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EXCUSE ME, SIR, BUT YOUR CLIMATE'S ON FIRE: CALIFORNIA'S S.B. 1368 AND THE DORMANT COMMERCE CLAUSE

*Peter Carl Nordberg**

INTRODUCTION

Just how inventive can a state be in attacking the problem of global climate change? Climate change is increasingly being recognized as a significant problem. Although national legislation appears necessary, the federal government has failed to take meaningful action. As a result, states have begun to act, enacting their own unique legislation tailored to address the causes of climate change related to each individual state.

This Note addresses the constitutionality, under the dormant Commerce Clause, of one of the most innovative pieces of state climate change legislation, California S.B. 1368.[1] Part I summarizes the problem of climate change, particularly emphasizing recent popular opinion about the issue. Part II discusses political responses to climate change, focusing first on the federal nonresponse and then on California's novel response. Part III introduces S.B. 1368, discussing relevant historical events, the legislation itself, and its potential effects on California as well as neighboring states. Part IV summarizes the history of the dormant Commerce Clause, focusing on how it applies to S.B. 1368, and outlining current Supreme Court jurisprudence. Part V discusses in depth different classes of Supreme Court cases that shed light on S.B. 1368's constitutionality, and then applies those cases to S.B. 1368, before finally examining an important policy justification for S.B. 1368's constitutional validity—a federalism argument for allowing states to blaze the trail on environmental issues in the face of federal inertia.

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1 Act of Sept. 29, 2006, ch. 598, 2006 Cal. Legis. Serv. 3792 (West) (codified at CAL. PUB. UTIL. CODE § 8340 (West Supp. 2007)).

I. CLIMATE CHANGE: A SERIOUS PROBLEM

The summer of 2006 was the hottest in the United States since 1936.[2] The July heat wave set over 2300 daily heat records nationwide.[3] In New York City, the heat led to extensive blackouts.[4] Californians were without power for days at a time; some filed with their power companies for reimbursement of the costs of food lost from lack of refrigeration.[5] However, the heat was more than an inconvenience: Approximately 140 people died in California as a result of the heat wave.[6] That summer was not a one-time spike, either. According to NASA's Goddard Institute for Space Studies, 2005 was the hottest year on record globally,[7] and the ten hottest years on record have occurred since 1990.[8]

Climate change is caused by the emission of greenhouse gases into the atmosphere.[9] Increased levels of greenhouse gases cause the earth's atmosphere to retain more infrared radiation, leading to higher temperatures.[10] Increased global temperatures have led to shrinking polar ice caps,[11] disappearing glaciers,[12] and rising sea levels.[13] All of these symptoms have been accompanied by a dramatic,

2 *This Summer Was Hottest Since Dust Bowl*, L.A. TIMES, Sept. 16, 2006, at A20.

3 *Id.*

4 Alan Feuer, *City Dims Lights as Heat Strains the Power Grid*, N.Y. TIMES, Aug. 2, 2006, at A1.

5 Gayle Pollard-Terry, *If a Blackout Spoils Food, Utility May Eat the Cost: Those Who Tossed More than Salad in the Recent Outages Can File a Claim*, L.A. TIMES, Aug. 13, 2006, at K1.

6 Felicity Barringer, *California, Taking Big Gamble, Tries to Curb Greenhouse Gases*, N.Y. TIMES, Sept. 15, 2006, at A1.

7 Juliet Eilperin, *World Temperatures Keep Rising with a Hot 2005*, WASH. POST, Oct. 13, 2005, at A1. 2005 was the fourth year in a row to post record temperatures. *See* NOW—The Political Climate: Climate Change at the Start of 2006, PBS.ORG, Feb. 10, 2006, http://www.pbs.org/now/science/climatemediaint.html.

8 *See* NATURAL RES. DEF. COUNCIL, GLOBAL WARMING SCIENCE (2006), http://www.nrdc.org/globalWarming/fgwscience2005.asp.

9 INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2001 93, *available at* http://www.grida.no/climate/ipcc%5Ftar/wg1/pdf/TAR-01.pdf.

10 *Id.*

11 *See* Gretchen Cook-Anderson, *Arctic Ice Meltdown Continues With Significantly Reduced Winter Ice Cover*, NASA.GOV, Sept. 13, 2006, http://www.nasa.gov/centers/goddard/news/topstory/2006/seaice_meltdown.html (citing study led by Joey Comiso finding 6% annual reduction in the polar ice cap over the past two years, compared with just 1.5% per decade during the period prior to that beginning in 1979).

12 J. Oerlemans, *Extracting a Climate Signal from 169 Glacier Records*, 308 SCIENCE 675, 675–77 (2005).

13 *See* INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2007 5–7 [hereinafter IPCC 2007 REPORT], *available at* http://www.ipcc.ch/SPM2feb07.pdf (describing sea level rise caused by climate change). The effects of sea level rise

unprecedented increase in greenhouse gases present in the atmosphere.[14]

Scientists have predicted that climate change will increase.[15] If current trends continue unchecked, the amount of annual damage from climate change could be $300 billion by 2050.[16] According to moderate predictions, global temperatures will rise about four degrees Fahrenheit during this century.[17] Although the correlation between these symptoms and increased greenhouse gases is sometimes disputed,[18] the scientific consensus is clear: Climate change is happening; it is caused, at least in part, by humans; and its consequences could be tragic.[19]

What may be even more important from a political perspective than the *fact* of climate change is the *perception* of climate change. Accounts of the effects of climate change have flooded the media.[20] In 2004, *The Day After Tomorrow*, a special-effects-heavy disaster flick

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would be especially dire in coastal states like California; a rise of one meter would cause an estimated encroachment of 200 to 400 meters on California's shoreline. James G. Titus et al., *Greenhouse Effect and Sea Level Rise: The Cost of Holding Back the Sea*, 19 COASTAL MGMT. 171 (1991), at 178, *available at* http://yosemite.epa.gov/OAR/globalwarming.nsf/UniqueKeyLookup/SHSU5BPPAL/$File/cost_of_holding.pdf.

14 Andrew C. Revkin, *Gases at Level Unmatched in Antiquity, Study Shows*, N.Y. TIMES, Nov. 25, 2005, at A14 ("Shafts of ancient ice pulled from Antarctica's frozen depths show that for at least 650,000 years three important heat-trapping greenhouse gases never reached recent atmospheric levels caused by human activities, scientists are reporting today.").

15 *See* IPCC 2007 REPORT, *supra* note 13, at 13 (stating the panel's conclusion that the effects of climate change would "very likely" be greater in the twenty-first century than those in the twentieth century, with "very likely" defined as a greater than ninety percent certainty); *see also* Barringer, *supra* note 6 (citing a 2004 National Academy of Sciences report predicting five times as many heat waves in Los Angeles in a hundred years, and twice as many deaths resulting from heat).

16 Amy Cortese, *As the Earth Warms, Will Companies Pay?*, N.Y. TIMES, Aug. 18, 2002, § 3, at 6.

17 Andrew C. Revkin, *Budgets Falling in Race to Fight Global Warming*, N.Y. TIMES, Oct. 30, 2006, at A1.

18 *See, e.g.*, Holman W. Jenkins, Jr., *Climate of Opinion*, WALL ST. J., April 4, 2007, at A14 (claiming that the consensus regarding human responsibility for climate change is "purely a social invention").

19 Naomi Oreskes, *Beyond the Ivory Tower: The Scientific Consensus on Climate Change*, 306 SCIENCE 1686, 1686 (2004) (surveying 928 scientific, peer-reviewed journal articles, and finding that none disagreed with the consensus position that human activities are responsible for dramatic increases in greenhouse gases in the atmosphere, which in turn have caused "surface air temperatures and subsurface ocean temperatures to rise.").

