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Dr. CARB or: How I Learned to Stop Worrying About the Feds and Love States' Rights

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Abstract

Climate change is one of the largest environmental problems the world is currently facing. At the forefront of the climate change issue is the problem of carbon emissions. Environmentalists were hopeful that a national regulatory structure would be created with the enactment of the Clean Air Act in the 1970s. Since its enactment, however, it is clear the Clean Air Act was not the solution to the national carbon emissions problem environmentalists were hoping for. With the federal government failing to act, states have taken it upon themselves to regulate carbon emissions. California, with its enactment of the California Low Carbon Fuel Standard, has taken important steps to reduce carbon emissions through the regulation of carbon production in the creation of alternative fuels. But regulation of an interstate problem raises certain constitutional issues, namely the dormant Commerce Clause. The dormant Commerce Clause is the inverse of the Commerce Clause found in Article I, Section 8, clause 3 of the United States Constitution, which gives Congress the power to regulate commerce among the several states. Inversely, the dormant Commerce Clause prohibits a state from regulating commerce that extends beyond its borders. The United States Ninth Circuit Court of Appeals recently held that California's Fuel Standard did not violate the dormant Commerce Clause. This Note

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analyzes the California Low Carbon Fuel Standard and the ruling of the Ninth Circuit. Based on this analysis, this Note explains what will and will not work when drafting emissions regulations after the Ninth Circuit's decision. Finally, this Note makes recommendations to state legislatures attempting to draft carbon emissions regulations. These recommendations will hopefully aid states in drafting legislation that will avoid dormant Commerce Clause violations.

Table of Contents

I. Introduction

Modern environmentalists have looked at the federal government of the United States of America as the defender of the environment.[1] Since the creation of the Environmental Protection Agency (EPA) in December 1970, environmentalists

1. *See* ROBERT V. PERCIVAL ET AL., ENVIRONMENTAL REGULATION: LAW SCIENCE AND POLICY 90–91 (6th ed. 2009) (describing the rise of the modern environmentalism movement which called for federal action to protect the environment).

have had high hopes for national regulation of the environment.[2] These hopes were fueled with the passage of legislation like the Clean Air Act (CAA)[3] and Clean Water Act (CWA).[4] But the federal government has yet to institute nation-wide regulatory schemes to protect the emission of greenhouse gasses.[5] Proposed global warming legislation stalled in the United States Congress and has little chance of being passed in the near future.[6] As a result, the some states have created their own climate change legislation.[7] Due to the lack of federal legislation, states are left with the option of becoming the "laboratories of experimentation" described by former Supreme Court Justice Louis Brandeis.[8]

Climate change, pollution, and protection of natural resources are difficult problems for states to address in the

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2. *See id.* at 91 (noting how by 1970, environmental causes became 'the favorite sacred issue of all politicians, all TV networks, all goodwilled people of any party', citing THEODORE WHITE, THE MAKING OF THE PRESIDENT 45 (1973)).

3. *See* 42 U.S.C.A. § 7545 (West) (providing for the regulation of fuels).

4. *See generally* 33 U.S.C. §§ 1251-1387 (2006).

5. *See* Nicholas Loris, *Congress Should Stop Regulations of Greenhouse Gases*, THE HERITAGE FOUNDATION (Sept. 23, 2013), available at http://www.heritage.org/research/reports/2013/09/congress-should-stop-regulations-of-greenhouse-gases (giving the background of the EPA's regulation of carbon-dioxide) (on file with the WASHINGTON AND LEE JOURNAL OF ENERGY, CLIMATE AND THE ENVIRONMENT).

6. Ben Geman, *Heat Wave, Fires have Climate Change Activists Going on the Offensive*, THE HILL, (July 6, 2012, 10:00AM), http://thehill.com/policy/energy-environment/236391-heat-wave-fires-leave-some-climate-change-supporters-looking-to-go-on-offense (explaining that there is little hope for climate change legislation from Congress after the 2010 bill failed) (on file with the WASHINGTON AND LEE JOURNAL OF ENERGY, CLIMATE AND THE ENVIRONMENT).

7. *See State Legislation from Around the Country*, CENTER FOR CLIMATE AND ENERGY SOLUTIONS (last visited Dec. 1, 2014, 3:44 PM), http://www.c2es.org/us-states-regions/key-legislation (listing the various state programs to address climate change) (on file with the WASHINGTON AND LEE JOURNAL OF ENERGY, CLIMATE, AND THE ENVIRONMENT).

8. *See* New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("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; and try novel social and economic experiments without risk to the rest of the country.").

United States' federalist system.[9] One of the biggest challenges facing states in their regulation of the environment is the constitutionality of the statutory schemes that would be required to regulate air pollution.[10] States run the risk of regulating beyond their borders, protecting in-state interests at the expense out-of-state economies.[11] According to one legal scholar, "[w]ith traditional environmental, command-and-control regulation, states can target air emissions, water pollution, and land use practices of facilities located wholly within state borders and often achieve meaningful progress. These approaches, however, are of limited effect in the area of climate change because of its national and international scope."[12] States also run the risk of regulating beyond their place in the federalist system.[13] Due to the nature of environmental issues states are attempting to regulate, the efficacy of the regulatory scheme is dependent on the state's ability to influence action in the stream of interstate commerce, the regulation of which is enumerated to Congress in the Constitution of the United States.[14]

As Article 1, Section 8, Clause 3 of the Constitution, also known as the Commerce Clause, establishes, "[t]he Congress shall have the Power . . . [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."[15] In contrast, the dormant, or negative, view on the Commerce Clause represents the concept that, because Congress has the enumerated power to regulate interstate commerce, the

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9. *See* Christine A. Klein, *The Environmental Commerce Clause*, 27 HARV. ENVTL. L. REV. 1, 60–65 (2003) (discussing the different viewpoints regarding environmental protection and federalism).

10. *See* Klein, *supra* note 9, at 1–3 (introducing how the commerce clause affects a state's ability to regulate environmental issues).

11. *See* Klein, *supra* note 9, at 3 ("Such state efforts may have economic consequences for the free market and economic benefits for the regulating state, thus treading perilously close to the Court's expanding view of economic protectionism forbidden under the commerce clause.").

12. Alexandra B. Klass, *Climate Change and the Convergence of Environmental and Energy Law*, 24 FORDHAM ENVTL. L. REV. 180, 198 (2013) (citations omitted).

13. *See* Klein, *supra* note 9, at 5 (highlighting instances when environmental measures have been invalidated as violating the Commerce Clause).

14. *See* U.S. CONST. art. I, § 8, cl. 1, 3 (granting Congress the power to regulate interstate commerce).

15. *Id.*

states are forbidden from doing so.[16] The purpose of the dormant Commerce Clause is the avoidance of economic and political protectionism created through state and local statutory schemes.[17] Throughout history, the dormant Commerce Clause has been used by out-of-state entities to attack environmental regulations they claim unconstitutionally hinder their ability to compete in a particular state's marketplace.[18]

Even with this significant barrier to state action, state regulation of the environment is the best, if not the only, option available for regulating greenhouse gasses. This Note will focuses on a recent challenge undertaken by the Rocky Mountain Farmers Union (RMFU) against a regulatory scheme enacted by the State of California.[19] The District Court for the Eastern District of California determined that California violated the dormant Commerce Clause when it attempted to regulate carbon emissions in transportation fuels.[20] The Court of Appeals for the Ninth Circuit overruled the district court decision, which provides a beacon for states and environmentalists alike.[21] This Note will analyze the rulings of the two courts and assess their impact on state legislation in the field, discussing what regulations will still work, what will not work, and where state regulatory schemes can go from here.[22] Because of California's

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16. *See* Gibbons v. Ogden, 22 U.S. 1, 3 (1824) (stating that no part of the power to regulate interstate commerce can be exercised by the States).

17. *See* Andrew D. Thompson, *Public Health, Environmental Protection, and the Dormant Commerce Clause: Maintaining State Sovereignty in the Federalist Structure*, 55 CASE W. RES. L. REV. 213, 219 (2004) (describing the purpose of the dormant Commerce Clause as the prevention of potential hostilities due to economic protectionism and the protection of natural resources).

18. *See infra* Part II.

19. *See generally* Rocky Mountain Farmers Union v. Corey, 730 F.3d 1070 (2013) (reviewing California's Fuel Standard).

20. *See* Rocky Mountain Farmers Union v. Corey, 730 F.3d 1070, 1086 (2013) (concluding California's efforts "violated the dormant Commerce Clause by (1) engaging in extraterritorial regulation, (2) facially discriminating against out-of-state ethanol, and (3) discriminating against out-of-state crude oil in purpose and effect"); *see also* CAL. CODE REGS. tit. 17, § 95480 (2010) (giving the purpose of California's low-carbon fuel standard legislation).

21. *See Rocky Mountain*, 730 F.3d. at 1078 (finding the regulation did not "facially discriminate against out-of-state commerce").

22. *See* Sarah Kunkleman, *Attorneys Say States Can Protect Against Constitutional Challenges to Climate Rules*, 199 DAILY ENVTL. REP.

unique position as the only state permitted by Congress to attempt regulation of emissions from motor vehicles, the Ninth Circuit's ruling is important as a guide for states attempting to enact legislation to regulate emissions. The ruling of the Ninth Circuit can be viewed as a preview of dormant Commerce Clause challenges to state regulation of other sources of greenhouse gasses.

Part II of this Note will focus on the history of dormant Commerce Clause jurisprudence from its theoretical development to its more modern analysis. Part III analyzes the text of California's Fuel Standard. Part IV discusses RMFU's challenge to the Fuel Standard in the federal trial and appellate courts. Part V analyzes what drafting techniques, in light of RMFU's recent appellate court challenge, states can employ so environmental protection legislation will not violate the dormant Commerce Clause. Namely, states can ensure their legislation pursues a permissible aim, utilizes geographic factors that are directly tied to the reduction of carbon emissions and not to the protection of local economies, and finally employs alternative regulatory structures. Generally, this Note attempts to show that, while federal action in the forum of greenhouse gasses is lacking, state regulations can be an effective way of controlling the issue.

II. History of the Dormant Commerce Clause

The dormant Commerce Clause is not an actual clause in the Constitution.[23] "It is the Court which has imposed the policy under the dormant Commerce Clause . . . ."[24] The dormant Commerce Clause finds its origins in the interstate commerce

(BNA), at A-1 (Oct. 15, 2013) (opining that states can protect against dormant Commerce Clause challenges when drafting legislation).

