LEGAL GUIDELINES FOR COOPERATION BETWEEN THE EUROPEAN UNION AND AMERICAN STATE GOVERNMENTS

Daniel Farber[1]

Neither California nor the European Union is a traditional sovereign state. Their innovative efforts at collaboration must be structured to avoid legal and practical limitations on both sides that stem from California's status as a subnational entity within a sovereign nation and the EU's status as a supra-national entity composed of sovereign nations. Those limitations are the subject of this chapter.[2] Fortunately, these limitations do leave considerable room for some forms of regulatory cooperation.

As we will see, in seeking to cooperate more fully with the European Union, California may encounter a variety of constitutional barriers. For instance, California may not act in a manner inconsistent with federal law, even in furtherance of an otherwise desirable innovation. California also may be precluded from entering into certain kinds of agreements with the EU because doing so would invade the foreign policy prerogatives of the federal government.[3] On the other hand, the European Union's ability

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[1] Sho Sato Professor of Law and Chair of the Energy and Resources Group, University of California, Berkeley. Elaine Meckenstock (Berkeley J.D. 2009) played an invaluable role in preparing this chapter.

[2] For a useful recent comparative study, see Michael G. Faure & Jason Scott Jonston, *The Law and Economics of Environmental Federalism: Europe and the United States Compared* (University of Pennsylvania Law School Institute for Law and Economics, Research Paper No 08-07) (2008), *available at* http://ssrn.com/abstract-1098493.

[3] For an extensive discussion of these issues in the context of recent climate change initiatives by California, see Jeremy Lawrence, *Where Federalism and Globalization Intersect: The Western Climate Initiative as a Model for Cross-Border Collaboration Among States and Provinces*, 38 ENV. L. REP. 10796 (2008).

to cooperate as a unified entity may also be limited, less because of formal restrictions on its regulatory jurisdiction than because of practical and legal limitations on its ability to secure compliance with its mandates.[4] As one observer puts it, "[a]t the same time that EU environmental laws are multiplying . . . implementation and enforcement of these laws is lagging."[5]

The existence of these limitations has implications for policy design. California's efforts pursuant to a cooperative agreement are on the strongest ground when the following conditions are met: (1) the California action treats in-state and out-of-state firms evenhandedly, (2) the local benefits of the state's action to California are demonstrable, (3) the action avoids any arguable conflict with federal statutes, treaties, or executive agreements, and (4) the agreement is akin to a memorandum of understanding, bestowing no regulatory authority on any transnational institution and avoiding any mechanism for direct legal enforcement between the parties.

On the other side, the likelihood of actual European implementation is greatest when information production and disclosure is a key part of the agreement, the EU position represents a consensus view of Member States, or the economic leverage of key EU members such as Germany or Britain is sufficient to obtain compliance and those Member States support the agreement. That last observation also suggests a reason for the EU to seek cooperation from major U.S. states such as California: those states may add to the enforcement leverage that can be exerted against multinational firms.

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[4] For recent discussions of the compliance issue, see Clifford Rechtschaffen, *Shining the Spotlight on European Union Environmental Compliance*, 24 PACE ENV. L. REV. 161 (2007); Luigi Carafa, *The Outlook for Compliance with EU Environmental Law: "Pushing" for a Decentralised System of Complaints?, available at* www.ssrn.com/abstract=1158405.

[5] Rechstschaffen, *supra* note 4, at 161.

The applicability and importance of these policy recommendations will vary based on the nature and scale of cooperation proposed. On one end of the spectrum, significant regulatory schemes – for example an agreement to link carbon markets – would require very careful design to avoid potential legal difficulties. On the opposite end of the regulatory spectrum, an agreement to share information – about methodologies for measuring and monitoring biodiversity loss, for example – might trigger few, if any, of these concerns. Similarly, California is far more likely to be concerned about potential lack of monitoring and enforcement on the EU's side when considering coercive regulations. In terms of information sharing, however, particularly with respect to information the EU itself has generated, these concerns are substantially reduced.

Parts I and II of this chapter consider legal constraints on American states and on the EU, respectively. Part III considers the policy implications for cooperative efforts. Although some especially ambitious forms of cooperation may be problematic, other forms of regulatory cooperation raise fewer problems and may promise important benefits to both sides.

I. Limitations on Policy Implementation by U.S. States

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

Second, under the Supremacy Clause of the U.S. Constitution, a state law that conflicts with a federal statute is invalid. This preemption doctrine, which contrasts with the EU's subsidiarity principle, also invalidates state laws that interfere with the goals of federal statutes less directly. Preemption law is currently unsettled, but its scope has been expanded by some recent Supreme Court decisions.

A final constitutional restriction may be especially pertinent to EU-California cooperation. Under the doctrine of foreign policy preemption, a state action is invalid if it invades the core foreign-affairs domain that is exclusively reserved to the federal government. Unlike EU member-states, American states do not retain the power to engage in their own foreign policy, although their decisions inevitably have some impact on foreign entities. The line between permissible foreign impact and impermissible foreign policy is far from obvious under this doctrine and related ones discussed below. The Supreme Court has issued two recent opinions on this subject, which are generally regarded both as unclear in their exact meaning and as significantly expanding this doctrine and limiting state actions.[6]

This section will describe the constitutional doctrines and their implications for EU-California cooperation. Some aspects of the doctrine are clear and provide strong warnings about the form cooperation may take, such as the need to avoid any discrimination against goods from particular locales and any actions that directly contravene U.S. federal legislation. But outside of these danger zones, the rules are quite

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

murky. The best defense to possible challenges in these gray areas is to document in depth how California policies address local needs and to coordinate as much as feasible with the federal government.