20 *See, e.g.*, Jeffrey Kluger, *Is Global Warming Fueling Katrina?*, TIME.COM, Aug. 29, 2005, http://www.time.com/time/nation/article/0,8599,1099102,00.html.

about the world entering a second ice age caused by climate change, grossed $186 million at the box office.[21] *An Inconvenient Truth*, a documentary about climate change featuring former Vice President Al Gore, became the third highest grossing documentary ever.[22] The media attention, combined with the rising temperatures, has led to significant popular opinion that the federal government needs to do something about the problem of climate change.[23]

II. POLITICAL RESPONSES TO CLIMATE CHANGE

A. Federal Inertia

In late May of 2002, the Bush administration sent a report on the potential effects of climate change, drafted by the Environmental Protection Agency (EPA), to the United Nations.[24] The report stated that the United States could experience significant problems as a result of climate change within a few decades.[25] President Bush distanced himself from the report soon after it was released: His administration emphasized the "considerable uncertainty" about the science of climate change, and refused to join other developed nations in ratifying the Kyoto treaty, which placed mandatory greenhouse emissions limits on most of its members.[26] The Administration instead called for vol-

21 Barbara Vancheri, *"Day After" Director Stuck with Cold, Hard Reality*, PITT. POST-GAZETTE, Oct. 12, 2004, at B1.

22 Tina Daunt, *Green Is Gold for Gore and His Celeb Pals*, L.A. TIMES, Feb. 26, 2007, at E1.

23 *Compare* Gary Langer, *Poll: Public Concern on Warming Gains Intensity*, ABCNEWS.COM, Mar. 26 2006, http://abcnews.go.com/Technology/GlobalWarming/story?id=1750492&page=1 (stating that almost seven in ten Americans think the government needs to do something about climate change), *with* Jon Cohen & Gary Langer, *Poll: Many See No Need to Worry About Warming*, ABCNEWS.COM, June 15, 2005, http://abcnews.go.com/Technology/PollVault/story?id=850438 (stating that only thirty-eight percent of Americans think climate change is a serious problem that the government needs to do something about). For a description of the heightened public concern for the environment, see Lydia Saad, *Americans See Environment as Getting Worse*, GALLUP POLL BRIEFING, Apr. 2006, at 57.

24 *See* U.S. DEP'T OF STATE, U.S. CLIMATE ACTION REPORT—2002 (2002) [hereinafter CLIMATE ACTION REPORT], *available at* http://yosemite.epa.gov/oar/globalwarming.nsf/UniqueKeyLookup/SHSU5BWHU6/$File/uscar.pdf; Katherine Q. Seelye, *President Distances Himself from Global Warming Report*, N.Y. TIMES, June 5, 2002, at A23.

25 CLIMATE ACTION REPORT, *supra* note 24.

26 *See* Seelye, *supra* note 24. President Bush has argued that the Kyoto Treaty is "fatally flawed," notably because it exempts China from its greenhouse gas emission standards, although he acknowledges rising global temperatures. *See* Press Release, Office of the Press Sec'y, President Bush Discusses Global Climate Change (June 11, 2001), *available at* http://www.whitehouse.gov/news/releases/2001/06/20010611-2.html.

untary emissions standards.[27] Because of his administration's slow response to the threat of climate change, as well as the increasing perception of climate change as a serious danger, President Bush has come under significant criticism.[28] Accurate or not, this criticism and the popular opinion on climate change have had two important effects: First, Congress has begun independent hearings on climate change,[29] and second, states are taking the initiative in crafting unique legislation to lower greenhouse emissions. This Note focuses on one of these acts.

B. The Political Response of One State: California's Global Warming Solutions Act of 2006 and S.B. 1368

On June 1, 2005, California Governor Arnold Schwarzenegger signed Executive Order S-3-05.[30] Citing increased temperatures as a threat to California's coastline, the Sierra snowpack, and the health of citizens, the Order set aggressive targets for reduction of greenhouse gas emissions.[31] Schwarzenegger specifically mentioned California's role as a leader on environmental issues.[32]

Fifteen months later, Schwarzenegger got what he wanted: The California Legislature passed A.B. 32, also known as the Global Warming Solutions Act.[33] On September 27, 2006, Schwarzenegger signed the Act into law.[34] The Act gives the California Air Resources Board

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27 *See* Zachary Coile, *Global Warming Fear Lights Fire Under Congress*, S.F. CHRON., Sept. 23, 2006, at A1.

28 *See, e.g.*, Coile, *supra* note 27 (citing Philip Clapp, president of the National Environmental Trust, as criticizing Bush's "'just-say-no' policy on global warming"); Editorial, *Capping the Greenhouse*, BOSTON GLOBE, June 4, 2006, at E8 (commenting on President Bush's hope that climate change "will just go away."). In a Google search conducted on April 8, 2007 for the phrase "Bush on Global Warming," the top hit was a Will Ferrell Saturday Night Live sketch parodying Bush's mannerisms and views on climate change. *See* Transbuddha.com, Will Ferrell—Bush on Global Warming, http://www.transbuddha.com/mediaHolder.php?id=1147 (last visited April 8, 2007).

29 *See* Coile, *supra* note 27.

30 Cal. Exec. Order No. S-3-05 (July 1, 2005), *available at* http://gov.ca.gov/index.php?/executive-order/1861/. The order set the goal of reducing state emission levels to 2000 levels by 2010, to 1990 levels by 2020, and to eighty percent of 1990 levels by 2050. *Id.* The 1990 level was chosen because it was the base level for Kyoto. *See* Miguel Bustillo, *Gov. Vows Attack on Global Warming*, L.A. TIMES, June 2, 2005, at B1.

31 Cal. Exec. Order No. S-3-05.

32 *Id.*

33 California Global Warming Solutions Act of 2006, ch. 488, 2006 Cal. Legis. Serv. 2757 (West) (codified in scattered sections of CAL. HEALTH & SAFETY CODE (West Supp. 2007)).

34 *Id.*

sweeping powers over greenhouse gas emissions, and mandates a reduction to 1990 levels by 2020.[35]

Although some have questioned the achievability of the Act's goals,[36] the significance of the legislation goes far beyond its effect in California. First, other states often follow California's lead on environmental issues. For instance, California was the first state to require catalytic converters.[37] In 2002, California passed a law regulating carbon dioxide emissions from cars, and now ten states have enacted similar laws.[38] Therefore, the Act's greatest impact may be in providing a model for other states to follow. Second, the Act is an attempt to rebuke the federal government for its inertia on climate change. In using the same baseline as the Kyoto Protocol,[39] 1990 emission levels, the Act serves as a statement on the failure of Congress to ratify, and the Administration to encourage ratification of, Kyoto. Further, just two months before signing the Act, Schwarzenegger held a meeting with Tony Blair, one of President Bush's closest allies in international politics, to sign an agreement to collaborate on pollution reduction.[40] Whether the President got it or not, one commentator succinctly described the message being conveyed: "On one of the most pressing scientific issues of our time, the leader of the free world doesn't live in Washington, D.C. He lives in Sacramento . . . and his name is Arnold Schwarzenegger."[41]

The Act, in giving the California Air Resources Board control over in-state entities producing greenhouse gases, provided one half of California's climate change legislative package. The other half, less scrutinized but possibly more far-reaching, was S.B. 1368.

III. S.B. 1368

A. Historical Background

Other than climate change in general, two historical events are important to a proper understanding of S.B. 1368 and its potential

35 *Id.*

36 *See, e.g.*, William Sweet, *Clean Air, Murky Precedent*, N.Y. TIMES, Sept. 29, 2006, at A1 (arguing that the bill could potentially be undermined by California's prior success regulating emissions, since there are fewer emissions to cut in California).

