LIKE A NATION STATE

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Using California's self-consciously internationalist approach to climate change regulation as a primary example, this Article examines constitutional limitations on state foreign affairs activities. In particular, by focusing on the prospect of California's establishment of a greenhouse gas (GHG) emissions trading system and its eventual linkage with comparable systems in Europe and elsewhere, this Article demonstrates that certain constitutional objections to extrajurisdictional linkage of state GHG emissions trading systems and the response that these objections necessitate may be more complicated than previously appreciated. First, in order to successfully combat the argument that state-level climate change activities interfere with a federal executive position of withholding binding domestic GHG emissions reductions in advance of a multilateral agreement including key developing nations, states must demonstrate that the executive branch is not acting with congressional support and has, furthermore, declared its position too informally to constitute an exercise of any of the president's independent constitutional powers. Second, state efforts to link GHG emissions trading systems with those of other nations may face serious challenges under the foreign affairs and Foreign Commerce Clause doctrines. Finally, states' efforts to integrate with other trading schemes or to otherwise protect the integrity of their own trading schemes must be carefully constructed lest they invite challenge as being discriminatory or overreaching, in light of more conventional dormant Commerce Clause constraints on state regulation.

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INTRODUCTION

To some observers, Arnold Schwarzenegger only became an action hero on July 31, 2006. On that day, the 38th governor of California, flanked by then Prime Minister Tony Blair and a handful of global business leaders, announced to the world that his state was no longer content to serve only a quasi-sovereign role: "California is a great part of the United States, but we happen to be a leading state with a huge economy, and we are, like I say, a nation state."[1] What's more, Governor Schwarzenegger emphasized that, as a "nation state," California maintains its own foreign policy, one that differs dramatically from the federal government's with respect to climate change. Whereas the federal executive branch has, under George W. Bush, held back from acting in the belief that strong domestic legal efforts to reduce greenhouse gas (GHG) emissions would forfeit valuable bargaining chips in international climate negotiations, Schwarzenegger has adopted the contrary goal of setting an example on the world stage through advance action. With the full support of the California state legislature, Governor Schwarzenegger has sought to "show leadership" by taking numerous steps to reduce California's GHG emissions, irrespective of whether other major emitters concurrently agree to follow suit.[2] According to the governor of the nation's most populous state—the executive overseeing an economy that would rank fifth in size in the world if California were actually a nation state[3]—the scientific debate on climate change is officially over[4] and the moral case for legal action is so straightforward that a worldwide film

1. Governor's Remarks, Office of the Governor of the State of Cal., 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?/print-version/speech/2918. Governor Schwarzenegger in turn cites Tony Blair as his own "action hero" for inspiring him to commit to ambitious greenhouse gas emission reduction goals for the state of California. *See* Andrew Grice, *Blair Hails "Historic Day" in the Battle Against Climate Change*, INDEPENDENT, Mar. 14, 2007, Supplement, at 2.

2. Governor's Remarks, *supra* note 1.

3. *See* Pew Center on Global Climate Change, State and Local Net Greenhouse Gas Emissions Reduction Programs, *available at* http://www.pewclimate.org/states.cfm?ID=51 (last visited Mar. 8, 2008).

4. *Cf*. Governor's Remarks, *supra* note 1 (noting remarks of Steve Howard, chief executive officer of the Climate Group, stating that Schwarzenegger "said the debate is over in such a compelling way . . . [that] the Governor will go down in history as The Emissions Terminator").

audience should immediately grasp its plotline: "[W]e have the responsibility to our people and to the rest of the world that we take care of our environment, and since we know there is global warming . . . we should stop it."[5]

The only potential obstacle to the unfolding of Governor Schwarzenegger's plotline is its constitutionality, for the deliberately extrajurisdictional focus of California's climate change activities seems difficult to square with the familiar refrain that, in U.S. foreign relations, subnational governments have essentially no role to play;[6] they, in fact, "disappear."[7] Nevertheless, operating under the assumption that, "when [California] act[s], the world takes notice and it has tremendous impact,"[8] California has adopted a climate change strategy that avowedly depends on the successful exportation of its policies to other states and other nations for California itself to avoid a potentially ruinous unilateral GHG disarmament. To be clear, no one in California is under the illusion that the state can address global climate change adequately on its own; instead, the very premise of California's climate change policy is that the state will be able to inspire, cajole, and cooperate with other political jurisdictions in order to achieve a coordinated solution. In light of that aim, how can California's climate change stance be reconciled with the supposedly "irrefutable postulate that[,] though the states were several[,] their people in respect of foreign affairs were one?"[9] If "[t]here is no question . . . that [states] would be prohibited

5. *Id.* Such bold proclamations abound. Speaking to the 75th annual meeting of the U.S. Conference of Mayors, Governor Schwarzenegger emphasized that he and his fellow subnational officials were "not waiting for Washington." Governor's Remarks, Office of the Governor of the State of Cal., Governor Speaks at U.S. Conference of Mayors 75th Annual Meeting (June 23, 2007), *available at* http://gov.ca.gov/index.php?/print-version/speech/6772. As a result, he proudly proclaimed, "We are the ones that are leading the fight against global warming. We are the ones that are creating an American policy that will inspire the rest of the world to join us and to become partners with us, and we are the ones that will ensure a brighter tomorrow for the people, and a brighter tomorrow for our planet." *Id.* Similarly, writing in the *Washington Post* with Connecticut Governor Jodi Rell, Schwarzenegger argued, "It's high time the federal government becomes our partner or gets out of the way." Arnold Schwarzenegger & Jodi Rell, *Lead or Step Aside, EPA*, WASH. POST, May 21, 2007, at A13.

6. *See, e.g.*, LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 150 (2d ed. 1996) ("At the end of the twentieth century as at the end of the eighteenth, as regards U.S. foreign relations, the states 'do not exist.'").

7. *See* United States v. Belmont, 301 U.S. 324, 331 (1937) ("[I]n respect of our foreign relations generally, state lines disappear. As to such purposes, the state . . . does not exist.").

8. Governor's Remarks, *supra* note 1.

9. United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 317 (1936); *see also* Am. Ins. Ass'n v. Garamendi, 539 U.S. 396, 413 (2003) ("There is . . . no question that at some point an exercise of state power that touches on foreign relations must yield to the National Government's policy, given the 'concern for uniformity in this country's dealings with foreign nations' that animated the Constitution's allocation of the foreign relations power to the National Government in the first place.") (quoting Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 427

from directly entering into negotiations with foreign nations in an attempt to establish reciprocal greenhouse gas emissions limitations,"[10] then how can the various climate change initiatives pursued by California be so patently multilateral in their aspirations?

To date, several scholars have concluded that subnational climate change initiatives such as those pursued by California generally do pass constitutional muster, notwithstanding frequent judicial declarations of the federal government's "one voice" in foreign relations.[11] Such analyses, however, focus on only a selection of state and local climate change policies from among the vast number and variety of such policies being pursued, many

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n.25 (1964)); Japan Line Ltd. v. County of L.A., 441 U.S. 434, 449 (1979) (recognizing "the Framers' overriding concern that 'the Federal Government must speak with one voice when regulating commercial relations with foreign governments'") (quoting Michelin Tire Corp. v. Wages, 423 U.S. 276, 285 (1976)); Zschernig v. Miller, 389 U.S. 429, 436 (1968) (holding unconstitutional "state involvement in foreign affairs and international relations—matters which the Constitution entrusts solely to the Federal Government"); United States v. Pink, 315 U.S. 203, 233 (1942) ("Power over external affairs is not shared by the States; it is vested in the national government exclusively."); Hines v. Davidowitz, 312 U.S. 52, 63 (1941) ("The Federal Government, representing as it does the collective interests of the forty-eight states, is entrusted with full and exclusive responsibility for the conduct of affairs with foreign sovereignties."). For numerous similar examples, see Edward T. Swaine, *Negotiating Federalism: State Bargaining and the Dormant Treaty Power*, 49 DUKE L.J. 1127, 1221 n.331 (2000).

10. Thomas W. Merrill, *Global Warming as a Public Nuisance*, 30 COLUM. J. ENVTL. L. 293, 321 (2005).

11. *See, e.g.*, David R. Hodas, *State Law Responses to Global Warming: Is It Constitutional to Think Globally and Act Locally?*, 21 PACE ENVTL. L. REV. 53, 79, 81 (2003) (addressing a wide variety of state and local GHG initiatives and concluding broadly that "there is simply no federalism concern here" and that "from all constitutional perspectives, it is constitutional for states to react to risks of global warming, or to think globally but act locally"); Merrill, *supra* note 10, at 319–28 (analyzing foreign policy preemption objections to climate change public nuisance litigation and concluding that "the dormant foreign policy preemption argument should fail"); Note, *Foreign Affairs Preemption and State Regulation of Greenhouse Gas Emissions*, 119 HARV. L. REV. 1877, 1877 (2006) [hereinafter Note, *Foreign Affairs Preemption*] ("[M]andatory state limits on GHGs are not preempted by the federal foreign affairs power."). For additional analyses of constitutional issues raised by subnational regulation of greenhouse gases, see Daniel A. Farber, *Climate Change, Federalism, and the Constitution*, 50 ARIZ L. REV. (forthcoming 2008), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1081664; Erwin Chemerinsky et al., *California, Climate Change, and the Constitution*, 37 ENVTL. L. REP. 10653, 10653 (2007) (providing a "practical road map for California and other states attempting to reduce [GHG] emissions without violating the dictates of the Constitution"); Kirsten H. Engel, *Mitigating Global Climate Change in the United States: A Regional Approach*, 14 N.Y.U. ENVTL. L.J. 54 (2005); Michael A. Mehling, *Bridging the Transatlantic Divide: Legal Aspects of a Link Between Regional Carbon Markets in Europe and the United States*, 7 SUSTAINABLE DEV. L. & POL'Y 46 (2007); Brian H. Potts, *Regulating Greenhouse Gas 'Leakage': How California Can Evade the Impending Constitutional Attacks*, ELECTRICITY J., June 2006, at 43; Claire Carothers, Note, *United We Stand: The Interstate Compact as a Tool for Effecting Climate Change*, 41 GA. L. REV. 229 (2006); Yvonne Gross, Note, *Kyoto, Congress, or Bust: The Constitutional Invalidity of State CO_2 Cap-and-Trade Programs*, 28 THOMAS JEFFERSON L. REV. 205 (2005).

of which pose distinct constitutional challenges. Moreover, the analyses must necessarily depend on assuming debatable positions within notoriously underdetermined areas of constitutional law, including various restrictions on state foreign affairs activities that emanate from the Treaty Clause, the Compact Clause, the Foreign Commerce Clause, and the foreign affairs preemption doctrine. Although unsatisfying, the safest conclusion to draw in this context is that the recent foreign affairs activities of state and local governments exist in a constitutional fog, similar in many respects to the dim doctrinal haze that covers the interbranch distribution of foreign affairs authority at the federal level.[12]

In this Article, we seek to highlight a portion of the terrain underlying this fog. Using the prospect of states' linkage of their developing GHG emissions trading schemes with those of foreign nations as a primary example, this Article examines several serious but underappreciated constitutional objections to state-level climate multilateralism. In particular, piecemeal integration of state-level climate change policies might be challenged as interfering with a purported federal government policy of withholding domestic legal action on GHG emissions in order to maximize the bargaining chips available for international climate negotiations, an argument that the Court has, on occasion, been receptive to when presented by the federal executive branch. The effort by state actors to link their climate change policies with those of other jurisdictions also might be challenged as encouraging states to discriminate against other jurisdictions, to sit in judgment upon them, or to exert a coercive influence over their regulatory choices, situations that the Court has shown willingness to avert through invocation of the Commerce Clause and of foreign affairs preemption. As we show, both of these forms of objection to extrajurisdictional linkage of state GHG emissions trading systems are more complicated and require more serious consideration than generally appreciated.

Although we focus on the specific case of potential integration of state GHG emissions trading schemes in this Article, we do so knowing that the example may prove to be of fleeting relevance. Legal developments in the area of climate change have, in recent years, occurred at a rapid pace. As with other features of state and local climate change programs, a state GHG emissions trading system could be expressly preempted at

12. *See, e.g.*, *Garamendi*, 539 U.S. at 436 n.3 (Ginsburg, J., dissenting) ("'One is compelled to conclude that there are agreements which the President can make on his sole authority and others which he can make only with the consent of the Senate (or of both houses), but neither Justice Sutherland . . . nor any one else has told us which are which.'" (quoting HENKIN, *supra* note 6, at 222)).

any moment by Congress, whether or not the system has been integrated internationally.[13] Our analysis, however, will remain pertinent even if state GHG emissions trading turns out to be a temporary step on the road to a national or global trading system. Climate change is only the most salient and intractable of international environmental dilemmas at present; other significant challenges, such as conventional air pollution regulation, biodiversity preservation, water resource management, desertification, hazardous waste disposal, and toxic chemical regulation will continue to evince a substantial need for coordinated multijurisdictional action.[14] Such challenges also will, no doubt, attract the attention of subnational governments, particularly those whose progressive populaces insist on the mantra "think globally, act locally." As Julian Ku recently noted, the forces of globalization that have bound citizens together in webs of economic, cultural, and technological interdependence also have made possible the intervention by those citizens into global affairs at subnational political levels.[15] This localization of the global will not be undone. Accordingly, our analysis will remain relevant even as the substance of state and local foreign affairs activities shifts in unforeseeable ways.

We also wish to stress that this Article offers an analysis of constitutional objections to subnational climate change regulation from within the existing doctrinal framework, rather than a normative argument about whether state or federal governments provide the most appropriate or effective locus of legal authority for resolving international environmental conundrums.[16] As recent

13. The system also could be displaced by less direct federal activity, as appears to have happened late last year when the Environmental Protection Agency (EPA) used newly passed federal fuel economy standards as a ground for denying California's waiver request under the Clean Air Act to regulate GHG emissions from mobile sources. *See infra* note 24.

14. *See* Douglas Kysar & Ya-Wei Li, *Regulating From Nowhere: Domestic Environmental Law and the Nation-State Subject*, *in* 2 THE IMPACT OF GLOBALIZATION ON THE UNITED STATES: LAW AND GOVERNANCE (Beverly Crawford ed.) (forthcoming 2008).

15. *See* Julian G. Ku, *Gubernatorial Foreign Policy*, 115 YALE L.J. 2380, 2412–14 (2006). Writing from a very different vantage point, Michael Hardt and Antonio Negri have also affirmed the increasing relation between the local and the global, one that they believe may displace the nation state. According to Hardt and Negri, "each struggle, though firmly rooted in local conditions, leaps immediately to the global level." MICHAEL HARDT & ANTONIO NEGRI, EMPIRE 56 (2000).

16. For such a normative account, see Jonathan B. Wiener, *Think Globally, Act Globally: The Limits of Local Climate Policies*, 155 U. PA. L. REV. 1961, 1962 (2007) (maintaining that "subnational state-level action is not the best way to combat global climate change" because "local action is not well suited to regulating mobile global conduct yielding a global externality"). A large body of literature has addressed the more general question of whether state and local participation in foreign affairs is normatively desirable. *See, e.g.*, Richard B. Bilder, *The Role of States and Cities in Foreign Relations*, 83 AM. J. INT'L L. 821, 829 (1989) (arguing that, "[t]o the extent that state and local actions express citizen and community views, raise public consciousness and add to robust debate on important public policies, they serve an important public function"); Martin S. Flaherty,

analyses have demonstrated, the federalism debate within environmental law has tended to rely on an unduly rigid demarcation between state and federal authority.[17] Detailed historical analysis of the actual development of environmental law regimes reveals a much more complex arrangement, in which state and federal lawmakers and regulators operate in an iterative fashion, learning from each other's successes and mistakes, prodding each other in formal and informal ways to action, and generally engaging in dialectical, rather than atomized, communications and activities. California, as the longtime bellwether jurisdiction for environmentalism within the United States, has played an especially significant role within this process of iterative federalism. Thus, even if one agrees with commentators that an effective global climate change policy regime must be one of coordinated national action,[18] a further normative question remains as to whether, within any particular nation, such action best emerges from a strong, top-down federal authority, from a more organic, bottom-up process of state experimentation, or from some fruitful hybrid of both approaches.[19] To the extent that our analysis bears on this debate, it does so in the sense that constitutional objections may limit the degree to which state action is permissible in the arena of international environmental problems, even assuming that it is desirable.

Part I provides background information on state and local climate change institutions, with special attention to the prospect of subnational GHG emissions trading programs being established and linked for cross-jurisdictional trading in advance of national legislation. As Governor

Are We to Be a Nation? Federal Power vs. "States' Rights" in Foreign Affairs, 70 U. COLO. L. REV. 1277 (1999) (contending that the Supreme Court's federalist revival poses a significant and undesirable threat to national supremacy in foreign affairs); Jack L. Goldsmith, *Federal Courts, Foreign Affairs, and Federalism*, 83 VA. L. REV. 1617, 1622–23 (1997) (advancing the claim that "as the category of foreign relations comes to include matters traditionally regulated by states in which the states have a genuine interest, prevailing understandings of American federalism require that the decision to regulate these matters by federal law be made through political deliberations in which the states have a voice"); Daniel Halberstam, *The Foreign Affairs of Federal Systems: A National Perspective on the Benefits of State Participation*, 46 VILL. L. REV. 1015, 1028 (2001) ("[A]lthough tensions between state and federal policies do emerge periodically, state activities often benefit the Nation."); Ku, *supra* note 15, at 2414 ("[A] system of gubernatorial foreign policy is the most practical and feasible way to accommodate the internationalizing pressure of globalization with the traditional conception of federalism still extant in U.S. constitutional jurisprudence.").

