

NOTE

**THE DORMANT COMMERCE CLAUSE
AND CALIFORNIA’S LOW CARBON
FUEL STANDARD**

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California’s Low Carbon Fuel Standard (LCFS), enacted as part of the State’s pioneering Global Warming Solutions Act (AB 32), purports to regulate the amount of carbon emissions associated with fuels consumed in the state. Part of this scheme involves assigning numeric scores to vehicle fuels reflecting the amount of carbon emissions associated with their production, transportation, and use. The scores are part of a “cap-and-trade” scheme to lower the state’s total amount of carbon emissions associated with fuel use. Out-of-state industry groups brought a challenge in the United States District Court for the Eastern District of California, alleging that the LCFS violated the “dormant Commerce Clause” of the United States Constitution. The United States District Court for the Eastern District of California agreed with the Plaintiffs, and issued a preliminary injunction. On October 16, 2013, the Ninth Circuit reversed and remanded.

This Note describes the background of the dormant Commerce Clause and its application in previous environmental regulations. It then analyzes the arguments on both sides of the challenge to California’s LCFS, and suggests a course of action for California and other states going forward to comply with the Constitution in this developing area of law. Finally, this Note discusses the application of dormant Commerce Clause doctrine to the scenario of global climate change, and the relevance of global warming as a critical issue that states can be allowed to regulate, especially when the federal government has not.

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INTRODUCTION

All over the world, the natural environment is shifting. In the coming decades and centuries, scientists expect the changes to continue and accelerate. The shift is caused by global climate change spurred by the warming effect of high levels of carbon dioxide and other greenhouse gases in the atmosphere. In addition to rising temperatures worldwide, scientists predict increased likelihood of destabilizing effects, including “[c]ontraction of snow cover areas, increased thaw in permafrost regions, decrease in sea ice extent”; “[i]ncreased frequency of hot extremes, heat waves and heavy precipitation”; “[i]ncrease in tropical cyclone intensity”; “[p]recipitation increases in high latitudes”; “[p]recipitation decreases in subtropical land regions”; and “decreased water resources in many semi-arid areas.”¹ Many of these impacts are likely to affect California: it is the state with the third highest amount of coastline by length, all of which is subject to rising sea levels and resulting land loss.² Climate change also threatens California’s water supply, such as through a decrease in the vital snow pack.³

In the United States, transportation accounts for 28% of greenhouse gas emissions.⁴ For individuals, transportation makes up an even higher share of greenhouse gas emissions: the U.S. Government estimates that 51% of

1. *Climate Change: Effects*, NAT’L AERONAUTICS & SPACE ADMIN., <http://climate.nasa.gov/effects> (last visited Oct. 9, 2013).

2. JANICE CHERYL BEAVER, CONG. RESEARCH SERV., U.S. INTERNATIONAL BORDERS: BRIEF FACTS, at CRS-3 to -4 (2006). The two states with longer coastlines are Alaska and Florida.

3. CLIMATE CHANGE IN CALIFORNIA, CAL. DEP’T OF WATER RES., (2007), *available at* <http://www.water.ca.gov/climatechange/docs/062807factsheet.pdf>.

4. *National Greenhouse Gas Emissions Data*, U.S. ENVTL. PROTECTION AGENCY, <http://www.epa.gov/climatechange/ghgemissions/usinventoryreport.html> (last visited Oct. 9, 2013).

each household's "carbon footprint" results from transportation fuels.⁵ Furthermore, each gallon of gasoline burned is estimated to result in twenty pounds of added carbon dioxide to the atmosphere.⁶ Worldwide, transportation is estimated to account for about 13% of total greenhouse gas emissions.⁷ Carbon in vehicle fuels, therefore, is an attractive point of attack for policymakers interested in reducing carbon output.

Despite these dire anticipated effects of climate change, policymakers at the federal level had largely failed to address climate change by the early 2000s.⁸ The existing federal framework for regulating air pollutants proved inadequate to face the unique challenges posed by climate change: the 1970s Clean Air Act envisioned the regulation of "criteria pollutants" posing a direct danger to human health through inhalation.⁹ This framework failed to address climate change for several reasons.¹⁰ For example, the Clean Air Act applies to sources emitting just a few hundred tons of regulated pollutants per year; given the large volumes of carbon dioxide emitted by individuals each year, many thousands of new sources would be brought under regulation immediately were the Clean Air Act to apply to greenhouse gases.¹¹ This was an administrative headache the EPA could not manage. As a result, it became clear that a new structure was needed to address the unique concerns, and overwhelming scope, of the climate change problem.¹² It was also clear that the federal government was in no hurry to enact a solution.¹³

5. *Reduce Climate Change*, U.S. DEP'T OF ENERGY, <http://www.fueleconomy.gov/feg/climate.shtml> (last visited Oct. 9, 2013).

6. *Id.*

7. *Climate Change 2007: Synthesis Report*, Figure: Global Anthropogenic GHG emissions, INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, http://www.ipcc.ch/publications_and_data/ar4/syr/en/figure-spm-3.html (last visited Oct. 9, 2013).

8. *See, e.g.*, Ryan Lizza, *As the World Burns*, THE NEW YORKER, Oct. 11, 2010, available at http://www.newyorker.com/reporting/2010/10/11/101011fa_fact_lizza; *see also* Jason Dearen, *Calif. on Verge of Major Greenhouse Gas Rules*, SAN DIEGO UNION-TRIBUNE, Dec. 16, 2010, available at <http://www.utsandiego.com/news/2010/Dec/16/calif-on-verge-of-major-greenhouse-gas-rules/?#article-copy>.

9. *Six Common Air Pollutants*, U.S. ENVTL. PROTECTION AGENCY, <http://www.epa.gov/air/urbanair/> (last visited Oct. 9, 2013).

10. *See, e.g.*, Lisa Heinzerling, *Climate Change at EPA*, 64 FLA. L. REV. 1, 8 (2012) (describing the political and administrative difficulties in applying the existing Prevention of Significant Deterioration [PSD] framework to climate change, which would "bring[] in many thousands of sources into the program for the first time all at once").

11. *Id.*

12. *Id.* at 2.

13. The Obama Administration has recently, as of this writing, begun to address climate change increasingly within the Clean Air Act. *See, e.g.*, Justin Gillis, *Obama Puts Legacy at Stake with Clean-Air Act*, N.Y. TIMES (June 25, 2013), <http://www.nytimes.com/2013/06/26/science/earth/clean-air-act-reinterpreted-would-focus-on-flexibility->

Facing this regulatory failure, California seized the opportunity to regulate greenhouse gases on its own. The State had long been a pioneer in environmental regulations. A key example of this leadership involved the regulation of mobile sources of air pollution in the 1970s in the Clean Air Act.¹⁴ Before the federal government undertook to regulate air pollution, California had already taken steps to control pollution from vehicles through motor vehicle emissions standards.¹⁵ Once the federal government passed the Clean Air Act and took control of air pollution, however, Section 209 of the Act disallowed states from creating regulations on mobile sources more strict than those the federal government adopted, with the exception that California may apply for a waiver from the EPA in order to pursue a stricter standard for mobile sources.¹⁶ This provision shields multi-state commercial actors from the inefficiency of having to comply with a patchwork of different standards in order to sell cars nationwide. California, therefore, has long been a leader in environmental regulations, but federal authority sometimes reins in the State's efforts in the interests of national consistency.

The Clean Air Act stands primarily as an example of federal authority: it centralized and nationalized the project of regulating air pollution in a uniform manner. It also reigned in state regulation in Section 209, when it disallowed states from regulating more stringently on their own, and capped California's ability to do so. Nevertheless, it is a principle of federalism that states should be allowed to act as "laboratories" in which new policies are dreamed of and tested.¹⁷ This theory stems from a lengthy and passionate dissent of Justice Brandeis, in which he wrote that 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."¹⁸ The idea of

and-state-level-efforts.html?pagewanted=all. California's actions, discussed here, predated such efforts at the federal level.

14. John P. Dwyer, *The Practice of Federalism Under the Clean Air Act*, 54 MD. L. REV. 1183, 1196 n.65 (1995) ("Congress first adopted the special provision for California in the Air Quality Act of 1967 as a result of intense state lobbying. California had adopted motor vehicle emission standards long before the federal government adopted such standards, and thus the state led the way for federal standards." (citation omitted)).

15. *Id.*

16. 42 U.S.C. § 7543(a)–(b); *California Waivers and Authorizations*, U.S. ENVTL. PROTECTION AGENCY, <http://www.epa.gov/otaq/cafr.htm> (last visited Oct. 9, 2013). The statute does not list California by name, but states that "The Administrator shall . . . waive application of this section to any State which has adopted standards . . . for the control of emissions from new motor vehicles or new motor vehicle engines prior to March 30, 1966." 42 U.S.C. § 7543(b)(1). Only California had done so. In effect, then, the statute singled California out.

17. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

18. *Id.*

“states as laboratories” is invoked as a matter of course in discussions of federalism—especially by those supporting an embattled state policy.¹⁹

Of course, as evidenced by California’s regulation of mobile sources before the Clean Air Act, there are some downsides to states’ abilities to act as laboratories. In the context of civil rights, for example, the Fourteenth Amendment’s equal protection and due process guarantees have long curtailed states’ authority to enact discriminatory laws.²⁰ The federal government also tends to take over from states in situations where there might otherwise be a “race to the bottom,” or a system of incentives for states to compete for businesses by offering lower protections, such as for the environment.²¹

In addition to the above policy considerations that explain the interaction between state and federal regulators, the United States Constitution has long been interpreted to limit the authority of states to regulate major issues. The Commerce Clause grants to Congress the authority to “regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.”²² Since the early nineteenth century, as this Note describes, that grant of authority has been interpreted as containing an implicit restriction of the states’ authority to regulate interstate commerce. In other words, that which Congress may regulate, the states may not. Therefore, states may not regulate areas, such as commerce, that are delegated to Congress. This principle, as applied to the exclusive authority of Congress over the ability to regulate Commerce, is known as the dormant Commerce Clause.²³

This Note examines the history and current status of the dormant Commerce Clause of the U.S. Constitution, and the applicability of the dormant Commerce Clause in the context of California’s efforts to control the emission of greenhouse gases. It analyzes one federal court’s finding that California’s regulations did violate the Constitution, and discusses the rejection of that reasoning on appeal at the Ninth Circuit. It argues that the

19. See James A. Gardner, *The “States-as-Laboratories” Metaphor in State Constitutional Law*, 30 VAL. U. L. REV. 475 (1996).