37 Zachary Coile & Jane Kay, *EPA Says It Can't Limit Car Emissions: Agency's Stance Could Obstruct State Law on Greenhouse Gases*, S.F. CHRON., Aug. 29, 2003, at A4.

38 *See* Barringer, *supra* note 6 (noting that this law is currently the subject of a legal challenge); Michael Hawthorne, *Blagojevich Aims to Cut Greenhouse-Gas Output*, CHI. TRIB., Feb. 13, 2007, § 2, at 4.

39 *See* Bustillo, *supra* note 30.

40 Editorial, *The Hot New Issue*, L.A. TIMES, Aug. 2, 2006, at B12.

41 Editorial, *California Leads on Global Warming*, OREGONIAN, Sept. 2, 2006, at E04.

effects: deregulation of the electrical utility industry and the California energy crisis beginning in May 2000.

Prior to deregulation, electrical utility companies were granted monopolies in a particular geographical area.[42] They were regulated to prevent abuse of their monopoly.[43] These firms were also traditionally "vertically integrated"—that is, they performed all of the services required for supply of power to the market.[44] These services included generation, transmission, and distribution.[45] Now, however, many states have deregulated their power industries, allowing a competitive market for electricity.[46] As a result, the electric utility infrastructure has become more decentralized.[47] Instead of the old model, where a single utility company controlled all aspects of the process, deregulation has resulted in independent generators and marketers buying and selling bulk power.[48] Now, rather than relying solely on one entity for power generation, transmission, and distribution, the market for power relies on a multi-faceted chain, which, in theory, enhances pricing and supply.[49]

In 1996, California restructured its electric utility market, specifically creating a new "spot" market for investor-owned utilities to purchase their power.[50] California also capped the prices utilities could charge consumers for power.[51] In late May 2000, the plan backfired, with wholesale prices soaring and utilities getting stuck buying power at the high wholesale prices and selling at the capped prices.[52] The utility companies had to borrow substantial amounts in order to continue to operate.[53] Strained capacity led to rolling black-

42 FRED BOSSELMAN ET AL., ENERGY, ECONOMICS AND THE ENVIRONMENT 150 (2000).

43 *Id.*

44 *Id.* at 151, 654.

45 *Id.* at 654.

46 *See* Steven Ferrey, *Sustainable Energy, Environmental Policy, and States' Rights: Discerning the Energy Future Through the Eye of the Dormant Commerce Clause*, 12 N.Y.U. ENVTL. L.J. 507, 645 (2004) (stating that twenty-four states and the District of Columbia had deregulated as of 2004).

47 *Id.* at 515.

48 Nicholas W. Fels & Frank R. Lindh, *Lessons from the California "Apocalypse": Jurisdiction Over Electric Utilities*, 22 ENERGY L.J. 1, 4 (2001).

49 *Id.* at 4–5.

50 *Id.* at 1.

51 *Id.*

52 *Id.*

53 *Id.* at 11. The prices continued to rise through the summer months as a result of increased hot weather demand. *Id.* at 11–12.

outs.[54] On March 9, 2001, one of the largest California electrical utility companies, Pacific Gas & Electric, declared bankruptcy.[55]

Aggravated by the famed involvement of Enron and its disgraced CEO Kenneth Lay,[56] the California energy crisis, along with deregulation of the electrical utility market, provide the backdrop for passage of S.B. 1368.

B. Description of S.B. 1368

Passed by the California legislature on August 31, 2006 and signed by Governor Schwarzenegger on September 31, S.B. 1368 is either an innovative attempt to ensure that California uses only "clean" power, or it is egregious discrimination against out-of-state electricity generators, depending upon whom you ask.[57]

S.B. 1368 prohibits in-state power distributors from buying power under a long-term contract (defined as any contract for longer than five years) with an out-of-state power generator that fails to comply with emissions standards set up by the California Energy Commission.[58] The standards adopted require that emissions must be "at a rate of emissions of greenhouse gases that is no higher than the rate of emissions of greenhouse gases for combined-cycle natural gas baseload generation."[59] In this way, the legislation is tailored to target current "dirty" coal production, without banning coal permanently, given the potential for development of cleaner coal technology.[60]

The text of S.B. 1368 contains important legislative findings. The legislature found that "[g]lobal warming will have serious adverse consequences on the economy, health, and environment of California";[61] that investor-owned utilities are planning long-term contracts that would result in greenhouse gas emissions for at least the next thirty years;[62] that forcing utilities to internalize the costs of pollution will

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54 *Id.* at 12.

55 *Id.*

56 *See* Peter H. King et al., *Paper Trail Points to Roots of Energy Crisis*, L.A. TIMES, June 16, 2002, at A1. Ken Lay was quoted as telling David Freeman, former head of the Los Angeles Department of Water and Power, "[i]n the final analysis, it doesn't matter what you crazy people in California do, because I got smart guys out there who can always figure out how to make money." *Id.*

57 Act of Sept. 29, 2006, ch. 598, § 2, 2006 Cal. Legis. Serv. 3792, 3795 (West) (codified at CAL. PUB. UTIL. CODE § 8340 (West Supp. 2007)); *infra* Part IV.B.

58 Act of Sept. 29, 2006, ch. 598, § 2, 2006 Cal. Legis. Serv. at 3795.

59 *Id.*

60 *See California GHG Standard Targeting Coal Power Hits Major Snags*, ENERGYWASHINGTON WEEK, May 17, 2006, at 11 [hereinafter *California GHG Standard*].

61 Act of Sept. 29, 2006, ch. 598, § 1, 2006 Cal. Legis. Serv. at 3794.

62 *Id.*

reduce the cost to California of future federal utility regulation;[63] that regulation of the state's consumption, not just production, of electricity is essential to meaningful climate change;[64] and that California, as the largest energy market in the West, has a responsibility to act as a leader to other states in issues of regulating emissions.[65]

C. Effects of S.B. 1368

S.B. 1368 places serious restrictions on the market for power. Just a few years after a devastating energy crisis, California is potentially risking further shortages and price increases in the name of environmental health. Whether this is a reflection of the gravity of the problem of climate change, the foolhardiness of state legislators bent on political gain, or a testament to the resilience of the industry and people of California, it certainly adds a sense of the dire consequences that could occur should S.B. 1368 significantly burden the ability of power companies to contract for power generation.[66]

However, the effect of S.B. 1368 extends beyond the borders of California. The legislation, targeted especially towards heavily-polluting coal plants,[67] severely limits the power plants that can participate in the California market. According to the California Energy Commission, approximately forty percent of California's power supply comes from out of state.[68] Of this amount, about half, or twenty percent of California's power supply, comes from coal; California has no in-state coal power plants.[69] Further damaging from the perspective of other states, the power market in California consumes about forty percent of power produced in the West.[70] Because of these facts,

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63 *Id.*

64 *Id.*

65 *Id.* at 3795.

66 *See California GHG Standard*, *supra* note 60, at 10 (discussing the possibility that S.B. 1368 could increase electricity prices).

67 *See id.* at 11.

68 *See* CAL. ENERGY COMM'N., CALIFORNIA'S MAJOR SOURCES OF ENERGY, http://www.energy.ca.gov/html/energysources.html (last visited Feb. 23, 2007).

69 *Id.*; *see also* CONSORTIUM OF ELEC. RELIABILITY TECH. SOLUTIONS, PLANNING FOR CALIFORNIA'S FUTURE TRANSMISSION GRID 9–11 (2003) (describing how higher natural gas prices led to increased importation of out-of-state, coal-generated power).