17. *See* Ann Carlson, *Iterative Federalism and Climate Change* (UCLA Sch. of Law Research Paper No. 08-09, 2008), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1115556; *see also* David E. Adelman & Kirsten H. Engel, *Adaptive Federalism: The Case Against Reallocating Environmental Regulatory Authority* (Ariz. Legal Studies, Discussion Paper No. 07-23, 2007), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1016767.

18. *See, e.g.*, Wiener, *supra* note 16.

19. *See* Carlson, *supra* note 17.

Schwarzenegger explains, regional and international alliances of that nature "are sending the world a message, and what we are saying is basically that we are going to change the dynamic on greenhouse gas and carbon emissions, and that we are taking actions ourselves, and we are not waiting for Washington."[20] The remainder of the Article examines constitutional uncertainties associated with this plan of action. Part II observes that Governor Schwarzenegger's vision of the bottom-up linkage of various emerging GHG emissions trading systems is in tension with the federal executive branch's apparent objection to domestic legal action in advance of a comprehensive, top-down international solution. Parts III and IV then evaluate whether GHG emissions trading integration would either so fundamentally implicate a state in the evaluation of other nations' internal affairs as to threaten the federal government's "one voice" on matters of foreign policy or would necessitate impermissible discrimination against or burdening of out-of-state commerce.

I. TO BUILD A MARKET: CLIMATE CHANGE POLICY INTEGRATION

California's actions on climate change are emblematic of a more general push by subnational governments within the United States to regulate GHG emissions.[21] Whether via common law liability actions,[22] more conventional environmental lawsuits seeking to enforce federal agency obligations,[23] direct

20. Governor's Remarks, *supra* note 5.

21. *See, e.g.*, BARRY G. RABE, STATEHOUSE AND GREENHOUSE: THE EMERGING POLITICS OF AMERICAN CLIMATE CHANGE POLICY (2004); John Dernbach, *Moving the Climate Change Debate From Models to Proposed Legislation: Lessons From State Experience*, 30 ENVTL. L. REP. 10933 (2000); Engel, *supra* note 11; Hodas, *supra* note 11; Laura Kosloff & Mark Trexler, *State Climate Change Initiatives: Think Locally, Act Globally*, 18 NAT. RESOURCES & ENV'T 46 (2004); Carolyn Kousky & Stephen H. Schneider, *Global Climate Policy: Will Cities Lead the Way?*, 3 CLIMATE POL'Y 359 (2003); Robert B. McKinstry, Jr., *Laboratories for Local Solutions for Global Problems: State, Local and Private Leadership in Developing Strategies to Mitigate the Causes and Effects of Climate Change*, 12 PENN. ST. ENVTL. L. REV. 15 (2004); Merrill, *supra* note 10; Wiener, *supra* note 16. A catalogue of such initiatives can be found at Pew Center on Global Climate Change, What's Being Done . . . In the States, http://www.pewclimate.org/what_s_being_done/in_the_states (last visited Mar. 14, 2008).

22. *See, e.g.*, Connecticut v. Am. Elec. Power Co., 406 F. Supp. 2d 265, 267 (S.D.N.Y. 2005) (dismissing federal common law nuisance action brought by a coalition of states and nongovernmental organizations against major GHG emitters); Complaint for Damages and Declaratory Judgment, California *ex rel.* Lockyer v. Gen. Motors Corp., No. 06-05755 (N.D. Cal. Sept. 20, 2006) (bringing common law liability claim against major automakers).

23. *See, e.g.*, Massachusetts v. EPA, 127 S. Ct. 1438 (2007) (finding that the Commonwealth of Massachusetts has standing to challenge the EPA's failure to regulate mobile sources of GHG emissions and that the agency has statutory authority to regulate such emissions under the Clean Air Act); Coke Oven Envtl. Task Force v. EPA, No. 06-1182, 2007 WL 707329 (D.C. Cir. June 23, 2006) (challenging the EPA's failure to regulate stationary sources of GHG emissions under the Clean Air Act).

regulation of mobile[24] and stationary[25] GHG emitters, adoption of renewable energy portfolio standards,[26] mayoral commitment to GHG emissions reductions,[27] or a variety of other efforts, state and local governments have proven to be the most active and aggressive sources of legal action on climate change in the United States. With the Bush Administration demonstrating skepticism about climate change science and an unwillingness to support binding emissions limits, and with Congress generally neglecting to step into the void because of its longstanding view that developing nations must be included as part of any significant effort to address GHG emissions,[28]

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24. *See* Cal. Health & Safety Code § 43018.5 (West 2007). This 2002 Act requires the California Air Resources Board (CARB) to "develop and adopt regulations that achieve the maximum feasible and cost-effective reduction of greenhouse gas emissions from motor vehicles." *Id.* In September 2004, CARB approved regulatory amendments to California's existing motor vehicle standards that required compliance by automakers with new vehicle emissions limits for carbon dioxide, methane, nitrous oxide, and hydrofluorocarbons beginning in the 2009 model year. Cal. Envtl. Prot. Agency Air Res. Bd., Fact Sheet: Climate Change Emission Control Regulations (Dec. 10, 2004), http://www.arb.ca.gov/cc/ccms/factsheets/cc_newfs.pdf. Under section 209 of the federal Clean Air Act, any such state motor vehicle emissions regulation is preempted unless issued by a state that had already adopted emissions control standards prior to March 30, 1966, and unless the state is granted a waiver by the EPA. Clean Air Act, 42 U.S.C. § 7543 (2000). California, as the only state eligible for this exemption, has historically received waivers from the EPA on a routine basis, an authorization that then enables any other state to adopt regulations identical to California's more protective standards. Nevertheless, after a contentious two-year negotiating process—during which the Supreme Court issued its dramatic opinion in *Massachusetts v. EPA* and two federal district courts cleared the way for state regulation of motor vehicle GHG emissions by denying industry preemption challenges to the California regulations based on the Energy Policy and Conservation Act—the EPA ultimately denied California's waiver request. *See* Carlson, *supra* note 17, at 30.

25. For instance, the California Global Warming Solutions Act of 2006, A.B. 32, 2005–2006 Leg., Reg. Session (Cal. 2006) (codified at CAL. HEALTH & SAFETY CODE §§ 38500–38599 (West Supp. 2008)), requires the state to achieve a 25 percent reduction in its GHG emissions by 2020. By executive order, Schwarzenegger also has committed the state to reducing its emissions to 80 percent below 1990 levels by the year 2050. *See* Cal. Exec. Order No. S-3-05 (2005), *available at* http://www.dot.ca.gov/hq/energy/ExecOrderS-3-05.htm. Similarly, Maine passed legislation in 2003 that requires the state to reduce carbon dioxide emissions to 1990 levels by 2010, and then to 90 percent of 1990 levels by 2020. ME. REV. STAT. ANN. tit. 38 §§ 574–789 (Supp. 2007).

26. *See* Engel, *supra* note 11, at 56 (observing that state renewable portfolio standards might collectively reduce U.S. emissions by 1 to 1.5 percent below "business as usual" levels by 2015–2020).

27. More than 800 mayors in communities representing more than seventy-seven million individuals signed the U.S. Conference of Mayors Climate Protection Agreement, under which they agreed to reduce GHG emissions in their communities by 7 percent below 1990 levels by 2012. *See* Mayors Climate Protecting Center, List of Participating Mayors, http://usmayors.org/climateprotection/list.asp (last visited Mar. 14, 2008).

28. This view was most prominently expressed in the 1997 Byrd-Hagel Resolution, which was passed by a 95–0 vote of the U.S. Senate and which declared that body's intention to reject any treaty or other agreement requiring Senate approval that did not include a binding GHG emissions schedule for developing nations or that "would result in serious harm to the economy of the United States." Byrd-Hagel Resolution, S. Res. 98, 105th Cong. (1997). In 2005, the Senate's stance softened somewhat, with the McCain-Lieberman Climate Stewardship and Innovation Act

officials in subnational positions have increasingly sought to fill the leadership vacuum. As David Hodas observes, the resulting contrast between the apparent position of the federal government on climate change and the percolating activities of state and local governments is sufficiently dramatic that it suggests a rupture in our political unity: "It is as though we live in two different countries."[29]

As noted above, Governor Schwarzenegger wholeheartedly agrees with this assessment and has sought to position California as a "nation state"[30] on the international stage with respect to climate change. When it passed the California Global Warming Solutions Act of 2006 (Assembly Bill No. 32 (A.B. 32)), the California state legislature concurred with Governor Schwarzenegger's ambitious vision. This landmark legislation directs the California Air Resources Board (CARB) to adopt regulations that require the reporting and verification of statewide GHG emissions and to develop compliance mechanisms that achieve a reduction of statewide emissions to 1990 levels by the year 2020.[31] In the findings and declarations section of A.B. 32, the California legislature announced an intention to "plac[e] California at the forefront of national and international efforts to reduce emissions of greenhouse gases," and to assume a "global leadership role" by "encouraging other states, the federal government, and other countries to act"[32] rather than waiting for multilateral consensus. The self-consciously internationalist nature of California's climate change policy is further underscored in A.B. 32 by the statute's requirements that CARB promote consistency among GHG emissions

attracting thirty-eight votes and a new resolution calling for a mandatory national emissions cap receiving fifty-four votes. *See* Wiener, *supra* note 16, at 1963 n.9. The latter statement, dubbed the Bingaman-Domenici Resolution, still indicated that any national legislation must "not significantly harm the United States economy" and must "encourage comparable action by other nations that are major trading partners and key contributors to global warming." 151 Cong. Rec. S7037 (2005). As of the writing of this Article, numerous climate-related bills were being debated in Congress, most of which linked domestic legislative action with a need to pursue comparable restrictions on other nations. *See, e.g.*, H.R. COMM. ON ENERGY AND COMMERCE & SUBCOMM. ON ENERGY AND AIR QUALITY, CLIMATE CHANGE LEGISLATION DESIGN WHITE PAPER: COMPETITIVENESS CONCERNS/ENGAGING DEVELOPING COUNTRIES 2 (2008) [hereinafter H.R. COMM. ON ENERGY AND COMMERCE], *available at* http://energycommerce.house.gov/climate_change/white_paper.competitiveness.013108.pdf ("[P]ast action on climate change suggests that Congress would be unlikely to adopt legislation committing the U.S. to reduce its GHG emission limits without action by developing countries as well.").

29. Hodas, *supra* note 11, at 53.
30. *See supra* note 1 and accompanying text.
31. CAL. HEALTH & SAFETY CODE § 38550 (West Supp. 2008).
32. *Id.* § 38501.

reporting regimes throughout the world,[33] that it consider other state, local, and national GHG reduction measures when developing its own program,[34] and, more broadly, that it "consult with other states, and the federal government, and other nations to identify the most effective strategies and methods to reduce greenhouse gases, [to] manage GHG control programs, and to facilitate the development of integrated and cost-effective regional, national, and international GHG reduction programs."[35]

In an executive order implementing this legislation, Governor Schwarzenegger expressly directed state officials to develop a market-based GHG emissions reduction program that would permit linkages with other significant programs throughout the world, especially the most well-developed of such schemes to date, the cap-and-trade GHG emissions program of the European Union.[36] Known as the Emissions Trading Scheme (EU-ETS), this program involves, in broad outline, the imposition of GHG emissions caps on multiple sectors, such as electricity generation and transportation, by member governments, along with the establishment of an EU-wide emissions allowance registry through which actors can buy and sell permits. In such cap-and-trade schemes for GHG emissions, permits are typically issued in units of carbon dioxide (CO_2) emissions, with other GHG contributors being converted into CO_2 equivalent emissions factors based on their relative global warming potential.

In order to help fulfill the goal of integration, Governor Schwarzenegger directed the state's secretary for environmental protection to appoint a Market Advisory Committee to provide guidance to CARB in implementing A.B. 32.[37] On June 30, 2007, the Committee released its report, *Recommendations for Designing a Greenhouse Gas Cap-and-Trade System for California*, which documented several challenges facing the construction of any GHG emissions trading program, as well as additional issues associated with linking California's eventual program to other systems such as the EU-ETS.[38] As the

33. *Id.* § 38530(c)(2).
34. *Id.* § 38561(c).
35. *Id.* § 38564.
36. *See* Cal. Exec. Order No. S-20-06 (2006), *available at* http://gov.ca.gov/executive-order/4484; *see also* Chemerinsky et al., *supra* note 11, at 10653 ("Although [A.B. 32] does not directly call upon [CARB] to use market-based solutions to reduce emissions, it seems that [CARB], along with many of California's leaders, prefers a cap-and-trade program over other alternatives.").
37. *See* Press Release, Office of the Governor, Governor Schwarzenegger Announces Executive Order (Oct. 16, 2006), *available at* http://gov.ca.gov/index.php?/press-release/4447.
38. MKT. ADVISORY COMM., CAL. AIR RES. BD., RECOMMENDATIONS FOR DESIGNING A GREENHOUSE GAS CAP-AND-TRADE SYSTEM FOR CALIFORNIA (2007), *available at* http://www.climatechange.ca.gov/documents/2007-06-29_MAC_FINAL_REPORT.PDF [hereinafter MARKET ADVISORY COMM.].

report noted, the construction of a successful GHG emissions trading program demands careful consideration of, inter alia, which greenhouse gases to target for the cap; which sectors and activities to subject to emissions restrictions; what overall level of emissions and schedule of reductions to set as a basis for the cap; how to allocate permits among existing and new sources once the cap is established; whether to give away or auction permits; whether to allow credit for sponsorship of offsets, that is, reductions in GHG emissions that occur outside the scope of the cap-and-trade program; whether to allow banking or borrowing of permits between compliance periods; whether to create a program safety valve such as the issuance of additional permits at a predetermined price if compliance proves to be unexpectedly difficult; and whether to credit in some fashion GHG emissions reductions that actors undertake prior to the establishment of the system.[39] Once these various decisions have been made, the success of the cap-and-trade system then depends on reliable monitoring and enforcement by regulators to ensure that covered GHG emitters comply with permit requirements and that GHG emissions actually are controlled. As the Market Advisory Committee succinctly put it, "[m]onitoring is the gold standard for tradable allowances."[40]

Even tackling these political and administrative challenges will not suffice to ensure the integrity of the GHG emissions trading program, since policymakers also must consider the fact that their jurisdiction is connected through webs of economic and environmental interdependence with myriad other jurisdictions that follow their own climate change policies. More so than any other environmental dilemma, climate change illustrates the porosity of territorial borders. This is most obviously true in the sense that GHG emissions impact global atmospheric processes irrespective of where the emissions originate, such that environmental benefits from any emissions reduction can be undone through increases elsewhere on the planet. It is also true in the more subtle sense that GHG emissions limits affect the cost of producing many goods that themselves cross jurisdictional boundaries, such that differential climate change policies may alter existing patterns of production and trade.

At the national level, policymakers in the United States remain deeply concerned about the competitiveness effects of climate change regulation, even as the prospects for a federal GHG emissions trading program have grown brighter. Accordingly, much attention has focused recently on the question of how to achieve the environmental objectives of GHG emissions

39. *Id.* at 18–78.
40. *Id.* at 71.

trading without suffering adverse economic impacts from leakage—that is, from the relocation of GHG intensive industry and manufacturing to jurisdictions with no or lower GHG emissions standards.[41] One frequently discussed safeguard against leakage involves border adjustments such as tariffs, taxes, permit purchase requirements, or other trade-related mechanisms that seek to eliminate any cost advantage imported goods might enjoy on account of more lax climate change policies in their country of origin.[42] A more aggressive approach would simply ban importation of goods unless they had been produced according to regulatory standards of equal or greater environmental stringency than those applied to domestic manufacturers. Assuming that such defensive mechanisms withstood challenge under international trade agreements (or under the dormant Commerce Clause if adopted at the subnational level),[43] then the importing jurisdiction could be confident that its climate change policies were not being undermined by economic activities occurring within its borders, despite their connection to extrajurisdictional emissions.

More desirable than border adjustments would be outright integration of a jurisdiction's GHG emissions trading program with those of other states, regions, and countries. As noted above, Governor Schwarzenegger holds high hopes that California eventually will adopt a trading program that can be linked with the EU-ETS. Indeed, the urge to integrate appears almost irresistible in the case of GHG emissions trading. The premise of the cap-and-trade policy approach is that a given environmental goal can be achieved at less cost through trading than through conventional regulatory standards because firms have varying compliance costs.[44] Especially in a case such as that of GHG emissions, in which environmental benefits are obtained largely without regard to where reductions occur,[45] policymakers ideally would

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41. *See, e.g.*, Chemerinsky et al., *supra* note 11, at 10654–59.

42. *See* H.R. COMM. ON ENERGY AND COMMERCE, *supra* note 28, at 8.