A. The Dormant Commerce Clause

In a unified national economy, the existence of a multitude of differing state environmental laws can impede the flow of commerce. Yet, the states have often taken the lead in the environmental area because of pressing local problems. The conflict between the local interest in regulation and the economic interests of other states (and foreign nations) cannot be resolved effectively by the courts of any of the states involved. Obviously, both the state that is engaging in regulation and the states that are affected by the regulation have interests which disable them from providing a completely neutral forum. For this reason, the federal courts have emerged as the tribunals in which these conflicting interests can be assessed. This doctrine traces back to the early years of the Nineteenth Century,[7] with perhaps the most influential opinion coming in the decade before the Civil War.[8]

The basis for federal court involvement in these issues is the commerce clause of the Constitution. The commerce clause, on its face, is a grant of power to Congress, not a grant of power to the federal courts or a restriction on state legislation. Yet, since the early 19th century, the Supreme Court has always construed the commerce clause as preventing certain kinds of state legislation, regardless of actual conflict with

[7] Early examples include Gibbons v. Ogden, 32 U.S. 1 (1924) and Wilson v. Black Bird Creek Marsh Co., 27 U.S. 245 (1829).

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

Congressional legislation. Various theories have been utilized in an effort to support judicial intervention, focusing on the lack of representation for out-of-state interests in state legislatures, the constitutional goal of creating an internal common market and preventing economic protectionism, and freedom of economic movement as a component of national citizenship. The doctrine itself has been subject to changing formulations, in general moving from formalist categorizations to more pragmatic approaches. For present purposes, however, we can ignore the rather tangled history of commerce clause theory and concentrate on the doctrine as it exists today.[9]

At present, there are three strands to commerce clause theory. One test governs state legislation that discriminates against interstate commerce, where discrimination is defined as "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter."[10] Such legislation is virtually per se unconstitutional. A second test applies to the State's proprietary activities. Such activities are virtually immune from restriction under the dormant commerce clause. The third test applies to the remaining forms of state legislation. These forms of legislation are dealt with by a balancing test, with a "thumb on the scale" in favor of the state regulation.

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[9] For defenses of the doctrine's legitimacy, see Donald Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause* 84 MICH. L. REV. 1091 (1986); Richard Collins, *Economic Union as a Constitutional Value*, 63 NYU L. REV. 43 (1988); Mark Tushnet, *Rethinking the Dormant Commerce Clause*, 1979 WIS. L. REV. 125; Daniel Farber, *State Regulation and the Dormant Commerce Clause*, 3 CONST. COMM. 395 (1986).

[10] United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth., 550 U.S. 330, 127 S. Ct. 1786, 1793 (2007). Note that the definition at least implies that discrimination *against* in-state interests (i.e. stricter environmental regulations) would not violate the dormant commerce clause. Although the Supreme Court has not yet addressed this question, at least one lower court ruled this way. Ben Oehrleins & Sons & Daughter, Inc. v. Hennepin County, 115 F.3d 1372, 1385 (8th Cir., 1997) ("purely local monopolies or market controls that inure to the benefit of out-of-state concerns simply do not constitute 'discrimination' under the Commerce Clause.")

1. The Ban on Discriminatory State Regulation

The first test is illustrated by *City of Philadelphia v. New Jersey*.[11] This case involved a New Jersey statute prohibiting the import of most waste originating outside the state. The Supreme Court struck down this restriction. The parties in the case disputed whether the purpose of the restriction was economic favoritism toward local industry or environmental protection of the state's resources from overuse. The Court found it unnecessary to resolve this dispute. According to the Court, the evil of protectionism can reside in legislative means as well as legislative ends.[12]

The Court conceded that certain quarantine laws have not been considered forbidden by the commerce clause even though they were directed against out of-state commerce. The Court distinguished those quarantine laws, however, on the ground that in those cases the very movement of the articles risked contagion and other evils. According to the Court, "[T]hose laws thus did not discriminate against interstate commerce as such, but simply prevented traffic of noxious articles, whatever their origin." Subject to this very narrow exception, legislation which on its face distinguishes out-of-state items from domestic items seems likely to be held unconstitutional, in the absence of compelling justification.[13]

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[11] 437 U.S. 617 (1978).

[12] *Id.* at 627.

[13] *Id.* Other cases speak of a virtually per se rule of invalidity for discriminatory state laws. Wyoming v. Oklahoma, 502 U.S. 437, 454-55 (1992). One of the few exceptions is Maine v. Taylor, 477 U.S. 131 (1986)(allowing Maine to bar the importation of live baitfish, on the ground that there were proven dangers that baitfish parasites would pose to indigenous wild fish and that could not be otherwise avoided). For critiques of the Court's approach, see Kirsten Engel, *Reconsidering the National Market in Solid Waste: Trade-Offs in Equity, Efficiency, Environmental Protection, and State Autonomy*, 73 N.C. L. REV. 1481 (1997); Lisa Heinzerling, *The Commercial Constitution*, 1995 SUP. CT. REV. 217.

As it turned out, *Philadelphia v. New Jersey* was simply the first in a series of cases in which the Court thwarted efforts by states to control the flow of garbage.[14] One recurrent issue involves the converse of *Philadelphia v. New Jersey*: rather than attempting to exclude garbage imports, governments try to ban garbage exports. Such regulations are known as flow controls. A five-Justice majority in *C & A Carbone, Inc. v. Town of Clarkstown*[15] found such a flow control ordinance to be facially discriminatory and struck it down under the *Philadelphia v. New Jersey* test. The majority pointed to several permissible alternatives to flow control, including the use of property taxes to subsidize the local disposal facility.

These cases demonstrate that any regulation keyed to geography faces the risk that it will be considered discriminatory, even if the regulation merely favors one geographic location over the rest of the world. The lesson of these cases is clear: if possible, California should avoid differential treatment on the basis of geographic origins or destinations of goods or services. Rather, state laws and regulations should describe goods in geographically neutral terms.

2. The Market Participant Exception

[14] In two 1992 cases, the Court struck down two variations on the New Jersey statute. One variation was to impose a tax on garbage imports rather than banning them. In *Chemical Waste Management v. Hunt* 502 U.S. 334 (1992), the Court struck down a special tax imposed on waste generated outside the state. A second variation was to delegate import controls to the local level. In *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Department of Natural Resources* 504 U.S. 353 (1992), the Court struck down a state law forbidding landfills from accepting garbage generated elsewhere unless the county's landfill plan authorized them to do so.