70 *See* Sweet, *supra* note 36; *see also* Press Release, Natural Res. Def. Council, Governor Signs Bill to Limit Dirty Power Generation (Sept. 29, 2006), *available at* http://www.nrdc.org/media/pressreleases/060929a.asp (stating that at least thirty-one dirty coal power plants are being planned or developed in the West, with much of the power destined for California). S.B. 1368 has already placed one large-scale transmission line, the Frontier Line, in jeopardy. *California Bill Could Stymie Western Generation, Coal Expansion*, 30 PLATTS COAL OUTLOOK, Sept. 11, 2006, at 9.

power generators outside of California and states other than California have a great incentive to combat S.B. 1368.

IV. THE DORMANT COMMERCE CLAUSE: A FLY IN THE OINTMENT?

A. Brief History of the Dormant Commerce Clause

Article I, Section 8, Clause 3 of the United States Constitution provides that Congress has the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."[71] Although it is phrased as a "positive" grant of power to Congress to control interstate commerce, the Commerce Clause "has long been understood to have a 'negative' aspect that denies the States the power unjustifiably to discriminate against or burden the interstate flow of articles of commerce."[72] The basic principle of the dormant Commerce Clause is "that our economic unit is the Nation, which alone has the gamut of powers necessary to control of the economy."[73]

Two cases stand as the early foundation for dormant Commerce Clause jurisprudence. First, in *Gibbons v. Ogden*,[74] the Court, in overturning a steamboat monopoly given by New York State, considered briefly the question of whether Congress's powers under the Commerce Clause were exclusive.[75] Chief Justice John Marshall wrote that "[t]here is great force in this argument," but he declined to decide the case on those grounds.[76] Second, in *Cooley v. Board of Wardens*,[77] the Court upheld a Pennsylvania law that required pilots to be employed on ships entering or leaving the port of Philadelphia.[78] The Court held that the jurisdiction to regulate interstate commerce is concurrent between the federal government and the states.[79] The Court adopted a national-local distinction to guide in this analysis: "Whatever subjects of this power are in their nature national, or admit only of one uniform system, or plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by Congress."[80]

Although the Court has abandoned the national-local distinction, the basic rule still applies: States cannot discriminate unfairly against

71 U.S. CONST. art. I, § 8, cl. 3.
72 Or. Waste Sys., Inc. v. Dep't of Envtl. Quality, 511 U.S. 93, 98 (1994).
73 H.P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525, 537 (1949).
74 22 U.S. (9 Wheat.) 1 (1824).
75 *Id.* at 209.
76 *Id.*
77 53 U.S. (12 How.) 299 (1851).
78 *Id.* at 311–12.
79 *Id.* at 319.
80 *Id.*

interstate commerce, but they are not denied entirely the ability to affect or regulate interstate commerce.[81]

B. Relevance of the Dormant Commerce Clause to California's S.B. 1368

At first glance, S.B. 1368 presents a significant dormant Commerce Clause problem: It appears to discriminate openly against out-of-state electricity generators.[82] After a careful examination, however, the problem appears more complex. In passing the bill, the legislature made several findings that allege that the bill is indispensable to the state's environmental regulations, and that relate the bill to California's local interests.[83] Also, the bill does not really discriminate outright against importation of power; it just refuses to allow "dirty" power, in the same way as California might refuse to allow gasoline below a certain grade to be burned in-state for environmental reasons, except that the immediate environmental consequences of the "dirty" power occur out of state. The legislation is even-handed in its treatment of in-state and out-of-state interests: "Dirty" power generation is as impermissible within California as it is outside the state. Further complicating the issue, opponents of the bill have brought up the possibility of constitutional infirmity, specifically as to the dormant Commerce Clause, and some have even raised the specter of a court challenge.[84]

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81 *See infra* Part IV.C.

82 As a foundational issue, it is clearly settled law that the dormant Commerce Clause applies to the importation of power. That is, electricity is an item of interstate commerce for purposes of the dormant Commerce Clause. *See* Fed. Power Comm'n v. Union Elec. Co., 381 U.S. 90, 94 (1965) ("There is no question that the interstate transmission of electric energy is fully subject to the commerce powers of Congress.").

83 *See supra* notes 61–65 and accompanying text.

84 *See, e.g.*, *CA Lawmaker Proposes Utility GHG Standard Become State Law*, ENERGYWASHINGTON WEEK, March 1, 2006 (stating that Sempra Energy and Southern California Edison had raised constitutional concerns about the bill); *California GHG Standard*, *supra* note 60, at 11 (stating that "power generators in California and western states such as Wyoming, Montana and Utah" had complained about the bill, "with some alleging that . . . [it] . . . may violate" the dormant Commerce Clause.); Amethyst Cavallaro, *California on the Edge Again*, POWER GROUP ONLINE, http://pepei.pennnet.com/Articles/Article_Display.cfm?ARTICLE_ID=271934 (asking if "one state [has] the right to regulate how another state does business," and quoting Marcus Wood, an attorney for Stoen Rives, LLP, as saying that he expects a challenge to the law); Posting of Carter Wood to ShopFloor.org, http://blog.nam.org/archives/2006/09/command_and_con.php (Sept. 28, 2006, 06:41) (calling the bill "unconstitutional"). These sources also bring up the possibility of a Supremacy Clause violation; this possibility is outside the scope of this Note. For relevant discussion of the Supremacy Clause in similar contexts, see generally David B. Spence & Paula Murray,

S.B. 1368 presents significant constitutional analytical challenges: The legislation prohibits contracts with out-of-state entities failing to comply with environmental regulation, an innovative form of legislation not yet addressed by the Court; similarly, the Court has not dealt specifically with climate change as a balancing factor for potentially discriminatory legislation. These points will be discussed in more detail below.

C. *Basic Outlines of Current Dormant Commerce Clause Jurisprudence*

"Whether the issue is state taxation, state environmental regulation, truck safety, or something else, the cases have continually been decided on an ad hoc basis with the result being that there is no coherent theory for the Court to follow."[85] Part of the seeming incoherence of the Court's current dormant Commerce Clause jurisprudence is the confusion surrounding the Court's framework for analysis. The Court sometimes suggests a two-tiered analysis, and sometimes recognizes a third tier. For instance, in *Brown-Forman Distillers Corp. v. New York State Liquor Authority*,[86] the Court identified a two-tiered analysis, stating that when a statute is facially discriminatory, it will be invalidated without analysis of mitigating factors.[87] However, in *Hughes v. Oklahoma*,[88] the Court cited the *Pike* test[89] as the "general rule" of dormant Commerce Clause analysis; although it found the law facially discriminatory, it used balancing language and allegedly looked at the purpose of the statute and nondiscriminatory alternatives.[90]

The Law, Economics, and Politics of Federal Preemption Jurisprudence: A Quantitative Analysis, 87 CAL. L. REV. 1125, 1146–53 (1999).

85 Brian C. Newberry, *Taking the Dormant Commerce Clause Too Far?*—West Lynn Creamery, Inc. v. Healy, 114 S. Ct. 2205 (1994), 69 TEMP. L. REV. 547, 556 (1996); *see also* Winkfield F. Twyman, Jr., *Beyond Purpose: Addressing State Discrimination in Interstate Commerce*, 46 S.C. L. REV. 381, 383 (1995) (stating "that there is widespread agreement that the [dormant Commerce Clause] doctrine is incoherent").

86 476 U.S. 573 (1986).

87 *Id.* at 578–79.

88 441 U.S. 322 (1979).

89 *See* Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970) (articulating the general rule as follows: "Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.").

90 *Hughes*, 441 U.S. at 336–37.

Because of this ambiguity, any analysis will be at least partly artificial.[91] However, both as an aid in classifying the cases and as an invaluable tool for analysis of S.B. 1368, this Note will use a two-step classification scheme, as laid out below.

