

In 1997, the U.S. Senate approved a resolution that declared that the United States would not ratify any international agreement on climate change unless the agreement required adequate emission controls on developing countries and did not cause the United States economic harm.<sup>74</sup> President George W. Bush has stated that his administration is opposed to the Kyoto Protocol because it does not include major carbon-producing countries, like China.<sup>75</sup> These statements demonstrate that the federal government will not presently act to reduce GHGs under Kyoto. This does not mean that states are precluded from acting as a result. President Bush also has entered into an executive agreement with Asian nations, called the Asia-Pacific Partnership on Clean Development and Climate, which focuses on encouraging the development of new technology that can reduce GHG emissions.<sup>76</sup> The partnership is the only formal action that deals explicitly with federal government action on climate change. It is proper to ask whether this is preemption by an executive agreement. It does not appear that it is. The partnership does not expressly preempt state law. In fact, the charter states that the partnership is meant to complement and not to replace the Kyoto Protocol, and that it will build on other global initiatives. Thus, it seems rather than prohibiting action,

the partnership seeks to encourage other efforts to reduce GHG emissions.<sup>77</sup> Furthermore, given that the agreement focuses on developing clean technologies, rather than economic cap-and-trade programs, a state statute to initiate carbon trading with the EU is unlikely to directly conflict with or impede the partnership.

It should be noted that Congress has recently been considering a number of bills to address climate change and doing so with increasing fervor.<sup>78</sup>

If any of these bills are ratified, state cap-and-trade programs might be more directly preempted. For now, however, we are operating under the assumption that the federal government has not taken any direct action to establish a cap-and-trade program in the United States.

Because state carbon trading schemes are not explicitly preempted, to the extent that the federal government prohibits California from setting up a trading system that cooperates with foreign countries, it would have to be under the narrow exception of *Garamendi*, or the dormant foreign relations power. In fact, the Supreme Court in *Massachusetts v. EPA* suggests that a state's ability to act on the international stage in this very context of climate change is limited:

When a state enters the union, it surrenders certain sovereign prerogatives. Massachusetts cannot invade Rhode Island to force reductions in greenhouse gas emissions, it cannot negotiate an emissions treaty with China or India, and in some circumstances the exercise of its police powers to reduce in-state motor-vehicle emissions might well be pre-empted.<sup>79</sup>

The relevant question, then, is whether *Garamendi* can be distinguished from the case of an international agreement on GHG emissions reductions between California and the EU. Basically, if the California Air Resources Board is able to demonstrate how trading regulations do not fall within the *Garamendi* exception, those regulations will be more robust to potential constitutional challenges.

One difference between the insurance laws in *Garamendi*, as compared with a GHG trading market, is that the insurance laws implicated the president's wartime power. In other words, when a state's law implicates the president's ability to broker peace, the executive's dormant foreign relations power is particularly powerful. In fact, the Court in *Garamendi* specifically noted that the executive would not normally have had as much power to

*If Congress does enact a climate change law, state cap-and-trade programs might be directly preempted*

regulate claims from private entities, but with regard to wartime claims, the public and the private sectors become blurred.<sup>80</sup> In contrast to the laws at issue in *Garamendi*, California's GHG regulations avoid compromising the president's wartime authority.

A cap-and-trade market linking California with the EU would be aimed at facilitating private voluntary exchanges, not at resolving public international disputes. It is not as if California would be ratifying a formal policy with the EU on how to address climate change, but rather it would only serve to facilitate efficient trading markets. While it is true that public regulations would need to be in place in order to ensure an efficient trading scheme, the private market would be controlling the trades, rather than public negotiations. As a result, international diplomacy is not at stake in as precarious a way as it was in *Garamendi* or as in the illustrative example of initiating formal talks with China, as the Court described in *Massachusetts v. EPA*. It would be important for the California Air Resources Board to emphasize this distinction in its regulations and focus on the private rather than public aim of any negotiations that would include the EU.

Another difference between *Garamendi* and emissions trading markets is that emissions trading fits more easily within a traditional state interest. In *Garamendi*, the Court stated that California was not acting within a traditional state interest by enacting regulations directing insurance companies to disclose Holocaust-era insurance claims. As compared to the limited aim of redressing Holocaust victims in *Garamendi*, a GHG emissions trading scheme would have much broader relevance for the entire state.