[15] 511 U.S. 383 (1994).

The second class of state regulations involves proprietary or quasi-proprietary activities by the State.[16] Here, the leading case is *Hughes v. Alexandria Scrap Corp.*[17] This case involved a Maryland bounty system for old, abandoned cars. Maryland processors needed only to submit an indemnity agreement in which their suppliers certified their own rights to the hulks. In contrast, out-of-state processors were required to submit title certificates or police certificates. The Court held that this statute was valid because the State was not exercising a regulatory function but rather had itself entered the market in order to bid up prices.

The market participant exemption allows states to discriminate in their own market transactions, but not to require others to discriminate. Even when a state law goes beyond the market participant exemption, the government's market role can help to justify otherwise impermissible restrictions on commerce. The Court's most recent commerce clause decision illustrates how a state's proprietary involvement can be used to limit out-of-state trade. In *United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Management Authority*,[18] the Court upheld a city ordinance that required all local waste haulers to bring their waste to a city-owned facility. The proprietary exemption did not apply because the city was restricting sales by third-parties (the waste haulers) to out-of-state buyers, not merely restricting its own purchases and sales. If the state had required the haulers to deal with a privately-owned in-state facility, *Carbone* would have required that the ordinance be struck down.

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[16] For discussion of this issue, see Dan Coenen, *Untangling the Market-Participant Exemption to the Dormant Commerce Clause*, 88 MICH. L. REV. 395 (1988); Mark Gergen, *The Selfish State and the Market*, 66 TEX. L. REV. 1097 (1988).

[17] 426 U.S. 794 (1976).

[18] 127 S. Ct. 1786 (2007).

In fact the public nature of the facility was the basis for the Court's distinction between United Haulers and Carbone (where the facility had been privately-owned): "Disposing of trash has been a traditional government activity for years, and laws that favor the government in such areas -- but treat every private business, whether in-state or out-of-state, exactly the same -- do not discriminate against interstate commerce for purposes of the Commerce Clause."[19] The Court explained that "the dormant Commerce Clause is not a roving license for federal courts to decide what activities are appropriate for state and local government to undertake, and what activities must be the province of private market competition."[20]

The Court did not exempt the ordinance entirely from judicial review. Rather, the Court considered the measure's validity under the test usually applied to nondiscriminatory state laws (discussed below). Significantly, then, the proprietary status of the facility resulted in a looser standard than the usual per se rule against discriminatory regulation of commerce.

The proprietary exemption seems to rest in part on a reluctance to ban states from engaging in market conduct that is open to private parties. In any event, California clearly has greater flexibility in entering into agreements with the EU to the extent the agreement concerns government-owned facilities or involves market participation. It may be ironic that one effect of the market participant rule is to discourage governments from privatizing activities – ironic because the current Supreme Court can hardly be accused of a propensity toward socialism.

[19] *Id.* at 7790.

[20] *Id.* at 1796.

3. Nondiscriminatory Regulation

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

In order to guard against these risks, the Court subjects nondiscriminatory state legislation to a balancing test.[21] Under this *Pike* test (so named for the case in which it was announced[22]), the impact of a statute on interstate commerce is balanced against the state's justifications for the statute. The Seventh Circuit decision in *Procter & Gamble Co. v. Chicago*[23] is a good illustration. The case involved a Chicago ordinance banning the use of detergents containing phosphates. The Seventh Circuit found that the ordinance did burden interstate commerce. Due to the warehousing methods used in the industry, the Chicago ordinance would restrict sales of phosphate detergents in a wide area beyond Chicago and even Illinios, including parts of Wisconsin, Indiana, and Michigan. Nevertheless, the court found that the possible contribution of the ordinance to controlling the growth of algae in the Illinois River and in Lake Michigan was sufficiently great to justify the burden placed on commerce. Interestingly, the court

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[21] A leading example of its application is Kassel v. Consolidated Freightways Corp., 450 U.S. 662 (1981)(striking down state restrictions on the use of certain extra-long truck-trailer combinations).

[22] Pike v. Bruce Church, Inc., 397 U.S. 137 (1970).

[23] 509 F.2d 69 (7th Cir.1975)

referred in part to the possible effect of this legislation in encouraging similar rules in other jurisdictions, in addition to the direct beneficial effects of the regulation. In an era in which inter-jurisdictional regulatory learning is commonplace, this is an important point.

Balancing tests are not always predictable in their application, and this one is no exception. On the whole, however, environmental laws have fared well under this strand of commerce clause doctrine. For example, the Supreme Court found that the burden on commerce created by Minnesota's regulation of plastic milk containers was not clearly excessive, even though the Minnesota Supreme Court had found the supposed benefits of the statute to be illusory.[24]

This balancing test has been attacked by Justice Scalia, some lower court judges, and several scholars.[25] These critics have assembled several arguments against the use of such a test to assess nondiscriminatory legislation. If a state law does not discriminate against interstate commerce, they argue, the federal courts should not second guess the state legislature about the balance between a statute's costs and benefits. Moreover, ill-advised but nondiscriminatory statutes are subject to a built in political check, because the adversely affected local industry will lobby for repeal. Thus, these laws can be handled by the political process without judicial intervention. Finally, these critics argue, the judicial balancing in these cases is unhappily reminiscent of the era in which courts routinely overturned statutes they considered unwise.

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[24] Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456 (1981).

[25] *See* CTS Corp. v. Dynamics Corp., 481 U.S. 69 (1987) (Scalia, J., concurring). For academic criticism, see Julian Eule, *Laying the Dormant Commerce Clause to Rest*, 91 YALE L.J. 425 (1982); Richard Sedler, *The Negative Commerce Clause as a Restriction on State Regulation and Taxation: An Analysis in Terms of Constitutional Structure*, 31 WAYNE ST. L. REV. 885 (1985).