23. *See* Martin H. Redish & Shane V. Nugent, *The Dormant Commerce Clause and the Constitutional Balance of Federalism*, 1987 Duke L.J. 569, 571 ("[T]he simple fact is that there is no dormant commerce clause to be found within the text or textual structure of the constitution.").

24. W. Lynn Creamery, Inc. v. Healy, 512 U.S. 186, 217 (1994) (Rehnquist, C.J., dissenting).

clause and its contours have been developed over the years through judicial interpretation.[25]

A. Theoretical Development

The Supreme Court first addressed the "negative" Commerce Clause in *Gibbons v. Ogden*.[26] Though the holding of *Gibbons* relied specifically on Article 6, Clause 2 of the Constitution, known as the Supremacy Clause, the dicta of Chief Justice John Marshall's opinion seemed to lay the groundwork for virtually exclusive federal power over interstate commerce through the dormant Commerce Clause.[27] This exclusive federal power is created by two restrictions on state power from the Commerce Clause.[28] As one legal scholar has stated, "First, Congress can preempt state law merely by exercising its Commerce Clause power. Second, the Commerce Clause itself—absent action by Congress—restricts state power; the grant of federal power implies a corresponding restriction of state power."[29] This implicit restriction on states limits their ability to regulate intrastate activities that impact interstate activities.[30]

In *Gibbons*, New York attempted to monopolize the licensing of steamboat operators on New York waters.[31] The New York law was enforced to the exclusion of other state licenses and

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25. *See, e.g.*, Pike v. Bruce Church, Inc., 397 U.S. 137 (1970); Philadelphia v. New Jersey, 437 U.S. 617 (1978); Maine v. Taylor, 477 U.S. 131 (1986).

26. *See* Gibbons v. Ogden, 22 U.S. 1, 19–20(1824) (highlighting the uncertain application of the Commerce Clause in areas where Congress has not yet legislated).

27. *See* Klein, *supra* note 9, at 23–24 (explaining Chief Justice Marshall's desire to establish a vast and exclusive federal commerce power limited only by the Constitution itself); See *Gibbons*, 22 U.S. at 3 (noting the power to regulate commerce is general, and has no limitations except those that are prescribed in the Constitution itself).

28. *See* Paul E. McGreal, *The Flawed Economics of the Dormant Commerce Clause*, 39 WM. & MARY L. REV. 1191, 1191–92 (1998) (explaining the restrictions placed on state power by the Commerce Clause).

29. *Id.* at 1192 (citations omitted).

30. *See id.* at 1191 (describing the impact of the dormant Commerce Clause on the states).

31. *See Gibbons*, 22 U.S. at 4–7 (existing New York law required a New York license to operate a steamboat between New York and New Jersey).

a federal licensing system.[32] Chief Justice Marshall ruled that the New York law was "repugnant to that clause of the constitution of the United States, which authorizes Congress to regulate commerce . . . according to the laws of the United States . . . ."[33] Chief Justice Marshall's opinion favored a broad power of the federal government over interstate commerce.[34] This holding "adopt[ed] a principle which acknowledge[d] the right of Congress, over a vast scope of internal legislation, which no one has heretofore supposed to be within its powers."[35] The Court acknowledged situations where states could enact laws that nevertheless would have an impact on interstate commerce, but distinguished the police power of the state from any power to interfere in commerce.[36] The Court's decision included health laws—such as quarantine laws—in the category of validly exercised police power, but stated that if a state passed a health law as pretext the enactments should be void.[37] If "under the pretext of executing its power, [a state] pass[es] laws for the accomplishment of objects not entrusted to the government" the Court would have the duty of striking down the law.[38] The Court reasoned that the framers of the Constitution granted Congress plenary authority over interstate commerce in "the conviction that in order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation."[39] Though the distinction between state police power and state interference in interstate commerce

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32. *See id.* at 4–5 (outlining the New York licensing procedure and the effect of the license on other states).

33. *Id.* at 1.

34. *See* Klein, *supra* note 9, at 24 (explaining Chief Justice Marshall's opinion as "whittling down the role of the states in regulating . . . interstate commerce.").

35. *Gibbons*, 22 U.S. at 19.

36. *See id.* at 31 (explaining how a state's police power may exist, but it cannot be inconsistent with an act of Congress); Trevor D. Stiles, *Renewable Resources and the Dormant Commerce Clause*, 4 ENVT'L & ENERGY L. & POL'Y J. 33, 58 (2009) (explaining the dichotomy of state action created by Chief Justice Marshall).

37. *See Gibbons*, 22 U.S. at 20 (explaining that quarantine laws would be an acceptable exercise of power).

38. McCulloch v. Maryland, 17 U.S. 316, 423 (1819).

39. *See* Hughes v. Oklahoma, 441 U.S. 322, 325 (1979) (describing the intent of the Framers of the Constitution).

may have been clear to Chief Justice Marshall in *Gibbons*, the Court has been required to revisit the dormant Commerce Clause analysis in an attempt to deal with current issues.[40]

B. Modern Analysis

State statutes and regulations fall into three categories for dormant Commerce Clause analysis: (1) those that are facially discriminatory, (2) those that are facially neutral but with discriminatory purpose or effect, and (3) those that are not facially discriminatory but have an adverse effect on interstate commerce.[41] This Note will discuss the two main tests used in analyzing these three categories, the virtual *per se* invalidity test[42] and the *Pike* balancing test.[43] Though political protectionism is also a facet of the application of the dormant Commerce Clause, this Note will focus on the RMFU's claim of economic protectionism.[44] The modern rationale of the dormant Commerce Clause comes from the need to limit economic and political protectionism by individual states.[45] The test that is used depends on the nature of the state statute's interference with interstate commerce.[46] If the statute is facially neutral and regulates evenhandedly with only incidental effects on interstate

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40. *See* Stiles, *supra* note 36, at 58 (stating that many state actions may fall clearly under the state police power and yet still fall short of constitutionality under disparate impact analysis).

41. *See* Kathleen M. Sullivan & Noah Feldman, CONSTITUTIONAL LAW, 232–33 (18th ed. 2013) (describing the three modern categories of dormant commerce clause challenges).

42. *See* City of Philadelphia v. New Jersey, 437 U.S. 617, 624 (1978) ("[W]here simple economic protectionism is effected by state legislation, a virtually per se rule of invalidity has been erected.").

43. See Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970) (introducing how to evaluate a state statute or regulation under the *Pike* balancing test).

44. *See* Rocky Mountain Farmers Union v. Goldstene, 843 F. Supp. 2d 1071, 1086 (E.D. Cal. 2011) (explaining how economic protectionism shapes dormant Commerce Clause analysis).

45. *See* Thomas Alcorn, *The Constitutionality of California's Cap-and-Trade Program and Recommendations For Design of Future State Programs*, 3 MICH. J. ENVTL. & ADMIN. L. 87, 122 (2013) (explaining the central purpose of the dormant Commerce Clause).

46. *See* Thompson, *supra* note 17, at 223 (explaining the appropriate uses for each of the modern analytical tests).

commerce, the *Pike* balancing test is applied.[47] If the statute discriminates against interstate commerce on its face, in practical effect, or if its purpose is discriminatory, the virtual *per se* invalidity test is applied.[48] The Supreme Court defines discrimination in relation to the Commerce Clause as "differential treatment of in-state and out-of-state economic interest that benefits the former and burdens the latter."[49]

1. Pike Balancing Test

In *Pike v. Bruce Church, Inc.*, the Supreme Court determined whether legislation enacted by the State of Arizona violated the dormant Commerce Clause.[50] Arizona's legislation required cantaloupes grown in Arizona to be packaged in the state and transported in containers approved by a state official.[51] Bruce Church, Inc. had been shipping its high quality cantaloupes across the border to a processing factory in California, packing them with the California packaging company's label, and then distributing them for sale in California and Arizona.[52] Arizona brought suit against Bruce Church to ensure that their high quality product would be labeled as coming from Arizona thereby increasing the reputation of other farms in Arizona.[53] In order to effectuate the Arizona legislation, Bruce Church would have to spend several months constructing a new packing facility in Arizona, at a cost of over $200,000.[54]

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47. *See* Hughes v. Oklahoma, 441 U.S. 322, 336 (1979) (describing the approach to dormant Commerce Clause analysis under the balancing test).

48. *See* Hughes v. Oklahoma, 441 U.S. 322, 336–37 (1979) (describing the alternative approach to the dormant Commerce Clause when a statute is discriminatory on its face or in practical effect).

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

50. *See* Pike v. Bruce Church, Inc., 397 U.S. 137, 138 (1970) (evaluating a state law related to selling cantaloupes outside of the state).

51. *See id.* at 138 (explaining the parameters of the Arizona law).

52. *See id.* at 139–40 (describing the business practices of Bruce Church, Inc.).

53. *See id.* at 142–43 (stating the local interest for the statute was to protect the reputation of Arizona growers).

54. *See id.* at 140 (describing the consequences of Bruce Church, Inc. adhering to the Arizona statute).

The Court looked to whether a state statute "regulates even-handedly to effectuate a legitimate local public interest, and [whether] its effects on interstate commerce are only incidental."[55] The statute "will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits."[56] Justice Potter Stewart, writing for the Court, went on to say that when a legitimate local interest is found, the extent the interference with interstate commerce will be tolerated is based on the nature of the interference and the degree to which it could be advanced with less impact.[57] In his analysis of the legitimacy of the local interest involved, Justice Stewart found that the state's interest in protecting the reputation of growers in the state and the state's interest in maximizing financial returns to an industry within it, are legitimate.[58] As the interest was legitimate and the statute was not facially discriminatory, there was a presumption of validity.[59] This presumption of validity was overcome by the fact that the regulation had a "far different impact, and quite a different purpose."[60]

The Court balanced the legitimate local interest of protecting growers reputations against requiring Bruce Church to construct a packaging plant at a cost of $200,000 rather than send its produce to a nearby California packaging plant, and found that the burden imposed on commerce was excessive in relation to its local benefits.[61] Justice Stewart stated that the "nature of that burden is, constitutionally, more significant than its extent."[62] Justice Stewart concluded by stating "[s]uch an incidental consequence of a regulatory scheme could perhaps be

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55. *Id.* at 142 (citing Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440, 443 (1960)).