In large part, just as governmental purpose established in the record will control the dormant Commerce Clause analysis, the record built by the California Air Resources Board during its decisionmaking process will fundamentally determine how a court would view California's interest.

It is not hard to imagine that in formulating regulations for a cap-and-trade system, one reason California might move forward is to make up for what might be viewed as the failure of the federal government to take any meaningful international action on climate change. Indeed, the fact that the federal government has not entered into the Kyoto Protocol might have great value as symbolic politics. The more that California articulates an interest in trying to demonstrate the inadequacies of the federal approach, the more its own characterization

suggests a desire to set up a conflict between federal policy and state policy — and the closer it gets to the dormant foreign affairs line.

Particularly problematic would be an effort by California to try to use its program to somehow reform the international trading system formed by Kyoto, perhaps by insisting on some change to its trading or processes before California would concede to reciprocity of emission credits. If this is the case, as suggested in *Massachusetts v. EPA*, California would have very weak footing. The Court has long recognized a prominent federal interest in foreign commerce, just as it has its interest in interstate commerce. For example in *Japan Line, Ltd. v. City of Los Angeles*,<sup>81</sup> the Court struck down a state tax on Japanese shipping companies, stating, "foreign commerce is preeminently a matter of national concern."<sup>82</sup> It would be wise for California to avoid renegotiating existing Kyoto conditions during any discussions.

Thus, California would be smart to build a strong record emphasizing the ways in which the state would benefit from both its program and its desire to reduce costs of the program on its regulated community. While the particular method of establishing an international trading system may be a novel approach to minimizing the cost of exercising police power, the idea of both seeking efficiency and attempting to protect and look after its citizens is a very familiar one for state lawmakers.

The theme California may want to emphasize is that its trading scheme would increase environmental well-being by encouraging the reduction of GHGs while saving businesses money by allowing them to trade carbon credits in a larger market. In particular, it should make clear that linking state initiatives to the EU's Emissions Trading Scheme or other foreign carbon markets has the potential of making it easier for state businesses to comply with stringent emission caps because the ETS is such a large and comprehensive market.<sup>83</sup>

Both the private nature of emissions trading regulations that would include Europe and the fact that such regulations would align with traditional state interests serve to distinguish *Garamendi* from an emissions trading scheme. Yet, it may still be argued that the federal government has a federal interest to speak with one voice in continued negotiations and that if California were to incorporate international cooperation into its trading system, the United States would have less clout as a hold out. It could also be argued that establishing a trading initiative between foreign governments and U.S. states would interfere with the administration's protests against the Kyoto Protocol. The argument

*The record built by the state during its decisionmaking will determine how a court would view its interest*

may go that if Kyoto member nations can deal with states individually, there is less allure to meet U.S. demands. This is something that California should keep in mind as it begins to consider opening discussions with foreign governments. In the end, the state should proceed gingerly when attempting to bridge markets. The more that California attempts to engage in negotiations about economic or political discrepancies between trading systems, the more likely that it will enter the realm of foreign policy.

While it is uncertain whether it would be possible for California to create an economically advantageous and politically feasible trading system with foreign governments considering the constitutional limits inherent, it would be prudent for the California Air Resources Board to include a severability clause in relation to any regulations linking California with foreign carbon markets. With that added protection, California could ensure that a cap-and-trade system could still exist within the state even if it was unable to formally establish a trading relationship with foreign governments.

## Conclusion

In this promising time for GHG regulation in California, the state faces some critical choices about how to structure its cap-and-trade program. Its decisions will create different political winners and losers and will have distinct implications for the program's efficiency, equity, and administrative costs. Among the many factors that California ought to consider are the constitutional implications of combating leakage and extending a trading market into international territory.

The fate of California's ability to control leakage will hinge on whether the state can take actions without triggering strict scrutiny under the dormant Commerce Clause. Facially discriminatory laws, laws with discriminatory effects or purposes,

or laws that regulate outside a state's jurisdiction always face strict scrutiny. When a law is nondiscriminatory and does not reach outside the state's jurisdiction, courts are likely to utilize the less stringent Pike balancing test. In large part, Pike requires courts to weigh the burden a law places on interstate commerce against the purported benefit of the law.