First, if a law overtly discriminates against interstate commerce, that is, if "simple economic protectionism is effected by state legislation, a virtual *per se* rule of invalidity has been erected."[92] An obvious example of this is where a state blocks all commerce at its borders.[93] In *City of Philadelphia v. New Jersey*,[94] a case involving the transfer of waste, discussed below, the Court suggested that if there was something about the transportation itself that justified discrimination, the law might be allowable.[95]

Second, if the law is facially neutral, but nonetheless has a discriminatory purpose or effect, the Court uses a balancing test, as found in *Pike v. Bruce Church*[96]: "[T]he extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities."[97] The Court places the burden on the state to prove the unavailability of less discriminatory measures and the importance of the local benefit being served by the challenged statute.[98] If the Court finds that the law is not discriminatory at all, either facially, in purpose, or in effect, then the law could be said to be per se valid. For instance, in *Henneford v. Silas Mason Co.*,[99] the Court held that a law imposing a "use" tax equivalent to an in-state sales tax was valid.[100] Justice Cardozo stated that "[e]quality is the theme that runs through all sections of the statute. . . . [T]he stranger

91 For instance, one commentator has observed that the per se rule of invalidity invites a conclusory analysis: "We are declaring your statute unconstitutional because it seems to affect insiders and outsiders differently . . . we do not need to explain further." Stanley E. Cox, *Garbage In, Garbage Out: Court Confusion about the Dormant Commerce Clause*, 50 OKLA. L. REV. 155, 167 (1997) (internal quotation marks omitted).

92 City of Phila. v. New Jersey, 437 U.S. 617, 624 (1978).

93 *Id.* at 624.

94 437 U.S. 617.

95 *Id.* at 628–29.

96 397 U.S. 137 (1970).

97 *Id.* at 142. Ironically, it is generally agreed that the law addressed using the balancing test in *Pike* could be found per se invalid today, although this fact does nothing to diminish the use of the *Pike* test today. *See* Cox, *supra* note 91, at 188.

98 Hughes v. Oklahoma, 441 U.S. 322, 336 (1979).

99 300 U.S. 577 (1937).

100 *Id.* at 587–88.

from afar is subject to no greater burdens as a consequence of ownership than the dweller within the gates."[101]

V. SUPREME COURT CASES AND ANALYSIS OF S.B. 1368

This Part will use the two-part analysis discussed in Part IV.C as an organizational scheme, along with the result in each case, and will apply the analysis under each subpart to S.B. 1368. Within each part, the cases are organized by how the Court characterized the law in question. Because of the dearth of analytical tools provided by the Court's jurisprudence, these characterizations are important as a means of analogy to S.B. 1368.

A. Facial Discrimination

1. Case Law

As explained above, the first step in a dormant Commerce Clause analysis is to determine if the statute facially discriminates against out-of-state economic interests. Discrimination may be defined as "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter."[102] As one commentator has said, "[i]f an ordinance burdens interstate and intrastate commerce equally, it cannot be said to discriminate against interstate commerce. Thus, to test properly for discrimination, a court must draw a line around a region, enabling it to evaluate whether local businesses enjoy a competitive advantage . . . ."[103]

a. Laws Prohibiting Export

In dealing with the conservation of natural resources, the Court has required states to justify discriminatory measures by a showing that the measure chosen is the least discriminatory of all possible measures. For example, in *Hughes*, the Court overturned a state statute prohibiting the export of minnows harvested from state rivers, streams, or lakes.[104] Justice Brennan, writing for the Court, held that this law was facially discriminatory, since it halted export at the state's borders.[105] "At a minimum such facial discrimination invokes the strictest scrutiny of any purported legitimate local purpose and of the

101 *Id.* at 583–84.

102 Or. Waste Sys., Inc. v. Dep't of Envtl. Quality, 511 U.S. 93, 99 (1994).

103 Catherine Gage O'Grady, *Targeting State Protectionism Instead of Interstate Discrimination Under the Dormant Commerce Clause*, 34 SAN DIEGO L. REV. 571, 583 (1997).

104 Hughes v. Oklahoma, 441 U.S. 322, 323 (1979).

105 *Id.* at 336.

absence of nondiscriminatory alternatives."[106] In looking at the potential "legitimate local purpose," the Court rejected Oklahoma's claim that the legislation was necessary as a conservation measure, on the grounds that the state had chosen the most discriminatory of all possible measures, that of an outright ban on export.[107]

In *New England Power Co. v. New Hampshire*,[108] the Court struck down a state statute that prohibited the exportation of electricity generated by hydroelectric power plants.[109] By trying to restrict the transfer of electricity in interstate commerce, New Hampshire had unconstitutionally protected its citizens at the expense of other states.[110] In *Wyoming v. Oklahoma*,[111] the Court struck down an Oklahoma regulation requiring Oklahoma coal power plants to burn coal mined in Oklahoma for at least ten percent of their coal needs.[112] The purpose of the bill, as set out by the Oklahoma legislature, was to keep ratepayer money in Oklahoma and to encourage in-state economic development.[113] The Court found that, because of the patent discrimination against out-of-state interests, the magnitude of the effect of the discrimination on out-of-state interests was irrelevant.[114] The Court then rejected Oklahoma's attempt to justify the statute by arguing that it lessened the power industry's reliance on a single source of coal.[115] Regardless of the legitimacy of the stated goal, Oklahoma could not reach it by cutting itself off from the national economy.[116]

b. Laws Prohibiting Import

Cases involving the physical transfer of waste from outside a state to a landfill inside the state form a large part of the Supreme Court's dormant Commerce Clause jurisprudence. The Court has consistently held that a statute or regulation that prohibits the importation of waste is invalid, in spite of cited health and safety concerns.

106 *Id.* at 337.

107 *Id.* at 337–38. Less discriminatory alternative means might have included limiting the number of minnows that could be harvested, or limiting the use of minnows within the state. *Id.* at 338.

108 455 U.S. 331 (1982).

109 *Id.* at 344.

110 *Id.*

111 502 U.S. 437 (1992).

112 *Id.* at 440, 461.

113 *Id.* at 443.

114 *Id.* at 455–56.

115 *Id.* at 456.

116 *Id.* at 456–57.

For instance, in *City of Philadelphia*,[117] the Court struck down a state statute that required approval of the commissioner of the State Department of Environmental Protection for importation of "any solid or liquid waste which originated or was collected outside the territorial limits of the State, except garbage to be fed to swine . . . ."[118] The commissioner could approve the transfer of the waste if it did not endanger "the public health, safety and welfare."[119] Pursuant to the statute, the commissioner promulgated regulations allowing four "narrow" categories of waste to enter the state.[120] In adopting the statute, the legislature made specific findings about the effect of out-of-state waste on New Jersey's environment based on rapidly-diminishing landfill space.[121]

In a majority opinion by Justice Stewart, the Court found that this statute was protectionist on its face, and therefore subject to the per se rule of invalidity.[122] The Court refused to address the question of legislative intent, although there was disagreement about whether the statute was specifically intended to protect New Jersey's economy; instead, the Court said that protectionism can be found in "legislative means as well as legislative ends."[123] Regardless of the legislative purpose behind the statute, the state could not discriminate "against articles of commerce coming from outside the State *unless there is some reason, apart from their origin, to treat them differently.*"[124] The key question, the Court said, was whether the state was trying to avoid the effects of "a problem common to many," that is, the problem of waste disposal, by isolating itself from interstate commerce.[125]

Where a state uses a fee structure to discourage disposal of waste in-state, the fee structure must charge an even-handed amount between waste generated in-state and out-of-state. In *Chemical Waste Management, Inc. v. Hunt*[126] the Court struck down a state fee structure that discriminated against out-of-state waste.[127] The Alabama statute at issue placed a cap on the amount of hazardous waste that could be disposed of in state, and imposed a fee of $25.60 per ton on all waste