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

The Court's most recent application of this test was the *United Hauling* case discussed above. The Court held that the benefits of the flow-control regime clearly outweighed any possible burden on interstate commerce.[26]

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

B. Preemption Problems

The dormant commerce clause is an implicit constitutional limitation on state authority and applies regardless of whether Congress has legislated in the field or whether the President has taken a position on a subject. When the federal government *has* acted, state authority is also subject to additional restrictions. Typically, these restrictions take effect when Congress has enacted relevant legislation that in some way conflicts with state law. More rarely, a non-legislative action by the President or

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[26] 127 S. Ct. at 1798.

Congress relating to foreign affairs may also preempt a state. When the state's position deviates from the federal government, preemption is a particularly troublesome issue.

1. Statutory Preemption

In cases of direct conflict with congressional enactments, the state statute must give way. The Supremacy Clause of the Constitution provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the authority of the United States, shall be the Supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary not withstanding.[27]

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

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

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[27] U.S. Constitution, Article VI.

[28] *See* Shaw v. Delta Airlines, 463 U.S. 85 (1983). Administrative agencies may also have this power where authorized by Congress. *See* Hillsborough County v. Automated Medical Laboratories, 471 U.S. 85 (1983). For a recent discussion of express preemption, see Robert L. Glicksman, *Nothing is Real: Protecting the Regulatory Void Through Federal Preemption by Inaction*, 26 VA. ENV. L. REV. 5, 18-25 (2008). Similarly, if Congress determines that state regulation should not be preempted by a federal statute, Congress may expressly say so in a "savings clause" in the statute.

[29] This form of preemption is discussed in Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947).

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

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

Every preemption case in a sense is unique. Apart from some vague and usually unhelpful maxims, little can be said about this area of law that is of much help in deciding individual cases. The question before the court in each case is whether Congress, in passing a particular statute, would have been willing to allow the state to impose certain kinds of regulations in the same area. This is essentially an issue of statutory construction. It can only be resolved by close attention to the language of the federal statute, to its legislative history, and to its purposes. Thus, the best advice for lawyers in analyzing preemption problems is to probe the relevant federal legislative materials and assess the extent to which the state statute would have a practical effect on the implementation of the federal statute.

The Supreme Court has enunciated a presumption against preemption. For example, in a decision dealing with state tort remedies against cigarette companies, the

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

Court said that it "start[s] with the assumption that the historic police powers of the States [are] not to be superseded by . . . Federal Act unless that [is] the clear and manifest purpose of Congress."[31] It is not obvious, however, how significant this presumption is in practice, since the Court does quite often find that states laws are preempted by federal statutes even where reasonable minds might disagree with that conclusion.[32]

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

2. Foreign Affairs Preemption

In addition to the general doctrines governing preemption discussed above, states must contend with an increased risk of preemption in the foreign policy arena. The Constitution gives various organs of the federal government the authority to enter into treaties, receive ambassadors, and go to war. Other provisions ban the states from making war or entering treaties. Thus, it is not difficult to discern a constitutional purpose to give the federal government control over foreign affairs. History confirms

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[31] Cipollone v. Liggett Group, Inc., 505 U.S. 504 (1992).

[32] For a recent discussion of these issues, see Robert L. Glicksman & Richard E. Levy, *A Collective Action Perspective on Ceiling Preemption by Federal Environmental Regulation: The Case of Global Climate Change*, 102 NW. U. L. REV. 579, 589-591 (2008).

that the federal government was designed to provide a unified voice abroad. The extent to which states retain some authority to deal with matters having an international impact remains controversial. Given globalization, it seems to be increasingly common for states to reach out beyond national borders in their regulatory activities. Recent Supreme Court decisions create uncertainties about the constitutional validity of such efforts.

The Supreme Court has issued two recent opinions dealing with implied restrictions on state regulatory authority affecting foreign affairs. First, in *Crosby v. National Foreign Trade Council*,[33] the Court considered a Massachusetts law that prohibited state or local governments from doing business with companies that were themselves doing business with Burma. The Court held that the state law was preempted by federal legislation imposing sanctions on Burma. The Court concluded that the state law interfered with a provision of the federal law that gave the President discretion to control economic sanctions against Burma. Congress had given the President the power to end Congressionally-imposed sanctions if he certified that Burma had made progress on human rights; he also had the power to re-impose sanctions in case of back-sliding and to suspend sanctions in the interest of national security. The Court found it implausible that Congress would have given such broad authority to the President while allowing states to undermine the effects of his decisions. Also, the state sanctions went further than the federal sanctions.

Finally, in the Court's view, the state law conflicted with the congressional directive for the President to help develop a multinational strategy regarding Burma, since it would undermine the President's ability to engage in effective diplomacy.

[33] 530 U.S. 363 (2000).

Indeed, the state law had already resulted in WTO complaints against the United States, causing conflict, rather than promoting international cooperation, in dealing with Burma. As the Court said, the state laws "compromise the very capacity of the President to speak for the Nation with one voice in dealing with other governments."[34]

The Court's more recent ruling in *American Insurance Ass'n v. Garamendi*,[35] is more difficult to interpret. The background of the case involved World War II-era insurance policies held by European Jews, many of which were either confiscated by the Nazis or dishonored by insurers who denied the existence of the policy or claimed that it had lapsed from unpaid premiums. Ultimately, the Allied governments had mandated restitution to Nazi victims by the West German government. Unfortunately, although a large numbers of claims were paid, many others were not, and large-scale litigation resulted after German reunification.

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

In the meantime, California passed a law requiring any insurer doing business in the state to disclose information about all policies sold in Europe between 1920 and 1945.

[34] 530 U.S. at 381.

[35] 539 U.S. 396 (2003).

California officials were unmoved by a protest from the federal government that the statute would possibly derail its agreement with Germany.

The Court divided 5-4 about the validity of the California law. The majority found the California law invalid as an interference with presidential foreign policy. According to the majority, the consistent presidential policy had been to encourage voluntary settlement funds rather than to support litigation or coercive sanctions. California clearly sought to place more pressure on foreign companies than the president had been willing to exert. This obvious conflict between express foreign policy and state law was itself a sufficient basis for preemption. As the Court said, California was using an iron fist where the President had consistently chosen kid gloves. The majority found the preemption issue particularly clear, given the weakness of the state's interest viewed through a lens of traditional state legislative activities.