56. *Id.*

57. *Id.* (discussing the extent to which a legitimate local interest may burden interstate commerce).

58. *See id.* at 143 (stating that the Arizona law did not fall under a protected category of local regulation of a safety field).

59. *See id.* (listing the requirements for a presumption of validity of a state statute regulating produce packaging).

60. *Id.* at 144.

61. *See id.* (explaining the consequences of the law on the Arizona grower).

62. *Id.* at 145.

tolerated if a more compelling state interest were involved."[63] The balancing test established in *Pike v. Bruce Church, Inc.* is applied to facially neutral statutes and regulations without a discriminatory purpose or effect that place an incidental burden on interstate commerce.[64] As explained in Part IV, Section B of this note, the *Pike* balancing test is the correct test for analyzing the California Fuel Standard.

2. Virtual Per Se Invalid Test

The United States District Court for the Eastern District of California applied a different test to the California Fuel Standard.[65] The district court relied on Supreme Court's rulings that laws facially discriminating against interstate commerce are virtually *per se* invalid.[66] As the United States Supreme Court has stated, "[t]he clearest example of such legislation is a law that overtly blocks the flow of interstate commerce at a State's borders."[67] In *City of Philadelphia v. New Jersey*, the State of New Jersey enacted a statute prohibiting the importation of solid waste originating outside of the state.[68] Channeling Chief Justice Marshall's dicta concerning the permissibility under the Commerce Clause of "health laws," New Jersey's law required that the commissioner of the State Department of Environmental Protection clear extraterritorial waste so as not "endangering the public health, safety and welfare."[69]

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63. *Id.* at 146.

64. *See* Rocky Mountain Farmers Union v. Goldstene, 843 F. Supp. 2d 1071, 1084–85 (E.D. Cal. 2011) (explaining when the *Pike* balancing test is applied).

65. *See id.* at 1090 (concluding that the Fuel Standard "impermissibly discriminates on its face against out-of-state entities").

66. *See id.* at 1088 (explaining that laws blocking the flow of interstate commerce are virtually per se invalid).

67. City of Philadelphia v. New Jersey, 437 U.S. 617, 624 (1978).

68. *See id.* at 618–19 (describing, briefly, the nature of the statute in question).

69. *See id.* (establishing the only permissible way for out of state waste to be dumped in New Jersey). The Court stated that the New Jersey law was dissimilar to the quarantine laws suggested by Chief Justice Marshall. *Id.* at 629. The Court found that the laws failed to follow precedent of quarantine laws found acceptable by the dormant Commerce Clause because the movement of items was not banned due to evils other than the nature of the items themselves. *Id.* at 628–29. (citing Asbell v. Kansas, 209 U.S. 251 (1908); Reid v.

In holding the statute invalid, the Court stated that the statute "[o]n its face . . . impose[d] on out-of-state commercial interests the full burden of conserving the State's remaining landfill space."[70] The Court explained that statutes placing the full burden on out-of-state commercial interest are virtually *per se* invalid under the Commerce Clause, regardless of the initial purpose they were enacted to serve.[71] A facially invalid statute can only be constitutional under the dormant Commerce Clause if the state can "identify a non-protectionist and compelling local interest that cannot be served" by any non-discriminatory means.[72] Justice Stewart found that the New Jersey statute, though cloaked in language the Supreme Court of New Jersey found compelling, was promulgated for a protectionist purpose.[73] The Court stated that "[c]ontrary to the evident assumption of the state court and the parties, the evil of protectionism can reside in legislative means as well as legislative ends."[74] Justice Stewart concluded by stating that the purpose of the New Jersey statute "may not be accomplished by discriminating against articles of commerce coming from outside the State unless there is some reason, apart from their origin, to treat them differently.

Colorado, 187 U.S. 137 (1902) and Bowman v. Chicago & Northwestern R. Co., 125 U.S. 465 (1888)).

70. *City of Philadelphia,* 437 U.S. at 628.

71. *See id.* at 626–27 (explaining the legislative intent of the statute is irrelevant under the virtual *per se* invalid test).

72. CAROLYN ELEFANT & EDWARD A. HOLT, CLEAN ENERGY STATES ALLIANCE, THE COMMERCE CLAUSE AND IMPLICATIONS FOR STATE RENEWABLE PORTFOLIO STANDARD PROGRAMS 5 (2011), *available at* http://www.cleanenergystates.org/resource-library/resource/cesa-report-the-commerce-clause-and-implications-for-state-renewable-portfolio-standard-programs-pdf (explaining the exception to the virtual per se invalidity test is a narrow one) (on file with the WASHINGTON AND LEE JOURNAL OF ENERGY, CLIMATE, AND THE ENVIRONMENT); *see* Maine v. Taylor, 477 U.S. 131, 151 (1986) (explaining why Maine's facially discriminatory statute is permissible under the Commerce Clause).

73. *See City of Philadelphia*, 437 U.S. at 626 (finding that New Jersey's statute was passed for protectionist reasons); *see also supra* note 71 and accompanying text.

74. *City of Philadelphia*, 437 U.S. at 626.

Both on its face and in its plain effect, [the statute] violates this principle of nondiscrimination."[75]

C. State Success!

"Only one facially discriminatory law has avoided invalidation . . . ."[76] When California was drafting its Fuel Standard, the only example of a facially discriminatory law that was not held to be invalid came from *Maine v. Taylor*.[77] In *Maine v. Taylor*, the Supreme Court was called upon to determine whether a Maine statute creating criminal liability for individuals who brought live baitfish into the state violated the dormant Commerce Clause.[78] The state attempted to convince the Court that a congressional act had authorized the court to lower the level of scrutiny used to analyze the anti-live baitfish statute.[79] The Supreme Court, agreeing with the District Court of Maine, held there was no such unambiguous authorization and that the virtual *per se* invalidity test of *City of Philadelphia* applied.[80] The Court therefore had to find that the statute "serve[d] a legitimate local purpose, and the purpose [was not] one that [could] be served as well by available nondiscriminatory means."[81] The Supreme Court found that Maine had a legitimate local interest in protecting the state's "unique population of wild fish" from the effects of baitfish parasites potentially introduced

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75. *See id.* at 626–27 (explaining that states cannot exclude articles of commerce from other states unless there is a valid reason to treat them differently).

76. ELEFANT & HOLT, *supra* note 72, at 5. *See generally*, Maine v. Taylor, 477 U.S. 131, 151 (finding that Maine's facially discriminatory statute is constitutional).

77. *See id*. at 5 (explaining that California only had one previous example of success to emulate); s*ee also, supra* note 72 and accompanying text.

78. *See* Maine v. Taylor, 477 U.S. 131, 137–38 (1986) (discussing the terms of the Maine statute in question).

79. *See id.* at 138–40 (arguing that the Lacey Act allows wildlife legislation to be analyzed under a lower level of scrutiny than would otherwise be applied under the Commerce Clause).

80. *See id.* at 148 (disagreeing with the argument of Maine and affirming the District Court of Maine in its application of the per se rule of invalidity).

81. *See id.* at 140 (discussing what the Court must find to uphold Maine's statute).

by imported fish.[82] The Court also found that Maine had satisfied the second prong of the virtual *per se* invalidity test by presenting evidence that there was no legitimate non-discriminatory means of protecting the state's wild fish population.[83]

Maine is an important marker in the development of dormant Commerce Clause jurisprudence for two reasons. First, it demonstrates the application of the virtual *per se* invalidity test to a state statute protecting the environment within a state.[84] Second, it provides a guide for what constitutes an absence of non-discriminatory means of protecting these resources.[85] In Justice John Paul Steven's dissent in *Maine*, he criticized the majority for concluding "the State has no obligation to develop feasible inspection procedures that would make a total ban unnecessary."[86] Thus, in drafting legislation states still must be conscious of possible alternatives to their statutory and regulatory schemes that place less of a burden on interstate commerce.

III. California Fuel Standard Legislation

This part of the Note focuses on the California Low-Carbon Fuel Standard (Fuel Standard) and the regulatory scheme it created.[87] The CAA expressly prohibited state regulation of emissions from new motor vehicles.[88] Congress provided California with latitude to create a test program "to demonstrate the effectiveness of clean-fuel vehicles in controlling

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82. *See id.* at 142–43 (explaining that the parasites from the baitfish could introduce parasites and non-native species of fish, which would impact the state fish population unpredictably and possibly in a harmful way).

83. *See id.* at 147 (finding that the "abstract possibility of developing acceptable testing procedures" to protect the native species of fish does not establish a "nondiscriminatory alternative").

84. *See id.* at 142–43 (following the two-step process under the *per se* invalidity test for determining that the statute was valid).

85. *See id.* at 147 (noting that abstract possibilities are not less discriminatory means).

86. *See id.* at 152 (Stevens, J., dissenting).

87. *See generally* CAL. CODE REGS. tit. 17, §§ 95480–95490 (2010) (creating a regulatory scheme in order to limit carbon emissions).

88. *See* 42 U.S.C. § 7543(a) (2014) (expressly stating that states shall not "adopt or attempt to enforce any standard regulating the control of emissions from new motor vehicles").

air pollution . . . ."[89] A primary requirement was that the California program be, "in the aggregate, at least as protective of public health and welfare as applicable Federal standards."[90] Other states were allowed either to adopt federal standards or the standards enacted by California.[91]

California's legislature acted by pronouncing the legitimate local interest of protecting the state's air quality, water supply, coastlines, and natural environment, through the enactment of emissions regulations.[92] The legislature stated that the environmental damage would have "detrimental effects on some of California's largest industries, including agriculture, wine, tourism, skiing, recreational and commercial fishing and forestry" and would "increase the strain on electricity supplies."[93] The state legislature resolved to reduce emissions to the equivalent of their 1990 level by the year 2020.[94] The California Air Resources Board ("CARB") was charged with this task.[95]

The California legislature passed Assembly Bill 32, the Global Warming Solutions Act of 2006.[96] The Act requires CARB to "issue regulations, including scoping and reporting requirements to achieve maximum technologically and

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89. *See id.* § 7589(a) (outlining the establishment of a California pilot test program).