43. For both international trade and dormant Commerce Clause analyses, this is a strong assumption. *See* Joost Pauwelyn, *U.S. Federal Climate Policy and Competitiveness Concerns: The Limits and Options of International Trade Law* (Nicholas Inst. for Env't Policy Solutions, Duke Univ., Working Paper No. 07-02, 2007), *available at* http://www.nicholas.duke.edu/institute/internationaltradelaw.pdf; Patricia Weisselberg, Note, *Shaping the Energy Future in the American West: Can California Curb Greenhouse Gas Emissions From Out-Of-State, Coal-Fired Power Plants Without Violating the Dormant Commerce Clause?*, 42 U.S.F. L. REV. 185 (2007).

44. MARKET ADVISORY COMM., *supra* note 38, at 6.

45. *See* H.R. COMM. ON ENERGY AND COMMERCE & SUBCOMM. ON ENERGY AND AIR QUALITY, CLIMATE CHANGE LEGISLATION DESIGN WHITE PAPER: APPROPRIATE ROLES FOR DIFFERENT LEVELS OF GOVERNMENT 11 (2008), *available at* http://energycommerce.house.gov/climate_change/white%20paper%20st-lcl%20roles%20final%202-22.pdf ("Unlike most air pollutants, local [GHG] reductions alone will not help the local area given that climate change is caused by global, rather than local, concentrations of greenhouse gases."). We say "largely" because

require emissions reductions from those actors that can achieve reductions at least cost. Trading approximates this ideal scenario by allowing higher cost firms to purchase excess permits from lower cost firms, rather than being required to undertake emissions reductions themselves. In essence, the burden of achieving a given level of emissions reduction is allocated to those actors best positioned to bear it. This efficiency advantage of emissions trading programs increases with the number of sectors and firms under the cap, since the likelihood of cost heterogeneity increases accordingly. Naturally, linkage with the trading programs of other jurisdictions offers similar efficiency-enhancing potential in that, through linkage, permits issued in one jurisdiction could become exchangeable with those of another jurisdiction. For these reasons, the Market Advisory Committee recommended that CARB both include as many domestic sources within California's trading scheme as practicable and seek to integrate its eventual system with other trading schemes such as the EU-ETS.[46]

Like the initial construction of a trading program, however, linkage entails a series of practically challenging and politically sensitive questions. As the Market Advisory Committee noted, because "[t]erms for linking with other programs will need to be negotiated individually with the specific jurisdiction(s) involved," CARB may need to establish "a formal institution within California that evaluates other trading programs on an ongoing basis to determine their appropriateness for linkage."[47] The most basic question regarding appropriateness is whether the other jurisdiction has established an overall emissions cap and schedule of reductions that is comparable to California's scheme. Jurisdictions also must consider their respective policies on borrowing and banking, safety valves, and other critical design features. Comparable stringency on these various dimensions is desirable because it reduces administrative costs by allowing permits to be exchanged between systems on a one-for-one basis.[48] It also helps to ensure regulatory effectiveness by preventing dilution of the GHG permit currency through exchange with

many GHG emissions reductions also entail reductions in other pollutants, such as traditional criteria air pollutants regulated under the Clear Air Act, that have more localized environmental and human health effects. In such contexts, the normative case for emissions trading becomes complicated by the need to take account of the distributive outcome of permit trading. *See* Jonathan Remy Nash & Richard L. Revesz, *Markets and Geography: Designing Marketable Permit Schemes to Control Local and Regional Permits*, 28 ECOL. L.Q. 569 (2001).

46. MARKET ADVISORY COMM., *supra* note 38, at 69.

47. *Id.*

48. *Id.* at 71 ("Identical requirements across states and sources (as in the U.S. SO_2 and NO_x programs) and between the federal government and states (as with RGGI) keep[ ] transaction[ ] costs low and confidence in the market and in program compliance high. Differences in protocols should be carefully considered and justified.").

permits from a weaker system. In theory, jurisdictions could develop conversion or exchange ratios to account for the differential stringency of their systems. Such an effort, however, would entail complex judgments regarding the relative worth of the two systems' emissions reductions targets. For jurisdictions with a similar economic development status and similar historical contributions to GHG concentrations, such judgments might simply reduce to a comparison of the jurisdictions' percentage reduction goals. For jurisdictions that are not similarly situated, however, establishing an exchange ratio would necessitate judgments regarding how much the jurisdictions ought to be allowed to emit as a matter of international and intergenerational distributive equity—the very kinds of judgments that have plagued the Kyoto Protocol and subsequent United Nations Framework Convention on Climate Change negotiations.[49]

Even if two jurisdictions establish comparable caps and related design features, linkage still can adversely impact a trading system if one jurisdiction fails to adequately administer its system. This is because, "[a]t its core, a cap-and-trade program is a method of tracking and accounting for [GHG] emissions and having the costs of those emissions factored into economic decisions."[50] Hence, without rigorous monitoring and enforcement, actual emissions levels may differ substantially from reported levels, ultimately risking a loss of confidence in the integrity of the emissions market. For instance, as the Market Advisory Committee noted in its report, "[d]ifferential non-compliance penalties can affect the integrity of the overall regime, e.g., weak non-compliance penalties will tend to produce a weaker system, leading to the potential for a combined regime to exceed intended caps."[51] Similar weakening could occur if one jurisdiction permits the use of offsets too liberally or without adequate verification. In theory, offsets expand the range of options available to regulated entities as they seek to reduce GHG emissions, increasing the overall efficiency of the system. However, deciding whether an offset truly reflects a reduction of GHG emissions from a business as usual scenario requires nettlesome counterfactual judgments, about which jurisdictions may legitimately disagree. At what pace in the absence of regulation, for instance, would actors be expected to begin converting to

49. See Cass R. Sunstein, *The World vs. the United States and China? The Complex Climate Change Incentives of the Leading Greenhouse Gas Emitters*, 55 UCLA L. REV. 1675 (2008).

50. H.R. COMM. ON ENERGY AND COMMERCE & SUBCOMM. ON ENERGY AND AIR QUALITY, CLIMATE CHANGE LEGISLATION DESIGN WHITE PAPER: SCOPE OF A CAP-AND-TRADE PROGRAM 2 (2007), *available at* http://energycommerce.house.gov/climate_change/white_paper.10307.pdf.

51. MARKET ADVISORY COMM., *supra* note 38, at 71.

alternative fuels or green building design techniques? Because offsets often take place in developing nations or other areas outside the regulating jurisdiction, they also present significant verification challenges. Again, jurisdictions may disagree on whether to accept the legitimacy of offsets based on alliances, tensions, and other geopolitical variables that exist between the regulating jurisdiction and the jurisdiction in which the purported offset occurs.

Recognizing the need for careful planning and coordination in order to maximize prospects for smooth integration of GHG emission trading schemes, state and local actors have increasingly sought to engage their counterparts in climate change policy discussions. Several northeastern states, for instance, have formed the Regional Greenhouse Gas Initiative (RGGI) in order to develop a cap-and-trade program that would enable them to jointly reduce carbon dioxide emissions from power plants.[52] In addition to its full member governments, RGGI also includes as official observers Massachusetts, the District of Columbia, Pennsylvania, Rhode Island, the Eastern Canadian Provinces, and New Brunswick.[53] Similarly, California has banded together with the states of Arizona, New Mexico, Oregon, Utah, and Washington, as well as the Canadian provinces of British Columbia and Manitoba, to form the Western Climate Initiative (WCI).[54] Members of the WCI have agreed to set an overall regional GHG reduction goal, to establish a "market-based program, such as a load-based cap and trade program," to achieve the regional GHG reduction goal, and to participate in a multistate GHG registry to enable tracking, management, and crediting for entities that reduce GHG emissions.[55] Likewise, in the

52. *See* Regional Greenhouse Gas Initiative (RGGI), http://www.rggi.org (last visited Mar. 14, 2008).

53. *See* Regional Greenhouse Gas Initiative (RGGI), Participating States, http://www.rggi.org/states (last visited Mar. 14, 2008).

54. *See* Western Climate Initiative, http://www.westernclimateinitiative.org (last visited Mar. 14, 2008).

55. Press Release, Western Climate Initiative, Five Western Governors Announce Regional Greenhouse Gas Reduction Agreement (Feb. 26, 2007), *available at* http://www.westernclimateinitiative.org/ewebeditpro/items/O104F12774.pdf; *see also* Press Release, Office of the Governor of the State of Cal., Governor Schwarzenegger Applauds Nine Midwest States for Creating Regional Climate Partnership (Nov. 15, 2007), *available at* http://gov.ca.gov/index.php?/print-version/press-release/8109 (noting that Utah and the provinces of Manitoba and British Columbia have joined the WCI). Again, California has been particularly aggressive in pursuing cooperative regulatory arrangements with other jurisdictions. In addition to the WCI, California also has signed memoranda of understanding regarding climate change regulatory coordination with Great Britain, the Canadian provinces of British Columbia and Ontario, and the Australian state of Victoria. *See* sources cited *infra* note 62. Although these agreements typically state that they are "not intended to create any legally binding rights or obligations, and will not be

Midwest, nine governors and the premier of Manitoba recently signed an agreement modeled on the RGGI and WCI alliances,[56] raising the obvious prospect of linking the various regional initiatives into a single GHG emissions trading market that would cover a large portion of North America. Such efforts are complemented by the Climate Registry, an emerging effort by numerous states, provinces, and tribes to develop and manage a common GHG reporting system.[57] Finally, a coalition of European Union countries, U.S. states, and Canadian provinces have formed the International Carbon Action Partnership (ICAP), an international forum within which governments have agreed to share their expertise on GHG regulation and seek to "develop a well-functioning global cap and trade carbon market."[58]

II. CASUAL FOREIGN AFFAIRS: FORMALITY, BARGAINING CHIPS, AND THE SEPARATION OF POWERS

Much of the extrajurisdictional activity of states in the climate change arena has taken the shape of memoranda of understanding, joint statements of purpose, commitments to collaborate, and other informal multilateral relations.[59] Indeed, even the unequivocally hard law of A.B. 32 equivocates on the details and binding quality of its internationalist dimensions, suggesting something more along the lines of soft international lawmaking at the state level. Similarly, at the federal level, much of the Bush Administration's expression of its climate change stance has consisted of policy memoranda, amicus briefs, speeches, and other devices that fall short of formal executive action.[60] In both cases, the casualness of the foreign affairs activity can be understood as an attempt to maximize the position of the relevant government actor within the constitutional framework. State

enforceable in any court of law," they nevertheless evince a strong commitment to "the leadership role of sub-national jurisdictions in driving global climate change solutions." Memorandum of Understanding Between the State of Victoria and the State of California for Collaboration on Climate Change Action (May 4, 2007), *available at* http://gov.ca.gov/pdf/press/070506_climate_change_document.pdf. For a similar arrangement between Florida and Germany, see Partnership on Global Climate Change Action Between the Federal Republic of Germany and the State of Florida (July 13, 2007), *available at* http://fsec.ucf.edu/en/media/enews/2007/pdf/20070713-FRG-FL-partnership.pdf (establishing a "partnership" on global climate change action between Florida and Germany, as detailed through a "Joint Declaration of Intent").

56. *See* Midwest Greenhouse Gas Accord (Nov. 15, 2007), *available at* http://www.wisgov.state.wi.us/docview.asp?docid=12497.

57. *See* The Climate Registry, http://www.theclimateregistry.org (last visited Mar. 14, 2008).

58. *See* Frequently Asked Questions About the International Carbon Action Partnership (ICAP) 1 (May 14, 2008), *available at* http://www.icap-carbonaction.com/docs/icap-faqs.pdf.

59. *See supra* note 55.

60. *See* Central Valley Chrysler-Jeep, Inc. v. Goldstene, 529 F. Supp. 2d 1151 (E.D. Cal. 2007).

actors keen on influencing the global climate change debate have structured their activities in ways that seem designed to avoid raising problems under the Treaty and Compact Clauses, while still pursuing meaningful multilateral coordination of climate change regulations.[61] Just as firms invoke "best practices" and "industry standards" in order to circumvent competition law restrictions on their coordinated behavior, states seem to be adopting similar models of cooperation in order to avoid running afoul of the federal government's exclusive hold on foreign affairs.[62] Conversely, the federal executive branch has sought maximum preemptive force for its policy of nonaction; lacking a statute, treaty, or executive agreement regarding climate change that might more explicitly displace state activities, the Bush Administration and its supporters instead have tried to elevate their all-or-nothing negotiating strategy into an express policy that would have the effect of preempting inconsistent state and local activities.[63]

61. *See* Engel, *supra* note 11, at 75 (suggesting that the largely voluntary nature of state and local climate change action "could demonstrate upfront compliance with the Compact Clause"); Note, *The Compact Clause and the Regional Greenhouse Gas Initiative*, 120 HARV. L. REV. 1958, 1979 (2007) (concluding that the Memorandum of Understanding establishing RGGI should survive Compact Clause challenge).

62. *See, e.g.*, Memorandum of Understanding Between the State of Washington and the Province of British Columbia on Pacific Coast Collaboration to Protect Our Shared Climate and Ocean (June 2007), *available at* http://www.maritimeawards.ca/OGCWC/Docs/Agreements/BC_WA_CAO_Agreement.pdf ("*Action on our Shared Pacific Ocean*: II. Washington and British Columbia commit to work together to: . . . B. Share best practices on protecting marine habitats off our coasts."); Partnership on Global Climate Change Action Between the Federal Republic of Germany and the State of Florida, *supra* note 55 ("The purpose of this statement is to outline an aggressive agenda for partnership that supports the climate policies of each partner and provides mutual economic benefits to the Federal Republic of Germany and the State of Florida."); Memorandum of Understanding Between the State of Victoria and the State of California for Collaboration on Climate Change Action, *supra* note 55 ("This MOU . . . recognises the value of collaboration in pursuing best-practices policies and technologies for greenhouse gas emissions reduction and adaptation to climate change."). *Cf.* David Zaring, *Best Practices*, 81 N.Y.U. L. REV. 294, 294, 313 (2006) (explaining the rise in the use of the "best practices" model by administrative agencies and attributing its increasing popularity to "its prominence in two other areas: 1) business management, and 2) international cooperation").

63. This approach has been similar in important respects to the Administration's attempt to achieve preemption of state regulation and state tort law through federal agency assertion of a conflict with federal executive branch decisions not to regulate. *See generally* Nina A. Mendelson, *A Presumption Against Agency Preemption*, 102 NW. U. L. REV. 695 (2008). Such an effort is well illustrated by another conflict between the Bush Administration and the State of California that revolved around the state's effort to apply Proposition 65's disclosure requirement to mercury contaminations in seafood sold at supermarkets. In that episode, the executive branch's assertion of preemption came in the form of a letter to the Attorney General of California, arguing that the EPA and the Food and Drug Administration had jointly determined that point-of-sale mercury disclosure should not be required because consumers would potentially overreact to the information. *See* Katherine Renshaw, Note, *Sounding Alarms: Does Informational Regulation Help or Hinder Environmentalism?*,

As this Part explains, the sway that a government actor derives from engaging in such casual foreign affairs may depend upon whether the actor is operating on the state or federal level. Whereas state governors may manage to circumvent constitutional limitations by expressing their international accords in hortatory rather than mandatory terms, the president's power to preempt state action in the environmental arena may be limited if, acting without congressional support, he presents only an informal foreign affairs policy. As the U.S. Supreme Court has acknowledged, states have traditionally exercised substantial powers with regard to various kinds of environmental regulation—a history of state activity that Congress has repeatedly condoned through the adoption of statutes that envision concurrent regulatory authority in the environmental arena.[64] Furthermore, the nature of climate change, in particular, demands coordinated action by the president and Congress; hence, in the absence of contrary indications from Congress, state efforts with respect to climate change should not be subject to the same degree of preemption as state attempts to intervene in spheres, like the settlement of foreign claims, that have historically been the province of broader independent presidential power. This doctrinal conclusion has a normative explanation: Climate change actions like those undertaken by California on the state level, which encourage coordination of research and regulatory efforts as well as exploration of market-based options that could be meshed with other jurisdictions' policies, do nothing to foreclose future supervening efforts by the federal government and should therefore be left in place until such a time as a unified nation acts.

The president's contrary claim—that unilateral GHG emissions reductions by states undermine the nation's ability to persuade large developing countries to join a multilateral regime on equal terms and therefore should be preempted[65]—bears a surface resemblance to arguments that the Court has, on occasion, accepted. For instance, in *American Insurance Ass'n v. Garamendi*,[66] the Court held that a California insurance regulation requiring disclosure of corporate information by state-licensed insurance companies to enable pursuit of restitution claims by Holocaust

14 N.Y.U. ENVTL. L.J. 654, 682–83, 688, 696 n. 203 (2006); Bob Egelko, *FDA Opposing State Warnings on Canned Tuna: Top Official Sides With Firms in Mercury Suit*, S.F. CHRON., Aug. 20, 2005, at B1.

64. *See* Carlson, *supra* note 17.

65. *See, e.g.*, EPA, Control of Emissions From New Highway Vehicles and Engines, 68 Fed. Reg. 52922, 52931 (Sept. 8, 2003) ("Unilateral EPA regulation of motor vehicle GHG emissions could also weaken U.S. efforts to persuade key developing countries to reduce the GHG intensity of their economies."); *see also* Brief for the Federal Respondent, Massachusetts v. EPA, 127 S. Ct. 1438 (2007) (No. 05-1120).