20. See, e.g., *Lawrence v. Texas*, 539 U.S. 558 (2003); *Gratz v. Bollinger*, 539 U.S. 244 (2003); *Craig v. Boren*, 429 U.S. 190 (1976); *Loving v. Virginia*, 388 U.S. 1 (1967); *Reynolds v. Sims*, 377 U.S. 533 (1964); *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

21. See, e.g., Erin Ryan, *Federalism and the Tug of War Within: Seeking Checks and Balance in the Interjurisdictional Gray Area*, 66 MD. L. REV. 503, 581 (2007) (describing the Clean Air Act’s federal role in setting National Ambient Air Quality Standards as “a classic regulatory function of government, as is the prevention of ‘race to the bottom’ collective action problems that might ensue if regional authorities competed with one another for industry by progressively lowering pollution standards that could ultimately leave all worse off”).

22. U.S. CONST. art. I, § 8, cl. 3.

23. See *infra* Part III.

methods California used to reduce the “carbon intensity” of vehicle fuels are not facially invalid as discriminating against interstate commerce, and that the appropriate test in a legal challenge would be a balancing test, weighing California’s interest in the environment against the burdens it imposes on interstate commerce.

More broadly, this Note discusses the emerging recognition of global climate change as a “legitimate local purpose.”²⁴ With this recognition, it becomes more possible for states validly to use otherwise-illegal discriminatory means to solve environmental problems. At the same time, the Note acknowledges the peculiar legal stance associated with this recognition.

Another article in this issue describes the dormant Commerce Clause at length and provides a good deal of background on the broader schemes California has used to curb global climate change. This Note delves more deeply into one regulatory regime used by California’s Air and Resources Board, which is known as the Low-Carbon Fuel Standard (LCFS). This Note also deals specifically with the federal challenge to the LCFS, and the legal developments represented by that challenge.

I. GLOBAL WARMING AND CALIFORNIA

The risks California faces due to global warming have been well documented.²⁵ In view of these concerns, the California legislature was anxious to craft legislation that would effectively reduce harmful impacts on California.²⁶ In addition, the legislature recognized the historic position California found itself in: it was keen to craft legislation that might serve as a model for the rest of the nation. Mary Nichols, the chairwoman of the California Air Resources Board (CARB), explained that California was trying to “fill the vacuum created by the failure of Congress to pass any kind of climate or energy legislation for many years now.”²⁷

At the end of these deliberations in 2006, California enacted the Global Warming Solutions Act, better known as Assembly Bill 32 (AB 32).²⁸ The new law set several ambitious targets to dramatically reduce California’s climate change-inducing greenhouse gas emissions, such as requiring CARB “to adopt regulations to require the reporting and verification of statewide

24. See *infra* Parts III(B), III(F), IV(A)(2).

25. See generally *Reports on the Third Assessment from the California Climate Change Center*, CAL. CLIMATE CHANGE PORTAL, CA.GOV, http://www.climatechange.ca.gov/adaptation/third_assessment/ (last visited Oct. 9, 2013). The site also includes comprehensive information about California’s coordinated efforts to adapt to climate change.

26. Dearen, *supra* note 8 (internal quotation marks omitted).

27. *Id.*

28. CAL. HEALTH & SAFETY CODE §§ 38500–38599 (West, Westlaw through Ch. 526, except Ch. 352, of 2013 Reg. Sess.).

greenhouse gas emissions and to monitor and enforce compliance with this program.”²⁹ CARB was also required, among other things, to “adopt a statewide greenhouse gas emissions limit equivalent to the statewide greenhouse gas emissions levels in 1990 to be achieved by 2020” and to adopt “rules and regulations in an open public process to achieve the maximum technologically feasible and cost-effective greenhouse gas emission reductions.”³⁰

II. THE LOW CARBON FUEL STANDARD

Pursuant to AB 32 and an executive order of Governor Schwarzenegger, CARB enacted the LCFS in 2007.³¹ The LCFS was to involve collaboration between multiple groups within California’s Environmental Protection Agency, the University of California, and others to establish a compliance schedule to meet AB 32’s aggressive 2020 target for 1990-level emissions.³² The LCFS was to reduce the amount of carbon emissions associated with vehicle fuels sold and consumed in California, as part of an array of regulations that would reduce California’s overall carbon emissions.³³ By establishing “carbon intensity ratings” for categories of vehicle fuels, the LCFS provided a metric for identifying how much carbon was associated with all types of vehicle fuels in the state.³⁴

The LCFS took a holistic view of fuels’ carbon intensities, looking to greenhouse gas emissions associated with all stages of their production.³⁵ One factor in the score was the amount of transportation involved in the fuels’ consumption in California.³⁶ This led to the result that out-of-state fuels chronically scored much higher than in-state fuels, although Midwestern corn ethanol-based fuels and Brazilian sugarcane-based fuels also received top ratings by CARB.³⁷

The LCFS applies to any transportation fuel for sale in California.³⁸ One type of transportation fuel regulated under the LCFS, at the heart of the dispute in this paper, is ethanol, of which 98 percent is made from

29. Assemb. B. 32, 2005–2006 Sess. (Cal. 2006).

30. *Id.*

31. *Low Carbon Fuel Standard*, CAL. ENERGY COMM’N, CA.GOV, http://www.energy.ca.gov/low_carbon_fuel_standard (last visited Oct. 9, 2013).

32. *Id.*

33. *Id.*

34. CAL. CODE REGS. tit. 17, § 95480.3(b) (2012).

35. Kirk Tracy, Rocky Mountain Farmers Union v. Goldstene: *Low Carbon Fuel Standards, Lifecycle Greenhouse Gases, and California’s Continued Struggle to Lead the Way*, 24 TUL. ENVTL. L.J. 173, 174 (2010).

36. *Id.*

37. *Id.*

38. CAL. CODE REGS. tit. 17, § 95480.1 (2012).

corn.³⁹ Ethanol is an “alcohol-based fuel made by fermenting and distilling starch crops, such as corn”; the resulting ethanol can be used separately or mixed with traditional gasoline.⁴⁰ The primary benefits of ethanol over gasoline are its lower carbon emissions (the LCFS’s primary concern), and its ability to reduce the need for imported oil.⁴¹ Corn destined to become ethanol for consumption in California is either shipped to California and processed into ethanol there, or produced elsewhere and shipped into California as a finished product.⁴² The finished product “travels by truck or rail to facilities where it is blended with gasoline.”⁴³

The vehicle fuels regulated under the LCFS are assigned a “carbon intensity” (CI) score, reflecting the amount of greenhouse-gas emissions associated both with the fuel itself as well as with the circumstances of its production.⁴⁴ This CI score is assigned to categories of vehicle fuels as a matter of convenience, but producers may request a customized score from CARB if they wish, in a process known as “Method 2A or 2B.”⁴⁵ For any such individualized CI score to be approved, “the regulated party must demonstrate that the method is . . . scientifically defensible.”⁴⁶ Moreover, the Executive Officer of CARB is tasked with reviewing CI scores and may choose a value that “most closely corresponds” to the category, or “pathway,” for a particular “fuel or blendstock.”⁴⁷ To determine the score, all aspects of the fuel’s “life cycle” are taken into account, including the geographic region in which the fuel was produced and the amount of distance the fuel was transported into California.⁴⁸ The average categorical scores are changed yearly.⁴⁹

CARB was to begin reducing the total CI allowed in the state, beginning by small increments in 2011 and going down a full 10 percent (to 90 percent of existing values) by 2020.⁵⁰ To this end, regulated parties were required to calculate their CI value, which would generate either a credit or deficit, depending on how much the party had reduced its CI score.⁵¹ Par-

39. Complaint for Declarative and Injunctive Relief at paras. 14–15, *Rocky Mountain Farmers Union v. Goldstene*, 843 F. Supp. 2d 1071 (E.D. Cal. 2011) (No. 109CV02234), 2009 WL 5421971 [hereinafter *Complaint*].

40. *Ethanol*, FUELECONOMY.GOV, <http://www.fueleconomy.gov/feg/ethanol.shtml> (last visited Oct. 9, 2013).

41. *Id.*

42. *Complaint*, *supra* note 39, paras. 14–15.

43. *Id.* para. 15.

44. CAL. CODE REGS. tit. 17, § 95486 (2012).

45. *Id.* § 95486(c).

46. *Id.* § 95486(e).

47. *Id.* § 95486(a)(3)(A).

48. *Id.* § 95486(a)(2)(C)–(D).

49. *Id.* § 95486(b) tbl.8.

50. *Id.* § 95482.

51. *Id.* § 95485(a).

ties would then have the option to trade credits and deficits, resulting in a “cap-and-trade” scheme.⁵²

The LCFS contained a table, known as “Table 6,” or the “Carbon Intensity Lookup Table for Gasoline and Fuels that Substitute for Gasoline.”⁵³ It gave a long list of categories of fuels based on type and origin, each with a corresponding “Pathway Identifier.”⁵⁴ These pathways each were assigned three scores for CI: a score for “Direct Emissions,” a score for the carbon intensity of “Land Use or Other Indirect Effect,” and a “Total” score.⁵⁵ While it does not bear listing all of the scores here, some examples are that the total scores for “Midwest Average” was 99.40 grams of carbon dioxide per megajoule (gCO₂e/MJ), compared with a “California Average” of 95.66 gCO₂e/MJ.⁵⁶ The lowest average score on the list was “Landfill gas (bio-methane) cleaned up to pipeline quality NG [Natural Gas]; compressed in CA,” which had a CI value of 11.26 gCO₂e/MJ.⁵⁷ In general, Brazilian sugarcane also received relatively low CI scores, such as 58.40 gCO₂e/MJ for “Brazilian sugarcane with average production process, mechanized harvesting and electricity co-product credit,” and 73.40 gCO₂e/MJ for “Brazilian sugarcane using average production processes.”⁵⁸

Perhaps unsurprisingly, the mechanics of the LCFS were not agreeable to industry groups and other interested parties—particularly those receiving relatively high CI scores in the Midwest, who perceived a protectionist, pro-California economic motivation. They proceeded to challenge the standard on the grounds that it violated the Commerce Clause of the United States Constitution, under the so-called “dormant Commerce Clause” theory.⁵⁹

III. DORMANT COMMERCE CLAUSE DOCTRINE

Article I, Section 8, of the United States Constitution confers upon Congress the power to “regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.”⁶⁰ The so-called

52. *Id.* § 95485(c). Emissions trading, or “cap-and-trade,” is a market-based approach used to control pollution by providing economic incentives for achieving reductions in the emissions of pollutants. *See* ROBERT N. STAVINS, EXPERIENCE WITH MARKET-BASED ENVIRONMENTAL POLICY INSTRUMENTS (Res. for the Future, Discussion Paper 01-58, 2001).