Because of the subjective nature of this test, the upshot of judicial review is often difficult to predict. Part of the challenge is that this balancing test requires the reviewing court to balance incom-

mensurate values. To succeed under the Pike test, California should find a way to regulate the carbon content of electricity by focusing entirely on California entities. In doing so, it should ensure that its regulation does not place an unequal burden on out-of-staters who are navigating the regulations in order to achieve compliance.

Finding the right balance may prove challenging. But creating a program that exceeds constitutional limits will prove fatal. If California invests ahead of time in addressing constitutional concerns, it will not have to invest after the fact in defending a program that cannot withstand judicial scrutiny.

International linkages between California's trading market and the carbon markets of other nations might yield a ground-breaking step toward an efficient market in GHG emissions trading throughout the world. But this does not resolve the constitutional challenges associated with building this market. Action by California that is directed toward foreign governments may be preempted by the dormant foreign relations power under the *Garamendi* exception. Of course, *Garamendi* is a limited holding, and the facts of *Garamendi* may be distinguished from a GHG trading program in California that would incorporate trading with foreign nations.

As it begins to develop a program to address GHG emissions, the California Air Resources Board should attempt to emphasize the differences between *Garamendi* and any link between California and foreign nations in order to make a future trading program robust. In particular, the board should highlight the private, as opposed to public, nature of a trading market. The board should also develop a record that demonstrates how GHG trading markets can be classified as a traditional state interest. Finally, the board should consider including a severability clause in its regulations that would allow it to terminate relations with the EU if necessary while keeping the rest of a trading program intact. Overall, it may be legally difficult for California to develop relations with foreign nations in an attempt to combat global warming and even potentially to enter into the ETS or other foreign carbon trading markets, but the state may decide the benefits are worth the effort. If so, as it moves forward, California should remain aware of the legal challenges and attempt to avoid interfering with international negotiations surrounding climate change reductions. •

*Finding the right balance may be challenging, but exceeding constitutional limits would be fatal*

*California faces some critical choices about how to structure its cap-and-trade program*