66. 539 U.S. 396 (2003).

victims and their families impermissibly interfered with federal executive efforts to establish claim compensation mechanisms with only voluntary corporate participation.[67] Significantly, the Court found preemption notwithstanding the lack of an express preemption clause in the executive agreements establishing Holocaust claims tribunals. Indeed, the executive agreements appeared to expressly contemplate concurrent state activity, in light of a tepid U.S. promise in the agreements to simply recommend that state courts dismiss Holocaust-related lawsuits.[68] Nevertheless, the Court credited arguments by the United States as amicus curiae that an impermissible state interference arose simply because, "if the California law is enforceable, the President has less to offer [by way of enticement into the voluntary claim resolution schemes] and less economic and diplomatic leverage as a consequence. The law thus 'compromise[s] the very capacity of the President to speak for the Nation with one voice in dealing with other governments.'"[69]

On first glance, one might plausibly extend this "bargaining chip theory"[70] to the climate change context, where preemptive state GHG emissions restrictions—particularly from a substantial emitter such as California—might seem to interfere directly with the president's chosen strategy of promoting only voluntary GHG emissions abatement in advance of collective international restrictions. The basic notion would be that the federal government can, as a matter of its foreign affairs expertise, determine that it is better to withhold domestic, legally enforced reductions in order to threaten more effectively China, India, Brazil, and other large emitters with the prospect of mutually assured destruction, should those nations fail to agree to binding multilateral reductions. Thus, the story goes, when California unilaterally binds itself to reduce GHG emissions, the federal government's foreign affairs strategy is concomitantly weakened. In that sense, Justice Souter's observation in *Garamendi* that "California seeks to use an iron fist where the president has consistently chosen kid gloves," along with his statement that "the wisdom of the National Government's policy" is not relevant in determining whether conflicting state policies are preempted, might appear to apply not only to Holocaust claims resolution,

67. *Id.* at 423–25.
68. *Id.* at 406.
69. *Id.* at 424.
70. Merrill, *supra* note 10, at 325 ("The Court's recent foreign policy preemption cases seem less concerned with the specific legal authority for preemption than with the general proposition that States should not interfere with federal bargaining chips.").

but also to climate change policy.[71] All that would seem to matter is that the "iron fist" of A.B. 32 undermines the force of President Bush's preferred "kid gloves" approach to climate change, since it suggests that significant portions of his own country would rather bite the proverbial bullet than continue his game of Russian Roulette.[72]

This surface similarity, however, ignores the critical role played by the president's need to derive constitutional authority for acting from either Congress or the Constitution.[73] The Bush Administration has relied on *Garamendi* and other precedents, such as *United States v. Curtiss-Wright Export Corp.*[74] and *Dames & Moore v. Regan*,[75] to suggest the existence of an expansive foreign affairs power that can be exercised by the president independent of congressional oversight, and even in contravention of Congress' expressed will.[76] However, scholars have objected to such broad readings of

71. *Garamendi*, 539 U.S. at 427.

72. *Cf.* Central Valley Chrysler-Jeep, Inc. v. Goldstene, 529 F. Supp. 2d 1151, 1187 (E.D. Cal. 2007) ("Plaintiff's 'bargaining chip' theory of interference only makes logical sense if it would be a rational negotiating strategy to refuse to stop pouring poison into the well from which all must drink unless your bargaining partner agrees to do likewise.").

73. *See* Medellín v. Texas, 128 S. Ct. 1346, 1367–68 (2008); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 585 (1952).

74. 299 U.S. 304 (1936).

75. 453 U.S. 654 (1981).

76. For the invocation of independent presidential power in the foreign affairs and foreign relations arena, see Michael P. Van Alstine, *Executive Aggrandizement in Foreign Affairs Lawmaking*, 54 UCLA L. REV. 309, 325 (2006) ("Predictably, the present administration has now seized on *Garamendi* and its apparently reinvigorated ancestors as a springboard for the comprehensive claim that the president has a discretionary and unreviewable power both to define and to compel domestic compliance with international law."); Brief for the United States as Amicus Curiae Supporting Petitioner at 12, 13, Medellín v. Texas, 128 S. Ct. 1346 (2008) (No. 06-984) ("[I]t is the President who is responsible for the conduct of foreign relations. United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 320 (1963) . . . . In a series of cases, the Court has upheld the President's authority to determine individual rights as part of settling disputes with foreign nations . . . *Garamendi*, 539 U.S. [at] 396 . . . ; *Dames & Moore*, [453 U.S. at 680] . . . . The President may exercise this dispute resolution authority without seeking the consent of the Senate or approval from Congress . . . and the exercise of such authority preempts conflicting state law." (citations omitted)); Brief for the Respondents at 12, Rasul v. Bush, 542 U.S. 507 (2004) (Nos. 03-334, 03-343) ("The Constitution commits to the political branches and, in particular, the President, the responsibility for conducting the nation's foreign affairs and military operations."); Brief for the United States as Respondent Supporting Petitioner at 31, Sosa v. Alvarez-Machain, 542 U.S. 692 (2004) (No. 03-339) ("It is the 'plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations' to decide 'the important complicated, delicate and manifold problems of foreign relations'" (citing *Curtiss-Wright*, 299 U.S. at 319–20; *Garamendi*, 539 U.S. at 414)).

A recent signing statement demonstrates the extent to which President Bush envisions his foreign affairs power as predominating—at least in certain circumstances—even over Congress' contrary will. When signing the Sudan Accountability and Divestment Act of 2007, which authorizes state and local governments to divest financially from firms doing business in certain areas of Sudan, President Bush observed that, "as the Constitution vests the exclusive authority to conduct

Garamendi,[77] and the Court itself appears to have cabined the scope of *Garamendi* through its recent decision in *Medellín v. Texas*.[78] In *Medellín*, Chief Justice Roberts' opinion returned to the separation of powers framework supplied by Justice Jackson's concurrence in *Youngstown Sheet & Tube Co. v. Sawyer*[79] to analyze the extent of the president's authority to preempt state procedural default rules by implementing a decision of the International Court of Justice interpreting the United States' international treaty obligations.[80] *Medellín* thereby reinforced the applicability of Justice Jackson's familiar tripartite framework for assessing whether presidential action is authorized, in contrast to the more free-floating presidential foreign affairs power seemingly present in *Garamendi*:

> First, "[w]hen the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate. . . . Second, "[w]hen the President acts in absence of

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foreign relations with the Federal Government, the executive branch shall construe and enforce this legislation in a manner that does not conflict with that authority." Press Release, Office of the Press Secretary, Statement by the President (Dec. 31, 2007), *available at* http://www.whitehouse.gov/news/releases/2007/12/20071231.html. The Act itself expressly states that "[a] measure of a State or local government authorized under [the Act] is not preempted by any Federal law or regulation." Sudan Accountability and Divestment Act of 2007, Pub. L. 110-174, 121 Stat. 2516. The president's purported reservation of authority suggests, however, that he himself might seek to overrule specific acts of divestment by state and local governments, despite Congress' plain intent to provide detailed and exclusive conditions for authorized divestments through the statute.

77. *See, e.g.*, Curtis Bradley, *Unratified Treaties, Domestic Politics, and the U.S. Constitution*, 48 HARV. INT'L L.J. 307, 324 (2007) ("Despite [its] broad language, the Court [in *Garamendi*] did not suggest that the executive had unlimited authority, even through executive agreements, to preempt state law.") (2007); Brannon P. Denning & Michael D. Ramsey, American Insurance Association v. Garamendi *and Executive Preemption in Foreign Affairs*, 46 WM. & MARY L. REV. 825, 912–13 (2004) (criticizing the Court's decision in *Garamendi* and suggesting that it created a "foreign affairs exception" to "the broader rule against executive lawmaking" that was grounded neither in "constitutional text" nor "longstanding practice"); Van Alstine, *supra* note 76, at 346–47 (explaining that broad readings of the extent of presidential power in foreign affairs under *Garamendi* fail to understand the importance to the Court of Congress' acquiescence to the kinds of activities in which the president was engaging in that case).

78. 128 S. Ct. 1346 (2008).

79. 343 U.S. 579 (1952).

80. *Medellín*, 128 S. Ct. at 1367 ("The United States maintains that the President's constitutional role 'uniquely qualifies' him to resolve the sensitive foreign policy decisions that bear on compliance with an [International Court of Justice] decision and 'to do so expeditiously.' . . . In this case, the President seeks to vindicate United States interests in ensuring the reciprocal observance of the Vienna Convention, protecting relations with foreign governments, and demonstrating commitment to the role of international law. These interests are plainly compelling. Such considerations, however, do not allow us to set aside first principles. . . . Justice Jackson's familiar tripartite scheme [from *Youngstown*] provides the accepted framework for evaluating executive action in this area.") (quoting Brief for United States as *Amicus Curiae* Supporting Petitioner at 11, 12, *Medellín*, 128 S. Ct. 1346 (No. 06-984)).

> either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain." . . . . In this circumstance, Presidential authority can derive support from "congressional inertia, indifference or quiescence." . . . Finally, "when the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb," and the Court can sustain his actions "only by disabling the Congress from acting upon the subject."[81]

Needless to say, debates often occur over the category into which a particular presidential action fits, as statutes may either more—or substantially less—explicitly authorize certain kinds of foreign affairs decisions by the president.[82] Nevertheless, *Youngstown* does, in general, "stand[ ] for the proposition that Congress has broad authority to structure the exercise of executive authority," including in the realm of foreign affairs.[83]

The *Youngstown* framework helps to make sense of when the Supreme Court has accepted the bargaining chip objection to state foreign affairs activities. For instance, in *Crosby v. National Foreign Trade Council*[84] the Court recognized the "competence" of informal executive branch statements to establish that a Massachusetts statute restricting state purchases from firms doing business in Burma undercut the president's power to negotiate with Burma under a federal economic sanctions program.[85] The Court did so, however, because the president was operating pursuant to an express delegation of authority from Congress to pursue multilateral diplomatic pressure against Burma, thereby affording him the greatest scope of his power under Justice Jackson's *Youngstown* framework. Earlier, in *Dames & Moore v. Regan*,[86] the Court acknowledged that the president's control of foreign assets and suspension of domestic litigation in response to the Iranian hostage crisis was an essential carrot with which he could attempt a successful resolution of the situation. Chief Justice Rehnquist's opinion for the Court, while observing that the boundaries between the *Youngstown* categories are more

81. *Id.* at 1368 (quoting *Youngstown*, 343 U.S. at 635, 637–38 (Jackson, J., concurring)).

82. *Compare* Hamdi v. Rumsfeld, 542 U.S. 507, 552 (2004) (Souter, J., concurring) (deeming the executive branch's detention of Hamdi not sanctioned by Congress' Authorization for the Use of Military Force (AUMF) and therefore involving the "lowest ebb" of the president's power under Justice Jackson's framework from *Youngstown*), *with* Hamdi v. Rumsfeld, 542 U.S. at 517 (O'Connor, J., plurality opinion) (determining that the AUMF did allow for Hamdi's detention).

83. Ernest Young, *The Constitution Outside the Constitution*, 117 YALE L.J. 408, 442 (2007).

84. 530 U.S. 363 (2000).

85. *Id.* at 377.

86. Dames & Moore v. Regan, 453 U.S. 654 (1981).

fluid than often described,[87] nevertheless focused throughout on whether the president's actions had been expressly or impliedly approved of by Congress. Rather than simply invoking an independent presidential authority to resolve international disputes without congressional delegation or oversight, the Court referred with approval to Justice Frankfurter's statement from *Youngstown* that, "'a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned . . . may be treated as a gloss on 'Executive Power' vested in the President by § 1 of Art. II.'"[88] Thus, in both *Crosby* and *Dames & Moore*, the effective exercise of the president's foreign affairs authority was seen to depend on a clearing of space, such that foreign entities would be obliged only to negotiate with the federal executive branch in order to achieve a coherent and comprehensive resolution of the relevant matter.[89] Also in both cases, however, the president's ability to constitutionally assert the need for such a clearing of space depended on Congress at least tacitly endorsing his activities.

Even *Garamendi* itself can be understood through the *Youngstown* framework. To be sure, the Court found that the California insurance disclosure law conflicted with U.S. foreign policy based only on letters and congressional testimony by executive branch officials, much like the relatively informal statements that have been relied on by litigants and opponents to advance the view that California's climate change activities should be preempted.[90] The weight that the Court in *Garamendi* placed upon

87. Although Chief Justice Rehnquist, in *Dames & Moore*, invoked Justice Jackson's categories from *Youngstown*, he indicated that they represented more of a malleable standard than a clear rule: "Although we have in the past found and do today find Justice Jackson's classification of executive actions into three general categories analytically useful, we should be mindful of Justice Holmes' admonition . . . . that '[t]he great ordinances of the Constitution do not establish and divide fields of black and white.' . . . Justice Jackson himself recognized that his three categories represented 'a somewhat over-simplified grouping,' . . . and it is doubtless the case that executive action in any particular instance falls, not neatly into one of three pigeonholes, but rather at some point along a spectrum running from explicit congressional authorization to explicit congressional prohibition. This is particularly true as respects cases such as the one before us, involving responses to international crises the nature of which Congress can hardly have been expected to anticipate in any detail." *Id.* at 669.

88. *Youngstown*, 343 U.S. at 610–11.

89. As the *Crosby* Court put it, "We need not get into any general consideration of limits of state action affecting foreign affairs to realize that the President's maximum power to persuade rests on his capacity to bargain for the benefits of access to the entire national economy without exception for enclaves fenced off willy-nilly by inconsistent political tactics." *Crosby*, 530 U.S. at 382; *see also id.* at 377 ("Quite simply, if the Massachusetts law is enforceable the President has less to offer and less economic and diplomatic leverage as a consequence. . . . [T]he state Act reduces the value of the chips created by the federal statute. It thus 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'").

90. *See* Am. Ins. Ass'n v. Garamendi, 539 U.S. 396, 422 (2003) (citing the views articulated at "high levels of the Executive Branch").

these informal comments resulted, however, from the precise area of activity involved in the case: post-conflict international claims resolution. As Justice Souter asserted in his opinion for the majority in *Garamendi*:

> Making executive agreements to settle claims of American nationals against foreign governments is a particularly longstanding practice. . . . Given the fact that the practice goes back over 200 years and has received congressional acquiescence throughout its history, the conclusion "[t]hat the President's control of foreign relations includes the settlement of claims is indisputable."[91]

Youngstown, thus, could be seen lurking in the background of even *Garamendi*: Because Congress had responded to prior presidential efforts to settle Americans' claims against foreign governments with "inertia, indifference or quiescence," the Court was entitled to assume that the president's actions represented a legitimate exercise of power within the "zone of twilight."[92] The less Congress has expressed its approval, the less informal executive branch statements will affect the Court's determination.

In *Barclays Bank v. Franchise Tax Board of California*,[93] by contrast, the Court refused to strike down a California tax provision under the Foreign Commerce Clause because it found that Congress had assented implicitly to California's policy of requiring "worldwide combined reporting" of corporate income.[94] Importantly, executive branch officials had stressed in press releases, letters, and amicus briefs that the California policy would invite harmful economic retaliation by foreign nations. The Court deemed those informal executive expressions "merely precatory"; as such, they were insufficient to raise even the prospect that they might constitute a manifestation of the president's "independent powers," as required, according to Justice Jackson, whenever the president purports to act legitimately at the "lowest ebb" of his authority under category three.[95] These executive branch statements were, therefore, clearly inadequate to invalidate California's tax rule.[96] Notably, in *Barclays Bank*, the Court deduced Congress' approval of California's scheme from its failure to act on legislative proposals to prohibit state imposition of worldwide combined reporting.[97] As Justice Ginsburg

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91. *Id.* at 415 (quoting U.S. v. Pink, 315 U.S. 203, 240 (1942)).
92. *See Youngstown*, 343 U.S. at 637 (Jackson, J., concurring).
93. 512 U.S. 298 (1994).
94. *Id.* at 326.
95. *Id.* at 329–30 ("Executive Branch communications that express federal policy but lack the force of law cannot render unconstitutional California's otherwise valid, *congressionally* condoned, use of worldwide combined reporting." (emphasis added)).
96. *Id.*
97. *Id.* at 324–28.

wrote, "That the Executive Branch proposed legislation to outlaw a state taxation practice, but encountered an unreceptive Congress, is not evidence that the practice interfered with the Nation's ability to speak with one voice, but is rather evidence that the preeminent speaker decided to yield the floor to others."[98]

To date, several observers—including two federal district court judges weighing challenges to state regulation of GHG emissions from motor vehicles prior to the Environmental Protection Agency's (EPA's) decision to deny California's Clean Air Act waiver request—have concluded that the federal government simply has not spoken clearly enough in the climate change context to establish a foreign affairs position with which California could be said to be in conflict.[99] They note, for instance, that in some settings the executive branch has actually held up state and local climate policies as a shining example of all that the United States is doing to address climate change.[100] As we have stressed throughout this Part, however, the outcome of the bargaining chip objection does not solely hinge on whether the federal government has expressed a foreign policy position against unilateral domestic GHG abatement with adequate clarity and formality to constitute a "policy," as opposed to merely a "strategy."[101] Instead, the outcome hinges on whether the Court will give weight to relatively informal executive branch assertions of the bargaining chip theory as a federal position—a question that, in turn, hinges on whether the assertions pertain to an area of traditional congressionally condoned presidential foreign affairs authority, as in *Garamendi*, or an area in which the president is acting with express congressional delegation and approval, as in *Crosby*.