53. CAL. CODE REGS. tit. 17 § 95486(b) tbl.6.

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. *See infra* Part IV.

60. U.S. CONST. art. I, § 8, cl. 3.

“dormant” or “negative” commerce doctrine, though of long standing, does not appear in the text of the Constitution.⁶¹ Instead, it is the theory that no body other than Congress may regulate interstate or foreign commerce, as Congress holds exclusive power to do so in the text of the Constitution. Therefore, even when Congress has failed to act, no other body may legislate in the arena Congress has been delegated.⁶²

Chief Justice John Marshall was among the first to articulate this principle. In *Gibbons v. Ogden*, he wrote that New York’s grant to individuals the exclusive rights to navigate the waters within the state was “repugnant” to the Commerce Clause of the U.S. Constitution, which “authorizes Congress to regulate commerce.”⁶³ Marshall argued that the structure of the Constitution could not withstand the ability of states to regulate interstate commerce: “If there were no power in the general government, to control this extreme belligerent legislation of the States, the powers of the government were essentially deficient.”⁶⁴ Finally, Marshall wrote that the assignment of the commerce power to Congress was “an investment of power for the general advantage” in Congress’s hands, “which power can never be exercised by the people themselves, but must be placed in the hands of agents, or lie dormant.”⁶⁵ It is from this phrase that the “dormant” Commerce Clause draws its name.

During the last two centuries, the Supreme Court has continued to apply the dormant Commerce Clause. The Court uses two tests to determine whether state action violates the dormant Commerce Clause. In the first, known as the “strict scrutiny” test, a court determines whether a state law discriminates purposefully, facially, or in effect against interstate commerce.⁶⁶ The court will also determine whether the statute regulates “extraterritorially”—whether it seeks to control behavior occurring purely outside its borders.⁶⁷ Statutes that discriminate or regulate extraterritorially are subject to “strict scrutiny,” and the state bears the burden of demonstrating “both that the statute serves a legitimate local purpose, and that this purpose could not be served as well by available nondiscriminatory means.”⁶⁸

61. See, e.g., *United Haulers Ass’n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 338, 342–343 (2007).

62. See, e.g., *id.*

63. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 1 (1824).

64. *Id.* at 5.

65. *Id.* at 189.

66. See, e.g., *Maine v. Taylor*, 477 U.S. 131, 138 (1986).

67. See *Healy v. Beer Inst.*, 491 U.S. 324, 336 (1989); *Am. Beverage Ass’n v. Snyder*, 700 F.3d 796, 807 (6th Cir. 2012).

68. *Taylor*, 477 U.S. at 138 (internal quotation marks omitted).

Statutes that discriminate only incidentally are subject to the *Pike* balancing test, named after *Pike v. Bruce Church, Inc.* The Supreme Court established that statutes not discriminating on their face against interstate commerce “violate the Commerce Clause only if the burdens they impose on interstate trade are ‘clearly excessive in relation to the putative local benefits.’”⁶⁹

A. *The Choice of Test*

The beginning of a dormant Commerce Clause analysis is the determination of which legal test is appropriate to evaluate the state law in question. First, the court must determine “whether the ordinance discriminates against interstate commerce.”⁷⁰ Discrimination for these purposes “simply means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter.”⁷¹ If the court finds that “a restriction on commerce is discriminatory, it is virtually *per se* invalid.”⁷² This is known as the “strict scrutiny” test, and it is so demanding that only one state law has ever survived it in the Supreme Court.⁷³ Next, if the court finds that the ordinance itself does not discriminate, the court determines whether it “imposes a burden on interstate commerce that is ‘clearly excessive in relation to the putative local benefits.’”⁷⁴

The determination of what constitutes “discrimination” arises from the statute on its face, its text, its purposes, and its effects. Broadly speaking, the statute is not discriminatory if it “regulates even-handedly to effectuate a legitimate local public interest.”⁷⁵ Even though a statute can discriminate without a determination that its *purpose* is to discriminate, protectionism is an important piece of the logic here: the Supreme Court has identified the “crucial inquiry” as “whether [the law] is basically a protectionist measure, or whether it can fairly be viewed as a law directed to legitimate local concerns, with effects upon interstate commerce that are only incidental.”⁷⁶

Even without facial discrimination—such as when a law, by its terms, applies evenly to everyone—the law may still discriminate against interstate commerce if it has discriminatory effects. For example, in *Hunt v. Washington State Apple Advertising Commission*, the Supreme Court held that a North Carolina law was discriminatory where it required apples sold in the state

69. *Id.* (quoting *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970)).

70. *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 390 (1994).

71. *Oregon Waste Sys., Inc. v. Env'tl. Quality Comm'n*, 511 U.S. 93, 99 (1994).

72. *Id.*

73. *See Taylor*, 477 U.S. at 146 (discussed below).

74. *C & A Carbone*, 511 U.S. at 390 (quoting *Pike*, 397 U.S. at 142).

75. *Pike*, 397 U.S. at 142.

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

to bear *only* the USDA label.⁷⁷ The law discriminated because “North Carolina . . . had never established a grading and inspection system,” so “the statute had no effect on the existing practices of North Carolina producers,” but “Washington growers and dealers . . . were forced to alter their long-established procedures, at substantial cost, or abandon the North Carolina market.”⁷⁸ Therefore, a law applying even-handedly to all parties might still discriminate if it has the effect of placing substantial barriers on interstate commerce without effectively furthering its “laudable goal” of protecting consumers from fraud.⁷⁹

Finally, the strict scrutiny test will be applied if the law regulates extra-territorially—that is, if the state attempts to regulate behavior occurring beyond its borders. This doctrine of the Commerce Clause applies in two situations: where the state attempts to regulate “commerce that takes place wholly outside of” its borders, “whether or not the commerce has effects within the state”; and where the statute “directly controls commerce occurring wholly outside the boundaries of” the state.⁸⁰ The court will also consider whether the “statute may interact with the legitimate regulatory regimes of other States and what effect would arise” if more states adopted similar legislation in order to guard against the “projection of one state regulatory regime into the jurisdiction of another State.”⁸¹ In the extraterritoriality analysis, the “critical inquiry is whether the practical effect of the regulation is to control conduct beyond the boundaries of the State.”⁸²

B. Strict Scrutiny: Legitimate Local Purpose

Once the court has determined that the strict scrutiny test is applicable, the first step in applying it is determining whether the State acted in furtherance of a compelling state interest or “legitimate local interest.”⁸³ However, in applying the strict scrutiny test, courts rarely dwell on the discussion of what constitutes a legitimate local interest.⁸⁴ Instead, courts appear to presume that any purpose beyond simple economic protection-

77. Hunt v. Wash. State Apple Adver. Comm'n, 432 U.S. 333, 340 (1977).

78. *Id.*

79. *Id.* at 353.

80. Rocky Mountain Farmers Union v. Goldstene, 843 F. Supp. 2d 1071, 1091 (E.D. Cal. 2011), *rev'd sub nom.* Rocky Mountain Farmers Union v. Corey, 730 F.3d 1070 (9th Cir. 2013).

81. *Id.* at 1090. Courts phrase this consideration in terms of “economic Balkanization.”

82. *Id.* (quoting Healy v. Beer Inst., 491 U.S. 324, 336 (1989)).

83. C & A Carbone, Inc. v. Town of Clarkstown, 511 U.S. 383, 392 (1994).

84. Courts differ in their choice of words for the test; satisfactory interests are described either as “compelling” or “legitimate”; and the word “purpose” appears interchangeably with the word “interest.” For example, *C & A Carbone*, 511 U.S. at 392, uses “legitimate local interest.” *Pike v. Bruce Church*, 397 U.S. 137, 145–46 (1970) uses both “compelling state interest” and “legitimate local purpose.”

ism, and probably excluding otherwise illegal purposes, are valid.⁸⁵ The case law is somewhat undeveloped at this step, because when strict scrutiny is applied, the statutes almost always fail for being discriminatory. Indeed, the strict scrutiny test is so demanding that discriminatory laws are said to be almost per se invalid.⁸⁶ Therefore, courts rarely reach the discussion of what legitimate environmental local purposes might be; it is possible that *all* environmental purposes, so long as they do not stem from protectionism, are valid.⁸⁷

In *C & A Carbone, Inc. v. Town of Clarkstown*, the Supreme Court applied the strict scrutiny test and held that “a so-called flow control ordinance, which requires all solid waste to be processed at a designated transfer station before leaving the municipality” violated the dormant Commerce Clause because the ordinance “depriv[ed] competitors, including out-of-state firms, of access to a local market.”⁸⁸ The “avowed purpose of the ordinance,” which was “to retain the processing fees charged at the transfer station to amortize the cost of the facility,” was not the sort of legitimate local purpose a government must demonstrate in order to be able to discriminate.⁸⁹ Further, even if the Court had accepted financing as a legitimate local purpose, the State must show that there were no other reasonable, non-discriminatory means to achieve that end.⁹⁰

Similarly, Oregon’s waste disposal regime, which subjected disposers of waste generated out-of-state to surcharges roughly three times higher than disposers of in-state waste, was facially invalid under the strict scrutiny test.⁹¹ The Court held that economic and “resource” protectionism, both of which would provide preferable treatment to Oregon economic interests, could never be valid local interests to satisfy the test.⁹²

85. For example, it can be assumed that the Court would not declare “valid” the state purpose to discriminate on the basis of race.

86. See, e.g., *Oregon Waste Sys., Inc. v. Env'tl. Quality Comm'n*, 511 U.S. 93, 100 (1994).

87. Cf. *City of Philadelphia v. New Jersey*, 437 U.S. 617, 627 (1978). Even bona fide goals in the public interest violate the Commerce Clause if the means of achieving them is protectionist. The Supreme Court wrote in *City of Philadelphia* that discriminatory legislation was nearly always invalid, “whether the ultimate aim of the legislation was to assure a steady supply of milk by erecting barriers to allegedly ruinous outside competition . . . or to create jobs by keeping industry within the State . . . or to preserve the State’s financial resources from depletion by fencing out indigent immigrants In each of these cases, a presumably legitimate goal was sought to be achieved by the illegitimate means of isolating the State from the national economy.” *Id.*

88. *C & A Carbone*, 511 U.S. at 386.