Notes follow on next page

## Notes

1. Cal. Health & Safety Code §§38501-38599 (West 2006).
2. 2006 Cal. Stat. 89.
3. *Id.*
4. 2002 Cal. Legis. Serv. ch. 200 (AB 1493) (West), codified at Cal. Health & Safety Code §43018.5(a) (West 2002).
5. See, e.g., Carla Marinucci, "State, U.K. Strike Emissions Deal, Bypassing Bush," *S.F. Chron.*, Aug. 1, 2006, at A1; Edwin Garcia & Paul Rogers, "Governor, Blair Sign Warming Accord," *San Jose Mercury News* (California), Aug. 1, 2006, at B1.
6. Cal. Exec. Order No. S-3-05 (June 1, 2005) (calling for a reduction in 2020 to 1990 levels and an additional reduction in 2050 to 80% below 1990 levels).
7. See Press Release, "California Public Utilities Commission, PUC to Set Cap on Greenhouse Gas Emissions Produced While Generating Electricity" (Feb. 16, 2006), available at [http://www.cpuc.ca.gov/PUBLISHED/NEWS\\_RELEASE/53682.htm](http://www.cpuc.ca.gov/PUBLISHED/NEWS_RELEASE/53682.htm).
8. See Gerry Bemis & Jennifer Allen, *California Energy Comm'n, Inventory of California Greenhouse Gas Emissions and Sinks: 1990-2002 Update* (2005) (CEC-600—2005-025); Susan Brown, *California Energy Comm'n, Global Climate Change and California* (2005) (CEC-600—2005-007); California Climate Change Ctr., *Our Changing Climate — Assessing the Risks to California* (2006); Dan Cayan et al., *California Climate Change Ctr., Scenarios of Climate Change in California: An Overview* (2006) (CEC-500-2005-186-SF); Climate Action Team, California Env'tl. Protection Agency, *Climate Action Team Report to Governor Schwarzenegger and the Legislature* (2006); Guido Franco, *California Energy Comm'n, Climate Change Impacts and Adaptation in California* (2005) (CEC-500—2005-103).
9. See "Arnie in War on Climate Change," *Courier Mail* (Austl.), Sept. 29, 2006, at 41.
10. Guy Dinmore & Matthew Garrahan, "Californians Rush in Where Washington Fears to Tread," *Fin. Times* (London), Oct. 7, 2006, at 8.
11. Center for Clean Air Policy, *Policy Options for Reducing Greenhouse Gas Emissions From Power Imports* (2005) (CEC-600-2005-010), available at <http://www.energy.ca.gov/2005publications/CEC-600-2005-010/CEC-600-2005-010-D.PDF> (draft consultant report prepared for the California Energy Commission using data from EPA eGRID, 2000).
12. Cal. Health & Safety Code §38501 (in part).
13. *Granholm v. Heald*, 544 U.S. 460, 472 (2005).
14. *Id.* (citing *Hughes v. Oklahoma*, 441 U.S. 322, 325-26, 9 ELR 20360 (1979)); see also *The Federalist No. 22* (Alexander Hamilton) (discussing how the Constitution would prevent local protectionism and trade barriers resulting from states seeking retaliation for another state's trade barriers).
15. *Healy v. Beer Inst.*, 491 U.S. 324, 336-37 (1989).
16. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).
17. *Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978).
18. *Hunt v. Washington St. Apple Adver. Comm'n*, 432 U.S. 333, 350-53 (1977).
19. *Id.* at 353.
20. See, e.g., *id.*; *West Lynn Creamery v. Healy*, 512 U.S. 186 (1994); *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 11 ELR 20070 (1981); *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117 (1978).
21. *Hunt*, 432 U.S. at 353.
22. *Healy*, 491 U.S. at 336-37.
23. *Southern Pac. Co. v. Arizona ex rel. Sullivan*, 325 U.S. 761, 775 (1945).
24. See *id.*
25. *Maine v. Taylor*, 477 U.S. 131 (1986).
26. See, e.g., *Hughes v. Oklahoma*, 441 U.S. 322, 9 ELR 20360 (1979) (involving facial discrimination forbidding export of minnows, which "by itself may be a fatal defect, regardless of the State's purpose").
27. See *id.*
28. *Granholm v. Heald*, 544 U.S. 460 (2005) (holding that a law prohibiting the selling of wine directly to out-of-staters over the Internet to avoid under-age drinking was "mere speculation" and too tenuous); *Dean Milk Co. v. City of Madison*, 340 U.S. 349 (1951) (suggesting the use of national standards or expanding city inspections to achieve health-motivated regulation).
29. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 363 (1978) (Marshall, J., concurring in part and dissenting in part).
30. See, e.g., *Grutter v. Bollinger* 539 U.S. 306, 326 (2003) (observing that "[s]trict scrutiny is not 'strict in theory, but fatal in fact'" while upholding the University of Michigan Law School's affirmative action admissions program against an application of strict scrutiny).
31. 397 U.S. 137 (1970).
32. *Id.* at 142.
33. *Id.*
34. *Camps Newfound, Inc. v. Town of Harrison*, 520 U.S. 564, 610—12 (1997) (Thomas, J., joined by Rehnquist, C.J., & Scalia, J., dissenting) (going so far as to call application of the dormant Commerce Clause "tangled underbrush" and "virtually unworkable in practice").
35. *Pike*, 397 U.S. at 145.
36. *Id.* at 146.
37. *Id.*
38. *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 11 ELR 20070 (1981).
39. 127 S. Ct. 1438, 37 ELR 20075 (2007).
40. *Id.* (Roberts, C.J., dissenting).
41. *Id.* (Scalia, J., dissenting).
42. 126 S. Ct. 2208, 36 ELR 20116 (2006).
43. See *supra* Part I.A.1.
44. *Id.*
45. See Cal. Health & Safety Code §38501(c).
46. See *infra* Part II.
47. Pew Ctr. on Global Climate Change, *The European Union Emissions Trading Scheme (EU-ETS): Insights and Opportunities 2* (2006), available at <http://www.pewclimate.org/document.cfm?documentID=440> [hereinafter EU-ETS Trading Scheme].
48. *Id.*
49. *Id.* at 3-4 ("Simply stated, the EU-ETS dwarfs all existing early [greenhouse gas] GHG trading systems as well as the U.S. programs designed to control sulfur dioxide (SO<sub>2</sub>) under the Clean Air Act Amendments and nitrogen oxides (NO<sub>x</sub>) under the NO<sub>x</sub> Ozone Transport Commission."); see also Council Directive 2003/87, 2003 O.J. (L 275) 32 (EC), available at [http://eur-lex.europa.eu/LexUriServ/site/en/oj/2003/l\\_275/l\\_27520031025en00320046.pdf](http://eur-lex.europa.eu/LexUriServ/site/en/oj/2003/l_275/l_27520031025en00320046.pdf).
50. See Press Release, Office of the Governor, "Governor Schwarzenegger Signs Agreement With British Columbia Premier Campbell to Fight Global Warming" (May 31, 2007), available at <http://gov.ca.gov/index.php?/press-release/6521/>; Press Release, Office of the Governor, "Governor Schwarzenegger Joins Ontario Premier McGuinty in Signing Pact to Fight