90. *See* Rocky Mountain Farmers Union v. Corey, 730 F.3d 1070, 1078 (9th Cir. 2013) (citing 42 U.S.C. § 7543(b)) (requiring that the California program must be stricter in terms of protecting public health than the Federal standards).

91. *See* 42 U.S.C. § 7589(f) (2014) (establishing a voluntary opt-in program for other states interested in adopting the test program created by California).

92. *See* CAL. HEALTH & SAFETY CODE § 38501(a) (West 2007) ("Global warming poses a serious threat to the economic well-being, public health, natural resources, and the environment of California.").

93. *See id.* § 38501(b) (explaining the negative effects that global warming has on industry and electricity supplies).

94. *See id.* § 38550 (explaining that by January 1, 2008 the California Air Resources Board (CARB) will determine the emissions level of 1990 and use that finding to determine the emissions limit equivalent to that level, to be achieved by 2020).

95. *See id.* § 38510 (placing CARB in charge of monitoring and regulating sources of greenhouse gas in order to reduce the emission of greenhouse gasses).

96. *See id.* § 38500 (incorporating the Global Warming Solutions Act of 2006 into the California Code); 2006 Cal. Legis. Serv. 488 (West) (enacting the Global Warming Solutions Act of 2006).

economically feasible reductions."[97] In response to this order, CARB enacted various regulations including a cap-and-trade program to enforce limits on carbon emissions from a variety of domestic sources[98] and regulations seeking to reduce greenhouse gas (GHG) emissions from the transportation sector.[99]

CARB stated that the purpose of the Fuel Standard was to "reduce greenhouse gas emissions by reducing the full fuel-cycle, carbon intensity of the transportation fuel pool used in California, pursuant to the California Global Warming Solutions Act of 2006."[100] CARB would accomplish this by enacting regulations that "appl[y] to any transportation fuel . . . that is sold, supplied, or offered for sale in California."[101] CARB was required to consider "the relative contribution of each source or source category to statewide greenhouse gas emissions."[102] As the Ninth Circuit has noted, "[i]n California, transportation emissions account for more than 40% of GHG emissions—the state's largest single source."[103]

To reduce transportation emissions, CARB created a three part regulation system: (1) reducing emissions at the tailpipe source of new vehicles,[104] (2) reducing the number of vehicle miles

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97. *See* Rocky Mountain Farmers Union v. Corey, 730 F.3d 1070, 1079 (9th Cir. 2013) (citing CAL. HEALTH & SAFETY CODE §§ 38561(a) and 38562 (West 2007)) (providing examples of what Assembly Bill 32 required of CARB).

98. *See* CAL. CODE REGIS. tit. 17 § 95801 (2012) (introducing the purpose of the California Greenhouse Gas Cap-and-Trade Program); CAL. HEALTH & SAFETY CODE § 38562(c) (West 2007) (establishing "a system of market-based declining annual aggregate emission limits for sources or categories of sources that emit greenhouse gas emissions.").

99. *See* CAL. HEALTH & SAFETY CODE . § 38562(a) (West 2007) (requiring regulations to reduce greenhouse gas emissions). *See also* CAL. CODE REGS. tit. 13, § 1961.1 (2006) (regulating greenhouse gas exhaust emissions from 2009 through 2016 Model Passenger Cars, Light-Duty Trucks, and Medium-Duty Vehicles).

100. *See* CAL. CODE REGS. tit. 17, § 95480 (2010) (stating the purpose of the Low-Carbon Fuel Standard).

101. *Id.* § 95480.1 (noting which type of fuel the California Low Carbon Fuel Standard regulations applied to).

102. *See* CAL. HEALTH & SAFETY CODE § 38561(e) (explaining that the state board shall take into account relative contributions of different sources to global warming).

103. Rocky Mountain Farmers Union v. Corey, 730 F.3d 1070, 1079 (9th Cir. 2013).

104. *See supra* note 99 and accompanying text.

travelled,[105] and (3) reducing the greenhouse gasses emitted in the production of transportation fuels through the Fuel Standard.[106] The first two parts of the system focus on demand through the sale of new vehicles and the use of vehicles by consumers.[107] "The Fuel Standard . . . is directed at the supply side, creating an alternate path to emissions reduction by reducing the carbon intensity of transportation fuels that are burned in California."[108]

The problem with supply side regulation of greenhouse gas emissions is the location of the supply. California's fuel standard regulates fuels that are sold or imported into California.[109] Because of it's insufficient in-state supply of feedstock—raw materials used to make alternative fuels like corn, sugar cane, or oil—California is forced to regulate activity outside of the state.[110] California does so not by reaching outside of the state but regulating the fuel, or fuel stocks, as they enter the state to be consumed or created into alternative fuels.[111] This is where the dormant Commerce Clause challenge originates.

The foundation of the Fuel Standard's regulation of carbon emissions is the focus on the lifecycle measurement of carbon intensity.[112] Carbon intensity is "the amount of lifecycle

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105. *See* CAL. GOV'T CODE § 65080 (West 2011) (directing transportation planning agencies to create a sustainable communities strategies implementing the goals of emissions reductions proposed by CARB including the recording of vehicle miles travelled).

106. *See* CAL. CODE REGS. tit. 17, §§ 95480–95490 (establishing the California Fuel Standard).

107. *See Rocky Mountain*, 730 F.3d at 1079 ("The Tailpipe and VMT [vehicle miles travelled] standards work on the demand side; they aim to lower the consumption of GHG-generating transportation fuels.").

108. *Id.* at 1079–80.

109. *See* CAL. CODE. REGS. tit. 17 § 95480.1 (2010) (stating that the Fuel Standard "applies to any transportation fuel . . . that is sold, supplied, or offered for sale in California").

110. *See Rocky Mountain*, 730 F.3d at 1082–83 (explaining how California evaluated feedstocks from the Midwest and Brazil, in addition to in-state feedstock, with the Fuel Standard).

111. *See id.* at 1080 (explaining that California's Fuel Standard regulates the supply side by requiring fuel blenders to keep the average carbon intensity of its total volume of fuel below a certain level).

112. *See* CAL. CODE REGS. tit. 17, §§ 95482–95483 (2010) (establishing the average carbon intensity requirements for gasoline, diesel, and alternative fuels).

greenhouse gas emissions, per unit of energy of fuel delivered, expressed in grams of carbon dioxide equivalent per mega joule (gCO2E/MJ)."[113] Under the Fuel Standard carbon intensity is measured throughout the lifecycle of the fuel.[114] "Lifecycle greenhouse gas emissions" are defined as:

> [T]he aggregate quantity of greenhouse gas emissions . . . related to the full fuel lifecycle, including all stages of fuel and feedstock production and distribution, from feedstock generation or extraction through the distribution and delivery and use of the finished fuel to the ultimate consumer, where the mass values for all greenhouse gases are adjusted to account for their relative global warming potential.[115]

The Fuel Standard established a declining annual cap on average carbon intensity starting in 2011 and culminating in a 10% decrease by 2020.[116] Fuel producers are required to remain below the cap requirements for each year.[117] Credits and deficits are created for amounts producers are above or below the cap.[118] "Credits can be used to offset deficits, may be sold to other blenders, or may be carried forward to comply with the carbon intensity cap in later years."[119] Credits are generated quarterly[120]

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113. *Id.* at § 95481(16).

114. *See id.* (defining carbon intensity).

115. CAL. CODE REGS. tit. 17, § 95481(a)(38) (2010).

116. *See* CAL. CODE REGS. tit. 17, § 95482(b) (2010) (delineating the required reduction in average carbon intensity for gasoline and gasoline substitutes from 2011 to 2020); Cal. Exec. Order No. S-01-07 (Jan. 1, 2007), *available at* www.arb.ca.gov/fuels/lcfs/eos0107.pdf (ordering "that a statewide goal be established to reduce the carbon intensity of California's transportation fuels by at least 10 percent by 2020").

117. *See* CAL. CODE REGS. tit. 17 § 95482(a) (2010) (describing the expectations of fuel producers).

118. *See id.* at § 95485(a) (supplying the formula used for producers to calculate credits and deficits).

119. Rocky Mountain Farmers Union v. Corey, 730 F.3d 1070, 1080 (9th Cir. 2013) (citing CAL. CODE REGS. tit. 17, § 95485 (2010)).

120. *See* CAL. CODE REGS. tit. 17, § 95485(b) (2010) (establishing that beginning in 2011 credits are generated quarterly).

and may be bought and sold like commodities in the market established by the Fuel Standard.[121]

One of the main issues with creating a standard to regulate transportation fuels in a state is that for the regulation to be effective the state legislature must do one of two things: (1) require that all fuels be produced inside the state (something that is both constitutionally impossible under the Commerce Clause jurisprudence and practically impossible due to demand, facilities, and resources required),[122] or (2) impose carbon emission requirements on transportation fuels that are imported into the state.[123] The Fuel Standard attempts the second method by utilizing the lifecycle analysis of carbon emissions.[124] Through the lifecycle analysis CARB determines the carbon emissions for every step that goes into producing a fuel from the blendstock.[125] Individual iterations of a lifecycle, called a pathway, are assigned a carbon intensity value.[126] These pathways are used to determine the carbon intensity value of the production of a particular type of fuel.[127] In order to have producers participate in the Fuel Standard marketplace, where credits for carbon intensity are traded, fuels must be compared based on the totality of the carbon emissions of their production.[128]

In order to compare the lifecycle emissions of fuel produced from a variety of blendstocks, California utilized the

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121. *See id.* at § 95485(c) (explaining the Fuel Standard market and how it can used by producers).

122. *See supra* Part B (addressing modern constitutional analysis of the dormant Commerce Clause).

123. *See Rocky Mountain*, 730 F.3d at 1081 ("[T]he climate-change benefits of biofuels such as ethanol, which mostly come before combustion, would be ignored if CARB's regulatory focus were limited to emissions produced when fuels are consumed in California.").

124. *See* CAL. CODE REGS. tit. 17, § 95481(a)(38) (2010) (defining lifecycle greenhouse gas emissions).

125. *See id.* (including every step of the fuel creation process in the definition of lifecycle analysis); *see also id.* at § 95481(a)(14) (defining blendstock as a component that is either used as a fuel or is combined with other components to create a fuel used in a motor vehicle).

126. *See id.* § 95481(a)(14) (explaining that each blendstock corresponds to a pathway).

127. *See id.* § 95481(a)(16) (defining carbon intensity).