89. *Id.*

90. *Id.* at 392–94.

91. *Oregon Waste Sys.*, 511 U.S. at 108.

92. *Id.* at 107.

Prior to 2011, no state had identified global climate change as a legitimate local purpose justifying the use of discriminatory means. There had not been the opportunity to do so: few states had serious climate change legislation before California passed its climate change law in 2006.⁹³ However, an analogy to the argument that global climate change might be a state's concern can be found in the landmark *Massachusetts v. EPA* case. There, the Supreme Court held that Massachusetts had standing to challenge the EPA's failure to regulate greenhouse gas emissions under the Clean Air Act, as Massachusetts had demonstrated the requisite level of injury from global climate change, and had demonstrated that the EPA was failing to regulate a significant contributor to that phenomenon—vehicle emissions of greenhouse gases.⁹⁴ For example, since the “rising seas have already begun to swallow Massachusetts' coastal land,” and because “the Commonwealth owns a substantial portion of the state's coastal property, . . . it has alleged a particularized injury in its capacity as a landowner.”⁹⁵ The Court also suggested that the special status Massachusetts held as a sovereign imputed to it some of the injury resulting from the effects of global climate change on lands in its domain: given “Massachusetts' stake in protecting its quasi-sovereign interests,” the State “is entitled to special solicitude” in the standing analysis.⁹⁶ This holding suggests that states may have special interests in the regulation of climate change.

C. Very Legitimate Interests: Health and Safety Laws

Some cases have implied that a somewhat higher level of constitutional deference must be given to states regulating to protect health and safety, as well as other areas of traditional state concern. However, this factor is somewhat inconsistently applied. For example, in *United Haulers Ass'n v. Oneida-Herkimer Solid Waste Management Authority*, the Court wrote that the ordinances at issue were “exercises of the police power in an effort to address waste disposal, a typical and traditional concern of local government.”⁹⁷ Therefore, the Court declined the Plaintiffs' invitation to “hold that laws favoring public entities while treating all private businesses

93. See, e.g., Peter Henderson, *A Threat to California's Climate Change Progress*, N.Y. TIMES (Sept. 19, 2010), http://www.nytimes.com/2010/09/20/business/energy-environment/20green.html?_r=0 (explaining that “California is the clear U.S. leader on addressing climate change,” and that the “U.S. climate change bill, which passed the House of Representatives but failed in the Senate, was modeled after California's 2006 law”).

94. *Massachusetts v. EPA*, 549 U.S. 497, 521, 523 (2007) (internal quotation marks omitted).

95. *Id.* at 522.

96. *Id.* at 520.

97. *United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 347 (2007).

the same are subject to an almost *per se* rule of invalidity,” implying that such rigorous scrutiny of “economic legislation passed under the auspices of the police power” was a remnant of the bygone *Lochner* era of judicial supremacy.⁹⁸ Similarly, the Court affirmed in *Maine v. Taylor* that “[a]s long as a State does not needlessly obstruct interstate trade or attempt to place itself in a position of economic isolation, . . . it retains broad regulatory authority to protect the health and safety of its citizens and the integrity of its natural resources.”⁹⁹ Thus, the Court begins these cases in a stance of (at least formal) deference to states’ positions of authority to regulate health and safety within their borders.

Despite the Court’s deference to state police power, regulation of health and safety is not a shield against the requirements of the dormant Commerce Clause. Consistent with the logic of the balancing test, dire health concerns may merit harsh restrictions on interstate commerce; for example, many quarantine laws have passed muster, especially when they were targeted to the specific source of contagion.¹⁰⁰ On the other hand, a New Jersey statute banning the import of waste into the state was held to fail the balancing test, despite the State’s allegations that the law protected the public health.¹⁰¹ That law was not analogous to the valid quarantine laws, according to the Court, because the “harms caused by waste are said to arise after its disposal in landfill sites, and at that point . . . there is no basis to distinguish out-of-state waste from domestic waste.”¹⁰² The Court found that there was an impermissible disconnect between the State’s assertions that waste threatened the public health and the State’s chosen remedy, which was to ban *only* out-of-state waste, with no explanation for why only that waste threatened health.¹⁰³ In short, the Court concluded that the law must have been a thinly-veiled protectionist measure to attempt to reduce the size of New Jersey’s landfills through the impermissible means of restricting interstate commerce.¹⁰⁴

98. *Id.* (referencing *Lochner v. New York*, 198 U.S. 45 (1905)).

99. *Maine v. Taylor*, 477 U.S. 131, 151 (1986) (internal quotation marks omitted).

100. *See City of Philadelphia v. New Jersey*, 437 U.S. 617, 628–29 (1978) (“The appellees argue that not all laws which facially discriminate against out-of-state commerce are forbidden protectionist regulations. In particular, they point to quarantine laws, which this Court has repeatedly upheld even though they appear to single out interstate commerce for special treatment But those quarantine laws banned the importation of articles such as diseased livestock that required destruction as soon as possible because their very movement risked contagion and other evils. Those laws thus did not discriminate against interstate commerce as such, but simply prevented traffic in noxious articles, whatever their origin.”).

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.* at 629.

Finally, even though state laws regulating health and safety have traditionally been afforded a measure of deference by the courts, this stance was called into question by *Garcia v. San Antonio Metropolitan Transit Authority*.¹⁰⁵ In that case, the Supreme Court held that it was not the role of the federal judiciary to determine which realms were and were not traditionally the zones of state authority for the purposes of the Tenth Amendment, which guarantees that all powers not given to Congress remain with the states.¹⁰⁶ The court overruled the 1976 case *National League of Cities v. Usery*, which had identified the arenas that were traditional state functions that the federal government could not permissibly regulate.¹⁰⁷ In *Garcia*, the Court held that “the attempt to draw the boundaries of state regulatory immunity in terms of ‘traditional governmental function’ is not only unworkable but is also inconsistent with established principles of federalism and, indeed, with those very federalism principles on which *National League of Cities* purported to rest.”¹⁰⁸ However, the Court decided *United Haulers* in 1997, over ten years after *Garcia*. *United Haulers* included some of the strongest language suggestive of deference to traditional areas of state concern.¹⁰⁹ Therefore, it is unclear the extent to which *Garcia* has changed the stance courts must take in weighing state health and safety laws for the purposes of the dormant Commerce Clause.

It is also unclear whether the amount of deference courts grant to a state under the Tenth Amendment, as in *Garcia*, differs from the amount of deference due when testing a state law under the dormant Commerce Clause. The two provisions both appear in the Constitution, with neither taking an obvious position of inferiority to the other. Some scholars and Supreme Court Justices have found an affirmative guarantee in the Tenth Amendment, suggesting that it grants states certain powers or privileges, whereas others regard it only as a passive guarantee sketching out the relationship between the federal and state governments.¹¹⁰ The dormant

105. *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985).

106. U.S. CONST. amend. X; *Garcia*, 469 U.S. at 531.

107. *See Nat'l League of Cities v. Usery*, 426 U.S. 833, 845–46 (1976).

108. *Garcia*, 469 U.S. at 531.

109. *See supra* text accompanying note 97.

110. Traditionally, it was more common for courts to hold that the Tenth Amendment was merely a truism. *See United States v. Darby*, 312 U.S. 100, 124 (1941) (“The amendment states but a truism that all is retained which has not been surrendered. There is nothing in the history of its adoption to suggest that it was more than declaratory of the relationship between the national and state governments as it had been established by the Constitution before the amendment or that its purpose was other than to allay fears that the new national government might seek to exercise powers not granted, and that the states might not be able to exercise fully their reserved powers.”). However, some recent cases have adopted the idea that the Tenth Amendment creates affirmative limitations on the federal government’s authority. *See, e.g., New York v. United States*, 505 U.S. 144, 188 (1992); *Printz v. United States*, 521 U.S. 898, 933 (1997).

Commerce Clause seems to mirror the “truism” model of the Tenth Amendment: that is, it stands for the proposition that the states cannot do what Congress can in relation to commerce. Therefore, the dormant Commerce Clause mirrors the “size” of Congress’s Commerce power: a state regulation would not implicate the dormant Commerce Clause unless it involved a regulation Congress would also be permitted to enact. This analysis does not inform how to balance the two Constitutional provisions, but it suggests that a State defending its law against a dormant Commerce Clause challenge should allege that the challenge infringes upon the borders of the Tenth Amendment. The State could rely on the idea that the Tenth Amendment has some affirmative power, and that the federal government should not diminish that authority.

D. Strict Scrutiny: Reasonable Nondiscriminatory Alternatives

Finally, once a court has determined that a legitimate local purpose existed to justify discrimination in the strict scrutiny test, courts consider whether non-discriminatory alternatives existed that the State could have employed to achieve the desired interest. Since so many strict scrutiny cases fail at the first stage, when the court determines that the law is protectionist, it is somewhat rare to get a glimpse of what might satisfy a court for the purposes of determining whether there were no reasonable non-discriminatory alternatives to the discriminatory legislation. However, in a case challenging a municipal ordinance in Madison, Wisconsin that required all milk from outside the city to be pasteurized within five miles of the city, the court described that there were “reasonable and adequate alternatives” available to safeguard the quality of milk in Madison.¹¹¹ For example, the Court suggested that the City could charge the milk importers “the actual and reasonable cost” of inspection by the City’s own trusted officials, rather than insisting on local pasteurization.¹¹²

In *Maine v. Taylor*, the Supreme Court analyzed a Maine law banning the importation of live baitfish into the state, which was intended to stop the spread of invasive species and parasites.¹¹³ The Court found that “[n]o matter how one describes the abstract issue whether ‘alternative means could promote this local purpose as well without discriminating against interstate commerce,’ . . . the more specific question whether scientifically accepted techniques exist for the sampling and inspection of live baitfish is one of fact.”¹¹⁴ Furthermore, the Court held that the district court’s “finding that such techniques have not been devised cannot be characterized as

111. *Dean Milk Co. v. City of Madison*, 340 U.S. 349, 354–55 (1951).

112. *Id.*

113. *Maine v. Taylor*, 477 U.S. 131 (1986).