Greenhouse Gases” (May 30, 2007), available at <http://gov.ca.gov/index.php?/press-release/6476/>; Press Release, Office of the Governor, “Governor Schwarzenegger Collaborates With Premier Steve Bracks and the Australian State of Victoria to Fight Climate Change” (May 4, 2007), available at <http://gov.ca.gov/index.php?/press-release/6138/>; Press Release, Office of the Governor, “Gov. Schwarzenegger, Premier of Manitoba, Canada Sign Agreement to Explore Linking of Future Carbon Trading Markets and Reduce Global Greenhouse Gas Emissions” (Dec. 14, 2006), available at <http://gov.ca.gov/index.php?/press-release/4920/>; Press Release, Office of the Governor, “Gov. Schwarzenegger, British Prime Minister Tony Blair Sign Historic Agreement to Collaborate on Climate Change, Clean Energy” (July 31, 2006), available at <http://gov.ca.gov/index.php/press-release/2770/>; see also Charles J. Hanley, “U.S. States Group Seeks Global-Warming Action,” *Phila. Inquirer*, Dec. 17, 2004, at A31 (discussing the possibility of the EU trading with states in the United States).

51. Council Directive 2003/87, *supra* note 49, at 33; see also Council Directive 2004/101, 2004 O.J. (L 338) 18, 20 (EC) (discussing the possibility of recognizing allowances from the EC within Annex B countries that have not ratified the Kyoto Protocol). It may be, however, that a trading scheme between the EU and U.S. states can only operate in one direction if credits from non-Party nations like the United States cannot be used for compliance in the EU under Kyoto. This would mean U.S. businesses could gain cheap allowances from the EU without making major reductions in emissions within the United States. Kirsten Engel, “Mitigating Global Climate Change in the United States: A Regional Approach,” 14 *N.Y.U. Envtl. L.J.* 54, 82 (2005).

52. UNFCCC, “Kyoto Protocol: Background,” [http://unfccc.int/kyoto\\_protocol/background/items/3145.php](http://unfccc.int/kyoto_protocol/background/items/3145.php) (last visited June 20, 2007).

53. Engel, *supra* note 51, at 80 (“The states involved in developing a regional greenhouse gas emissions trading market in the United States have discussed, with EU representatives, the possibility of linking their two emissions trading schemes.”); see also Hanley, *supra* note 50.

54. U.S. Const. art. I, §8, cl. 3.

55. *American Ins. Ass’n v. Garamendi*, 539 U.S. 396, 414 (2003) (“If we are to be one nation in any respect, it clearly ought to be in respect to other nations.” (quoting *The Federalist No. 42*, at 279 (James Madison) (J. Cooke ed.1961)); *Japan Line, Ltd. v. City of Los Angeles*, 441 U.S. 434, 449 (1979) (“Foreign commerce is preeminently a matter of national concern. . . . Although the Constitution, Art. I, §8, cl. 3, grants Congress power to regulate commerce ‘with foreign Nations’ and ‘among the several States’ in parallel phrases, there is evidence that the Founders intended the scope of the foreign commerce power to be the greater.”).