117 437 U.S. 617 (1978).
118 *Id.* at 618.
119 *Id.* at 618–19.
120 *Id.* at 619.
121 *Id.* at 625.
122 *Id.* at 628–29.
123 *Id.* at 626.
124 *Id.* at 626–27 (emphasis added).
125 *Id.* at 628.
126 504 U.S. 334 (1992).
127 *Id.* at 334.

disposed under the cap limits.[128] In addition, the statute imposed an additional fee of $72.00 per ton on out-of-state waste.[129] The Court, reiterating the position of *City of Philadelphia* that a state cannot isolate itself from a common problem, held that the discriminatory fee structure was an improper means to a valid goal.[130] The Court required the state to show the existence of no other less discriminatory means and a legitimate local benefit, on the basis that the statute was facially discriminatory.[131] Alabama cited a number of important considerations in its use of the discriminatory fee, including environmental conservation, protection of citizens' health, and a revenue raising consideration; however, the Court rejected these justifications as insufficiently targeted towards out-of-state waste.[132] The Court required that the discrimination itself be justified by some reason other than "'economic protectionism.'"[133]

2. Is S.B. 1368 Facially Discriminatory?

S.B. 1368 initially appears discriminatory; by excluding electricity generated by noncompliant power plants from being the subject of long-term in-state contracts, the statute seems to set a barrier at the state's borders. However, at least facially, S.B. 1368 is not discriminatory. Unlike the law at issue in *New England Power*, S.B. 1368 does not give an economic advantage to in-state entities. That is, the law does not advantage in-state power suppliers or contractors; both are subject to the same regulation as those outside of California. Notably absent from the legislative history (or, for that matter, the political rhetoric surrounding the passage of the act) is discriminatory language or attitudes such as those reflected by former California Governor Davis's plans to favor "the development of generation capacity for in-state consumption."[134]

Further, unlike the law in *City of Philadelphia*, or the discriminatory fee structure in *Chemical Waste Management*, S.B. 1368 does not

128 *Id.* at 338.

129 *Id.* at 338–39.

130 *Id.* at 339–42.

131 *Id.* at 342–43.

132 *Id.* at 343–44.

133 *Id.* at 344 (quoting Wyoming v. Oklahoma, 502 U.S. 437, 454 (1992)).

134 *See* Fels & Lindh, *supra* note 48, at 28. Governor Davis decried the "10 to 12 percent of the electricity generated in California" that was exported to other states. *Id.* (quoting Press Release, Governor Gray Davis, State of State Address (Jan. 8, 2001), *available at* http://clinicalfreedom.org/Davis01.htm). He demanded that the electricity "stay in California to serve the people of this great state." *Id.* (quoting Governor Gray Davis, Transcript of Press Conference (Feb. 8, 2001)).

exclude California from a problem common to the nation. In fact, arguably the constitutional problem with the law is that it is *too* neutral: rather than regulating within California's sphere, it reaches through in-state contracts to burden out-of-state interests in the same way in-state interests are already burdened; the law subjects both to an equal emissions requirement. Whether this law violates the dormant Commerce Clause or not, it does not discriminate against interstate commerce on its face. Therefore, S.B. 1368 is not subject to the per se rule of invalidity.

B. The Pike Balancing Test

1. Case Law

a. Laws Voiding Other States' Economic Advantages

The Court will strike down statutes having the effect of robbing other states of their economic advantages, unless the statute is justified under the *Pike* balancing test. In *Hunt v. Washington State Apple Advertising Commission*,[135] the Court struck down a North Carolina statute requiring all closed containers of apples sold in the state to bear "the applicable U.S. grade or standard," and specifically disallowing apples bearing only a state grade.[136] Apple sellers in Washington State, the nation's largest apple producer, were affected the most by the statute, with Washington accounting for about half of all apples shipped in closed containers between states.[137] Washington had adopted a unique, stringent grading system of its own to guarantee the quality and reputation of Washington apples.[138] The grading system required careful state inspection, costing Washington apple growers around one million dollars per year; the Court found that the grading system was equal or superior to the equivalent federal grading standards.[139] In order for Washington apple growers to comply with the new North Carolina statute, they would have to use the federal grading system, thus foregoing the competitive advantage of the expensive, strict Washington grading system.[140] In spite of the legitimate local benefit, the Court found that the statute created too great

135 432 U.S. 333 (1977).

136 *Id.* at 335.

137 *Id.* at 336. North Carolina eventually adopted a regulation allowing apples sold in-state to bear the labels "'Unclassified,' 'Not Graded,' or 'Grade Not Determined,'" but disallowing state grades. *Id.* at 338 n.2.

138 *Id.* at 336.

139 *Id.*

140 *Id.* at 338.

a burden on interstate commerce.[141] Further, the Court found that this burden constituted "discrimination" for three reasons: the statute raised the costs of doing business in North Carolina for out-of-state apple sellers having a separate state grading system, the statute stripped Washington state of its competitive advantages, and the statute worked to the advantage of in-state apple sellers.[142]

It is important to distinguish this advantage to in-state sellers from the advantage discussed in the facially discriminatory cases. Obviously the types of advantage are not identical, or *Washington Apple* would have been analyzed as a case involving a facially discriminatory statute. The distinction considered abstractly is hard to discuss; in the context of the cases, the line becomes clear. In *Oklahoma*, the statute facially advantaged in-state coal producers. In *Washington Apple*, the statute facially required the same thing of in-state entities as it did of out-of-state entities; the *effects* of the statute, however, when considered in the context of Washington's competitive advantage, achieved through the expensive inspection system and grading standards, advantaged in-state apple growers.

Because the effect of the law in *Washington Apple* was "discrimination"—that is, the law imposed a discriminatory burden—for purposes of the dormant Commerce Clause analysis, the state had the responsibility to prove that the statute was justified because of the legitimate local benefits as well as the nonexistence of less discriminatory alternatives.[143] Although North Carolina acknowledged the burden on interstate commerce created by the statute, it claimed that the statute was justified by its local benefits: Prior to the statute's passage, thirteen different states shipped apples into North Carolina with state grading standards, many having similar confusing names.[144] Although the Court acknowledged consumer protection as a legitimate local benefit, it held that the statute was not justified on that basis: The statute did an insufficient job of improving the flow of information, and discrimination against Washington apples in particular did nothing to help consumers, since Washington apples were always equal or superior to equivalently graded apples under the federal standard.[145]

141 *Id.* at 352.

142 *Id.* at 351–53.

143 *Id.* at 353.

144 *Id.* at 349.

145 *Id.* at 353–54.

b. Laws "Reaching Into" Other States

In *Brown-Forman*, the Court held that New York State could not reach into another state and regulate liquor sales there.[146] In that case, New York had enacted a statute requiring producers of alcohol to sell to in-state wholesalers at prices no higher than the lowest price the producer charged anywhere else in the United States.[147] The law further required that the producer post a schedule with the Liquor Authority; schedules filed were effective for month-long periods.[148] The appellant paid a promotional allowance to wholesalers throughout the United States; the state Liquor Authority found that this allowance was inconsistent with the schedule filed by appellant, and that, further, the allowance had the effect of lowering the wholesale cost of liquor in other states, and so was a violation of the law requiring sales in New York not to exceed the price offered in any other state.[149] The Liquor Authority tried to revoke appellant's liquor license.[150] The Court held that the law was unconstitutional: "That the ABC Law is addressed only to sales of liquor in New York is irrelevant if the 'practical effect' of the law is to control liquor prices in other States."[151] The effect of the law was to require liquor producers, once they had posted a schedule in New York, to seek approval of the Liquor Commission before lowering prices below the schedule in any other state.[152] Possibly because the law did not just govern interstate commerce but in effect reached into other states to regulate prices of goods sold, or possibly because the "stated purpose" of the law was the economic goal of protecting consumers from price discrimination, the Court did not conduct the full *Pike* balancing test.[153]

c. Neutral Laws Designed to Protect Consumers

In *Exxon Co. v. Governor of Maryland*,[154] the Court upheld a Maryland statute that prohibited petroleum producers and refiners from

146 Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth., 476 U.S. 573, 585 (1986).