114. *Id.* at 146 (1986) (quoting *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979)).

clearly erroneous,” and that “the record probably could not support a contrary finding.”¹¹⁵ This standard does not require the development of new technologies that would achieve the ends without discrimination; therefore, the Plaintiffs’ assertions that other methods of controlling invasive species and parasites *might* be developed did not mean that Maine could not use the means most readily available to it in the present—the banning of importation.¹¹⁶

E. The Pike Balancing Test

In contrast with the virtual *per se* invalidity of statutes confronting the strict scrutiny test, the *Pike* balancing test tends to be highly deferential. As long as three conditions are met, the statute is likely to be upheld.¹¹⁷ Laws confronting the *Pike* standard have already met the first condition—that they do not discriminate on their face against interstate commerce, but that they only discriminate in their impacts.¹¹⁸ Next, the law must serve a valid, empirically demonstrable purpose for the state.¹¹⁹ Finally, the demonstrated impacts to interstate commerce must not be badly outweighed by the demonstrated burdens the state desires.¹²⁰

In 2007, the Supreme Court upheld a New York “flow control” ordinance that required all waste to be processed through a state-owned public benefit corporation.¹²¹ The Court reasoned that the flow ordinance should be subject to the *Pike* balancing test, rather than strict scrutiny, because all businesses, whether in- or out-of-state, were subject to precisely the same laws, and therefore the ordinance did not discriminate against interstate commerce.¹²² Employing the balancing test, the Court found that the legitimate local interests in creating “a convenient and effective way to finance [the affected counties’] integrated package of waste disposal services,” and in “increas[ing] recycling” outweighed the discriminatory impacts on interstate commerce, which were entirely theoretical: the lower courts had found no demonstrated impacts at all.¹²³

Courts defer to the State’s judgment about what non-protectionist goals it wishes to achieve, but a major factor in the balancing test is the ability of the State to demonstrate empirically that the effects it is imposing

115. *Id.*

116. *Id.* at 147.

117. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

118. *Id.*

119. *Id.*

120. *Id.*

121. *United Haulers Ass’n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 334 (2007).

122. *Id.* at 345–46.

123. *Id.* at 346.

on interstate commerce are justified in relation to the benefits the State desires. Justice Blackmun emphasized that, so long as “safety justifications [for a law] are not illusory, the Court will not second-guess legislative judgment about their importance in comparison with related burdens on interstate commerce.”¹²⁴ States often fail, however, to demonstrate that the benefits are not illusory, or that they are weighty enough to justify serious impacts on interstate commerce.¹²⁵ Iowa’s ban on trailers sixty-five feet and longer, purportedly to avoid the dangers associated with long trailers, was held invalid where there was no real evidence showing that sixty-five-foot trailers were any less safe than shorter ones, and in fact “[s]tatistical studies” had showed no safety difference at all.¹²⁶ Similarly, the Court struck down an Arizona law regulating the length of train cars as passing “beyond what is plainly essential for safety since it does not appear that [the law] will lessen rather than increase the danger of accident.”¹²⁷

F. Pike Balancing Test: Legitimate Local Purposes

Even compelling health justifications do not inoculate a law from dormant Commerce Clause scrutiny under the more forgiving *Pike* test. The *City of Philadelphia v. New Jersey* Court stated that “[a]ll objects of interstate trade,” including “innately harmful articles,” “merit Commerce Clause protection; none is excluded by definition at the outset.”¹²⁸ Rather than setting out a “two-tiered” system of dormant Commerce Clause analysis, wherein certain dangerous objects were excluded from protection altogether, earlier cases had held “simply that because the articles’ worth in interstate commerce was far outweighed by the dangers inhering in their very movement, States could prohibit their transportation across state lines.”¹²⁹ In other words, all articles warrant constitutional protection, even those that are “valueless” wastes.¹³⁰ However, there is a type of cost-benefit analysis courts employ: if the articles are worth very little and there are strong reasons to regulate them, the court will tip the balance in favor of the state’s regulation.¹³¹ States can likely pass laws to regulate harmful products without unduly interfering with interstate commerce because the health stakes are so high.

124. *Raymond Motor Transp. Inc. v. Rice*, 434 U.S. 429, 449 (1978) (Blackmun, J., concurring).

125. *See, e.g., id.* at 443.

126. *Kassel v. Consol. Freightways Corp.*, 450 U.S. 662, 670, 673 (1981).

127. *S. Pac. R.R. v. Arizona*, 325 U.S. 761, 781–82 (1945).

128. *City of Philadelphia v. New Jersey*, 437 U.S. 617, 622–23 (1978).

129. *Id.*

130. *Id.*

131. *Id.*

Because of the balancing nature of the *Pike* test, the burden placed on the regulated articles must be “clearly excessive in relation to the putative local benefits” in order to invalidate the law.¹³² Therefore, no matter how grave the peril the State attempts to regulate, the burden must be far worse. For a serious issue such as climate change, it would probably take an extreme burden to warrant overturning a state regulation under the *Pike* test.

IV. ROCKY MOUNTAIN FARMERS UNION CHALLENGE

Alleging that the LCFS violated the dormant Commerce Clause, farmers and farmer and industry groups brought suit in the United States District Court for the Eastern District of California on December 23, 2009.¹³³ The Plaintiffs sought injunctions against the LCFS, arguing it was unconstitutional for three reasons. First, they alleged that it “conflicts with and is preempted by federal law, including the Energy Independence and Security Act of 2007.”¹³⁴ Second, they argued that “it interferes with the regulation of interstate commerce.”¹³⁵ Finally, they argued that “it discriminates against out-of-state corn ethanol producers and importers and improperly regulates their extraterritorial conduct.”¹³⁶ The final two allegations formed their argument that the LCFS violated the dormant Commerce Clause.

In support of its allegations about the dormant Commerce Clause violation, the Complaint focused on the way in which the LCFS regulated extraterritorially. It pointed out that, “[f]or ethanol produced outside California, only two parts of the overall lifecycle of the ethanol—transportation of the ethanol within California and the combustion of ethanol in a motor vehicle in operation—occur inside California.”¹³⁷ The Complaint also challenged California’s calculation of the carbon intensity, which took into account the “so-called indirect ‘land use or other indirect effect’ from the production of corn itself, predominantly in the Midwest, ascribing a penalty to all corn ethanol based on its assumed indirect contribution to

132. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

133. *Rocky Mountain Farmers Union v. Goldstone*, 843 F. Supp. 2d 1071 (E.D. Cal. 2011), *rev’d sub nom. Rocky Mountain Farmers Union v. Corey*, 730 F.3d 1070 (9th Cir. 2013).

134. Complaint, *supra* note 39, para. 1. The “farmer Plaintiffs” consisted of the Rocky Mountain Farmers Union (RMFU), Redwood County Minnesota Corn and Soybean Growers, Penny Newman Grain, Inc., Fresno County Farm Bureau, Nisei Farmers League, and California Dairy Campaign. The “industry Plaintiffs” consisted of Growth Energy and the Renewable Fuels Association. *Rocky Mountain Farmers Union*, 843 F. Supp. 2d at 1096–1097.

135. Complaint, *supra* note 39, para. 1.

136. *Id.*

137. *Id.* para. 40.

worldwide [greenhouse gas (GHG)] emissions.”¹³⁸ As a result of this calculation, the Plaintiffs alleged that the LCFS “penalizes all corn ethanol based on the purported indirect effects of assumed farming practices that occur predominantly outside California, and through the regulation, California seeks to curb or eliminate these farming practices throughout the United States and beyond by making the entire corn ethanol market responsible for them.”¹³⁹ The Complaint further alleged that California discriminated against ethanol produced outside California, especially that produced in the Midwest.¹⁴⁰ The Complaint suggested that CARB regulated this way due to a “preference” for Brazilian sugarcane ethanol, which scored relatively better.¹⁴¹ Finally, the Complaint alleged that the LCFS would economically injure Midwestern ethanol producers both by imposing compliance costs on them through the cap-and-trade scheme, and by shifting Californian demand for ethanol to Brazilian sugarcane.¹⁴²

At the district court, Judge O’Neill found in the Plaintiffs’ favor in December of 2011.¹⁴³ He held that the LCFS was subject to strict scrutiny review due to its discrimination against out-of-state commerce, because the LCFS automatically assigned a higher score to other states’ fuels.¹⁴⁴ The court further held that, while the LCFS did serve the legitimate local purpose of reducing the risks of global warming, California failed to establish that it could not have used other nondiscriminatory means, such as a carbon tax or greater vehicle efficiency, to achieve that purpose.¹⁴⁵ Accordingly, the LCFS violated the dormant Commerce Clause.

California appealed to the Ninth Circuit, which heard oral arguments in October of 2012.¹⁴⁶ The Ninth Circuit judges agreed to a temporary reinstatement of the LCFS, but appeared to be somewhat unsympathetic to California’s arguments that the LCFS did not discriminate against other states.¹⁴⁷ They issued a ruling on October 16, 2013, discussed below.

138. *Id.* para. 41.

139. *Id.* para. 42.

140. *Id.* paras. 44–45.

141. *Id.* paras. 43–44.

142. *Id.* paras. 56–60.

143. *Rocky Mountain Farmers Union v. Goldstene*, 843 F. Supp. 2d 1071, 1079 (E.D. Cal. 2011), *rev’d sub nom.* *Rocky Mountain Farmers Union v. Corey*, 730 F.3d 1070 (9th Cir. 2013).

144. *Id.* at 1087, 1089.

145. *Id.* at 1093–94.

146. Karen Gullo, *California Asks Court to Reinstate Carbon Fuel Standard*, BLOOMBERG (Oct. 16, 2012, 3:45 PM), <http://www.bloomberg.com/news/2012-10-16/california-asks-court-to-reinstate-carbon-fuel-standard.html> (discussing what would become *Rocky Mountain Farmers Union v. Corey*, 730 F.3d 1070 (9th Cir. 2013)).