56. *Garamendi*, 539 U.S. at 414 (“The President . . . possesses in his own right certain powers conferred by the Constitution on him as Commander-in-Chief and as the Nation’s organ in foreign affairs.” (quoting *Chicago & S. Air Lines v. Waterman S.S. Corp.*, 333 U.S. 103, 109 (1948)); *United States v. Curtiss-Wright Corp.*, 299 U.S. 304, 319-22 (1936) (stating in the realm of foreign affairs, “the President alone has the power to speak or listen as a representative of the nation”).

57. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610-11, 635-36 (1952); see also *First Nat. City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 767 (1972).

58. See, e.g., *Dames & Moore v. Regan*, 453 U.S. 654 (1981) (recognizing that the formation of the Iran-United States Claims Tribunal as a forum to arbitrate against Iran preempted any state litigation on the matter); *United States v.*

*Pink*, 315 U.S. 203, 223, 230 (1942); *United States v. Belmont*, 301 U.S. 324, 330-31 (1937) (recognizing the Litvinov Agreement preempted state policy on whether to recognize a claims assignment from the Soviet Union to the United States).

59. See, e.g., U.S. Const. art. VI; *Crosby v. National Foreign Trade Council*, 530 U.S. 363 (2000).

60. U.S. Const. art. VI.

61. *Gade v. National Solid Wastes Mgmt. Ass’n*, 505 U.S. 88, 98, 22 ELR 21073 (1992) (quoting *Rice v. Santa Fe Elev. Corp.*, 331 U.S. 218, 230 (1947)).

62. *Id.* at 98.

63. *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963).

64. *Gade*, 505 U.S. at 98 (citing *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941), *Felder v. Casey*, 487 U.S. 131, 138 (1988), and *Perez v. Campbell*, 402 U.S. 637, 649 (1971)).

65. Brannon P. Denning, “International Decision,” 97 *Amer. J. Int’l L.* 950, 958 (2003).

66. 389 U.S. 429 (1968).

67. *Id.* at 431.

68. *Id.* at 432.

69. *Id.*

70. 539 U.S. 396 (2003). Given that *Garamendi* was a 5-4 decision and that two of the Justices in the majority no longer serve on the Court, it is possible that the Court may see a *Garamendi* analysis somewhat differently today. However, even if a challenge was brought, it might take years to find its way to the Court — if it makes it at all — so vote-counting at this stage is overly speculative.

71. *Id.* at 421.

72. *Id.* at 420.

73. *Id.*

74. The Senate passed the bill unanimously. S. Res. 98, 105th Cong. (1997). The U.S. House of Representatives had a similar bill which died in committee. H.R. Res. 211, 105th Cong. (1997).

75. Letter from President George W. Bush to Senators Hagel, Helms, Craig, and Roberts, in 1 Pub. Papers 235 (Mar. 13, 2001), available at <http://www.whitehouse.gov/news/releases/2001/03/20010314.html>; Office of Mgmt. & Budget, Exec. Office of the President, “Statement of Administration Policy” (2003), available at <http://www.whitehouse.gov/omb/legislative/sap/108-<->1/s139sap-s.pdf> (characterizing the Kyoto Protocol as “an international climate change agreement inconsistent with the views of the U.S. Senate”).

76. “Statement on the Asia-Pacific Partnership on Clean Development and Climate,” 41 *Weekly Comp. Pres. Doc.* 1226 (July 29, 2005).

77. Charter for the Asia-Pacific Partnership on Clean Development and Climate, Jan. 11, 2006, available at <http://www.state.gov/g/oes/rls/or/2006/59162.htm>.

78. S. 280, 110th Cong. (2007).

79. *Massachusetts v. EPA*, 127 S. Ct. 1438, 1454, 37 ELR 20075 (2007).

80. *American Ins. Ass’n v. Garamendi*, 539 U.S. 396, 415-16 (2003).

81. 441 U.S. 434 (1979).

82. *Id.* at 448.

83. See EU-ETS Trading Scheme, *supra* note 47.