128. *See Rocky Mountain*, 730 F.3d at 1081 ("An accurate comparison is possible only when it is based on the entire lifecycle emissions of each fuel pathway").

Greenhouse Gases, Regulated Emissions, and Energy Use in Transportation Model (GREET).[129] California modified the GREET Model, now aptly named CA-GREET, to incorporate "detailed information about local conditions, including California's stringent environmental regulations and low-carbon electricity supply."[130] Fuel producers are given three ways to comply with the reporting requirements of the Fuel Standard.[131]

Method 1 involves utilizing the default pathways issued by CARB.[132] Fuel producers are able to rely on Table 6 provided in Cal. Code Regs. tit. 17, § 95486(b)(1) to determine the average value of carbon intensity for the creation of gasoline or gasoline alternatives.[133] Method 2A allows a fuel producer to propose modifications to one or more inputs of the CA-GREET Model or modifications to one or more inputs to an alternative model used to generate a new pathway.[134] The fuel producer must show "that the proposed Method 2A . . . is at least 5.00 grams CO2-eq/MJ less than . . . calculated under Method 1 . . . [and that the producer] can and expects to provide in California more than 10 million gasoline gallon equivalents per year."[135] Method 2B allows for even more customization by the fuel producer, allowing creation of a new pathway provided that it is not already listed in the default pathways issue and that it is scientifically defensible.[136]

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129. *See* CAL. CODE REGS. tit. 17, § 95481(b)(14) (2010) (explaining the acronym GREET).

130. *See Rocky Mountain,* 730 F.3d at 1082 (discussing how CA-GREET works).

131. *See* CAL. CODE REGS. tit. 17, § 95486 (2010) (establishing the different methods available to fuel producers to determine carbon intensity values).

132. *See id.* § 95486(b)(1) (stating that to determine carbon intensity values under Method 1 the default pathways created by CARB, through utilization of the CA-GREET data, are used).

133. *See id.* at § 95486(b) (displaying the relevant data in Table 6).

134. *See id.* § 95486(c) (providing an alternative to Method 1 by allowing customization of the pathway determination via Method 2A).

135. *See id.* § 95486(e)(2)(A)–(B) (stating the requirements for a proposed Method 2A to be approved).

136. *See id.* § 95486(d) (allowing for the creation of a new pathway under Method 2B and listing what is required to create a new pathway).

Location plays a major role in the determination of carbon intensity.[137] In a Ninth Circuit opinion, Judge Ronald Gould discussed the relevant example of ethanol produced through fermentation of feedstock.[138] The opinion stated that under CA-GREET the ethanol's carbon intensity is determined by considering:

> (1) growth and transportation of the feedstock, with a credit for the GHGs absorbed during photosynthesis; (2) efficiency of production; (3) type of electricity used to power the plant; (4) fuel used for thermal energy; (5) milling process used; (6) offsetting value of an animal-feed co-product called distillers' grains, that displaces demand for feed that would generate its own emissions in production; (7) transportation of the fuel to the blender in California; and (8) conversion of land to agricultural use.[139]

Under this analysis, "[f]actors related to transportation, efficiency, and electricity are correlated with a plant's location in the Midwest, Brazil, or California."[140] Judge Gould emphasizes the importance of location in the CA-GREET factors by stating that the California production facilities are newer and more efficient so they receive a discount under the model.[141] California is hurt, however, by the fact that there is no corn grown for ethanol in the state.[142] This forces producers in California to

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137. *See id.* § 95486(b) (establishing different default carbon intensity ratings in Table 6 depending on the location of the production facility).

138. *See* Rocky Mountain Farmers Union v. Corey, 730 F.3d 1070, 1082–84 (9th Cir. 2013) (discussing the treatment of ethanol under the CA-GREET Model).

139. *Id.* at 1083.

140. *See id.* (describing the location analysis for determining the carbon intensity values for a pathway).

141. *See id.* (explaining the intricacies of carbon intensity analysis under CA-GREET)

142. *See id.* (explaining that California ethanol producers have to import raw corn for ethanol).

expend carbon importing the fuel stock.[143] The Midwest and Brazil have domestic corn production and, therefore, fare better in that respect.[144]

After this "big picture" overview of California's Low Carbon Fuel Standard this Note will focus on the challenge to the legislation made by the Rocky Mountain Farmer's Union.[145]

IV. Rocky Mountain Farmers Union

The Rocky Mountain Farmers Union (RMFU) is a "progressive, grassroots organization founded in 1907" to represent family farmers in Wyoming, Colorado, and New Mexico.[146] Its goal is sustaining rural communities, wise stewardship and use of natural resources, and protection of the region's food supply.[147]

A. District Court

In December 2009, RMFU (along with several other organizational plaintiffs) brought suit against James Goldstene, then Executive Officer of CARB, in the United States District Court for the Eastern District of California asking for declaratory and injunctive relief against CARB for the imposition of the Fuel Standard.[148]

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143. *See id.* (stating that raw corn imported for ethanol is heavier, and therefore more carbon intensive than finished fuel product coming from the Midwest and Brazil).

144. *See id.* (explaining that, based on CA-GREET pathways, the Midwest expends the least amount of carbon transporting fuel).

145. *See generally* Rocky Mountain Farmers Union v. Corey, 730 F.3d 1070 (9th Cir. 2013); Rocky Mountain Farmers Union v. Goldstene, 843 F. Supp. 2d 1071 (E.D. Cal. 2011).

146. *See About Us*, ROCKY MOUNTAIN FARMERS UNION, http://www.rmfu.org/about/ (last visited Nov. 29, 2014, 7:30 PM) (describing the history of the Rocky Mountain Farmers Union) (on file with the WASHINGTON AND LEE JOURNAL OF ENERGY, CLIMATE, AND THE ENVIRONMENT).

147. *See id.* ("RMFU is dedicated to sustaining our rural communities, to wise stewardship and use of natural resources, and to protection of our safe, secure food supply.").

148. *See* Rocky Mountain Farmers Union v. Goldstene, 843 F. Supp. 2d 1071, 1078–79 (E.D. Cal. 2011) (explaining the nature of the suit against CARB); Complaint for Declaratory and Injunctive Relief at 19–20, Rocky

1. RMFU's Arguments

RMFU moved for declaratory judgment and an order enjoining enforcement of the fuel standard.[149] RMFU was concerned that the Fuel Standard would "effectively bar Midwest-produced ethanol from the California market."[150] Other groups joined the RMFU in their concern over the constitutionality of the Fuel Standard stating that, if allowed to stand, the law would "give other states permission to defy the intent of Congress" thereby allowing the "establish[ment of] a patchwork of fuel regulations that would greatly complicate the nation's fuel infrastructure and potentially limit the trade of fuel and fuel components between states."[151] In RMFU's motion for summary judgment, they argued that the fuel standard violated the dormant Commerce Clause and was preempted by federal law.[152]

RMFU advanced its dormant Commerce Clause claim by stating that the California Fuel Standard discriminated against Midwest corn ethanol producers and importers by "assigning them relatively higher total carbon intensity values vis-a-vis California corn ethanol producers."[153] RMFU asserts the Fuel Standard assigns these values even though the California producers utilize "substantially the same production methods to produce substantially the same product."[154] RMFU asserted that

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Mountain Farmers Union v. Goldstene, 843 F. Supp. 2d 1071 (E.D. Cal. 2011) (No. 1:09-cv-02234), 2009 WL 5421971 (stating prayer for relief and filing date).

149. *See id.* at 1078 (explaining the procedural history of the court's opinion).

150. *Ethanol Producers Sue Over California's Low-Carbon Rule*, 30 No. 14 ANDREWS ENVTL. LITIG. REP. 6, Feb. 3, 2010, at 1 [hereinafter *Ethanol Producers Sue*] (on file with the WASHINGTON AND LEE JOURNAL OF ENERGY, CLIMATE, AND THE ENVIRONMENT); *see also* Complaint for Declaratory and Injunctive Relief, *supra* note 148, at 12 (explaining the effects and the consequences of the Fuel Standard).

151. *See Ethanol Producers Sue*, *supra* note 150, at 2 (quoting the joint statement of Growth Energy and the Renewable Fuels Association).

152. *See Rocky Mountain*, 843 F. Supp. 2d at 1078 (briefly outlining the plaintiffs arguments). RMFU's preemption argument is beyond the scope of this note.

153. *See* Complaint for Declaratory and Injunctive Relief, *supra* note 148, at ¶¶ 78–91 (outlining how the Fuel Standard violates the dormant Commerce Clause).

154. *Id.* at ¶ 81.

California has effectively "erected a barrier to Midwest corn ethanol around its borders."[155]

According to the RMFU, California impermissibly regulated and interfered with the channels of interstate commerce through subjecting out-of-state producers to higher in-state burdens due solely to their location.[156] RMFU claimed the interference is unconstitutional because the Fuel Standard ties higher carbon intensity values to the out-of-state producers interstate shipping decisions.[157] RMFU argued the Fuel Standard facially discriminated against interstate commerce by requiring approval of interstate shipping, delivery, and distribution methods before out-of-state producers could generate credits.[158] In an effort to bolster its argument the RMFU included a claim that the Fuel Standard also discriminated in practical effect.[159]

The facially discriminatory and the practical effect arguments place the Fuel Standard under the purview of *City of Philadelphia*'s virtually *per se* invalid test.[160] RMFU emphasized the applicability of the virtually *per se* invalid test by stating that "[t]he burden of the [Fuel Standard] on interstate commerce in corn ethanol is clearly excessive in relation to any purported local benefits."[161] The Fuel Standard would "not result in any measurable global climate change, nor in any measurable reduction of the effects of global warming. California's share of those immeasurable changes and reductions is likewise immeasurable, meaning the [Fuel Standard] provides no local benefit to the state."[162] RMFU also argued the Fuel Standard amounted to economic protectionism through its goal of replacing

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155. *Id.*

156. *See id.* at ¶82 (stating that California interferes with the channels of interstate commerce by imposing a higher burden on out-of-state producers merely because they ship into California).

157. *See id.* (explaining the connection between California's action and the interstate commerce of the RMFU).

158. *See id.* at ¶ 83 (arguing that the imposition of requirements on shipping methods facially discriminates against interstate commerce).

159. *See id.* at ¶ 84 (stating that the Fuel Standard, actually and practically, regulates wholly outside of California).