147. *Id.*

A. Challenge in the Eastern District of California

At the District Court for the Eastern District of California, the coalition of farmers, farming organizations, and corn ethanol industry groups suing CARB successfully obtained a preliminary injunction against CARB's LCFS.¹⁴⁸ Judge O'Neill agreed with them that the standard unconstitutionally regulated interstate commerce, finding that the LCFS facially discriminated against interstate commerce. Accordingly, he applied the strict scrutiny test.¹⁴⁹ While he agreed with California that reducing global warming was a legitimate local purpose justifying state action, he found that the State could have used other, non-discriminatory alternative measures to achieve their desired ends.¹⁵⁰

In this section, I will argue, as the Ninth Circuit later agreed, that Judge O'Neill applied the wrong test when he held that the LCFS facially discriminated against interstate commerce; instead, the *Pike* balancing test, rather than the strict scrutiny test, is appropriate.¹⁵¹ Next, I will discuss the significance of Judge O'Neill's finding that global warming was a legitimate local purpose, and the implications of this finding for future states' regulatory schemes. Finally, I will discuss and critique Judge O'Neill's finding that there were nondiscriminatory alternatives California could have used.

The Plaintiffs' Complaint for Declaratory and Injunctive Relief, filed on December 23, 2009, alleged two violations of law. First, it alleged that the LCFS was preempted by federal law, including the Energy Independence and Security Act (EISA).¹⁵² Second, relevant here, the complaint alleged that the LCFS violated the dormant Commerce Clause by discriminating impermissibly against Midwestern corn ethanol producers.¹⁵³

148. Rocky Mountain Farmers Union v. Goldstene, 843 F. Supp. 2d at 1105.

149. *Id.* at 1089.

150. *Id.* at 1093-94.

151. The Ninth Circuit remanded to determine whether the strict scrutiny test might still be applicable because the LCFS discriminated in purpose or effect. If not, the *Pike* balancing test will be applied. Rocky Mountain Farmers Union v. Corey, 730 F.3d 1070, 1087-88 (9th Cir. 2013).

152. Complaint, *supra* note 39, para. 1. The Plaintiffs heavily emphasized their first legal challenge to the LCFS: that it was preempted by federal law. They alleged that, because federal law, including the Energy Independence and Security Act (EISA), comprehensively regulated oil and gas, that states could not do so as well. However, the District Court for the Eastern District of California, Judge O'Neill, ruled that the farmer Plaintiffs lacked standing to bring the preemption claim, and the industry groups' individual Plaintiffs similarly lacked standing to make the challenge based on EISA. Moreover, Judge O'Neill held that the remaining Plaintiffs who had standing for the preemption challenge had failed to demonstrate that summary judgment was appropriate, so he denied their summary judgment motion on preemption. Rocky Mountain Farmers Union v. Goldstene, 843 F. Supp. 2d at 1094-95, 1103.

153. Complaint, *supra* note 39, paras. 49-50.

Perhaps to underscore the irrationality of CARB's chosen tool of regulation, the Plaintiffs emphasized that corn ethanol reduces greenhouse gas emissions relative to traditional liquid fuels.¹⁵⁴

The Plaintiffs failed to obtain summary judgment on the federal preemption issue, as the court ruled they lacked standing.¹⁵⁵ However, they persuaded the court to grant them summary judgment on the dormant Commerce Clause issues.¹⁵⁶ Judge O'Neill issued a preliminary injunction against CARB, finding that the LCFS impermissibly discriminated against interstate commerce.¹⁵⁷

1. The Choice of Test

The first step in the dormant Commerce Clause analysis, both in the pleadings and in Judge O'Neill's opinion, was to identify which dormant Commerce Clause test was appropriate for the analysis of the LCFS. Given that *Maine v. Taylor* stands as the only example of a state law upheld under the strict scrutiny test, neither party could fail to appreciate the vital importance of the choice of test. In the Equal Protection context, a similarly demanding test has been called "strict in theory, but fatal in fact."¹⁵⁸ That is, since so few laws survive this level of heightened scrutiny, the choice of test may be the most important part of the analysis.

In their Complaint, the Plaintiffs argued that LCFS was appropriately considered under a strict scrutiny test because it discriminated against interstate commerce in effect, if not in purpose.¹⁵⁹ One way the Plaintiffs attempted to demonstrate the appropriateness of the strict scrutiny test was by demonstrating that the LCFS regulated extraterritorial conduct. The Complaint alleged that, for "ethanol produced outside California, only two parts of the overall lifecycle of the ethanol—transportation of the ethanol within California and the combustion of ethanol in a motor vehicle in operation—occur inside California."¹⁶⁰ However, the LCFS lookup table took into account all stages of the ethanol production in order to assign a carbon intensity score. For example, CARB "purported to gauge the so-called indirect 'land use or other indirect effect' from the production of corn itself, predominately in the Midwest, ascribing a penalty to all corn ethanol based on its assumed indirect contribution to worldwide GHG emissions" because CARB believed that, "by participating in the market for certain

154. *Id.* para. 11.

155. *Rocky Mountain Farmers Union v. Goldstene*, 843 F. Supp. 2d at 1098.

156. *Id.* at 1105.

157. *Id.*

158. *Fullilove v. Klutznick*, 448 U.S. 448, 519 (1980) (Marshall, J., concurring).

159. Complaint, *supra* note 39, para 81.

160. *Id.* para. 40.

biofuels, regulated parties incentivize other, non-regulated parties all over the world to turn non-agricultural land into agricultural land; that land-use change by third parties supposedly releases GHG emissions, which CARB in turn attributes to the use of biofuels in this country.”¹⁶¹ In other words, California was regulating conduct occurring purely outside its borders when it considered, for example, the way in which the corn was grown in the Midwest, and the ripple effects of agricultural land use.

The Complaint also argued that the LCFS merited the strict scrutiny test because it facially discriminated against interstate commerce by drawing geographical distinctions. The LCFS allegedly “draws significant distinctions among different producers of U.S. corn ethanol, depending on whether the ethanol is produced in California or outside California.”¹⁶² As evidence, the Complaint emphasized that “for at least four corn ethanol fuel pathways, the ‘look-up table’ assigns a higher total carbon intensity value to corn ethanol originating in the Midwest than to identical corn ethanol originating in California, based on factors almost entirely beyond any single producer’s control.”¹⁶³ The Plaintiffs acknowledged that some of this discrepancy was due to “the carbon emitted during the interstate transportation of their ethanol.”¹⁶⁴ Indeed, the Plaintiffs went on to insist that any distinctions made on the basis of transportation would discriminate: “Tying carbon intensity scores to the distance a good travels in interstate commerce discriminates against interstate commerce,” they stated plainly.¹⁶⁵

Finally, the Plaintiffs emphasized that, in order to maintain their competitiveness in California, the already-embattled Midwestern corn ethanol producers would effectively be forced to either change their behavior to suit CARB’s whims or to purchase cap-and-trade credits on the California market.¹⁶⁶ Regulated parties, according to the Plaintiffs, could only generate credits “if the state approves of how that party produces, ships, delivers, and distributes its product, beginning at the location(s) where some components are produced, be they in-state or out-of-state, and ending in California.”¹⁶⁷ This suggestion demonstrated California’s extraterritorial regulation. If true, it suggested that the State is forcing out-of-state pro-

161. *Id.* para. 41.

162. *Id.* para. 44.

163. *Id.* para. 45.

164. *Id.*

165. Memorandum in Support of Motion for Summary Judgment at 7, *Rocky Mountain Farmers Union v. Goldstene*, 843 F. Supp. 2d 1071 (E.D. Cal. 2011) (No. 109CV02234), 2010 WL 5882459.

166. Complaint, *supra* note 39, para. 46.

167. *Id.* (citing CAL. CODE REGS. tit. 17, § 95484(d)(2) (2013)).

ducers either to change their behavior in specific ways, or to undertake new costs.

California responded to these allegations with a vociferous defense of its position, arguing that it was not discriminating against interstate commerce. First, California argued that it could not be discriminating because it was not treating similarly situated entities differently. In other words, California argued that the LCFS was facially neutral, and it was not California's fault that the Midwestern producers happened to have more of the qualities—high carbon intensity—that California was regulating.¹⁶⁸ “Under the LCFS,” explained California, “all ethanols are regulated in the same manner,” and the standard “has no . . . on/off switch” responding to in- and out-of-state ethanols differently.¹⁶⁹

In defense of its use of transportation distance as a factor in assigning carbon intensity, California noted that the measure was not the dispositive factor in the carbon intensity value assigned. California pointed out that, as originally promulgated, there was “no correlation between in-state status and lowest CI values or out-of-state status and highest CI values.”¹⁷⁰ Since then, with CARB's option for entities to request an individualized CI value, Midwestern producers' averages were still in the same range as California producers (if a little higher on average), and there were “five Midwest ethanol pathways with lower CI values than the value for which California plants have registered.”¹⁷¹ In sum, California argued, the LCFS was not discriminatory “both because it distinguishes among fuels based on carbon intensity, rather than origin, and because it provides the flexibility for low carbon fuel producers to apply for a lower, individualized CI value, regardless of the location of their facility.”¹⁷²

Finally, California argued that, even taking the transportation into account, there was no discriminatory purpose against Midwestern ethanol, and no discriminatory effect. It pointed out that “inclusion of emissions from transportation provides a net advantage to Midwest corn ethanol plants compared to California corn ethanol plants, because of the inclusion of the emissions for transporting the corn (which is grown in the Midwest).”¹⁷³ Overall, it argued, there was “no relative ‘penalty’ to Midwest

168. Defendants' Memorandum of Points and Authorities in Opposition to RMFU's Motion for Summary Judgment at 5–7, *Rocky Mountain Farmers Union v. Goldstene*, 843 Supp. 2d 1170 (E.D. Cal. 2011) (No. 09CV02234), 2010 WL 5882464 [hereinafter Defendants' Memorandum].

169. *Id.* at 6–7.

170. *Id.* at 7 (noting that in-state ranges were originally 77.44 to 88.90, whereas out-of-state ranges were originally 58.40 to 120.99).

171. *Id.*

172. *Id.*

173. *Id.* at 9.

producers based on their distance from California.”¹⁷⁴ For all of these reasons, California argued that “the true purposes of the LCFS . . . are the antithesis of protectionism,” because a primary goal of the standard was to “encourage the development and commercialization of lower carbon fuels, which will diversify the market, not contract it.”¹⁷⁵

In his opinion, Judge O’Neill agreed with the Plaintiffs that strict scrutiny analysis was appropriate. He cited Plaintiffs’ contentions that CARB had assigned Midwestern sources a roughly 10 percent higher CI score than their California counterparts, and he found that the “LCFS and Table 6 [of the LCFS] explicitly differentiate among ethanol pathways based on origin (Midwest vs. California) and activities inextricably intertwined with origin (electricity provided by Midwest power companies vs. California power suppliers and interstate transportation).”¹⁷⁶ He found that this explicit differentiation, leading to “higher CI scores based on, *inter alia*, the location of the production facility and the distance the product travels . . . discriminates against out-of-state corn-derived ethanol on its face.”¹⁷⁷ Due to this facial discrimination, he applied the strict scrutiny test.