147 *Id.* at 575.

148 *Id.* at 575–76.

149 *Id.* at 577.

150 *Id.*

151 *Id.* at 583 (quoting S. Pac. Co. v. Arizona, 325 U.S. 761 (1945)).

152 *Id.* Although cases involving alcohol are complicated by the Twenty-First Amendment analysis, the Court held that the dormant Commerce Clause was unaffected by the Twenty-First Amendment here. *Id.* at 584.

153 *Id.* at 583.

154 437 U.S. 117 (1978).

operating retail service stations within the state.[155] The statute was enacted following a shortage of petroleum, during which retail service stations had preferred access to petroleum, making the shortage worse.[156] For at least one of the plaintiffs, Exxon, all of the refined gasoline sold in the state came from refiners located outside the state.[157] The Court held that the statute did not violate the dormant Commerce Clause: first, the statute did not discriminate against interstate commerce on its face; second, since there were no in-state refiners of gasoline, the statute was not protectionist in nature; finally, the statute did not regulate so-called independent dealers who do not refine or produce petroleum, and so did not treat in-state independent dealers any different from out-of-state independent dealers.[158] As to the last point, the Court noted that the statute would not alter the proportion in the Maryland gasoline market of goods coming from out of state and those coming from in state.[159] The Court held that this was so even though some of the business might shift to out-of-state independent dealers from out-of-state producers or refiners: "[I]nterstate commerce is not subjected to an impermissible burden simply because an otherwise valid regulation causes some business to shift from one interstate supplier to another."[160] The dormant Commerce Clause protects the interstate movement of goods from discrimination, not the makeup of a particular market, or particular interstate suppliers.[161]

d. Neutral Laws Regulating the Environment

In *Minnesota v. Clover Leaf Creamery*,[162] a Minnesota dairy challenged a statute prohibiting the sale of milk in plastic, nonreturnable containers.[163] In enacting the statute, the legislature found that sales of milk in these containers presented a "solid waste management problem for the state," encouraged "energy waste," and caused depletion of "natural resources."[164] The Court held, first, that the statute was not protectionist in purpose or effect, since it regulated evenhandedly between milk containers from outside the state and those

155 *Id.* at 119.
156 *Id.* at 121.
157 *Id.*
158 *Id.* at 125–26.
159 *Id.* at 126 n.16.
160 *Id.* at 127.
161 *Id.* at 127–28.
162 449 U.S. 456 (1981).
163 *Id.* at 458.
164 *Id.*

from inside the state, and therefore the statute was not subject to the virtual per se rule of invalidity.[165] In applying the *Pike* test, the Court held that the burden on interstate commerce would be "relatively minor."[166] Dairies inside and outside the state would have to accommodate their practices around the new regulation, and there was no evidence that the in-state dairies would somehow be advantaged by the law.[167] The Court also rejected a claim that in-state pulpwood producers would benefit disproportionately from the regulation; although pulpwood production was a major Minnesota industry, plastics would still be used in some milk containers, and the burden on the out-of-state interests was not clearly excessive compared to the in-state environmental benefits.[168] Alternative suggestions for alleviating the problem either created a greater burden on interstate commerce or were not as effective.[169]

2. Is S.B. 1368 Valid Under the *Pike* Balancing Test?

a. Does S.B. 1368 Burden Interstate Commerce, and Is It Therefore Subject to the Balancing Test?

If a law is found not to be facially discriminatory, the analysis turns to whether the law has a discriminatory effect on interstate commerce, and therefore whether the balancing test applies. The question here, as outlined in *Washington Apple*, is whether the statute imposes some additional burden on other states or entities in other states. Specifically, *Washington Apple* identified three types of discrimination applying in the context of out-of-state sellers: raising the cost of doing business for out-of-state sellers, stripping other states of their competitive advantages, and advantaging in-state sellers. All three of these apply to S.B. 1368: the statute requires out-of-state power suppliers having noncompliant power plants to either upgrade their facilities or to stop doing business in California; other states arguably have the competitive advantage of a lower regulatory standard, and this statute strips them of that advantage as to sales to California power suppliers; finally, in the *Washington Apple* sense, the statute advantages in-state sellers. That is, like the statute in *Washington Apple*, S.B. 1368 does not advantage in-state sellers on its face, but when considered in light of the fact that other states may (and do) have more permissive

165 *Id.* at 471–72.
166 *Id.* at 472.
167 *Id.* at 472–73.
168 *Id.* at 473.
169 *Id.* at 473–74.

environmental regulations relating to power plants, the statute advantages in-state power providers.

However, S.B. 1368's discrimination is not the same as the discrimination at issue in *Brown-Forman.* S.B. 1368 does not force sellers in other states to comply with its regulation separately from their dealings with California. In *Brown-Forman,* the law, in effect, regulated sales apart from those made in-state: Sales to consumers in other states were effected as well. S.B. 1368 certainly affects interstate commerce, but it does not prohibit "dirty" power plants from dealing with distributors in states other than California. Therefore, *Brown-Forman*'s refusal to use the *Pike* balancing test analysis is irrelevant to S.B. 1368.

b. Is S.B. 1368 Invalid Under the *Pike* Balancing Test?

Because S.B. 1368 is not facially discriminatory but is discriminatory in effect, the law is subject to the *Pike* balancing test. To be constitutional, a law's discriminatory effects cannot outweigh its local benefits; because of the ad hoc and subjective nature of this analysis, the most effective predictions must be made through careful examination of the Court's prior jurisprudence.

The invalid law closest to S.B. 1368 is the law in *Washington Apple.* Both laws appear to govern neutrally but are actually discriminatory in effect. In each instance, the law increases the burden on out-of-state entities trying to do business with in-state entities, while couching that burden in neutral language. However, a careful reading of the balancing analysis in *Washington Apple* reveals an important difference between the apple grading standard law in *Washington Apple* and S.B. 1368: S.B. 1368 actually will further its purpose of lowering carbon emissions, while the law in *Washington Apple* did not further its purpose of protecting consumers[170] because the Washington apple standards discriminated against were actually more rigorous than the applicable federal standards, while the out-of-state emissions standards at odds with S.B. 1368 are clearly lower than the new California standards.

Compared to the law in *Exxon,* S.B. 1368 regulates an industry that has both in-state and out-of-state providers; therefore, it is possible that the law could protect the in-state providers from competitors outside the state. The Court in *Exxon* did note that the dormant Commerce Clause does not protect the particular makeup of an interstate market,[171] but S.B. 1368 threatens to move business from out-of-state interests to in-state interests, something the law in *Exxon* did not do.

170 *See* Hunt v. Wash. State Apple Adver. Comm'n, 432 U.S. 333, 353–54 (1977).
171 Exxon Co. v. Governor of Md., 437 U.S. 117, 127–28 (1978).

For this reason, the burden on interstate commerce imposed by S.B. 1368 is greater than that imposed in *Exxon*.

The closest valid law to S.B. 1368 from a dormant Commerce Clause perspective is the law at issue in *Clover Leaf*. In both cases, the law was enacted for a legitimate, environmental purpose. In both cases, the law is facially neutral. Further, the burden on interstate commerce is similar: Both in-state and out-of-state sellers have to adapt to the law, but only as far as products shipped into the state, and the regulations are specifically tailored to prohibit only the portions of the products (either the environmentally damaging milk containers or the production of power by environmentally "dirty" means) that are related to the state purpose.

