An important postscript to my earlier post regarding Berkeley Law's/CLEE's newly-published white paper on Proposition 23. That's the California initiative measure that, if approved by voters this November, would suspend implementation of that state's Global Warming Solutions Act, better known as AB 32.

The San Francisco Chronicle reports today that the Attorneys General of Alabama, Nebraska, North Dakota and Texas are devising an AB 32 back-up plan: if California voters reject Proposition 23 at the polls this fall, leaving AB 32 in effect, the four Attorneys General plan to file a lawsuit against the State of California challenging the constitutionality of AB 32.

According to the Chronicle, the AGs' legal claim is that California's efforts to reduce that state's greenhouse gas emissions to 1990 levels by the year 2020 run afoul of Dormant Commerce Clause principles. Specifically, the theory goes, AB 32 discriminates against interstate commerce by, e.g., limiting importation of electricity generated by out-of-state, coal-fired power plants that's intended to serve California consumers.

One motivation behind the AGs' proposed constitutional challenge to AB 32 is the fear that as California goes, so goes the rest of the nation. And that's not an idle concern: Minnesota, for example, recently enacted legislation mandating a 30% reduction in CO2 emissions from coal-fired power plants by 2012, and an 80% reduction by 2050. This alarms Minnesota's neighboring state of North Dakota, which supplies 60% of Minnesota's energy, much of it from a huge North Dakota coal mine. So it's probably unsurprising that North Dakota's Attorney General reportedly is no more enamored of the new Minnesota law than he is of California's AB 32.

The AGs' proposed lawsuit attacking AB 32 is not free from irony. At the same time he's challenging California's constitutional authority to regulate greenhouse gases at the state level, for example, Texas' AG has sued USEPA in separate litigation, challenging the Obama Administration's efforts to regulate GHGs on a national basis.

Some will say that this is another example of state Attorneys General using their considerable legal authority for crassly political purposes–just as some of the same AGs may be in filing suit to challenge health care legislation supported by the Obama Adminstration and recently enacted by Congress. And such a constitutional challenge to AB 32 would raise a host of interesting legal questions: for example, do

the AGs have standing to pursue this litigation against California?

Nevertheless, it's quite likely that any Dormant Commerce Clause-based litigation to AB 32 will carry more credibility–both in the courtroom and the court of public opinion–if it's advanced by the chief law enforcement officers of sovereign states than would a comparable lawsuit filed by business interests seeking to protect their corporate bottom lines.

This update: the North Dakota Attorney General's Office announced on 9/10 that while it is considering suit against Minnesota over the new Minnesota legislation described above, North Dakota "is not currently contemplating" litigation against California to challenge AB 32.