Judge O’Neill dismissed California’s arguments that the higher CI scores were based on permissible scientific, non-discriminatory bases. Despite the State’s assertions, Judge O’Neill found that the total regime “assign[ed] favorable assumptions to California while penalizing out-of-state competitors,” “treat[ed] electricity generate [sic] outside of the state differently than electricity generated inside its border,” and tied judgments to miles traveled—all of which were factors that discriminated against interstate commerce.¹⁷⁸ His judgment was ultimately grounded in the “effects” prong of the strict scrutiny test—while he acknowledged that the LCFS was not discriminatory in its purpose, it nevertheless discriminated on its face through its effects in interstate commerce. That is, since the LCFS could have the effect of raising the price of Midwestern ethanol relative to California ethanol, it impermissibly affected the interstate market.¹⁷⁹

The choice of the strict scrutiny test is problematic for several reasons. First, it was almost conceded, even by the Plaintiffs, that there was no protectionist motive in the LCFS—a motive that is often invoked as a rationale for the dormant Commerce Clause’s uncompromising stance in

174. *Id.*

175. *Id.* at 12.

176. *Rocky Mountain Farmers Union v. Goldstene*, 843 F. Supp. 2d 1071, 1086–87 (E.D. Cal. 2011), *rev’d sub nom. Rocky Mountain Farmers Union v. Corey*, 730 F.3d 1070 (9th Cir. 2013).

177. *Id.* at 1087.

178. *Id.* at 1088.

179. *Id.* at 1088–90.

these cases.¹⁸⁰ The Supreme Court strikes down state laws that appear to have a protectionist effect, even without determining whether protectionism truly was a motivation of the legislature.¹⁸¹ A prime example of this is in *Hunt v. Washington State Apple Advertising Commission*, in which the Court noted skeptically the protectionist effects of an apple labeling law purporting to protect consumers, but not rationally advancing that interest.¹⁸² Here, on the other hand, even the Plaintiffs acknowledged that California did not stand to benefit from its look-up tables. For example, they alleged in the Complaint that the LCFS tended to assign more favorable scores to sugar cane, grown largely in Brazil and elsewhere overseas, than to even Californian ethanol.¹⁸³ This favorable result for Brazilian producers, argued the Plaintiffs, would effectively “require regulated entities producing gasoline for sale in California quickly to try to obtain ethanol produced in Brazil, not the United States,” injuring in the process “the business of all corn ethanol biorefineries in the United States, including those located in California.”¹⁸⁴ Moreover, neither the Plaintiffs nor Judge O’Neill suggested there was anything other than a (perhaps misguided) desire to cure the ills of global warming motivating California’s adoption of the LCFS. Since the “purpose of the Commerce Clause is to prohibit outright economic protectionism or regulatory measures designed to benefit in-state economic actors by burdening out-of-state actors,” and that the dormant Commerce Clause works to “ferret out this illicit motive,” it is inapposite to employ the strict scrutiny test, in all its rigor, in a case empty of evidence of protectionism.¹⁸⁵

Ultimately, as Judge O’Neill conceded,¹⁸⁶ this case presented a different angle on the dormant Commerce Clause than is typical of those cases. Not

180. See, e.g., *id.* at 1086 (“The central rationale for the rule against discrimination is to prohibit state or municipal laws whose object is local economic protectionism.”) (quoting *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 390 (1994)).

181. See, e.g., *Hunt v. Wash. State Apple Adver. Comm’n*, 432 U.S. 333, 352 (1977).

182. *Id.*

183. Complaint, *supra* note 39, para. 43.

184. *Id.*

185. *E. Ky. Res. v. Fiscal Court of Magoffin Cnty.*, 127 F.3d 532, 540 (6th Cir. 1997).

186. *Rocky Mountain Farmers Union v. Goldstene*, 843 F. Supp. 2d 1071, 1088 (E.D. Cal. 2011), *rev’d sub nom. Rocky Mountain Farmers Union v. Corey*, 730 F.3d 1070 (9th Cir. 2013) (“The Court concludes that the LCFS offends the Commerce Clause after considering the unique challenge presented. This is not the quintessential dormant Commerce Clause challenge. Clearly, a law that compels the use of in-state products or forbids the use of out-of-state products would violate the Commerce Clause. See, *Alliance for Clean Coal v. Miller*, 44 F.3d 591, 596 (7th Cir. 1995). So, too, would a law that imposes a surcharge on an out-of-state product made in an identical fashion. See, *Oregon Waste [Sys., Inc. v. Envtl. Quality Comm’n]*, 511 U.S. [93,] 100 (1994). While the ethanol made in the Midwest and California are physically and chemically identical when ultimately mixed with petroleum, and while the pathways may be the similar, this Court appreciates that the carbon intensities of these two otherwise-identical products are different according to lifecycle analysis.”).

only did the LCFS not serve a protectionist motive for California; it also failed to discriminate in an orderly way. As both parties pointed out, Brazilian sugarcane producers scored better on the whole than other parties did, and some Midwestern producers scored better than some California producers. The general spread of the CI values points to the truth of CARB's assertions that it was merely trying to sensibly order fuels based on their carbon intensity for scientific purposes, rather than advancing a secret motive to promote California's economy.

Given these considerations, the only way in which the strict scrutiny test was applicable to the LCFS was through the "effects" test—the law facially discriminated in its effects—but not simply in its application. As Judge O'Neill wrote, a law "is facially discriminatory when it 'is not necessary to look beyond the text of this statute to determine that it discriminates against interstate commerce.'"¹⁸⁷ He continued to explain that "'discrimination' simply means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter."¹⁸⁸ According to the case law Judge O'Neill consulted, then, a law would need to treat in- and out-of-state interests differently in its text, and that differential treatment would need to be grounded in protectionism. The effects test is not met by simply demonstrating that a law has effects in interstate commerce at all—if this were the case, the *Pike* balancing test would not exist. To merit strict scrutiny review, a law must discriminate in effect *on its face* by treating out-of-state entities differently than in-state ones. Moreover, in-state actors must also benefit from the legislation.¹⁸⁹ It is hard to conclude that the LCFS met this standard.

Even conceding that the look-up tables, on the whole, demonstrated a "boost" in CI scores for Midwestern ethanol on average, that does not merit the conclusion that Californian interests benefited from imposing burdens on out-of-state interests. As all parties conceded, California did not stand to benefit significantly from the LCFS. Moreover, the only aspect of the law that is susceptible to this interpretation is Table 6, which demonstrates an inconsistent and slight disadvantage for Midwestern interests. Finally, the burden it imposes on Midwestern interests is still somewhat speculative:¹⁹⁰ the harm the Plaintiffs alleged was a potential

187. *Id.* at 1086 (citing *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 575–76 (1997)).

188. *Id.* (citing *Oregon Waste Sys.*, 511 U.S. at 99).

189. *E. Ky. Res.*, 127 F.3d at 543. The Sixth Circuit wrote that "there are two complementary components to a claim that a statute has a discriminatory effect on interstate commerce: the claimant must show both how local economic actors are favored by the legislation, and how out-of-state actors are burdened by the legislation."

190. *See, e.g.*, Appellants' Opening Brief at 94, *Rocky Mountain Farmers Union v. Corey*, 730 F.3d 1070 (9th Cir. 2013) (Nos. 12-15131, 12-15135).

increase in prices Midwestern producers would have to pass on to consumers because they, on average, would have higher compliance costs than groups with, on average, lower CI scores. This speculative, slight, and inconsistent burden on out-of-state parties does not rise to the level of dormant Commerce Clause cases, and it is hard to understand how the rationale of the exacting strict scrutiny test is served in this case. This is especially true taking into account CARB's attempts to make the LCFS responsive to individual requests for CI adjustments, and the agency's scientific and economic justifications for the mechanisms of the Table.

Given Judge O'Neill's analysis, it is possible that no regime serving the LCFS's avowed goals could survive strict scrutiny. That is, a regime like the LCFS would apparently have to ignore the impact of transportation distance on CI, which would reduce the accuracy and efficacy of the standard. This is especially true if the scheme would have to cease to consider all of the variables that led CARB to conclude that Midwestern ethanol was, on average, higher in CI than some other sources. For example, if CARB could not make *any* conclusions based on factual regional differences (such as the ways in which the corn was grown), the CI results would not reflect reality and would not allow the State to make a meaningful carbon-reduction effort. The dormant Commerce Clause frequently does foreclose states from pursuing projects, so the fact that this analysis might stymie California's wishes does not mean the analysis is wrong. However, the serious practical difficulties of complying with Judge O'Neill's interpretation of the constitutional mandates, when combined with the tenuous match between typical strict scrutiny analysis and the LCFS, make the application of this test a surprising result.

A different result might be mandated in the case if the LCFS considered the precise number of miles traveled by a transportation fuel, whether within or without California. Table 6's averages currently provide one transportation input for CI; all Californian producers are subject to the same average transportation value of 8.1gCO₂e/MJ, regardless of where they are located within the state.¹⁹¹ However, there would likely be an unreasonably high burden placed on CARB if it had to calculate the precise number of miles traveled to the ultimate point of sale. Such a regime would disable CARB from administering categories of CI at all—it would effectively have to perform an individual CI analysis for each batch of vehicle fuel. However, conceptually such a program might satisfy Judge O'Neill, if not the Plaintiffs, that transportation was no longer a factor used to discriminate against interstate commerce. The use of transportation miles to

191. *Rocky Mountain Farmers Union v. Corey*, 730 F.3d 1070, 1083 (9th Cir. 2013).

increase the CI of out-of-state fuels, but not in-state fuels, is the best argument that that factor was uniquely discriminatory to out-of-state interests.

Finally, in a close case such as this one, the State might argue that courts should defer to its judgment—at least to the limited extent that a court might err on the side of applying the more forgiving *Pike* balancing test as opposed to the strict scrutiny test when there are strong arguments for both tests. In other words, due to the general principles of state sovereignty and federalism enshrined in the Tenth Amendment, it might be appropriate to add a new rule to the dormant Commerce Clause doctrine: that when a statute does not clearly discriminate on its face, that a court should apply the *Pike* test. In this case, Judge O’Neill appears to have done the opposite: facing a strong argument from both sides at the test selection step, he chose to apply the “fatal in fact” strict scrutiny test. This approach raises concerns about states’ autonomy.