160. *See supra* Part II.B.2 (describing the virtually per se invalid test).

161. Complaint for Declaratory and Injunctive Relief, *supra* note 148, at ¶86.

162. *Id.*

imported fuel-stocks with those produced in state, thereby keeping more money in the state.[163]

RMFU in its motion for summary judgment requested the court grant relief in the form of a declaratory judgment that the Fuel Standard violates federal law and permanent and preliminary injunctions against California enforcing the Fuel Standard.[164]

2. CARB's Arguments

CARB responded to the RMFU's motion for declaratory judgment by arguing the RMFU had not carried their burden in showing the Fuel Standard discriminated against interstate commerce.[165] CARB began by showing that the lifecycle analysis employed by the Fuel Standard is internationally recognized as the method for reducing greenhouse gas emissions.[166] CARB also attempted to counter the argument that the Fuel Standard assigns lower carbon intensity ratings to California producers of ethanol by pointing out that the CA-GREET model did not assign California the lowest value for any ethanol type.[167] CARB concluded their rebuttal of the facial discrimination claim by explaining the inclusion of the 2A and 2B methods of carbon intensity rating.[168]

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163. *See id.* at ¶ 85 (explaining that CARB expects a decreased in Midwest imported ethanol while California ethanol production remains constant).

164. *See id.* at 19–20 (requesting the district court take the listed actions).

165. *See* Defendants And Defendant-interveners' Supplemental Memorandum Of Points And Authorities In Opposition To RMFU's Motion For Summary Judgment at 6–7, Rocky Mountain Farmers Union v. Goldstene, 843 F. Supp. 2d 1071 (E.D. Cal. 2011) (No. 1:09-CV-02234-LJO-DLB) 2011 WL 1233984 [hereinafter Defendant's Response] (stating that the party challenging the statue has the burden of showing discrimination and that the RMFU had not carried that burden).

166. *See id.* at 7 (explaining that two of the other plaintiffs (RFA and Growth Energy) in the case acknowledge the efficacy of lifecycle analysis).

167. *See id.* at 8 (stating that out-of-state producers of cane ethanol receive a better rating than California producers).

168. *See id.* at 9 (describing the alternative carbon intensity valuation methods provided for in the Fuel Standard).

CARB also argued that RMFU had failed to show evidence that the Fuel Standard actually had a discriminatory effect on Midwest ethanol.[169] Midwest ethanol plants continue to be built and existing plants continue to be purchased.[170] CARB also produced evidence that Midwest ethanol was selling in California.[171] CARB demonstrated that ethanol from the Midwest was being sold in California for more than it would have in other western United States markets.[172] Evidence was presented that Midwest producers were achieving lower carbon intensity ratings than California producers.[173]

CARB concluded its rebuttal to RMFU's dormant Commerce Clause claim by arguing that the Fuel Standard places no burden on interstate commerce and therefore was subject to *Pike* Balancing.[174] In the alternative, CARB argued even if the Fuel Standard was subject to strict scrutiny it survives because it serves a compelling state interest and cannot be achieved by any non-discriminatory means.[175]

3. The District Court's Ruling

On December 29, 2011 the district court granted RMFU's request for preliminary injunction and entered judgment for

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169. *See id.* at 11 (stating that the crucial inquiry is whether or not market share of out-of-state producers is reduced and that the plaintiffs have produced no evidence to prove this).

170. *See id.* at 13 (explaining that the Fuel Standard has not killed the ethanol production market in the Midwest).

171. *See id.* at 14 (showing that Midwest ethanol had two registered carbon intensities for sale in California).

172. *See id.* at 15 (stating that Midwest ethanol was sold for a higher price than it would be sold in Phoenix or the Pacific Northwest).

173. *See id.* (explaining that five current and twenty future Midwest producers had carbon intensity ratings lower than California producers).

174. *See* Rocky Mountain Farmers Union v. Goldstene, 843 F. Supp. 2d 1071, 1085 (E.D. Cal. 2011) (presenting CARB's argument that strict scrutiny analysis should not apply because the Fuel Standard is "a neutral law that applies evenly").

175. *See* Defendant's Response, *supra* note 165, at 16 (arguing that California is not closed to Midwest ethanol and that the lifecycle analysis is the only effective method available to the state in combating greenhouse gasses).

RMFU against CARB on RMFU's dormant Commerce Claim.[176] The court did so on two grounds: (1) the court held the Fuel Standard regulations discriminate against out-of-state energy producers, and (2) the court held that California attempted to regulate activities outside of its borders.[177]

The district court ruled that because the CAA did not give express or unambiguous authority for California to violate the Commerce Clause, the Fuel Standard did not survive Commerce Clause scrutiny.[178] The court then analyzed the extent to which the fuel standard discriminated against interstate commerce.[179]

Focusing on the tables the statute used to provide the default pathways for different blendstocks from varying regions,[180] the court found that, when the same production processes and blendstocks were used, the Fuel Standard "assign[ed] a higher [carbon intensity] on the basis of origin alone."[181] The court dismissed CARB's argument that the figures used for the default pathways were based on scientific methods rather than location.[182] The court stated that there were "favorable assumptions [for] California" in the figures used for the carbon intensity calculation and concluded "[t]his discriminates against interstate commerce."[183] The court also decided that, "tying carbon intensity scores to the distance a good travels in interstate commerce discriminates against interstate commerce."[184] Furthermore, the court dismissed the argument that the differences in the methods available to producers to

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176. *See Rocky Mountain*, 843 F. Supp. 2d at 1105 (issuing orders in the case).

177. *See* Klass, *supra* note 12, at 197 (explaining the ruling of the District Court).

178. *See Rocky Mountain*, 843 F. Supp. 2d at 1084 (determining that the Fuel Standard was subject to scrutiny under the Commerce Clause).

179. *See id.* at 1085–90 (analyzing the impact of the fuel standard on interstate commerce).

180. *See id.* at 1087 (stating that the Table 6 "explicitly differentiate[s] among ethanol pathways based on origin."); *see also* Cal. Code Regs. tit. 17, § 95486(b)(1) (2010) (displaying Table 6 and its relevant data).

181. *See Rocky Mountain*, 843 F. Supp. 2d at 1087 (evaluating the Fuel Standard's assessment of in-state and out-of-state ethanol pathways).

182. *See id.* at 1087–88 (outlining the arguments of CARB against the Commerce Clause challenges to the default pathways).

183. *See id.* at 1088 (explaining why the Fuel Standard "offends the Commerce Clause).

184. *Id.*

determine the carbon intensity of their product did not allow the statute to survive the Commerce Clause.[185] The potential for producers to define new pathways to determine carbon intensity was at the sole discretion of CARB and therefore it was "no defense to describe methods that *might* allow amendment of the LCFS in a manner that *might* ameliorate the discriminatory impact of the regulation."[186]

Ultimately, the court's analysis of the Fuel Standard did not fully grasp the approach of CARB in assigning values for carbon intensity. By focusing on the methods and materials used to produce ethanol, CARB successfully avoided the issue of location. If CARB assigned carbon intensity values solely based on the region the ethanol originated from, then the district court's analysis would have been correct.

Instead, the court unjustifiably allowed regulation of conduct outside of the state's borders.[187] The Fuel Standard incentivized certain methods of production in an attempt to change the behavior of entities wholly outside the state.[188] The court also determined that the Fuel Standard "impermissibly regulates the channels of interstate commerce."[189] The court found that this type of regulation, replicated by various states, would result in the Balkanization of the ethanol market.[190]

The court held the statute facially discriminates against interstate commerce and was therefore subject to strict scrutiny

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185. *See id.* at 1089 ("Moreover, the Method 2A and Method 2B procedures in the [Fuel Standard] do not alter this Court's conclusion that the [Fuel Standard] discriminates on its face against out-of-state corn ethanol.").

186. *Id.* at 1089–90 (emphasis in original).

187. *See id.* at 1090–93 (delineating RMFU's argument for impermissible control of activities beyond California's border); *see generally* Healy v. Beer Inst., 491 U.S. 324 (1978) (establishing control beyond a state's borders as an impermissible exercise of state power under the Commerce Clause).

188. *See Rocky Mountain*, 843 F. Supp. 2d at 1091 (describing the practical effect of the regulation as controlling conduct wholly outside of California).

189. *See id.* at 1092 (explaining that the Fuel Standard could influence the decision of a producer to use rail instead of a truck or a ship to transport materials).

190. *See id.* (stating that the Fuel Standard would influence producers to only sell to certain markets to avoid transportation or other penalties).

analysis.[191] The district court proceeded to apply the virtual *per se* invalidity test, asking whether the fuel standard served a legitimate local purpose *and* whether California lacked a non-discriminatory alternative.[192] The court noted that, under *Massachusetts v. EPA*, "that a state has a local and legitimate interest in reducing global warming."[193] It then cautioned that though the purpose of the legislation was "legitimate," it cannot "be achieved by the illegitimate means of isolating the State from the national economy."[194] The court held that CARB failed to carry the burden in showing there were no nondiscriminatory alternatives to the fuel standard.[195] The court stated that though the alternatives "may be less desirable, for a number of reasons, [CARB has] failed to establish there are no nondiscriminatory means by which California could serve its purpose of combating global warming through the reduction of GHG emissions."[196]

The district court concluded by finding for RMFU and stating that California's Fuel Standard "impermissibly treads into the province and powers of our federal government, reaches beyond its boundaries to regulate activity wholly outside of its borders, and offends the dormant Commerce Clause."[197]

B. United States Court of Appeals for the Ninth Circuit

In reviewing the appeal of the CARB, the Ninth Circuit reviewed the grant of summary judgment under a *de novo* standard[198] and the grant of preliminary injunction under an

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191. *See id.* at 1089 (determining the level of scrutiny to be applied to the statute).

192. *See id.* at 1093 (presenting the constitutional test required when a statute facially discriminates against interstate commerce).

193. *Id.* (citing Massachusetts v. EPA, 549 U.S. 497, 519, 522 (2007)).

194. *Id.* at 1088–89 (quoting City of Philadelphia v. New Jersey, 437 U.S. 617, 627 (1978)).

195. *See id.* at 1093–94 (stating that the court was not convinced by California's arguments "that the goal of reducing global warming cannot be adequately served by nondiscriminatory alternatives").