Justice Ginsburg's dissent made several cogent points. First, the state law only mandated information disclosure rather than coercing payment of claims. Second, the President had not entered into any formal executive agreement purporting to settle the claims of American holocaust survivors or their descendants against foreign insurance companies. Third, Justice Ginsburg said, upholding the state law "would not compromise the President's ability to speak with one voice for the Nation"; "[t]o the contrary," by declining to do so, "we would reserve foreign affairs preemption for circumstances where the President, acting under statutory or constitutional authority, has spoken clearly to the issue at hand."[36]

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[36] *Id.* at 442.

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

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

C. Other, Related Doctrines

The doctrines discussed above are the major barriers faced by state regulation. There are some related doctrines, however, that can sometimes pose a threat to state efforts at regulation.

1. Extraterritoriality

The restriction on "extra-territorial" legislation under the dormant commerce clause parallels the foreign affairs preemption doctrine and presents another potential issue for EU-California cooperation. This rule is illustrated by *Carbone* where the Supreme Court said that it would be illegitimate for a state to ban the export of waste for the purpose of protecting the environment outside of its borders. Similarly, the Court struck down a state law requiring liquor wholesalers to give "most favored nation" treatment to New York retailers, on the ground that this indirectly constrained the prices that the wholesalers could charge outside of the state, thereby "projecting" New York law into other states.[37] (If the wholesaler cut its prices to an out-of-state firm, it would have to cut its price for the New York firms, providing an incentive to maintain higher prices even for out-of-state transactions.) Notably, where the commerce clause does not apply, the rule about extraterritoriality is much more lenient and allows state regulation except where the state has no meaningful connection with the regulated activity.[38]

The special extraterritoriality ban under the dormant commerce clause has never been clearly explained and seems vulnerable to criticism.[39] The problem is that the ban on extraterritoriality is logically incoherent. None of the cases in which the Court has discussed this issue involved explicit regulation of out-of-state activities. Rather, they involved regulations that either strongly impacted competition in out-of-state markets or were purportedly designed in part to create out-of-state benefits. The problem is that in a

[37] Brown-Forman Distillers Corp. v. New York State Liquor Authority, 476 U.S. 573 (1986). The Court held a similar law applying to beer sales to be per se invalid because "the practical effect of the regulation is to control conduct beyond the boundaries of the State," preventing brewers from engaging in competitive pricing in a neighboring state. Healy v. Beer Inst., 491 U.S. 324 (1989).

[38] Allstate Ins. Co. v. Hague, 449 U.S. 302 (1981).

[39] For discussion of the extraterritoriality rule, see Daniel A. Farber, *Stretching the Margins: The Geographic Nexus in Environmental Law*, 48 STAN. L. REV. 1247 (1996).

unified national market, any important state regulation is likely to have some spillover effects outside the state. (Consider, for example, how Delaware's dominant role in corporate law affects the activities of corporations that do business around the world, many of which actually have no connection with Delaware except for their charters.) This will be especially true of a state with California's economic clout. Moreover, it seems artificial to count the out-of-state harms of a regulation against the state law, but not to count the out-of-state benefits in its favor. In fact, extraterritorial impacts are one justification for the *Pike* balancing test, not some unusual circumstance that warrants the creation of special rules. Rather than forming a basis for a separate, per se rule, it would be better to consider these effects on out-of-state markets as simply part of the balancing test. Failing that, the extraterritoriality concept should be confined to cases of direct interference with the regulatory authority of other states, lest it swallow up the balancing test.

2. Compact Clause

Another related restriction on state authority is the compact clause, which provides that "No State shall, without the Consent of Congress . . . enter into any Agreement or Compact with another State, or with a foreign Power."[40] As applied to interstate agreements, the Supreme Court has construed this provision to ban only those agreements that tend "to the increase of political power in the States, which may encroach upon or interfere with the just supremacy of the United States."[41] On this narrow reading, the Court upheld the formation of a multi-state tax commission formed to

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[40] Article I, sec. 10, cl. 3.

[41] Virginia v. Tennesse, 148 U.S. 503, 519 (1893).

develop tax policy for individual states, when that policy would be adopted separately by each state.[42] The commission had the power to conduct audits using subpoenas in any of the member states' courts, including audits of multinational corporations. Nevertheless, because of its inability to issue rules or assess taxes, the Court found that the commission's activities did not violate the compact clause.

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

II. Limitations on the Ability of the EU to Implement Cooperative Policies

An American state official might assume that, once a valid, cooperative agreement is reached with the European Union, the deal is done and implementation is

[42] United States Steel Corp. v. Multistate Tax Comm'n, 434 U.S. 452 (1978).

assured. The actual situation is much more complicated.[43] Although EU mandates are highly influential,[44] they do not receive the kind of automatic implementation, monitoring and enforcement as federal or state laws within the United States.

A. The Scope of the EU's Regulatory Jurisdiction

The ECJ has recognized that protection of the environment is one of the essential objectives of the European Community.[45] This is clear from the treaty itself, including Articles 174-75 EC, which provide the textual basis for the Commission to adopt environmental measures and set a "high level of protection" as the objective. Additionally, according to Article 95(1)-(3) EC, which provides authority to harmonize national laws in support of the internal European market, the Commission must take "as a base a high level of protection" with respect to health, safety, environmental protection, and consumer protection.[46] Member States also retain legislative authority to adopt more stringent regulations in the environmental area as long as they comply with the treaty (presumably including the provisions governing the free movement of goods)[47] and they notify the Commission.[48]

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[43] For material on EU law, see STEPHEN WEATHERILL, CASES AND MATERIALS ON EU LAW (8th ed. 2007); C. HARTLEY, THE FOUNDATIONS OF EUROPEAN COMMUNITY LAW: AN INTRODUCTION TO THE CONSTITUTIONAL AND ADMINISTRATIVE LAW OF THE EUROPEAN COMMUNITY (5th ed. 2003).