However, there is one significant difference between S.B. 1368 and the law at issue in *Clover Leaf*. The law in *Clover Leaf* specifically targeted a "local" problem: That is, the environmental damage at issue was a burden borne by the state and the state's residents. The waste management problems created by plastic milk containers had to be dealt with inside Minnesota. S.B. 1368 is specifically targeted to a problem that is clearly not "local," and, in fact, the problem the law is designed to fix is created outside California's borders.

In spite of this difference, there are several reasons to believe that the local benefit created by the law is sufficient to prevent it from being found unconstitutional under the dormant Commerce Clause. First, the California legislature, likely aware of the dormant Commerce Clause questions presented by the law, made a number of legislative findings related to the in-state effects of climate change.[172] The findings section referred to Governor Schwarzenegger's executive order, which discussed the threat to California's oceanfront, the Sierra snowpack, and the health of California citizens.[173] Second, because of the near-universal scientific acceptance of the connection between greenhouse gas emissions and climate change, California can only control the problems of climate change within its state if it can control the environmental quality of the products, including electricity, that its citizens are consuming, at least in the absence of federal legislation. Third, forcing California power plants to comply with California's stricter emissions requirements, effectively internalizing environmental costs, but allowing other power plants in the west to produce "dirty," cheap power and export it to California, would unduly disadvantage California's power industry—S.B. 1368, in effect, requires that out-of-state industries internalize their environmental

172 Act of Sept. 29, 2006, ch. 598, § 1, 2006 Cal. Legis. Serv. at 3794.
173 *Id.*

costs.[174] Finally, because of a federalism-related argument that will be discussed below, states should be given the benefit of the doubt when attempting to use effective means to regulate the environment.

E. One Significant Policy Consideration: The Role of States in Environmental Regulation

The Court has held that federal regulation of the environment is constitutionally valid under the Commerce Clause, although this power is slowly being eroded.[175] Also, federal regulation of the environment is desirable for a number of reasons. First, federal regulation preempts potential interstate conflicts. Second, federal regulation is vitally important when an international environmental problem is at issue. Finally, federal regulation, because of its uniformity, is more likely to effectively deal with a national environmental concern.[176]

Also, it is important to note that the strongest arguments in favor of state regulation of the environment may be inapplicable to the problem of climate change. The greatest benefits of state regulation, as Professor Jonathan Adler points out, stem from the local nature of the problem being remedied.[177] A localized regulation can be tailored closely to match a localized problem; similarly, local knowledge

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174 *See* Kirsten H. Engel, *The Dormant Commerce Clause Threat to Market-Based Environmental Regulation: The Case of Electricity Deregulation*, 26 ECOLOGY L.Q. 243, 250–51 (1999) (arguing that, in some environmental circumstances, applying the dormant Commerce Clause strictly may actually discourage economic efficiency, since some state statutes force industries to internalize their environmental costs).

175 Hodel v. Va. Surface Mining & Reclamation Ass'n, Inc., 452 U.S. 264, 277 (1981). The Court has significantly constricted the power of Congress under the Commerce Clause since it decided *Hodel*, although it has not explicitly overruled its holding there. *See* Jonathan Cannon, *Environmentalism and the Supreme Court: A Cultural Analysis*, 33 ECOLOGY L.Q. 363, 389 (2006). Professor Klein has argued that the Court has steadily diminished the ability of both the federal government and state governments to regulate the environment by shrinking the federal government's power under the "positive" Commerce Clause and by expanding the dormant Commerce Clause, respectively. *See* Christine A. Klein, *The Environmental Commerce Clause*, 27 HARV. ENVTL. L. REV. 1, 4 (2003).

176 Jonathan H. Adler, *Jurisdictional Mismatch in Environmental Federalism*, 14 N.Y.U. ENVTL. L.J. 130, 140–42 (2005); *see also* Richard B. Stewart, *Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy*, 86 YALE L.J. 1196, 1211–15 (1977) (arguing that federal action can more appropriately address environmental problems). *But see* Richard L. Revesz, *Federalism and Interstate Environmental Externalities*, 144 U. PA. L. REV. 2341, 2374–76 (1996) (criticizing federal environmental legislation on the grounds that it has been ineffective at forcing internalization of environmental costs).

177 Adler, *supra* note 176, at 137–38.

and expertise can be brought to bear in crafting legislation aimed at a uniquely local problem.[178] This justification is inapplicable in the context of climate change, since the problem is hardly unique to any single locality.

What, however, is the role of states in environmental regulation when the federal government refuses to act? Should states be given a little more constitutional leeway to enact environmental regulations that arguably burden interstate commerce impermissibly? Justice Brandeis, in his dissent in the 1932 case *New State Ice Co. v. Liebmann*,[179] famously described states as laboratories of democracy: "Denial of the right to experiment may be fraught with serious consequences to the Nation. It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory."[180] Professor Adler has argued that, in the context of at least some environmental problems, state regulation has some significant advantages over federal regulation.[181] One of these advantages is the flexibility that a state, acting on its own to combat an environmental problem, can have to create innovative legislative solutions.[182] Because of these "new and improved" legislative techniques, states have the benefit of learning "from each others' successes and failures."[183] These justifications are particularly relevant as applied to S.B. 1368.[184] Because its risks—a potentially reduced electricity supply with corresponding higher prices—are limited to California, other states will have an opportunity to gauge the effectiveness and practicality of S.B. 1368 without endangering their own electricity supply. Further, should S.B. 1368 prove to be as effective as the California legislature expected it to be, it could be a powerful political tool for congressmen (or a future president) trying to push through similar legislation on a national level.

178 *Id.* If it is, in fact, "more efficient and effective to address environmental problems through institutions of equivalent scope as the problem in question," then only action on the national or international level, possibly through an international treaty, can adequately address the problem of climate change. *Id.* at 133.

179 285 U.S. 262 (1932).

180 *Id.* at 311.

181 Adler, *supra* note 176, at 134–39.

182 *Id.* at 137.

183 *Id.*

184 Federalist arguments in dormant Commerce Clause contexts frequently come from strange places. As Professors Spence and Murray have pointed out, this context puts particular judges in a conflicted position: Often, their federalist tendencies conflict with their political feelings regarding the regulation at issue. *See* Spence & Murray, *supra* note 84, at 1128–29.

CONCLUSION

Scientists, government reports, the media, and common sense all tell us that our climate is changing. And if high summer temperatures, their accompanying blackouts, and heat-related deaths are not enough to motivate us try to fix the problem, climate change threatens to cause a litany of climate-related terrors worthy of a Hollywood disaster flick: rising sea levels, melting glaciers, reduced water supply, and increased hurricanes.

Whether the most extreme of these potential consequences are realistic, they are part of the public perception of climate change. In response to these threats to the planet, to public concern, and to the federal government's perceived failure to act, can a single state adopt an innovative measure tailored to reduce that state's impact on the environment? California's S.B. 1368 is a potentially effective measure, targeted at reducing California's "environmental footprint," even outside of the state. The statute requires utility companies desiring to supply California with electricity to internalize their environmental costs. A court considering the constitutionality of the measure should defer to the California legislature in its judgment; in so doing, a court would be striking a blow for the environment. More importantly, the measure should be considered constitutional because, under the analysis laid out above, it is consistent with the Supreme Court's dormant Commerce Clause precedent. California should be afforded the right to respond to this threat, to be "the leader in the fight against climate change."[185]

185 Bustillo, *supra* note 30 (quoting Governor Schwarzenegger).