98. *Id.* at 328–29; *see also* Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 385–86 (2000) (distinguishing *Barclays Bank* on the ground that the majority in the latter case had "found the reactions of foreign powers and the opinions of the Executive irrelevant in fathoming congressional intent because Congress had taken specific actions rejecting the positions both of foreign governments . . . and the Executive").

99. *See* Green Mountain Chrysler Plymouth v. Crombie, 508 F. Supp. 2d 295 (D. Vt. 2007); Central Valley Chrysler-Jeep, Inc. v. Goldstene, 2007 WL 4372878 (E.D. Cal.); *see also* Note, *Foreign Affairs Preemption*, *supra* note 11, at 1889 ("The record of congressional and executive actions does not clearly establish that the federal government is committed to pursuing a binding multilateral agreement on climate change.").

100. *See Re Integration of Greenhouse Gas Emissions Standards Into Procurement Policies*, Rulemaking Proceeding 06-04-009, Decision 07-01-039 (California Public Utilities Commission 2007), 2007 WL 403573, at *91–92 [hereinafter CPUC Proceeding].

101. *Central Valley Chrysler-Jeep*, 529 F. Supp. 2d 1186–87 ("The term 'policy' as used in *Zschernig* and its progeny refers to a concrete set of goals, objectives, and/or means to be undertaken to achieve a predetermined result. . . . In order to conflict or interfere with foreign policy within the meaning of *Zschernig*, *Garamendi* or related cases, the interference must be with a policy, not simply with the means of negotiating a policy.").

Notwithstanding a long history of executive branch leadership in international environmental lawmaking,[102] the president cannot be comfortably presumed to have broad authority to act with the acquiescence of Congress with regard to the climate change conundrum. Unlike postconflict claims resolution, which involves relatively discrete, one-time settlement of international disputes, addressing climate change will necessarily require vast, complex interventions into the flow and content of not only domestic, but also foreign commerce, an area in which, as Justice Souter recalled in *Garamendi*, "Congress holds express authority to regulate."[103] Indeed, because it implicates foundational elements of the regulated economy, climate change policy must entail a delicate interplay between foreign negotiation and domestic legislation, one that requires heavy involvement of both the federal executive and legislative branches. The Supreme Court itself, in *Massachusetts v. EPA*,[104] implicitly affirmed the necessity for coordination between Congress and the president with respect to climate change initiatives. Faced with the Bush Administration's opposition to EPA regulation of GHG emissions, based in part on the theory that climate change regulation should only go forward in the context of agreements with India, China, and other "key developing nations," Justice Stevens instead insisted on the EPA's obligation "to comply with [the] clear statutory command" of the Clean Air Act.[105] The Court therefore concluded, in fairly definitive language, that, "while the President has broad authority in foreign affairs, that authority does not extend to the refusal to execute domestic laws."[106]

In reaching this conclusion, the Court made two critical analytical moves. First, it stressed that Congress had delegated foreign policy authority in the climate change context to the secretary of state, rather than to the EPA.[107] Thus, the Court dismissed out of hand the EPA's assertions that regulating motor vehicle emissions might undercut the president's ability to

102. *Cf.* David A. Wirth, *A Matchmaker's Challenge: Marrying International Law and American Environmental Law*, 32 VA. J. INT'L L. 377, 420 (1992) ("Through its own inattention, by Executive Branch design, or both, the Congress has been marginalized in the negotiation and implementation of many international environmental agreements.").

103. Am. Ins. Ass'n v. Garamendi, 539 U.S. 396, 414 (2003).

104. 127 S. Ct. 1438 (2007).

105. *See id.* at 1462–63.

106. *Id.* at 1463.

107. *See id.* at 1448. Specifically, in the Global Climate Protection Act of 1987, Congress directed the president to develop a national policy on climate change, but called upon the secretary of state "to coordinate those aspects of United States policy requiring action through the channels of multilateral diplomacy." Pub. L. No. 100-204, § 1103(b)–(c), 101 Stat. 1407, 1408–09 (1987) (codified as amended at 15 U.S.C. § 2904(b)–(c)(2000)).

persuade other nations to join a multilateral reduction scheme.[108] Second, the Court interpreted Congress' definition of air pollutant in section 202(a)(1) of the Clean Air Act to be capacious enough to encompass GHG emissions, assuming that the EPA makes the initial determination that they contribute to climate change in a way that endangers public health or welfare.[109] Through these two steps, the Court in *Massachusetts v. EPA* construed the agency's assertion of the "bargaining chip theory" as one involving the "lowest ebb" of presidential power, where Congress has spoken and the President resists its instructions.[110] Whether or not one agrees with Justice Stevens' claim in *Massachusetts v. EPA* to have been merely construing the intent expressed by Congress when it adopted and amended the Clean Air Act in the 1970s, the executive no longer can contend that it is operating with the tacit support of the legislature in its opposition to unilateral domestic emissions reductions, as it perhaps could have during the period in which the Byrd-Hagel Resolution represented the Senate's clearest statement of its views regarding the propriety of advance domestic GHG emissions abatement.[111] The federal government's "one voice" instead has become fractured, necessitating judicial determination of what, in fact, the authoritative national position on climate change actually is before resolving whether a state's action should be viewed as inconsistent with that position. Because the president is, in this case, acting at the "lowest ebb,"[112] informal statements emanating from the executive branch regarding the need for preemption will, as *Barclays Bank* illuminates, be accorded less weight.

108. In *Garamendi*, by contrast, the Court failed to engage in a detailed inquiry regarding which departments and which officials were seen to be representing executive branch foreign policy because, again, the Court perceived no potential conflict between Congress and the president. *See Garamendi*, 539 U.S. at 423 n.13 ("The dissent would also dismiss the other Executive Branch expressions of the Government's policy . . . insisting on nothing short of a formal statement by the President himself . . . . But there is no suggestion that these high-level executive officials were not faithfully representing the president's chosen policy, and there is no apparent reason for adopting the dissent's 'nondelegation' rule to apply within the Executive Branch.").

109. *Massachusetts v. EPA*, 127 S. Ct. at 1462 ("While the Congresses that drafted § 202(a)(1) might not have appreciated the possibility that burning fossil fuels could lead to global warming, they did understand that without regulatory flexibility, changing circumstances and scientific developments would soon render the Clean Air Act obsolete.").

110. *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637–38 (1952) (Jackson, J., concurring). For a discussion of the history of presidential action at this "lowest ebb," see David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—A Constitutional History*, 121 HARV. L. REV. 941 (2008).

111. *See supra* note 28 (describing recent signs of support within Congress for domestic GHG emissions reductions perhaps even in advance of multilateral commitment).

112. *See supra* note 95 and accompanying text.

Even on the broad reading of *Garamendi* and related precedents advanced by the Bush Administration, in which the extent of presidential power in foreign affairs is not so strongly tied to the need for express or tacit congressional approval under the *Youngstown* framework, additional factors militate against the conclusion that state climate change initiatives such as those pursued by California could be preempted. Most notably, the Court purports to adopt a more circumspect attitude toward foreign affairs preemption when the state foreign affairs activity said to be in conflict represents an area of traditional state regulation. As Justice Souter suggested in *Garamendi*: "Where . . . a State has acted within what Justice Harlan called its 'traditional competence,' but in a way that affects foreign relations, it might make good sense to require a conflict, of a clarity or substantiality that would vary with the strength or the traditional importance of the state concern asserted."[113] At first glance, then, one might predict that the Court would hesitate to find foreign affairs preemption in the context of climate change regulation, since environmental protection is often stated to lie within the states' traditional purview. For instance, in the domestic Commerce Clause case of *Hughes v. Alexandria Scrap Corp.*,[114] involving Maryland's efforts to enhance its environment by encouraging the rapid processing of abandoned vehicles, the Court emphasized that Maryland's interest in protecting its environment represented a legitimate, and even laudable, purpose.[115] Because meaningful climate change policy will have dramatic consequences for environmental, economic, energy, land use, and other primary government regulatory functions, it implicates a host of such areas of "traditional state authority."[116]

On the other hand, *Garamendi* involved insurance regulation, surely itself an area of traditional state authority. This fact did not trouble the *Garamendi* majority, however, because it was willing to look beyond the surface of the California regulation to discern a nontraditional purpose. Rather than attempting to effectuate "legitimate consumer protection

113. *Garamendi*, 539 U.S. at 419 n.11 (quoting Zschernig v. Miller, 389 U.S. 429, 459 (1968)); *see also id.* at 442 (Ginsburg, J., dissenting) ("The displacement of state law by preemption properly requires a considerably more formal and binding federal instrument.").

114. 426 U.S. 794 (1976).

115. *Id.* at 809 ("Maryland entered the market for the purpose, agreed by all to be commendable as well as legitimate, of protecting the State's environment."); *id.* at 814 ("The 1974 amendment bears a rational relationship to Maryland's purpose of using its limited funds to clean up its own environment.").

116. *See, e.g.*, Rapanos v. United States, 547 U.S. 715, 738 (2006) (Scalia, J., plurality opinion) (speaking of the "[r]egulation of land use" as "a quintessential state and local power" and an "area of traditional state authority").

interests in knowing which insurers have failed to pay insurance claims," Justice Souter emphasized that the California regulation "effectively singles out only policies issued by European companies, in Europe, to European residents, at least 55 years ago," a fact that "raises great doubt that the purpose of the California law is an evaluation of corporate reliability in contemporary insuring in the State."[117] Thus, the Court viewed California's fundamental purpose to be one and the same as the national government's, namely, "seek[ing] to vindicate the claims of Holocaust survivors."[118] From that vantage point, California's interest in advocating for its "roughly 5,600 documented Holocaust survivors" paled in comparison to the federal government's interest in representing approximately "100,000 survivors" nationwide.[119] Thus, "[a]s against the responsibility of the United States of America, the humanity underlying the state statute could not give the State the benefit of any doubt in resolving the conflict with national policy."[120]

One could imagine a similar line of argument being applied against California in the climate change context. Although commentators have tended to regard the two situations as distinguishable,[121] in both cases the manner in which California exercised its admittedly traditional state authority is only explicable in relation to nontraditional foreign affairs concerns. Mandated disclosure of Holocaust-era financial information would seem arbitrary outside of an international context of continuing ethical and political demands for justice from the individuals and entities associated with Nazi Germany. Likewise, mandatory limits on GHG emissions make little sense in the absence of a simultaneous commitment by California to aggressively encourage comparable actions by a sufficient number of other states and nations to render its program not just symbolically, but instrumentally efficacious. In both cases, the exercise of an area of traditional state authority may be readily recharacterized as an intervention into foreign affairs. Again, whether or not the Court will engage in such a recharacterization seems to depend on considerations of how to balance authority, not only between the states and the national government, but also between the president and Congress.

117. *Garamendi*, 539 U.S. at 425–26.
118. *Id.* at 426.
119. *Id.*
120. *Id.* at 426–27.
121. *See, e.g.*, Chemerinsky et al., *supra* note 11, at 10663 ("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 *Garamendi*, for instance, California argued that Congress had broadly condoned state insurance regulation through passage of the McCarran-Ferguson Act, which states that "continued regulation and taxation by the several States of the business of insurance is in the public interest" and that "silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States."[122] Justice Souter rejected this argument on the theory that "a federal statute directed to implied preemption by domestic commerce legislation cannot sensibly be construed to address preemption by executive conduct in foreign affairs."[123] This quick dismissal suggests that, in the Court's view, the president holds strong authority in the area of postconflict claims resolution, even as against actions by the states that might be alternatively characterized as simple insurance regulations, and even as against actions from Congress that might alternatively have been seen to utilize its foreign—rather than domestic—commerce authority in support of state regulations.[124] Thus, whether California's climate change activities would be deemed to fall within the state's traditional purview in the face of a preemption claim by the president depends not simply on a formalistic assessment of the subject matter of the regulation, but on whether the Court regards the climate change problem to be one of primarily congressional or presidential authority. Again, in this respect, *Massachusetts v. EPA* bodes well for California, since the Court in that case rejected out of hand the EPA's assertion that foreign policy concerns trumped its obligation to implement Congress' Clean Air Act directives.

III. SITTING IN JUDGMENT: GHG EMISSIONS TRADING AND THE FEDERAL GOVERNMENT'S "ONE VOICE"

As noted in Part I, challenging implementation issues will arise when California attempts to ensure the integrity of any eventual GHG emissions trading scheme that it develops. Unless other jurisdictions adopt comparably stringent reduction schemes, firms within California will be left at a competitive disadvantage with firms outside of the state. This disadvantage, along with the related problem of leakage—which entails firms and industries

122. 15 U.S.C. § 1011 (2000).

123. *Garamendi*, 539 U.S. at 428.

124. Later, Justice Souter's opinion for the Court stated that "it is worth noting that Congress has done nothing to express disapproval of the President's policy." *Id.* at 429. Again, the impression that Congress had "done nothing" arguably only arose because the Court had construed the McCarran-Ferguson Act to avoid a conflict with the president's asserted foreign affairs position.

relocating entirely outside of California's jurisdiction in order to avoid restrictions—not only impairs the state's economic interests; it also threatens the environmental success of the GHG emissions control regime, since the emissions that California would have averted through regulation are instead produced by other sources. Thus, as does any jurisdiction seeking to unilaterally control GHG emissions, California has strong policy reasons to protect the integrity of its regime through compensating import taxes, permit purchase requirements, and other border adjustments applied to out-of-state entities.[125]

Of course, California ultimately would prefer not to depend on border adjustments, but instead to see its pioneering cap-and-trade program followed by other states and nations, such that eventually GHG emissions would be controlled on a global basis through an integrated permit market. Policy experts agree that linkage of multiple GHG emissions cap-and-trade programs is desirable in order to reduce compliance costs and promote flexibility.[126] Moreover, the greater the number and scope of effective, operating GHG emissions trading systems, the more likely the prospect that any one system will be able to take credit for having helped avert the climate crisis. Nevertheless, linking raises practical and political challenges that ultimately may draw states into unconstitutional territory. As the Market Advisory Committee observed, deciding whether to link with another GHG emissions trading system requires CARB to undertake a variety of intrusive inspections regarding, inter alia, "the scope and stringency of the other system; the integrity of the cap in the other system, including whether that system contains a 'safety-valve' mechanism that suspends or otherwise undermines the cap; the rigor of emissions monitoring, reporting, and verification requirements in the other system; the integrity of allowed carbon offsets; and the record of compliance and enforcement in the other system."[127] Despite serving a critical role in ensuring the overall policy effectiveness of GHG emissions regulation, this need to evaluate the stringency and effectiveness of other jurisdictions' trading systems prior to integration raises a variety of constitutional concerns.

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125. *See* Chemerinsky et al., *supra* note 11, at 10654–59

126. *See* MARKET ADVISORY COMM., *supra* note 38, at 69.

127. *Id.* at 72; *see also* W. CLIMATE INITIATIVE, STATEMENT OF REGIONAL GOAL (2007), *available at* http://westernclimateinitiative.org/ewebeditpro/items/O104F13006.pdf (listing considerations with respect to proposed new members for "determining whether the new entrant is undertaking comparable efforts to meet the challenge of climate change" to the efforts of existing members).

Linkage with foreign GHG emissions trading systems would prove especially challenging. Although in recent years the Supreme Court has tended to favor express and conflict preemption theories of federal foreign affairs exclusivity,[128] the so-called dormant foreign affairs preemption theory of *Zschernig v. Miller*[129] remains a potential obstacle to state climate change policy integration with foreign nations. In *Zschernig*, the Court preempted an Oregon probate law that prohibited inheritance by foreign nationals unless the heir's home jurisdiction would protect the property from confiscation and afford reciprocal rights of inheritance to American citizens. Essentially an anticommunism statute, the Oregon probate law was challenged by would-be heirs as an interference with federal foreign affairs.[130] Despite the facts that probate is an area of traditional state regulation, that no federal law, treaty, or executive agreement preempted the state statute, and that the Department of Justice submitted an amicus brief conceding that "the government [did not] contend that the application of the Oregon escheat statute . . . unduly interferes with the United States' conduct of foreign relations,"[131] the Court nevertheless ruled that the statute was "an intrusion by the State into the field of foreign affairs which the Constitution entrusts to the President and the Congress."[132] In particular, the Court believed that the statute impermissibly invited Oregon courts to sit in judgment upon foreign governments and to exert coercive influence over those governments' internal affairs through selective

128. Leanne Wilson, Note, *The Fate of the Dormant Foreign Commerce Clause After* Garamendi *and* Crosby, 107 COLUM. L. REV. 746, 747 (2007).