[44] According to one estimate, two-thirds of Dutch environmental law is based on EU mandates. See Faure and Johnston, *supra* note 2, at 9.

[45] Weathergill, *supra* note 43, at 36.

[46] The adoption procedures for measures vary between Art. 174 and Art. 95, so there can be debate over the source of authority for a given regulation. Likewise, some directives do not carefully distinguish the environmental protection policies related to the internal market from the broader policies covered by Art. 174. LUDWIG KRAMER, EC ENVIRONMENTAL LAW 2-8 (6th ed. 2007).

[47] Article 30 lists the legitimate policy objectives under which a member state may restrict trade but does not list environmental protection. Protection of human and animal health and safety are listed. Furthermore, the ECJ has come close to reading environmental protection into Article 30.

[48] Article 176 EC.

The Treaty of Amsterdam in 1997 tasked the EC with promoting "a high level of protection and improvement of the quality of the environment."[49] The Treaty of Amsterdam also promoted the "integration principle," calling for deeper integration of environmental concerns into other policies to foster sustainable development [50]

The EC's powers, however, are constrained by two guiding principles under Article 5 EC and the Protocol on the Application of the Principles of Subsidiarity and Proportionality. European-level action is supposed to take place only when objectives cannot be achieved by Member States but can be achieved by the Community (subsidiarity).[51] Also, Community action is subject to the principle of proportionality, going only as far as needed to achieve Treaty objectives. Thus, European measures should give as much flexibility as possible to national governments, with minimum standards preferred over fixed standards, directives preferred to regulations, and non-binding instruments over legal mandates. Regulations as opposed to directives tend to be used only when necessary to facilitate external trade or compliance with international agreements.

Other governing principles are provided by Article 174(2) EC. These principles including the precautionary principle, the prevention principle (prevention is better than cure), the source principle (environmental problems should be addressed at the source), and the polluter pays principle. Also, Article 174(2) contains the safeguard clause,

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[49] Article 2 EC.

[50] Article 6 EC.

[51] This is often a question of interpretation, as evidenced by debates within the European Union institutions. In the end, given the diversity of Member States, this is ultimately a political question more than a legal one. Kramer, *supra* note 46, at 17-20.

providing that measures harmonizing environmental protection should include a clause that allows Member States to take provisional measures for non-economic environmental reasons, subject to review by European institutions. This could be considered analogous to savings clauses in U.S. federal statutes that prevent preemption of state laws.

An additional twist is provided by Article 133, which grants the EC exclusive power over external trade. Some environmental measures may fall under Article 133, which is significant because of the exclusivity provision but also because different decision-making procedures apply.

B. Compliance by Member States

At first glance, it might appear that the EU is in a much better position than California to engage in regulatory cooperation. Although some environmental areas may fall under shared competence with Member States, the EU has far fewer limits on its substantive authority than California faces under the U.S. Constitution. And within its fields of competence, the EC can take different kinds of actions, some of which carry the force of law.[52] Regulations have general application and are binding in their entirety and directly applicable to all Member States. Directives are binding as to the result to be achieved but not as to form or methods. In contrast, recommendations and opinions have no binding force. EU environmental policies are often enacted through directives, setting standards with which Member States must comply but providing flexibility as to means.

However, as Faure and Johnston have observed, "[t]he real weakness of the European environmental law is … the potential failure of implementation by the Member

[52] Article 249 EC.

States."[53] The process of implementation is complex. First, at least where directives are concerned, the Member State must transpose the measure into national law. Then, the Member State may need to establish a legal and administrative framework through which to apply and enforce the regulations. And finally, the Member State must actually apply and enforce the law.[54]

Although technically the EC may bring an infringement proceeding against a Member State with respect to any of these phases, the EC is practically limited in its ability to do so, in large part due to information deficiencies.[55] Member States are required to report to the EC on the first two phases; essentially Member States must document that they are prepared to implement. Even these reports can sometimes be difficult to analyze and compare.[56] The EC does, however, monitor at least the early phases of implementation.[57]

But when it comes to the final phase of implementation – actual application and enforcement – the EC is largely dependent on information from others which comes primarily in the form of complaints from individuals, NGOs and other Member States.[58]

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[53] Jason Scott Johnston & Michael G. Faure, *Fashioning Entitlements: A Comparative law and Economic Analysis of the Judicial Role in Environmental Centralization in the US and Europe* (University of Pennsylvania Law School Institute for Law and Economics, Research Paper No. 08-06) (2007), *available at* http://ssrn.com/abstract=1098575.

[54] PAL WENNERAS, THE ENFORCEMENT OF EC ENVIRONMENTAL LAW 252 (2007) (labeling these three phases normative transposition, operational transposition, and operational).

[55] *Id.* at 253.

[56] *Id.* at 253-54 (describing the Commission's inability to report on application of the Integrated Pollution and Prevention Control directive due to the diversity of methodologies by reporting Member States and noting concerns about the effectiveness of the directive enacted to standardize such reports).

[57] *See, e.g.,* EUROPEAN COMMISSION, INTERNAL MARKET SCOREBOARD (2008), *available at* http://ec.europa.eu/internal_market/score/docs/score16bis/score16bis_en.pdf.

[58] Wenneras, *supra* note 54, at 255.

Although Member States are obligated to provide requested data to the Commission if it initiates a formal infringement investigation, the EC lacks direct investigative powers. In addition, the launching of an official investigation is not without costs and can hardly be expected to occur routinely.

Access to information likely explains why most of the infringement cases brought by the EC have involved the earlier phases of implementation.[59] Like a number of aspects of environmental enforcement by the EC, though, this does appear to be changing with an increasing emphasis on *application* instead of transposition.[60]

In addition to its lack of investigative powers, the EC also has no ability to penalize individual firms:

> [T]he European Commission, which serves as an administrative, quasi-executive branch of the EU governing structure, lacks any direct enforcement tools. The Commission . . . cannot inspect or monitor facilities. It cannot directly sue facilities within a member state, penalize individual facilities, issue compliance or other orders directed at regulated entities, or exercise criminal enforcement authority. . .[61]

In an effort to address this problem, the European Environmental Agency has used disclosure via websites as a tool to pressure firms to comply.[62] Essentially, though, the EC's primary enforcement tools – targeted exclusively at Member

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[59] Wenneras, *supra* note 54, at 255.