196. *Id.* at 1094.

197. *Id.*

198. *See* Rocky Mountain Farmers Union v. Corey, 730 F.3d 1070, 1086–87 (9th Cir. 2013) (determining the standard of review for appeals of summary judgment grants); *see also* CRM Collateral II, Inc. v. TriCounty Metro.

abuse of discretion standard.[199] The Ninth Circuit reversed the decision of the district court by holding that the Fuel Standard was not facially discriminatory and therefore the trial court failed to apply the correct test in analyzing the statute.[200]

The Ninth Circuit first determined the district court erred in its analysis of the CA-GREET pathways.[201] Rather than focusing on the pathways themselves for comparison, the court instead focused on the end product.[202] The court found that, regardless of the production method, ethanol was end product.[203] Furthermore, the appeals court held that the district court erroneously excluded pathways from their analysis.[204] In fact, the district court excluded sugar cane ethanol, predominantly from Brazil, and "all GHG emissions related to transportation, electricity, and plant efficiency from comparison," before concluding that the fuel standard is facially discriminatory on the basis of origin. [205] The final product of ethanol is truly fungible and has "identical physical and chemical properties" regardless of

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Transp. Dist. of Or., 669 F.3d 963, 968 (9th Cir.2012) (establishing the standard of review for summary judgment motions as *de novo*); Black Star Farms LLC v. Oliver, 600 F.3d 1225, 1229 (9th Cir. 2010) (establishing that review of a district court's resolution of constitutional claims is *de novo*).

199. *See Rocky Mountain*, 730 F.3d at 1087 (determining the standard of review for appeals of preliminary injunction grants); *see also* Stormans Inc. v. Selecky, 586 F.3d 1109, 1119 (9th Cir.2009) (establishing review of preliminary injunction grants as under an abuse of discretion standard).

200. *See Rocky Mountain*, 730 F.3d at 1078 ("We hold that the Fuel Standard's regulation of ethanol does not facially discriminate against out-of-state commerce, and its initial crude oil provisions . . . did not discriminate against out-of-state crude oil in purpose or practical effect.").

201. *See id.* at 1088 (criticizing the district court's use of "selective comparison" in evaluating fuel pathways).

202. *See id.* at 1089 ("If we ignore these real differences between ethanol pathways, we cannot understand whether the challenged regulation responds to genuine threats of harm or to the mere out-of-state status of an ethanol pathway. All factors that affect carbon intensity are critical to determining whether the Fuel Standard gives equal treatment to similarly situated fuels.").

203. *See id.* at 1090 (explaining that "CARB's method of lifecycle analysis treats ethanol the same regardless of origin").

204. *See id.* at 1088 (finding that the district court excluded relevant fuel pathways and contributors to GHG emissions).

205. *See id.* (highlighting the faults in the district court's evaluation as to whether the Fuel Standard is facially discriminatory).

the production methods.[206] Therefore the district court erred in leaving Brazilian ethanol out of its analysis.[207] Additionally, "[t]he district court also erred by ignoring GHG emissions related to: (1) the electricity used to power the conversion process, (2) the efficiency of the ethanol plant, and (3) the transportation of the feedstock, ethanol, and co-products."[208]

The elimination of these factors from the district court's analysis is important because it removes the scientific validity of the assignment of carbon intensity values. Selectively analyzing factors of the statutory scheme allowed the district court to focus on the factors colored by origin, an analysis that would result in a determination that the factors were facially discriminatory against producers outside of California. This was an error by the district court even if the data was correlated with location.[209] As the Ninth Circuit noted, "[a]ll factors that affect carbon intensity are critical to determining whether the Fuel Standard gives equal treatment to similarly situated fuels."[210]

The Ninth Circuit also reversed the district court's holding that California impermissibly regulated beyond its borders.[211] The Ninth Circuit found that California could assign different values of carbon intensity to ethanol from different regions as long as its rationale is not solely based on origin.[212] This is because California does not "base its treatment on a fuel's origin but on its carbon intensity."[213] The Fuel Standard only uses "location but only to the extent that location affects the actual GHG emissions attributable to a default pathway."[214]

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206. *See id.* (explaining why the comparisons made need to be different from the district court's).

207. *See id.* (finding error in the district court's exclusion of Brazilian ethanol data).

208. *Id.*

209. *See id.* (stating the district court erroneously compared data without concern for the emissions created by the three ignored factors).

210. *Id.* at 1089; *see also,* Massachusetts v. EPA, 549 U.S. 497, 524 (2007) (arguing that even an incremental step to reduce emissions is important to the Court's analysis).

211. *See Rocky Mountain*, 730 F.3d at 1101 (disagreeing with the district court that the Fuel Standard regulates extraterritorial conduct).

212. *See id.* at 1089 ("[A] regulation is not facially discriminatory simply because it affects in-state and out-of-state interests unequally," and different treatment must mean there are other reasons other than origin).

213. *Id.*

214. *Id.*

The Ninth Circuit reiterated that producers could apply for an individual determination of fuel intensity if they qualified under Method 2A or 2B.[215] The Court found that California producers did not have a leg up in the individual pathway application process.[216] Indeed, each individual producer was required to apply for, and have approved, his or her own individual pathway.[217] The Court found that the burden and benefits to certain producers "are attributable to the imprecision of averages rather than to discrimination," and concluded that "CARB gives ethanol producers in each regional category the substantially evenhanded treatment demanded by the Commerce Clause."[218]

The Ninth Circuit concluded CARB's decision to create a regional category based on California's border was not facially discriminatory.[219] Though the Fuel Standard's categories were formed with reference to state boundaries, they treated ethanol from all sources evenhandedly showing a rationale apart from origin.[220] The court explained that as of June 2011 there were no producers of corn ethanol in states neighboring California and that isolation provided legitimate justification for establishing California as one of the regional boundaries.[221] "CARB's decision to align the regional categories as it did produced accurate carbon intensity values."[222] In addition, regional energy supplies also provided adequate justification for the regions created by

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215. *See id.* at 1093–94 (explaining that the system is designed to avoid costly individualized determinations but that the alternative methods allow producers who are burdened by the default pathway to get an individualized assessment).

216. *See id.* at 1094 ("Parties from all three regions have registered individualized pathways showing that the categories do not uniformly benefit California's producers.").

217. *See id.* (explaining that a producer could not rely on the grant of a pathway to another producer).

218. *Id.* (citations omitted).

219. *See id.* (determining use of the California border was not facially discriminatory).

220. *See id.* at 1096 ("The Fuel Standard's regional categories for the default pathways show every sign that they were chose to accurately measure and control GHGs and were not an attempt to protect California ethanol producers.").

221. *See id.* (explaining that the closest producer was in Idaho, while the rest were East of the Rocky Mountains or in Brazil).

222. *Id.*

CARB.[223] CARB utilizes the regional categories to make the default pathways more efficient and accurate for the regulated parties, and on top of this CARB provides a method for individualized pathways if the producers feel the default's do not accurately reflect the carbon intensity of their methods.[224]

This holding is extremely important for states seeking to draft emissions regulations. Utilization of regional categories can be an integral part of a regulatory scheme's ability to withstand dormant Commerce Clause challenges, especially when combined with an individual determination method similar to the one used in the Fuel Standard. Basing valuations on region rather than by state can diminish the argument that a state is restricting interstate commerce. This is specifically when sources of emissions, methods of production, or resources, are starkly divided by region.

The Ninth Circuit reversed the district court determination that the fuel standard impermissibly regulates conduct beyond the state's borders.[225] The Ninth Circuit held that the fuel standard only regulated the California market.[226] The statute did not "make [an] effort to ensure the price of ethanol is lower in California than in other states, and it imposes no civil or criminal penalties on non-compliant transactions completed wholly out of state."[227] The CA-GREET factors measure and consider numerous factors that exist outside of the state of California, "[b]ut California does not control these factors—directly or in practical effect—simply because it factors them into the lifecycle analysis."[228]

Because the Ninth Circuit found that the district court erred in its application of strict scrutiny to the Fuel Standard, the court remanded the case back to the district court.[229] The district court will be required to apply the *Pike* balancing test to

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223. *See id.* (explaining the differences in regional energy sources).

224. *See id.* at 1096 (explaining the utility of the different methods provided by the Fuel Standard).

225. *See id.* at 1101 ("[N]o jurisdiction need adopt a particular regulatory standard for its producers to gain access to California.").

226. *See id.* (dismissing the rationale of the district court).

227. *Id.* at 1103.

228. *Id.*

229. *See id.* at 1107 (noting that "[t]he Fuel Standard's ethanol provisions are not facially discriminatory").

determine if the Fuel Standard places a burden on interstate commerce that is clearly excessive in relation to the putative local benefits.[230]

V. Drafting Future Legislation

The Center for Climate and Energy Solutions has opined that "[t]wo trends are apparent with regard to state and regional efforts that address climate change: 1) more states are taking action and 2) they are adopting more types of policies."[231] As of March 2011, twenty-nine states have renewable portfolio standards.[232] For these standards to be functional and long lasting they have to be drafted with the intent of surviving Commerce Clause challenges from out-of-state producers, or even neighboring states.[233] Utilizing the RMFU decision and other dormant Commerce Clause jurisprudence, this Note will now address some options for drafters of new environmental legislation or revisions to existing legislation.

A. Acceptable Aims of Energy Regulation

Absent involvement from Congress, states that wish to be environmentally conscious will be required to take matters into their own hands.[234] If a state seeks to address environmental regulation, their first consideration is establishing a permissible aim to the legislation.[235] States should be prepared for their statutory or regulatory schemes to be attacked under the virtual

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230. *See id.* (explaining how the district court should apply the Ninth Circuit's ruling on remand).

231. CENTER FOR CLIMATE AND ENERGY SOLUTIONS, CLIMATE CHANGE 101: STATE ACTION 1, *available at* www.c2es.org/docUploads/climate-101-state.pdf.

232. *See* ELEFANT, *supra* note 72, at 3 (explaining the expansion of states utilizing renewable portfolio standards to reduce greenhouse gas emissions).

233. *See id.* at 4 (outlining considerations states should make in creating RPS).

234. *See* Kunkleman, *supra* note 22 (quoting Lee C. Paddock in saying that "state initiatives are the 'direct result of inaction by Congress'").