129. 389 U.S. 429 (1968). Some commentators also regard *Garamendi* as a dormant foreign affairs preemption case, in the sense that Justice Souter's majority opinion is amenable to an expansive field preemption interpretation that would render it functionally quite similar to dormant foreign affairs preemption. *See, e.g.*, Chemerinsky et al., *supra* note 11, at 10662; Joseph B. Crace, Jr., Note, Gara*-mending the Doctrine of Foreign Affairs Preemption*, 90 CORNELL L. REV. 203, 213 (2004) (observing that the *Garamendi* Court may have been invoking foreign affairs preemption, despite the claim of conflict preemption); Todd Steigman, Note, *Lowering the Bar: Invalidation of State Laws Affecting Foreign Affairs Under the Dormant Foreign Affairs Power After* American Insurance Association v. Garamendi, 19 CONN. J. INT'L L. 465 (2004). Others view *Garamendi* as a more conventional conflict preemption case. *See, e.g.*, Note, *Foreign Affairs Preemption*, *supra* note 11. In truth, Justice Souter in *Garamendi* dodged the question of whether the California Holocaust Victim's Insurance Relief Act of 1999 only foundered because of a direct conflict with the executive agreements establishing Holocaust claims mechanisms, as opposed to being more broadly vulnerable as an overreaching of state authority. *See Garamendi*, 539 U.S. at 419–20 ("It is a fair question whether respect for the executive foreign relations power requires a categorical choice between the contrasting theories of field and conflict preemption evident in the *Zschernig* opinions . . . . [T]he question requires no answer here." (footnote omitted)).

130. Zschernig v. Miller, 389 U.S. 429 (1968).

131. Wilson, *supra* note 128, at 759 n.88 (quoting Brief for United States as Amicus Curiae, at 6 n.5, *Zschernig*, 389 U.S. 429 (No. 21)).

132. *Zschernig*, 389 U.S. at 432.

denial of economic benefits—a practice that would "unduly interfere" with the federal government's "one voice" in foreign affairs, and that had "great potential for disruption or embarrassment" to the nation.[133]

The concerns motivating *Zschernig* also find expression in the Court's dormant Foreign Commerce Clause jurisprudence.[134] In *Japan Line, Ltd. v. County of Los Angeles*,[135] for instance, the Court indicated that the dormant Foreign Commerce Clause reflects concerns that state regulation of economic intercourse with foreign nations might invite retaliatory measures from those nations or, more broadly, might "prevent[ ] the Federal Government from 'speaking with one voice when regulating commercial relations with foreign governments.'"[136] In general, the Court has continued to reaffirm the notion that its dormant Commerce Clause inquiry in the foreign arena contains all of the elements of the domestic inquiry, in addition to the "one voice" concern.[137] As a result, it has maintained that the Foreign Commerce

133. *Id.* at 434, 435.

134. *See* Peter J. Spiro, *Foreign Relations Federalism*, 70 U. COLO. L. REV. 1223, 1226 (1999) (noting the joint role of the dormant Foreign Commerce Clause and the dormant foreign affairs power in protecting federal foreign affairs exclusivity).

135. 441 U.S. 434 (1979).

136. *Id.* at 451. Although the Court sometimes cites the same precedents for the importance of maintaining "one voice" in the foreign affairs and Foreign Commerce Clause arenas, which voice is designated seems quite different in the two contexts. *See* Am. Ins. Ass'n v. Garamendi, 539 U.S. 396, 414 (2003) (citing *Japan Line*, 441 U.S. 434, a foreign commerce clause case). With respect to foreign affairs, the operative voice is that of the president; hence, in *Garamendi*, Justice Souter wrote that "[t]he law thus 'compromise[s] the very capacity of the President to speak for the Nation with one voice in dealing with other governments' to resolve claims against European companies arising out of World War II." *Garamendi*, 539 U.S. at 424 (citing Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 381 (2000)). With respect to foreign commerce, by contrast, the specified voice is that of the federal government as a whole; thus, in *Barclays Bank*, Justice Ginsburg discussed "the Federal Government's capacity to 'speak with one voice when regulating commercial relations with foreign governments.'" Barclays Bank PLC v. Franchise Tax Bd., 512 U.S. 298, 311 (1994) (citing *Japan Line*, 441 U.S. at 449).

137. The Court has been clearest about the steps of this inquiry in the tax context. According to Justice Brennan's opinion in *Wardair Canada, Inc. v. Florida Department of Revenue*, 477 U.S. 1 (1986):

> When a state tax is challenged as violative of the dormant Interstate Commerce Clause, we have asked four questions: is the tax applied to an activity with a substantial nexus with the taxing State; is the tax fairly apportioned; does the tax discriminate against interstate commerce; and is the tax fairly related to the services provided by the State. . . . In *Japan Line* . . . we noted that when the state tax allegedly interferes with the Federal Government's authority to regulate foreign commerce, two additional questions must be asked; "first, whether the tax, notwithstanding apportionment, creates a substantial risk of international multiple taxation, and, second, whether the tax prevents the Federal Government from speaking with one voice when regulating commercial relations with foreign governments."

Id. at 8 (quoting *Japan Line*, 441 U.S. at 451). Although we focus in the text on the "one voice" concern, it is worth noting that the risk of multiple taxation also arises in the context of GHG emissions trading systems. Unless a jurisdiction recognizes the GHG emissions permits surrendered

Clause represents even more of a straightjacket for states than its domestic counterpart.[138] Nevertheless, the Court has not generally mirrored the domestic dormant Commerce Clause analysis in its dormant Foreign Commerce Clause cases.[139] Instead, as with the *Zschernig* doctrine, states' practice of sitting in judgment upon the internal affairs of foreign jurisdictions—and even attempting to influence those affairs through financial incentives—has been seen by the Court as the chief concern of dormant Foreign Commerce Clause analysis. Thus, in order to protect the federal government's ability to present a unified position and personality on the global stage, the Court has held that state action must be invalidated "if it *either* implicates foreign policy issues which must be left to the Federal Government *or* violates a clear federal directive."[140] Furthermore, the Court's application of the "one voice" inquiry in the foreign Commerce Clause context has born greater resemblance to a conflict or implied preemption than a dormant Commerce Clause analysis. Rather than invalidating all state laws that might lead to a disunified voice in foreign commerce, regardless of whether Congress has spoken or not, the Court has assessed whether or not Congress actually intends to retain its singular voice or

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by an actor in compliance with its home jurisdiction's cap, the possibility arises that the actor will be required to pay twice for the same ton of CO_2 equivalent emissions.

138. *See Barclays Bank*, 512 U.S. at 311 ("In 'the unique context of foreign commerce,' a State's power is further constrained because of 'the special need for federal uniformity.'") (quoting *Wardair Can.*, 477 U.S. at 8); *Japan Line*, 441 U.S. at 448; *see also* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 6-21 (2d ed. 1988) ("If state action touching foreign commerce is to be allowed, it must be shown not to affect national concerns to any significant degree, a far more difficult task than in the case of interstate commerce."). Several courts of appeal have likewise insisted on the greater rigor of the dormant foreign commerce analysis than the usual dormant commerce inquiry. *See, e.g.*, Piazza's Seafood World v. Odom, 448 F.3d 744, 749 (5th Cir. 2006) ("[T]he scope of Congress's power to regulate foreign commerce, and accordingly the limit on the power of the states in that area, is greater."); Nat'l Foreign Trade Council v. Natsios, 181 F.3d 38, 66 (1st Cir. 1999) ("The Supreme Court has repeatedly suggested that state regulations that touch on foreign commerce receive a greater degree of scrutiny than do regulations that affect only domestic commerce.").

139. It came closest to doing so when it invalidated an Iowa tax as facially discriminatory against foreign commerce in *Kraft General Foods, Inc. v. Iowa Department of Revenue and Finance*, 505 U.S. 71 (1992). In that case, Justice Souter, writing for the Court, cited domestic dormant commerce precedents to support his assertion that, "[a]bsent a compelling justification, . . . a State may not advance its legitimate goals by means that facially discriminate against foreign commerce." *Id.* at 81. At least one commentator has argued that the dormant Foreign Commerce Clause does not serve the same interests as the domestic dormant Commerce Clause and that it should be superseded by a preemption analysis. *See generally* Wilson, *supra* note 128.

140. Container Corp. of Am. v. Franchise Tax Bd., 463 U.S. 159, 194 (1983). Accordingly, state protectionism is not necessarily the touchstone of the analysis as it is with the domestic dormant Commerce Clause: "[A] State's preference for domestic commerce over foreign commerce is inconsistent with the Commerce Clause even if the State's own economy is not a direct beneficiary of the discrimination." *Kraft*, 505 U.S. at 79.

instead has suggested through various informal means that it intends to permit experimentation among the states. As Justice Ginsburg explained in *Barclays Bank PLC v. Franchise Tax Board*,[141] "[a]n important premise underlying [prior dormant Foreign Commerce Clause] decisions is this: Congress may more passively indicate that certain state practices do *not* 'impair federal uniformity in an area where federal uniformity is essential' . . . it need not convey its intent with the unmistakable clarity required to permit state regulation that discriminates against interstate commerce."[142] Congressional failure to act in a particular area may itself constitute such a passive indication.[143]

Commentators thus far have tended to argue that state climate change initiatives will not face difficulties under *Zschernig* or the dormant Foreign Commerce Clause.[144] Here, though, we think the existing commentary overlooks some mechanical implications of GHG emissions trading schemes that might make them closer than appreciated to state activities previously held unconstitutional. As noted above, the ability of GHG emissions trading systems to be linked with those of other jurisdictions in a way that does not undermine regulatory effectiveness depends on the systems' having established mutually agreeable abatement goals, such that emissions permits in theory correspond to GHG reduction goals that the jurisdictions agree are comparable. It also depends on those jurisdictions undertaking comparably effective emissions monitoring, such that permits in actuality have the regulatory value that they claim to represent. The first of these tasks might be thought to be relatively simple, since all jurisdictions might agree to the same percentage reduction below the same historical benchmark, for instance. But, it need not be so straightforward. It could instead involve judgments about global equity, development status, historical contributions to the climate change problem, and other moral and political considerations.[145]

Even if jurisdictions agree that their overall emissions cap and schedule of reductions are comparable, there still must be scrutiny of the manner in which reductions are pursued. As the Market Advisory Committee report

141. 512 U.S. 298 (1994).
142. *Id.* at 323 (quoting *Japan Line*, 441 U.S. at 448).
143. *See id.* at 324–26.
144. *See* Hannah Chang, *Foreign Affairs Federalism: The Legality of California's Link With the European Union Emissions Trading Scheme*, 37 ENVTL. L. REP. 10771, 10782 (2007) ("California's legislation neither restricts, sanctions, criticizes, nor taxes a foreign country or its nationals or instrumentalities."); Note, *Foreign Affairs Preemption*, *supra* note 11, at 1898 ("[W]ithout a controlling federal law or a clear conflict with executive foreign policy of the kind found in *Garamendi*, and in the absence of any direct interaction with foreign governments, foreign nationals, or their business partners, courts should presume that state GHG regulations are not a 'matter of foreign policy.'").
145. *See supra* text accompanying notes 37–40.

made clear, GHG emissions trading markets do not simply appear with the ease of environmental economics textbook hypotheticals.[146] An enormous amount of scientific, economic, and political judgment must go into determining which sectors and firms to target with caps, how to allocate permits among them, whether to auction or give away permits, how to handle safety valves and offsets, and so on. Many of these judgments will be matters about which jurisdictions may vehemently disagree. To take just one salient example, a great deal of critical scientific attention has focused recently on the role of biofuels such as ethanol in the effort to combat GHG emissions. Britain's Royal Society, for instance, has warned that biofuels must be assessed, not only for their direct GHG emissions, but also for their environmental impacts due to fertilizer and processing emissions, land use changes, water consumption, biodiversity effects, and water and air pollution, as well as their economic and social impacts on global agricultural markets.[147] With respect to land use effects, a study in *Science* estimated that conversion of carbon-rich habitats into cropland for biofuel production could create a "carbon debt" in which decades or even centuries are required before the net GHG effect of biofuel production relative to fossil fuel use would actually be desirable.[148] In light of such evidence—and given the monumental interest group maneuvering that surrounds agriculture and its subsidization[149]—it is not implausible to imagine jurisdictions encountering intractable political divides when it comes to the regulatory treatment of ethanol or other controversial biofuels within GHG emissions trading schemes. To evaluate such matters for regulatory compatibility seems undeniably to risk one jurisdiction sitting in judgment upon another.

The second linkage challenge—ensuring adequate monitoring and enforcement of GHG emissions trading programs for integration purposes—also requires sitting in judgment upon a foreign jurisdiction and its internal affairs. The question of monitoring essentially comes down to a question regarding the effectiveness of the other jurisdiction's governmental institutions and procedures. Put bluntly, does the rule of law operate with adequate force in the partner jurisdiction for the linking state to be confident that its GHG permits will not be transformed into hot air by allowing them to be traded

146. MARKET ADVISORY COMM., *supra* note 38, at 15–17 (observing lessons learned from prior successful and unsuccessful cap-and-trade schemes).

147. ROYAL SOC'Y, SUSTAINABLE BIOFUELS: PROSPECTS AND CHALLENGES (2008), *available at* http://royalsociety.org/displaypagedoc.asp?id=28914.

148. Joseph Fargione et al., *Land Clearing and the Biofuel Carbon Debt*, 319 SCIENCE 1235, 1236–37 (2008).

149. *Cf.* J.B. Ruhl, *Farms, Their Environmental Harms, and Environmental Law*, 27 ECOLOGY L.Q. 263 (2000).

with the other jurisdiction's permits? In some circles, this line of inquiry into the effectiveness of the rule of law in foreign nations has become something of a contemporary counterpart to Cold War-era scrutiny of nations' economic structures.[150] Accordingly, recent commentators have urged California to "proceed gingerly when attempting to bridge markets," noting that "[t]he 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."[151] Although legally sound, this advice may underestimate as a policy matter how difficult it would be for California to successfully link its GHG emissions program with those of other jurisdictions, unless it engaged in precisely the kinds of negotiation and judgments being advised against. In *Zschernig*, the Court especially worried about the Oregon statute's demand that state courts "launch[ ] inquiries into the type of governments that obtain in particular foreign nations," and engage in "minute inquiries concerning the actual administration of foreign law [and] into the credibility of foreign diplomatic statements."[152] Such inquiries are not that dissimilar to those that must be undertaken by state regulators in order to successfully effect an integration of GHG emissions schemes. Thus, although heavily criticized[153] and perhaps only reaffirmed sub rosa by *American Insurance Ass'n v. Garamendi*,[154] the case of *Zschernig*, along with similar restrictions that emanate from the dormant Foreign Commerce Clause, presents a serious question as to the constitutionality of state-level integration of GHG emissions schemes with those of other jurisdictions.

IV. "SINK OR SWIM TOGETHER": GHG EMISSIONS TRADING AND THE DORMANT COMMERCE CLAUSE

In light of more conventional dormant Commerce Clause principles, there is additional reason to question whether California could constitutionally refuse to integrate its GHG emissions market or otherwise defend the integrity of its market through regulations. Specifically, California may encounter difficulty in defining the purpose of a selective linkage program or a border adjustment regulation in a manner that acceptably invokes local

150. *See generally* Beth Ahlering & Simon Deakin, *Labor Regulation, Corporate Governance, and Legal Origin: A Case of Institutional Complementarity?*, 41 L. & SOC'Y REV. 865 (2007).

151. Chemerinsky et al., *supra* note 11, at 10664.

152. Zschernig v. Miller, 389 U.S. 429, 434, 435 (1968).

153. *See, e.g.*, Robert J. Delahunty, *Federalism Beyond the Water's Edge: State Procurement Sanctions and Foreign Affairs*, 37 STAN. J. INT'L L. 1 (2001) (referring to *Zschernig* as "a weak, poorly reasoned, and aberrational precedent").

154. 539 U.S. 396 (2003); *see supra* text accompanying note 129.

interests and avoids appearing unduly burdensome on commerce. Because the Court has invoked the same standard it employs in the domestic arena in considering state legislation that facially discriminates against foreign commerce—a standard of virtually per se invalidity[155]—it may be extremely difficult for California to justify treating GHG emissions trading schemes, whether foreign or domestic, differently from its own. Much will depend on how the regulation is conceptualized. Formally, a trading permit scheme can be shown to be equivalent to a tax regime;[156] thus, one might argue that it should be evaluated according to the cases and standards applicable to arguably discriminatory state tax and regulatory laws. On the other hand, the regulatory instrument created by a permit scheme is, in a sense, propertized; indeed, its efficiency-enhancing potential derives from the very fact that it may be traded by private actors, much like an article of commerce. From this perspective, then, the relevant article of commerce that is arguably burdened by state regulation is the emissions permit itself, rather than the underlying goods and services (such as electricity, vehicle fuel, or agricultural goods) that are produced under the GHG emissions cap or that, if produced out of state, are made to conform to in-state regulations through some border adjustment.

Characterizing GHG emissions permits as an article of commerce subject to conventional nondiscrimination principles has surface plausibility. The Court has, after all, shown great reluctance to exempt items from characterization as commerce simply because of their centrality within natural resources or environmental law.[157] Thus, states may not generally hoard valuable natural resources for their own citizens' use and enjoyment, nor may they cordon themselves off from harmful items, such as hazardous

155. *See* Kraft General Foods, Inc. v. Iowa Dep't of Revenue & Fin., 505 U.S. 71, 81 (1992) ("Absent a compelling justification . . . a state may not advance its legitimate goals by means that facially discriminate against foreign commerce."); City of Phila. v. New Jersey, 437 U.S. 617, 626–28 (1998). *But cf.* Maine v. Taylor, 477 U.S. 131 (1986) (upholding a Maine ban on the importation of baitfish as the only available means to protect indigenous species from the threat of disease).