[60] Wenneras, *supra* note 54, at 255 (noting a shift in focus beginning in 2005).

[61] Rechtschaffen, *supra* note 4, at 162-163.

[62] *Id.* at174-177.

States – are political (Parliamentary hearings, public and private negotiations, etc.) and formal investigations which can lead to litigation before the ECJ.[63]

Despite these limitations, the EC appears recently to have increased its enforcement of environmental measures. For example, it has begun to use the interim measure mechanism through which the ECJ can enjoin the Member State from taking certain actions. The intention underlying this procedure is to prevent imminent and irreversible environmental damage. In 2006, the ECJ granted the EC's request to halt hunting of certain species of wild birds in Italy.[64] Interim measures have been requested in several other environmental contexts.[65]

In addition, the EC has recently begun to exercise its ability under Article 228 EC to impose penalty payments on Member States that do not comply with an ECJ judgment. The penalty, which is usually assessed on a daily basis until compliance is demonstrated, is suggested by the EC but ultimately set by the ECJ. For example, in one case, the EC proposed a penalty of 24,000 Euros per day, and the ECJ set the fine at 20,000.[66] Through 2003, the EC had utilized this mechanism only twice, but at the end of 2005, 77 such cases were pending at the ECJ.[67]

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[63] Member States can be sued for breaching Community obligations by the Commission, by their own citizens (either in national court or through a complaint with the Commission), or by other Member States via a complaint (first to the Commission and then to the ECJ).

[64] Case C503-06/R *Commission v. Italy* [2006].

[65] European Commission, *Interim measures: a rapid-response tool to stop environmental harm*, 31 ENV. FOR EUROPEANS 07 (2008) (describing requests for interim measures against Poland's construction of a highway bypass and Malta for wild bird hunting).

[66] Case C-387/97 *Commission v. Greece* [2000] ECR I-5047.

[67] Wenneras, *supra* note 54, at 274 (citing Ludwig Kramer, *Data on Environmental Judgments by the EC Court of Justice*, 1 J. EUROPEAN ENV. & PLANNING L. 127 (2004)).

This increased willingness to exercise authority and its success (even occasional) magnify the threat of this procedure as leverage the EC can use with out-of-compliance Member States. Thus, the official numbers of Article 228 proceedings before the ECJ surely do not tell the entire picture of this tool's effectiveness. Member States now face the prospect of meaningful suit by the Commission, in addition to the possibility, recognized by the ECJ in 1991 under some circumstances, of compensation due to citizens who have been damaged because of a Member State's failure to implement a directive.[68]

Notably, both of these enforcement tools require litigation, which carries costs. The practical capacity to pursue these remedies is limited.[69] Of course, the existence and occasional successful use of these tools can also prove effective as negotiating leverage before litigation commences, although such negotiations are not cost-free either. Thus, while these tools clearly strengthen the EU's enforcement position, they do not obviate the informational challenges discussed above nor do they provide the EC with a direct leverage against private actors.

III. Implications for Regulatory Cooperation

Clearly, California and the European Union face very different barriers to a cooperative arrangement. California is limited primarily in the subject matters upon which it can regulate. Regulation with significant economic impact runs the risk of a dormant Commerce Clause challenge, and any field in which Congress has already legislated may well be pre-empted from state involvement. In

[68] ECJ 19, Andrea Francovich and Danila Bonifaci v. Italian Republic, Joint Cases C-7/90 and C-9/90, ECR I-5357(1991).

[69] Rechtschaffen, *supra* note 4,. at 164.

addition, California is limited in the nature of the agreements into which it can enter with the EU, both by the federal government's primacy in foreign affairs and the ban on compacts (absent congressional approval) and treaties. On the other hand, the enforcement and informational challenges the EU faces might give California pause in some regulatory partnerships.

It is also worth noting that the advent of the Obama Presidency may well cause the EU to rethink the necessity and desirability of at least some direct regulatory partnerships with California. Perhaps under new leadership, California's policies will reflect U.S. policy, rather than lead it, in which case cooperation with the federal government would make sense. In addition, the EU undoubtedly hopes to have a different relationship with President Obama regarding the environment and would be understandably unwilling to partner with a state if it might jeopardize that relationship politically.

Despite these recent developments, however, and despite the barriers, there is still room for regulatory cooperation between the EU and California. Indeed, the Obama Administration might sometimes welcome such efforts in order to pave the way for later action at the federal level.

California's interest in such cooperation likely remains undiminished and the EU's is at worst uncertain. California, with partners in the U.S. and Canada, is on the road to implementing a greenhouse gas (GHG) emissions cap-and-trade program beginning in 2012.[70] Although the expectation is that President Obama will exercise strong leadership at the federal level on GHG emissions, a national cap-and-trade program in the United States is still a distant possibility at best.

[70] *See* http://www.westernclimateinitiative.org/.

Such a program will require congressional legislation, which to date has been an insurmountable challenge. It is, thus, not inconceivable that California and the EU might want to link their markets, which would be a very significant form of regulatory cooperation. Other environmental goals may face similar challenges in Congress, so regulatory cooperation with California may not be without appeal to the EU.

On a smaller scale, both California and the EU may well have interests in collaborations involving information-sharing. For example, California recently introduced a new, stronger regulatory approach to industrial chemicals and might have significant interest in information-sharing with the EC about the latter's REACH program. Both governments face significant challenges in responding to climate change and biodiversity loss and likely could benefit from knowledge-sharing (including research and measurement tools) on those fronts as well.