235. *See* ELEFANT, *supra* note 72, at 15 (stating that even when a facially neutral statute impacts interstate commerce the courts will require that the legitimate goals outweigh the incidental burden).

per se invalidity test and the *Pike's* balancing test.[236] Therefore states must ensure there is a developed legislative history of a compelling state interest in regulating emissions.[237] In the development of the statutes states should highlight findings of commissions and committees that support the regulation of emissions. The development of a compelling state interest will ensure that the state interest prongs of both tests will be satisfied. States should also include language in the purpose or goals section of environmental legislation emphasizing their desire to reduce emissions, though the impact of their state's efforts might be negligible on a global scale.[238]

B. Regulatory Structures

A stated legitimate purpose will not shield legislation that is facially discriminatory from a dormant Commerce Clause challenge.[239] This section of the Note provides recommendations for drafting regulatory schemes to avoid dormant Commerce Clause challenges, first advising on the content of the regulatory scheme and second proposing alternative methods of regulation.

The first suggested method of drafting a regulatory scheme aimed at reducing emissions is to include relevant data inputs that are not simply based on origin.[240] Ensuring that the data points are truly based on the creation of emissions and not

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236. *See id.* at 5–9 (highlighting the Commerce Clause tests that can be applied to a RPS).

237. *See id.* at 5–6 (emphasizing the importance of a compelling local interest when evaluating whether a RPS stands under the virtual *per se* invalidity test or the *Pike* balancing test).

238. *See* Massachusetts v. EPA, 549 U.S. 497, 522 (2007) ("That these climate-change risks are 'widely shared' does not minimize Massachusetts' interest in the outcome of this litigation.").

239. *See* City of Philadelphia v. New Jersey, 437 U.S. 617, 626 (1978) ("Contrary to the evident assumption of the state court and the parties, the evil of protectionism can reside in legislative means as well as legislative ends.").

240. *See* Rocky Mountain Farmers Union v. Corey, 730 F.3d 1070, 1088 (9th Cir. 2013) (stating the district court found the ethanol pathways discriminated based on origin).

simply based on the origin of the product is crucial.[241] This is demonstrated in the default pathways that were established under the California fuel standard.[242] CARB ensured that the data points that were being used to measure emissions during the life cycle of each fuel were only related to location where that was a factor in the emission of carbon.[243] If pathways are created based simply on the location of origin of the fuel they will be categorized as facially discriminatory and will be challenged as unconstitutional.[244] This method of focusing legislative efforts on the specifics of the emissions sources being regulated can be applied to legislation that aims to regulate other environmental harms in a way that mitigates the effectiveness of dormant Commerce Clause challenges.[245]

The California Fuel Standard was also designed to avoid dormant Commerce Clause challenges through its allowance for individual determinations of pathways.[246] Through the creation of three different pathways for producers to opt-in to, California allowed for out-of-state producers to submit their own production processes for carbon intensity analysis.[247] Though on its own a provision such as this might not create a shield for dormant Commerce Clause liability, it would reduce the potential for challenges from out-of-state producers that utilized production

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241. *See id.* at 1090 (approving of CARB's method of lifecycle analysis because it treats "ethanol analysis the same regardless of origin" and focuses on the carbon intensity of an ethanol pathway).

242. *See id.* at 1089 ("All factors that affect carbon intensity are critical to determining whether the Fuel Standard gives equal treatment to similarly situated fuels.").

243. *See id.* (stating that location was only considered only to the extent that it affected actual greenhouse gas emissions).

244. *See* Rocky Mountain Farmers Union v. Goldstene, 843 F. Supp. 2d 1071, 1088 (E.D. Cal. 2011) (stating that a facially discriminatory statute is unconstitutional).

245. *See* ELEFANT, *supra* note 72, at 14–18 (giving recommendations for Renewable Portfolio Standard statute drafting).

246. *See* Cal. Code Regs. tit. 17, § 95486 (2010) (establishing the different methods available to fuel producers).

247. *See* Rocky Mountain Farmers Union v. Corey, 730 F.3d 1070, 1094 (asserting that Methods 2A and 2B allows for out-of-state producers to have individualized pathways).

methods that were not common in California and therefore not included in the default pathways.[248]

Another recommended practice for drafters of environmental protection legislation comes from the *Rocky Mountain* Ninth Circuit decision that the regional determinations of CARB were not unconstitutional due to the narrow tailoring of regulated regions.[249] If states are able to show a reasonable basis for where lines of regions are drawn they will be able to avoid dormant Commerce Clause challenges similar to those brought by RMFU. The Ninth Circuit held that the California border was a legitimate grouping because it was tailored to match the realities of ethanol production in the region.[250]

One option that has not been put into practice by any group of states would be forming a coalition to enact multi-jurisdictional legislation that allowed for emissions monitoring, reporting, and regulating for a region or group of states. The enactment of such regulations would mitigate the concern of the dormant Commerce Clause of one state acting to the detriment of neighboring states. There is still a concern that states not inside the regional groupings could challenge the legislation for discriminating against interstate commerce. But if the groupings were drawn based on what is being regulated and regional similarities the potential of this would be diminished. An example of this could be a regional grouping of coastal states at the eastern seaboard drafting legislation to require a percentage of electricity be produced using ocean based wind power, or even tidal power plants.

Another potential alternative method of regulation can be the compensatory tax doctrine.[251] The doctrine has been affirmed

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248. *See id.* (concluding that the three methods provided by CARB establish even-handed treatment under the Commerce Clause).

249. *See id.* at 1096 ("The Fuel Standard's regional categories for the default pathways show every sign that they were chosen to accurately measure and control GHGs and were not an attempt to protect California ethanol producers.").

250. *See id.* at 1094 (holding that the California border was a legitimate regional grouping).

251. *See generally* Heddy Bolster, *The Commerce Clause Meets Environmental Protection: The Compensatory Tax doctrine as a Defense of Potential Regional Carbon Dioxide Regulation*, 47 B.C. L. Rev. 737 (2006) (applying the compensatory tax doctrine to regulate "leakage" in tradition cap-and-trade programs).

by the Supreme Court as a method of ensuring that no state, including the out-of-state party, gains an unfair advantage against another in interstate commerce.[252] The compensatory tax doctrine would allow a state to impose taxes on out-of-state producers that are equivalent to the taxes imposed on in-state producers.[253] The doctrine has three requirements for constitutionality: (1) the state must identify the interstate tax burden the State is attempting to compensate for, (2) the tax must be roughly approximate—but not exceed—that placed on interstate commerce, (3) finally, the events the tax is imposed on must be substantially equivalent.[254] In *Oregon Waste Systems*, the Supreme Court held a tax on imported waste was not a valid application of the compensatory tax doctrine because the tax imposed on out-of-state waste was three times higher than that imposed on in-state waste.[255]

The doctrine could be used as an alternative to the California Fuel Standard's cap-and-trade system.[256] The tax could be imposed pro rata based on carbon emissions that were established through the lifecycle analysis. Carbon intensity values could be broken into ranges with each range carrying a different level of tax liability. The system would encourage producers to change to alternative energy in an attempt to lower their overall tax liability. The burden that would be imposed on out-of-state producers would identical to that of in-state producers because the tax liability would be tied to overall emissions and not to the origin of the producer.

A final recommendation is one that states can utilize if—or more likely when—they are faced with a dormant Commerce Clause challenges. States considering drafting legislation aimed at environmental protection—whether it is a cap-and-trade

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252. *See* Dep't of Revenue of Wash. v. Assoc. of Wash. Stevedoring Cos., 435 U.S. 734, 748 (1978) (stating that no state should get more than a just share of interstate commerce).

253. *See* Bolster, *supra* note 251, at 749–50 (discussing the case *Hinson v. Lott*, 75 U.S. 148 (1869), and an Alabama law imposing a tax on out-of-state liquor distillers equivalent to the tax imposed on in-state distillers).

254. *See* Or. Waste Sys. v. Dep't of Envtl. Quality, 511 U.S. 93, 103 (1994) (explaining the requirements of the compensatory tax doctrine).

255. *See Or. Waste Sys.*, 511 U.S. at 108 (finding the tax unconstitutional because of the unequal burden imposed on out-of-state waste).

256. *See* CAL. HEALTH & SAFETY CODE § 38562(c) (West 2007) (establishing the cap-and-trade system of the California Fuel Standard).

system, a Renewable Portfolio Standard, or a regulatory scheme that hasn't even been thought of yet—should always be mindful of alternative regulatory schemes to what they are implementing. States should consider why these regulatory schemes are not feasible in their situation. States should make an attempt to document why regulatory schemes could not possibly be successful under their unique circumstances. If faced with a dormant Commerce Clause challenge states should present evidence to the courts that will satisfy the dormant Commerce Clause jurisprudence requiring that states acted with no non-discriminatory alternatives available. Though this recommendation is a last resort it is something that has worked in the past,[257] and states should be mindful of that fact.

VI. Conclusion

Due to a lack of Congressional action, and until there is more Congressional action, states will be required to establish their own environmental regulatory schemes. The nature and scope of the environmental problem means these regulatory schemes will impact interstate commerce and therefore implicate the dormant aspect of the Commerce Clause of the U.S. Constitution. As of this writing, California's Fuel Standard awaits a review under the less intensive *Pike* balancing test in the district court. The Ninth Circuit has denied RMFU's petition for a rehearing *en banc*.[258] RMFU's petition for certiorari to the United States Supreme Court has also been denied.[259]

This Note introduced you to the jurisprudence, relevant tests, and historical application of the dormant Commerce Clause. Through the lens of *Rocky Mountain Farmers Union*, *v. Corey* this Note has provided direction to states looking to understand the drafting requirements of environmental

257. *See* Maine v. Taylor, 477 U.S. 131, 151 (1986) (finding a statute, which discriminated on its face by restricting the importation of baitfish in Maine, was acceptable under dormant Commerce Clause analysis because Maine had a legitimate local interest in keeping non-native baitfish out of its waters which could not be served by a nondiscriminatory alternative).

258. Rocky Mountain Farmers Union v. Corey, 740 F.3d 507 (9th Cir. 2014).

259. Rocky Mountain Farmers Union v. Corey, 134 S. Ct. 2875, 189 L. Ed. 2d 835 (2014).

legislation that avoids dormant Commerce Clause challenges. If states are able to follow these recommendations their environmental legislation will be effective and—hopefully—protected from such challenges.