156. *See generally* Martin L. Weitzman, *Prices vs. Quantities*, 41 REV. ECON. STUD. 477 (1974) (demonstrating that, as an initial matter, tradable permits sold at auction have the same effect as a tax under conditions of perfect information).

157. *See, e.g.*, Sporhase v. Nebraska *ex rel.* Douglas, 458 U.S. 941, 952 (1982) (concluding that groundwater is an article of commerce, despite the fact that "water, unlike other natural resources, is essential for human survival"); C & A Carbone, Inc. v. Town of Clarkstown, 511 U.S. 383, 390–91 (1994) ("[W]hat makes garbage a profitable business is not its own worth but the fact that its possessor must pay to get rid of it. In other words, the article of commerce is not so much the solid waste itself, but rather the service of processing and disposing of it."); New England Power Co. v. New Hampshire, 455 U.S. 331, 338 (1982) ("Our cases consistently have held that the Commerce Clause . . . precludes a state from mandating that its residents be given a preferred right of access, over out-of-state consumers, to natural resources located within its borders or to the products derived therefrom.").

waste, that are subjects of commercialized handling and disposal practices. In *City of Philadelphia v. New Jersey*,[158] for instance, the Court held that a New Jersey ban on out-of-state waste violated the dormant Commerce Clause despite the state's acknowledged interest in managing scarce landfill space. The Court drew no distinction between articles of commerce that were valuable in themselves and those that became valuable because of a need to address their ill effects, stating simply that "[w]hat 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."[159] Especially as the market for GHG emissions reduction credits grows in scope and sophistication, the impulse to extend the *City of Philadelphia* reasoning will be strong: Just as states may not isolate themselves from the common problem of waste disposal, they may not turn their backs on efforts to erect an effective, fluid market for GHG emissions permits.

By all indications, California has no such desire to isolate itself; to the contrary, it affirmatively hopes to link its eventual GHG emissions trading system with those of other states, regions, and nations. In this case, however, California would face additional constitutional complications. First, it is well established that "a State may not adopt legislation that has the practical effect of establishing 'a scale of prices for use in other states.'"[160] California, especially if it develops the first successful operating GHG emissions trading program in the United States, will be in a position to exert tremendous influence over the shape and ambition of other programs as a condition of their linkage with California. The state must be careful in the exercise of this power, since the ability to set the terms of a GHG emissions trading program is, in no small measure, an ability to affect the tax level, and hence the price, of electricity, vehicle fuel, and a range of other foundational elements of the regulated economy. Questions of linkage would become especially delicate. For instance, although the Court has accepted the legitimacy of some efforts to equalize the playing field domestically between in-state and out-of-state commerce, it has taken a dim view of formal attempts to condition favorable regulatory treatment on reciprocal treatment by other jurisdictions.[161] What states may view as laudatory efforts to promote the development of environmentally preferred technologies and products (without simultaneously exposing

158. City of Phila. v. New Jersey, 437 U.S. 617 (1978).
159. *Id.* at 628.
160. Healy v. Beer Inst., 491 U.S. 324, 336 (1989) (quoting Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511, 528 (1935)).
161. *See, e.g.*, New Energy Co. of Ind. v. Limbach, 486 U.S. 269 (1988); *Sporhase*, 458 U.S. 941.

in-state firms to harmful competition from less sustainable alternatives), the Court may view as impermissible efforts to simply protect domestic interests or to coerce regulatory outcomes across borders.[162] Similar skepticism would likely greet any effort by California to condition importation of electricity, fuel, food, or other GHG-intensive goods and services upon formal adoption of a comparable GHG emissions trading regime by the exporting jurisdiction. For this reason, the deftly informal approach that California has taken thus far to its linkage efforts—as embodied in various memoranda of understanding and other soft law documents[163]—may go a long way toward dissuading courts that other jurisdictions are being impermissibly coerced into following the California climate regimen.

Another promising defense of state regulation of GHG emissions trading arises from the fact that, apart from certain voluntary private initiatives established in anticipation of eventual government regulation, GHG emissions permits are the legal creation of governments. Although tradable in the manner of commodities, the actual value of GHG emissions permits stems from their evidentiary force in demonstrating compliance with applicable regulatory emissions limits. From this perspective, because California will itself create the GHG emissions trading market, the state could ask that the Court review its actions with the leniency afforded to states when acting as market participants.[164]

This argument would find support in some domestic dormant Commerce Clause cases, including *Hughes v. Alexandria Scrap Corp.*,[165] involving Maryland's creation of a market for automobile hulks, and a case from this term considering the differential taxation of bonds issued by other states, *Dept. of Revenue of Kentucky v. Davis*.[166] *Hughes*, in particular, might provide a helpful precedent for California, since in that case Maryland was permitted to impose more burdensome administrative requirements on haulers of out-of-state junk cars to demonstrate eligibility for a state reclamation bounty. As Justice Stevens emphasized in a concurring opinion, "[b]y

162. *New Energy Co.*, 486 U.S. at 274 (rejecting Ohio's contention that beneficial tax treatment for Ohio-produced ethanol was not facially discriminatory since the statute also granted favorable treatment to out-of-state producers from states that granted reciprocal advantages, despite Ohio's argument that "the Ohio provision, far from discriminating against interstate commerce, is likely to promote it, by encouraging other States to enact similar tax advantages that will spur the interstate sale of ethanol").

163. *See supra* text accompanying notes 1, 55, 62.

164. *See generally* Potts, *supra* note 11 (arguing that California might successfully avoid Commerce Clause difficulties in GHG regulation due to the market participant exception).

165. Hughes v. Alexandria Scrap Corp., 426 U.S. 794 (1976).

166. 128 S. Ct. 1801 (2008).

artificially enhancing the value of certain abandoned hulks [through the state bounty program], Maryland created a market that did not previously exist."[167] Likewise, in establishing a GHG emissions trading scheme, California creates "commerce which owes its existence to a state . . . program."[168] Thus, reasoning from *Hughes*, the state should be permitted to manage that program in a manner that ensures its environmental purpose is effectuated.

One potentially decisive problem with this line of analysis for California in the international context, however, is that the Supreme Court and a number of circuit courts have indicated that the market participant exception and its rationale may not apply to the dormant Foreign Commerce Clause.[169] As the Court itself explained in *Reeves, Inc. v. Stake*,[170] "[w]e have no occasion to explore the limits imposed on state proprietary actions by the 'foreign commerce' Clause . . . . We note, however, that Commerce Clause scrutiny may well be more rigorous when a restraint on foreign commerce is alleged."[171] Thus, the Court's concern to protect the nation's "one voice" might be overpowering enough to trump even the state's interest as a market participant. In such a case, unless Congress stepped in affirmatively to permit discriminatory treatment, California essentially would be required to accept as equivalent to its own permit any foreign permit purporting to represent a ton of CO_2 equivalent emissions.

An additional problem with the market participant doctrine arises from the prospect of regulatory overreaching. Although the market participant doctrine "allows a state to impose burdens on commerce within the market in

167. *Hughes*, 426 U.S. at 815 (Stevens, J., concurring); *see also id.* (emphasizing that "[i]t is important to differentiate between commerce which flourishes in a free market and commerce which owes its existence to a state subsidy program").

168. *Id.*

169. *See* Reeves, Inc. v. Stake, 447 U.S. 429 (1980); Nat'l Foreign Trade Council v. Natsios, 181 F.3d 38, 66 (1st Cir. 1999) ("[W]e believe that the risks inherent in state regulation of foreign commerce—including the risk of retaliation against the nation as a whole and the weakening of the federal government's ability to speak with one voice in foreign affairs . . . weigh against extending the market participation exception to the Foreign Commerce Clause."); J.T. Hutchens, *The Market-Participant Exception and the Dormant Foreign Commerce Clause*, 5 CARDOZO PUB. L. POL'Y & ETHICS J. 445 (2007); Michael A. Zuckerman, Note, *The Offshoring of American Government*, 94 CORNELL L. REV. (forthcoming 2008) (arguing that the market participant exception should not be extended to the dormant Foreign Commerce Clause). *But see* K.S.B. Technical Sales Corp. v. N.J. Dist. Water Supply Comm'n, 381 A.2d 774, 784–87 (N.J. 1977) (upholding a state "Buy American Act" on market participant grounds, contending that "the cases scrutinizing state regulations affecting commerce, in the absence of interference with the foreign affairs power, seem to have made no distinction between interstate and foreign commerce").

170. 447 U.S. 429 (1980).

171. *Id.* at 437 n.9; *see also* Antilles Cement Corp. v. Acevedo Villá, 408 F.3d 41, 47 (1st Cir. 2005) (elaborating on the different conclusions lower courts have reached on the issue of whether the market participant exception applies in dormant Foreign Commerce Clause cases).

which it is a participant . . . [t]he State may not impose conditions, whether by statute, regulation, or contract, that have a substantial regulatory effect outside of that particular market."[172] Thus, in *South-Central Timber Development, Inc. v. Wunnicke*,[173] when Alaska tried to use its market role as a seller of state-owned timber to require all such timber to be partially processed in state to promote jobs and generate revenue, the Court deemed its actions a form of impermissible "downstream regulation."[174] The Court's concern was heightened in the case because "foreign commerce [was] burdened by the restriction," and "[i]t is a well-accepted rule that state restrictions burdening foreign commerce are subjected to a more rigorous and searching scrutiny."[175] If the Court took a simplistic view of GHG emissions permits as commodities, in which rights to emit would be assumed to be equivalent irrespective of jurisdictional origin unless a state demonstrated grounds for discriminatory treatment, then the effort to control linkage with other GHG emissions trading programs would raise constitutional concerns, notwithstanding the market participant doctrine.

Given that GHG emissions permits are only explicable as part and parcel of a more elaborate scheme of environmental regulation, the Court may refrain from characterizing GHG emissions permits as rudimentary commodities, despite the surface plausibility of this framework.[176] Perhaps neither a pure property nor a pure regulatory regime provide the best analogy for conceptualizing a GHG emissions trading scheme, but rather the more complex arrangement involved in *CTS Corp. v. Dynamics Corp. of America*.[177] In that case, the Court rejected a dormant Commerce Clause challenge to an Indiana antitakeover statute which prohibited the acquisition of voting rights by a purchaser of control shares in an Indiana corporation absent approval by a majority vote of prior disinterested shareholders.[178] After

172. South-Central Timber Dev., Inc. v. Wunnicke, 467 U.S. 82, 97 (1984).
173. 467 U.S. 82.
174. *Id.* at 99.
175. *Id.* at 100.
176. In *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564 (1997), for instance, the Court rejected out of hand a claim by the State of Maine to fall within the market participant exception when it chose to discriminate between providers of charitable services to in-state and out-of-state beneficiaries for tax exemption purposes: "Maine's tax exemption—which sweeps to cover broad swathes of the nonprofit sector—must be viewed as action taken in the State's sovereign capacity rather than a proprietary decision to make an entry into all of the markets in which the exempted charities function." *Id.* at 594; *see also* New Energy Co. of Ind. v. Limbach, 486 U.S. 269, 277 (1988) ("The market-participant doctrine has no application here. The Ohio action ultimately at issue is neither its purchase nor its sale of ethanol, but its assessment and computation of taxes—a primeval governmental activity.").
177. CTS Corp. v. Dynamics Corp. of Am., 481 U.S. 69 (1987).
178. *Id.*

first observing that the statute operated evenhandedly as against both in-state and out-of-state potential purchasers, the Court then treated the question of whether the statute had the effect of unduly burdening the interstate market for corporate acquisitions.[179] Writing for the majority, Justice Powell rejected this concern because it failed "to appreciate the significance for Commerce Clause analysis of the fact that state regulation of corporate governance is regulation of entities whose very existence and attributes are a product of state law."[180] He noted that it "is an accepted part of the business landscape in this country for States to create corporations, to prescribe their powers, and to define the rights that are acquired by purchasing their shares."[181] Moreover, he emphasized:

> [t]he very commodity that is traded in the securities market is one whose characteristics are defined by state law. Similarly, the very commodity that is traded in the "market for corporate control"—the corporation—is one that owes its existence and attributes to state law. Indiana need not define these commodities as other States do; it need only provide that residents and nonresidents have equal access to them.[182]

Because GHG emissions trading systems ultimately will cover vast swaths of the economy, including such sectors as electricity, transportation, agriculture, manufacturing, and commerce, courts may usefully analogize to this corporate law context, looking beyond the simple propertized form of the GHG emissions trading system and instead characterizing it as a complex exercise of the state's regulatory, rather than its proprietary, function.

Further support for this approach comes from the more recent case of *Dept. of Revenue of Kentucky v. Davis*, in which the Court upheld the constitutionality of a state taxation scheme that permitted an income tax deduction for interest paid on bonds issued by the state or its subdivisions, but not those issued by other states or their subdivisions. Kentucky had pressed the market participant doctrine to defend the differential taxation scheme but a majority of the Court resolved the case on a somewhat broader basis, determining that the type of law at issue simply did "'not discriminate against interstate commerce for purposes of the dormant Commerce Clause.'"[183] Relying on the Court's decision in *United Haulers Assn., Inc. v.*

179. *Id.* at 88–89.
180. *Id.* at 89.
181. *Id.* at 91.
182. *Id.* at 94.
183. *Id.* at 1809–10 (quoting United Haulers Assn., Inc. v. Oneida-Harkimer Solid Waste Mgmt. Auth., 127 S. Ct. 1786, 1795 (2007)).

Oneida-Herkimer Solid Waste Management Authority,[184] which upheld a state ordinance requiring all solid waste to be processed at a state-owned facility, Justice Souter stated that, because "[s]tate and local governments that provide public goods and services on their own, unlike private businesses, are 'vested with the responsibility of protecting the health, safety, and welfare of [their] citizens,'" "a government function is not susceptible to standard dormant Commerce Clause scrutiny owing to its likely motivation by legitimate objectives distinct from the simple economic protectionism the Clause abhors."[185] Thus, when a state is exercising a traditional function such as waste management or fund raising for public projects, the state may be able to treat the entities and instruments it creates to effectuate that function more favorably than counterparts found in the private market or created by other states.[186]

The full import of *Dept. of Revenue of Kentucky v. Davis* is difficult to assess: Although its language at points sweeps quite broadly, its outcome must be understood against the reality that "the issuance of debt securities to pay for public projects is a quintessentially public function," one with a "venerable history" stretching back to the colonial period.[187] Nevertheless, the fact that a state may constitutionally provide more favorable tax treatment to a financial instrument that it creates than a similar instrument created by sister states suggests that the Court might be quite sympathetic to California's need to protect the regulatory integrity of its GHG emissions trading system. In both cases, the effectiveness of the associated public function (i.e., raising public funds, or protecting health and the environment) depends on the state's ability to treat the relevant financial instrument as more than a mere commodity. Still, as in the case of state creation and oversight of corporate entities, the regulatory function must be deployed with sensitivity to dormant Commerce Clause concerns. Although a full analysis of such concerns is beyond the scope of this Article,[188] we do note that state regulatory measures that seek to protect the integrity of GHG emissions regulations through border adjustments or through selective linkage to outside programs, in order to maximize their chance of constitutional survival, must be designed to apply clear, nondiscriminatory criteria, rather than geographic or territorial limitations. For instance, California's recently

184. 127 S. Ct. 1786.
185. 128 S. Ct. at 1810 (quoting *United Haulers*, 127 S. Ct. at 1795).
186. *Id.* at 1811 ("There is no forbidden discrimination because Kentucky, as a public entity, does not have to treat itself as being 'substantially similar' to the other bond issuers in the market.").
187. *Id.* at 1810.
188. For a more thorough discussion, see Chemerinsky et al., *supra* note 11, at 10654–59.

adopted interim GHG emissions performance standards for long-term energy procurement contracts apply identical requirements to all covered contracts, whether the energy obtained under such contracts comes from an in-state or out-of-state generator.[189] Such a measure should successfully escape strict scrutiny, even if it has a greater incidental impact on out-of-state electricity generators than on in-state generators. In *Minnesota v. Clover Leaf Creamery Co.*,[190] for instance, the Court examined a state law that banned the retail sale of milk in plastic nonreturnable containers, while allowing sales in pulpwood nonreturnable containers. The law admittedly benefited in-state pulpwood producers at the expense of out-of-state plastic producers, but the Court concluded that the statute "does not discriminate between interstate and intrastate commerce," since its regulatory distinction effectuated legitimate state interests, rather than constituting a pretext for protectionism.[191]

Even if a regulatory scheme does not discriminate on its face or pursue a protectionist purpose, it may still be challenged simply for imposing an undue burden on interstate commerce. Under *Pike v. Bruce Church, Inc.*,[192] "[w]here [a] statute regulates evenhandedly 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."[193] As the Court has often reiterated, states may well articulate acceptable health and safety rationales for regulations that incidentally burden interstate commerce. According to Justice Stevens, writing for the Court in *Sporhase v. Nebraska*,[194] "[f]or Commerce Clause purposes, we have long recognized a difference between economic protectionism, on the one hand, and health and safety regulation, on the other."[195] In applying this principle, the Court has often endorsed environmental, health, and safety regulatory goals, deeming legitimate a state's interest in "regulat[ing] the use of water in times and places of shortage for the purpose of protecting the health of its citizens,"[196] a state's "purpose,