There are other potential avenues of cooperation that fall somewhere between those two poles. For example, if one entity develops standards for voluntary labels (e.g. for "climate friendly" products), the other might want to adopt those standards. California and the EU might wish to agree to respect labels produced under the other's regulatory scheme. Along those lines, the EU is currently negotiating bi-lateral agreements on sustainable production practices with countries that supply forestry products. If California has an interest in that issue, it might want to understand and utilize the foundational work the EU has already done. As one possibility, California might wish to target its own government procurement to sustainably-certified forestry products, using the

EU's standards, a practice which would likely survive a dormant commerce clause challenge under the market participation doctrine described above. California's participation as a buyer would provide additional economic leverage to the EU in its negotiations with suppliers.

As is clear from the analysis of barriers above, the specific form cooperation takes is a crucial piece of information to assess its validity under U.S. constitutional law and its viability with respects to the constraints on the EU. A few general points can be made, however, with reference to the kinds of cooperation suggested above.

First, information-sharing agreements seem the least likely to implicate barriers on either side of the partnership, assuming both entities are legally permitted to share the information in question. Such an arrangement would appear to have no impact on interstate commerce, nor would information-sharing likely be pre-empted by federal law in the United States. California should keep in mind the informational constraints and lack of direct enforcement capabilities of the EU, but if the information is already in European possession or will be gathered directly by EC staff (as with, for example, REACH), those issues could be minor.

Second, California may be able to take advantage of the market participation exception to the dormant commerce clause doctrine to partner with the EU at least with respect to its own procurement. California probably cannot join the bi-lateral agreements between the EU and its forestry products suppliers (those are likely international treaties), but if there is significant state interest,

California may well be able to shift its own procurement toward products that comply with the negotiated standards. Such cooperation could easily fall short of even a formal agreement, avoiding other concerns about compacts. California's participation could be sizable enough, in some contexts, to help drive the market and improve the EU's negotiating position.

Third, regulatory cooperation on a more significant scale – such as linking carbon markets – is still potentially viable if, indeed, it remains necessary due to the absence of action by the federal government. Clearly, if Congress does pass a national cap-and-trade program that would change the picture considerably. The EU may well wish to wait for a national program, rather than build one partnership with California only to have it replaced by a different partnership with the United States as a whole. On the other hand, where feasible (politically and otherwise) for the EU to do so, it should encourage California's leadership within the United States. As has happened in the past, California's model could become the framework for a national scheme, so the EU may well have an interest in where the cap is set and how the program functions. This is true both because linkages between trading programs should improve efficiencies, and because the EU has an interest in maximizing GHG emissions reductions worldwide.

Fourth, the regulatory area that seems the most fraught with challenges is also the one that seems the least desirable, at least at this specific moment in political history. It would seem unlikely that a partnership in which both sides agreed to binding controls, say for water pollution, would prove fruitful. Such an agreement might well be viewed as a violation by California of the Compact

Clause or the Treaty Clause. If the agreement involved preferences for goods produced under the regulated conditions, it would violate the dormant Commerce Clause as well. On the other hand, California would likely have substantial concerns about the EU's ability to ensure true compliance across the Member States. Certainly, some would comply, and the EU might be willing to pursue those that do not, but enforcement assumes knowledge of violation, the availability of political capital and the willingness to spend it. California may not wish to bind itself in the face of those uncertainties.[71]

Perhaps not surprisingly, regulatory cooperation between California and the EU to date appears to have been so informal as to be somewhat invisible as a legal matter. Clearly there is communication and information-sharing at some levels. Members of the Western Climate Initiative, including California, have drawn upon experience in the EU. Such informal activities present few, if any, problems and undoubtedly will continue where they are beneficial to both parties.

It is apparent that both the EU and American states like California face barriers to cooperation with each other due to the nature of the structures in which they operate. These limitations pose weightier challenges for some kinds of regulatory partnerships than for others. And each proposed effort at cooperation must be analyzed separately. Consider, for example, that the state action struck down in the *American Insurance Ass'n v. Garamendi* case involved information demands of private parties doing business in the state, so even information-based activities can be invalid if they involve areas pre-empted by the federal

[71] It is not, however, impossible to imagine that California (or the United States for that matter) might accept such uncertainties, if the alternative is greater pollution.

government. Perhaps the most important thing is for both sides to recognize the challenges the other side faces to ensure that expectations of the agreement can realistically and legally be achieved.

IV. Conclusion

Both U.S. states and the European Union must contend with certain obstacles to cooperative regulation. On the U.S. side, the restrictions stem from the overshadowing presence of the federal government and corresponding limits on state power. Implementation of a cooperative agreement by a U.S. state can face legal challenges based on the dormant commerce clause, statutory preemption, and foreign affairs preemption. Certain characteristics of the implementation of a state regulation may make a finding of invalidity more likely: discrimination against out-of-state commerce (except in conducting proprietary governmental activities); discrepancies between the state's requirements and those of federal regulations, statutes, treaties or executive agreements; creation of legally enforceable obligations against the state to comply with the agreement or a transnational body with enforcement authority. To the extent possible, these should be avoided.

On the EU side, the problem is two-fold: the "states" – more correctly, Member States – arguably have too much power (in terms of both information and enforcement), and the EU's ability to take enforcement actions is constrained by this informational deficiency as well as by the costs involved in doing so. To obtain implementation, the EU must obtain the cooperation of member states. Thus, if an agreement can only provide meaningful benefits if it is fully enforced within the borders of every EU member, caution on the part of non-EU partners is appropriate. But less than universal

enforcement within the EU may suffice if major states have enough leverage to bring transnational firms to heel or if the goal is to produce and share information.

For those who are engaged in cooperative efforts between the EU and American states, the biggest risk is the easy but mistaken assumption that the two legal systems are fully parallel. The EU has moved from being a very loose federation to something that has more of a superficial resemblance to American federalism. But there are still fundamental differences. American states do not have as much room to pursue their own policies or international agreements as European member states, nor does the European Union itself have as much practical internal power as the U.S. government. It is important to resist easy analogies and keep in mind the very real differences between the two systems, lest either side overestimate the power of the other to enter into binding and effective agreements. If these limitations are kept in mind, however, there are promising avenues for cooperation between the EU and American states.