189. *See* CPUC Proceeding, *supra* 100, at *95–96.
190. Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456 (1981).
191. *Id.* at 472.
192. 397 U.S. 137 (1970).
193. *Id.* at 142.
194. 458 U.S. 941 (1982).
195. *Id.* at 956; *see also* City of Phila. v. New Jersey, 437 U.S. 617, 623–24 (1978) ("The opinions of the Court through the years have reflected an alertness to the evils of 'economic isolation' and protectionism, while at the same time recognizing that incidental burdens on interstate commerce may be unavoidable when a State legislates to safeguard the health and safety of its people.").
196. *Sporhase*, 458 U.S. at 956.

agreed by all to be commendable as well as legitimate, of protecting [its] environment,"[197] and a state's desire to "protect[ ] [its] citizens from confusion and deception in the marketing of foodstuffs."[198]

Nevertheless, because local GHG emissions only lead to local impacts after first being mediated through complex global atmospheric, oceanic, and ecological processes, many of which involve centuries-long time scales,[199] a demand by courts under the *Pike* test for a particularized demonstration of the local benefits to be had from state GHG legislation may be tantamount to a declaration that such benefits do not exist. To be sure, a state's interest in attempting to avert the adverse impact of climate change upon its populace received acknowledgment from the Court in *Massachusetts v. EPA*.[200] In deciding the question of standing in favor of Massachusetts, Justice Stevens determined that Massachusetts' interest in the injury caused by climate change was not dissipated by being "widely shared," and that it could anticipate significant harm to its coastline resulting from global warming and a concomitant rise in sea level.[201] California might therefore, if faced with a dormant Commerce Clause challenge, legitimately claim that its GHG emissions regulations further this type of interest by helping to reduce the threat of climate change, even if only incrementally.[202] Critically, however, the Court's assessment of state interest in *Massachusetts v. EPA* was made in the context of determining whether the state had standing to enforce the statutory obligations of a federal agency that held national jurisdiction under the Clean Air Act. Indeed, part of the Court's reasoning in favor of standing emphasized the limited ability of Massachusetts as a state to lawfully address the interjurisdictional problems presented by climate change.[203] Thus,

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197. Hughes v. Alexandria Scrap Corp., 426 US. 794, 809 (1976). *But cf.* Reeves, Inc. v. Stake, 447 U.S. 429, 442 n.16 (claiming that the invocation of an environmental purpose was, in this case, disingenuous).

198. Hunt v. Wash. State Apple Advert. Comm'n, 432 U.S. 333, 353 (1977).

199. H.R. COMM. ON ENERGY AND COMMERCE & SUBCOMM. ON ENERGY AND AIR QUALITY, *supra* note 45, at 12 ("*[L]ocal* greenhouse gas emissions do not cause *local* environmental or health problems, except to the extent that the emissions contribute to *global* atmospheric concentrations.").

200. 127 S. Ct. 1438 (2007).

201. *Id.* at 1456.

202. *See id.* at 1457 (rejecting the EPA's argument that standing cannot be met because the EPA could not by itself, or solely through motor vehicle GHG emissions regulation, arrest global climate change, since "[a]gencies, like legislatures, do not generally resolve massive problems in one fell regulatory swoop").

203. *Id.* at 1454 ("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.").

whether the Court would be similarly solicitous in the dormant Commerce Clause context remains an open question.

A final complication arises from certain expansive lower court interpretations of Supreme Court cases that warn against the impermissibility of state efforts to control conduct that occurs outside of the state's borders, somewhat akin to the regulatory overreaching problem associated with the market participant exception. As the Court stated in *Healy v. Beer Institute*,[204] "the autonomy of the individual States within their respective spheres" implies that "a statute that directly controls commerce occurring wholly outside the boundaries of a State exceeds the inherent limits of the enacting State's authority and is invalid regardless of whether the statute's extraterritorial reach was intended by the legislature."[205] Although the Court has tended to apply this notion only in the context of state regulations that have the effect of fixing prices within other jurisdictions, some lower courts have read it more broadly to discipline all forms of state regulation.[206] While California could argue that its interim GHG emissions standards for electricity procurement merely seek to regulate contracts entered into by in-state entities—and merely do so in order to effectuate the interest of California citizens in reducing their contribution to global climate change—it is hard to escape the conclusion that California hopes to utilize its sizable market power to impact GHG emissions wherever it can. The difficulty in this context is that California seems to recognize, as it must, that the problem of GHG emissions cannot be redressed by any single jurisdiction. In defense of the state's efforts, officials have argued that GHG emissions restrictions

204. 491 U.S. 324 (1989).

205. *Id.* at 336.

206. *Compare* Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth., 476 U.S. 573, 580 (1986) (holding that New York could not require that liquor producers sell within the state at the lowest price they charge elsewhere in the United States; the state statute impermissibly sought to "regulate[ ] commerce in other states"), *and* Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511, 528 (1935) (striking down New York's Milk Control Act because a state may not "establish a wage scale or a scale of prices for use in other states, and . . . bar the sale of the products . . . unless the scale has been observed"), *with* Nat'l Solid Wastes Mgmt. Ass'n v. Meyer, 63 F.3d 652, 659 (7th Cir. 1995) (finding unconstitutional Wisconsin's ban on out-of-state solid waste disposal at in-state landfills unless this solid waste originated from a community with a recycling program comparable to Wisconsin's because of the statute's "extraterritorial scope and . . . adverse impact on commerce occurring wholly outside the enacting state"), *and* Hardage v. Atkins, 619 F.2d 871, 873 (10th Cir. 1980) (finding unconstitutional an Oklahoma statute that prohibited out-of-state hazardous waste generators from shipping waste into Oklahoma unless their home state had adopted "substantially similar standards for controlled waste disposal as those which Oklahoma has enacted"). *National Solid Wastes Management* is discussed in detail, *infra* text accompanying notes 209–214. *But cf.* Cotto Waxo Co. v. Williams, 46 F.3d 790 (8th Cir. 1995) (holding that a Minnesota statute prohibiting sale of petroleum-based sweeping compounds within the state did not exert impermissible extraterritorial reach because it left actors free to sell such compounds in other states).

further domestic state interests by "protect[ing] ratepayers from the costs and risks of complying with future laws and regulation that will further limit the emissions of GHG gases," and by "encourag[ing] a wide range of clean energy sources, which protects the reliability of the grid."[207] Artful as this characterization may be, it still implicitly concedes that California's climate change policy is premised on the prediction that other governments will recognize the seriousness of climate change and take strong steps to address it—a prediction that becomes all the more likely through California's flexing of its economic muscles behind facially neutral GHG regulations.

Proponents of a strong dormant Commerce Clause approach would argue that California instead must limit its regulatory oversight to production processes that occur entirely within its borders, leaving other states to decide for themselves whether in-state electricity generators should begin to reduce their GHG emissions before Congress acts. Although under this approach California citizens would likely continue to suffer the moral taint of purchasing electricity that was produced through less environmentally stringent processes, their complaint—the argument goes—should be directed at the national Congress rather than embodied in conditional importation rules that exert a coercive influence over other states and that might therefore foster retaliation and resentment across borders.[208] This strong view was exemplified in *National Solid Wastes Management Association v. Meyer*,[209] where the Seventh Circuit faced a Wisconsin recycling statute that blocked waste generators from using state landfills unless their waste originated from a region that had adopted an "effective recycling program," defined by the statute to include detailed public education, waste sorting, waste reduction, equipment, and other guidelines set by Wisconsin.[210] The court held that strict scrutiny applied to the Wisconsin statute, despite its evenhandedness with respect to in-state and out-of-state waste generators, because it "condition[ed] the use of Wisconsin landfills by non-Wisconsin waste generators on their home communities' adoption and enforcement of Wisconsin recycling standards."[211] The court was especially piqued by the statute's effect that "all persons in [a] non-Wisconsin community must adhere to the

207. CPUC Proceeding, *supra* 100, at *98.

208. *Cf*. Douglas A. Kysar, *Preferences for Processes: The Process/Product Distinction and the Regulation of Consumer Choice*, 118 HARV. L. REV. 525 (2004) (addressing an analogous argument in the international trade context).

209. *Nat'l Solid Wastes Mgmt.*, 63 F.3d 652.

210. *Id.* at 654.

211. *Id.* at 658.

Wisconsin standards whether or not they dump their waste in Wisconsin,"[212] or indeed whether or not their community adhered to standards that were more environmentally stringent than Wisconsin's. In light of alternative regulatory means that were perceived to be available to achieve the state's goal of sorting and recycling inbound solid waste, the Seventh Circuit concluded that Wisconsin's real ambition was to coerce its sister states into joining the recycling bandwagon precisely on Wisconsin's terms.[213]

National Solid Wastes Management Association represents only a single opinion from a Circuit that has been particularly aggressive in applying dormant Commerce Clause restrictions. As noted above, the Supreme Court's cases have tended merely to sanction state regulations that seek to manipulate prices beyond their borders, rather than to effectuate other regulatory goals such as environmental, health, and safety protection. Nevertheless, the *National Solid Wastes Management Association* court's disposition does suggest one possible way to thread the needle in the context of differential environmental production standards: Out-of-state actors could segregate their production streams, applying heightened environmental standards for articles of commerce that are intended for California (or Wisconsin), while meeting their home state's lower standards for other articles that they produce. In that manner, consumers in the more stringent jurisdiction would not suffer the moral taint of importing the fruits of production processes that they had legislated or regulated against domestically, out-of-state producers who would compete on an even-handed basis with in-state producers within the more stringent jurisdiction, and sister jurisdictions would not be forced as a practical matter to adopt the more

212. *Id.* Echoing concerns raised by *Zschernig* in the international context, the court also seemed troubled by the fact that the statute directed the Wisconsin Department of Natural Resources to engage in an inquiry regarding whether community recycling programs of other jurisdictions were "[a]dequate[ly] enforce[d]." *Id.* at 655. Specifically, the statute directed the Department to "promulgate rules for comparing the programs of non-Wisconsin municipalities to Wisconsin municipalities or counties," including such factors as "the level of financing, enforcement mechanisms and effort, and the number of materials being separated and recycled." *Id.* Although the Seventh Circuit did not specifically rely on these features of the Wisconsin statute in striking it down, the court did seem troubled by the possibility that out-of-state waste might be banned "not because it is more noxious than waste produced the Wisconsin way, but simply because it comes from a community whose ways are not Wisconsin's ways." *Id.* at 662.

213. The Seventh Circuit indicated that Wisconsin could have achieved its waste management goals simply by requiring all out-of-state solid waste to undergo sorting at a materials recovery facility. *See id.* at 662. Even though this approach would have treated waste generated out-of-state differently from in-state waste (which would still benefit from an exemption from sorting due to the Wisconsin community recycling program), the court suggested that it would pass constitutional muster.

stringent jurisdiction's standards.[214] In the case of electricity generation, such segregation could in fact be readily accomplished through what is known as "contract shuffling."[215] Out-of-state generators, which typically have a range of electricity sources from which to draw when fulfilling supply contracts, could simply allocate all of their clean energy sources to California purchasers, while fulfilling non-California contract obligations with dirty energy.

As the Market Advisory Committee noted in its report, however, this apparent solution hardly fulfills the actual ambition of California's climate change program, which is not simply to avoid moral taint, but to reduce GHG emissions from existing levels.[216] Nor is California's overall climate change ambition simply to reduce its own emissions, since very little tangible environmental effect would come from such a reduction in the absence of comparable restrictions outside the state; instead, California's "desire [is] to inspire others to act."[217] Still, whether such a desire can be realized within a nationally integrated economy in a practicable manner consistent with the dictates of the dormant Commerce Clause remains an open question. At bottom, the question of whether a state measure impermissibly reaches across borders is a question about what kinds of disparities in production processes should count as natural competitive advantages that sister states may not constitutionally seek to eliminate through border adjustments. In the international context, trade jurisprudence is evolving toward a system in which equalizing regulations will be upheld as nonprotectionist so long as the regulating jurisdiction can show some legitimate connection to the environmental, health, or safety good at issue and also can show some sincere attempts at a

214. Such an approach would be conceptually similar to a compensatory tax, which the Court has on occasion upheld as an acceptable exercise of state authority to level the playing field between intra- and interstate commerce. *See* Or. Waste Sys., Inc. v. Dep't of Envtl. Quality, 511 U.S. 93, 102–03 (1994) ("[I]nterstate commerce may be made to 'pay its way'. . . . [A] facially discriminatory tax that imposes on interstate commerce the rough equivalent of an identifiable and 'substantially similar' tax on intrastate commerce does not offend the negative Commerce Clause."); Henneford v. Silas Mason Co., 300 U.S. 577, 585 (1937) (accepting the constitutionality of a compensating use tax whereby Washington sought to make up for lost sales tax revenue from in-state use of products purchased out of state, and distinguishing *Seelig* by stating, in that case, "New York was attempting to project its legislation within the borders of another state by regulating the price to be paid in that state for milk acquired there"); *see also* Heddy Bolster, Note, *The Commerce Clause Meets Environmental Protection: The Compensatory Tax Doctrine as a Defense of Potential Regional Carbon Dioxide Regulation*, 47 B.C. L. REV. 737 (2006).

215. *See* MARKET ADVISORY COMM., *supra* note 38, at 44.

216. *See id.* ("[S]ome observers are concerned that contract shuffling could dramatically undermine a California cap-and-trade program: they note that there is sufficient generation capacity within the eleven states in the western power interconnect to entirely comply with expected emission reductions in California without any real change in generation.").

217. Chemerinsky et al., *supra* note 11, at 10658.

multilateral resolution.[218] In the domestic context, on the other hand, states have few resources from within dormant Commerce Clause jurisprudence with which to justify unilateral economic measures in furtherance of environmentally interdependent goals. In the oft-quoted words of Justice Cardozo, "[t]he Constitution was framed . . . upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division."[219]

CONCLUSION

In this Article we have mainly been interested in asking, as a doctrinal matter, whether state climate change multilateralism passes constitutional muster, putting aside its broader normative and political implications. We must acknowledge, however, that from a certain perspective the constitutionality of Schwarzenegger's globetrotting on behalf of the environment may be beside the point. That is, Schwarzenegger and other state actors may have compelling reasons for pursuing policies that they well know would fail to withstand constitutional challenge. Whether or not it is lawful, California's threat to create a binding GHG emissions reduction scheme, with its attendant disruption of economic activity and the specter that it raises of an ensuing patchwork of inconsistent or competing regulatory schemes, has the effect of bolstering support for uniform regulation at the federal level. Believing that national action on climate change has been wrongfully and dangerously withheld at the behest of industry and its entrenched political champions, California and its indomitable executive leader have engaged in a course of action that is perhaps best thought of as a form of state civil disobedience.

Like individual civil disobedience—"an act of protest, deliberately unlawful, conscientiously and publicly performed"[220]—California's climate change strategy involves enormous short-term costs to the state, but offers the hope of inspiring longer-term systematic change. By unilaterally committing to reduce its GHG emissions in advance of other jurisdictions, California has taken a stance that, unless it inspires other jurisdictions to follow suit, will possibly only succeed in harming the state's economy without achieving much of anything in the way of climate stability. As such, California's approach appears to be individually irrational when evaluated from the narrow perspective of classical game theory, with its assumption of purely

218. *See* Kysar, *supra* note 208.
219. Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511, 523 (1935).
220. CARL COHEN, CIVIL DISOBEDIENCE: CONSCIENCE, TACTICS, AND THE LAW 39–40 (1971).

self-interested and noncommunicative human institutions and actors. On the other hand, when seen through a thicker, more socialized lens, in which individuals and states are believed to be capable of engaging in dialogue and mutual redefinition of interests, California's apparent irrationality may have a grander logic, offering the prospect of eventually achieving collective rationality in an inverse manner to the classic tragedy of the commons scenario, in which individually rational behavior unravels hopelessly into collective irrationality.

Significantly, although California has willfully declared itself to be a nation state, its vision of a collaborative and sustainable climate future is open to all jurisdictions that desire to follow. In words attributed to Mahatma Ghandi, of one of history's greatest practitioners of civil disobedience, California is attempting to "be the change that [it] want[s] to see in the world," rather than waiting for the world's major actors to concurrently agree to change. To be sure, whether this inspire-and-lead strategy is more likely than a carrots-and-sticks strategy to engage key developing nations in climate action is a foreign policy judgment that the Constitution generally entrusts to the political branches of the federal government. Nevertheless, in the absence of an express or otherwise unequivocal statement of preemption by those branches, courts would be wise to construe their precedents narrowly to permit state civil disobedience on climate change. By its nature, California's stance on climate change does not fit into a domestic-foreign construction. It cannot be characterized as one or the other, because it recognizes that much of the meaning of the climate change policy problem rests in the artificial division of human interests that is created by political territoriality. Far from being an embarrassment to the nation, therefore, California's dissenting voice is regarded by many international observers as a primary reason for believing that climate change—the greatest tragedy of the commons the world has ever seen—might have a Hollywood ending.