2. Legitimate Local Purpose

Rocky Mountain is momentous in that it appears to be the first case in which a state asserted that global warming was a legitimate local purpose for the purposes of the dormant Commerce Clause. As such, the analysis of this prong of the strict scrutiny test may set the foundations for future state challenges, should other states adopt controversial measures such as A.B. 32. Despite the high stakes in this question, and despite Judge O’Neill’s generally unfavorable outcomes regarding the LCFS, his holding briefly and decisively stated that global warming was a legitimate purpose. This decision and its reasoning may have come as a surprise to both parties. The Ninth Circuit did not disturb the lower court’s ruling in its analysis.¹⁹²

The Plaintiffs leaned heavily on the relative sizes of the immense global warming problem and the modest LCFS to demonstrate that California’s regulatory scheme did not serve a legitimate local purpose. First, they argued that “GHG emissions mix into the atmosphere so thoroughly that their only effects are worldwide,” such that “the immediate locality from which the GHG is emitted is affected no more or no less than the entire world.”¹⁹³ In other words, *no* locality would be able to assert global warming as a legitimate local purpose, since the problem was inherently global, and “a ton of GHG emitted in India or China has the same effect on GHGs in California as a ton of GHGs emitted in California or Iowa.”¹⁹⁴ If this were truly the case, the Plaintiffs would have foreclosed all potential state regulation of global warming, since no locality could assert an injury greater than any other state’s or locality’s injury from GHG emissions.

192. See discussion *supra* Part IV.B.

193. Complaint, *supra* note 39, para. 52.

194. *Id.*

Second, the Plaintiffs argued that global warming could not serve as a legitimate local purpose because California was the only state to attempt to regulate in this way, resulting in negligible or even zero net change in GHG emissions. They alleged that the LCFS would simply incentivize producers to shuffle their existing fuels: they would “ship lower-carbon-intensity fuels’ to California, ‘while shipping higher-carbon-intensity fuels elsewhere.’”¹⁹⁵ Producers would thereby comply with the LCFS by rearranging their shipments, and no net carbon decrease would occur. In other words, the Plaintiffs asserted that no single state could achieve GHG reductions by capping the amount of carbon intensity of its fuels without exporting a similar regulatory scheme elsewhere to truly constrain the behavior of industry.

Finally, the Plaintiffs essentially argued that since California admittedly could not make a significant impact on global warming through the LCFS alone, that global warming could not be a legitimate local purpose. They quoted CARB in their complaint as having acknowledged that “‘GHG emission reductions by the LCFS alone will not result in significant climate change,’” and that “[i]t is unlikely that the LCFS alone will result in any measurable climate change and reduction of global warming.’”¹⁹⁶ This set of admissions by CARB factored into the Plaintiffs’ overall assertion that “there are virtually no local benefits to the LCFS regulation.”¹⁹⁷ In other words, global warming could not be a legitimate local purpose if California stood to gain nothing from the regulatory tool it had chosen to attack the problem.

California argued that global warming could be a local interest, if not because the regulated GHGs truly affected California specially, but simply because a global reduction in total GHG amount would work benefits in California. The State cited the Supreme Court in *Massachusetts v. EPA*, which decided that Massachusetts had standing to pursue a claim against the EPA for failing to regulate GHGs under the Clean Air Act.¹⁹⁸ In its brief, the State confidently quoted the court: the fact that the “climate-change risks are ‘widely-shared’ does not minimize [California’s] interest in reducing them.”¹⁹⁹ From this, the State concluded briefly that “California’s purpose [in the LCFS] is both legitimate and local.”²⁰⁰

195. *Id.* at para. 50 (emphasis added).

196. *Id.* at para. 53.

197. *Id.* at para. 56.

198. Defendants’ Memorandum, *supra* note 168, at 12–13. See *Massachusetts v. EPA*, 549 U.S. 479, 522 (2007).

199. *Id.* (quoting *Massachusetts v. EPA*, 549 U.S. at 522) (internal quotation marks omitted).

200. *Id.*

A significant problem that California failed to address in its brief is that the Court did not discuss *California's* interest in global warming in the Massachusetts case. Instead, where California inserted its name, it simply replaced “Massachusetts.”²⁰¹ Had the Court written that the widespread impacts of climate change do not reduce any state’s interest in them, California’s move would appear less daring. But the State put forward neither factual nor legal arguments as to why Massachusetts’s interest for standing purposes was identical to and applicable to California’s interest for Commerce Clause purposes. This is of concern because of the legal differences between these two cases and the factual background relied on by the Court in *Massachusetts v. EPA* to justify why Massachusetts had an interest in global warming, discussed *infra*.

California proceeded to rebut the Plaintiffs’ arguments that regulated entities’ opportunistic “resource shuffling” would eliminate any net carbon reductions. First, it argued that plants selling fuel both in and outside of California would have incentives to produce lower-carbon fuel overall, rather than exclusively selling lower-carbon fuels in-state and continuing business as usual for other target states—for example, it would be more efficient to produce all fuel the same way, rather than maintaining separate product lines merely to keep non-California-bound fuels higher in CI.²⁰² Furthermore, the State argued that the LCFS complemented the EPA’s Renewable Fuel Standard (RFS2), “providing additional incentives for incremental reductions in emissions within RFS2 categories of fuels.”²⁰³

In his opinion, Judge O’Neill agreed with California that *Massachusetts v. EPA* meant global warming was a legitimate local purpose for California.²⁰⁴ He wrote that “Defendants’ [*sic*] correctly point out that in *Massachusetts v. EPA* . . . the Supreme Court recognized that a state has a ‘well-founded desire to preserve its sovereign territory’ from the threats of rising seas and other impacts of global warming.”²⁰⁵ He, too, quoted the passage CARB had relied on: “‘That these climate-change risks are ‘widely-shared’ does not minimize [California’s] interest’ in reducing them.”²⁰⁶ Most notably, Judge O’Neill followed California’s lead and substituted “California” for “Massachusetts” in the quote without comment about the factual distinctions, if any, between those two states.²⁰⁷ Finally, he disposed of the issue whether the standing inquiry in *Massachusetts v. EPA* differed

201. *See id.*

202. *Id.*

203. *Id.*

204. *Rocky Mountain Farmers Union v. Goldstene*, 843 F. Supp. 2d 1071, 1093 (E.D. Cal. 2011), *rev’d sub nom. Rocky Mountain Farmers Union v. Corey*, 730 F.3d 1070 (9th Cir. 2013).

205. *Id.* (quoting *Massachusetts v. EPA*, 549 U.S. at 519).

206. *Id.* (quoting *Massachusetts v. EPA*, 549 U.S. at 522).

207. *Id.*

meaningfully from the LCFS case by remarking that the Supreme Court “explained in dicta that a state has a local and legitimate interest in reducing global warming,” which satisfied him that global warming served a legitimate local purpose.²⁰⁸ He offered no citations or further commentary on what dicta established that principle, and for what purposes it is legitimate.

The first important issue, unresolved by the opinion, is by what reasoning California has a legitimate local purpose in global warming. On the text of the opinion, Judge O’Neill seems to justify this result based on his reading of *Massachusetts v. EPA* as a blanket statement that all states have a legitimate local purpose in global climate change. However, this interpretation implicitly chooses one potential justification for the holding that Massachusetts had an interest in climate change, and ignores another strong one.

The rationale from *Massachusetts v. EPA* that Judge O’Neill appears to follow, borrowing from California’s brief,²⁰⁹ is that a state has a special status as sovereign to regulate affairs in its territory. The *Massachusetts v. EPA* Court wrote in dicta that “States are not normal litigants for the purposes of invoking federal jurisdiction.”²¹⁰ The Court cited a century-old case in which the Supreme Court held that Georgia “has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain. It has the last word as to whether its mountains shall be stripped of their forests and its inhabitants shall breathe pure air.”²¹¹ The Court reasoned that “[j]ust as Georgia’s independent interest ‘in all the earth and air within its domain’ supported federal jurisdiction a century ago, so too does Massachusetts’ [sic] well-founded desire to preserve its sovereign territory today.”²¹² It concluded that, given these considerations, Massachusetts was entitled to “special solicitude” in the standing analysis.²¹³

The second justification for Massachusetts’s interest in global warming, according to the Supreme Court, stemmed from its position as coastal landowner. Since the risks of global warming threatened to erode and swallow some of Massachusetts’s coastline, the State had more traditional standing as a landowner to contest acts and omissions that might take its property. The Court noted that the rising sea levels “have already begun to swallow Massachusetts’ [sic] coastal land,” and that the State, as the owner of “a substantial portion of the state’s coastal property,” had alleged “a par-

208. *Id.*

209. Defendants’ Memorandum, *supra* note 168, at 12–13.

210. *Massachusetts v. EPA*, 549 U.S. at 518.

211. *Id.* at 518–19 (quoting *Georgia v. Tenn. Copper Co.*, 206 U.S. 230, 237 (1907)).

212. *Id.* at 519.

213. *Id.* at 520.

ticularized injury in its capacity as a landowner.”²¹⁴ The injury to the State as a landowner would continue to increase with predicted global climate change.²¹⁵ Finally, the State would incur significant remediation costs due to these injuries.²¹⁶

Given this analysis, it is possible to explain Massachusetts’ interest in global warming in three ways: it derives either from its sovereignty, or from its coastal land ownership, or both. Judge O’Neill described the sovereignty reasoning as “dicta” establishing “that a state has a local and legitimate interest in reducing global warming.”²¹⁷ He did not address the land ownership prong, so, based on his holding, it may be either an alternative basis for establishing a local interest in climate change, or an optional extra factor.

The second important consideration in this analysis is to what extent the standard for standing, discussed in *Massachusetts v. EPA*, applies to the dormant Commerce Clause issue of legitimate local purpose. The Supreme Court established that Massachusetts was owed “special solicitude” in the *standing* analysis, largely due to its status as a sovereign.²¹⁸ This does not suggest that the State might be owed special solicitude in all analyses, however. In other words, the Court’s “sovereign” rationale for Massachusetts’ interest in global warming may not reach other legal questions. Critically here, the “sovereign” analysis may not be relevant to Commerce Clause questions. This is especially likely given that the underlying rationale of the dormant Commerce Clause is to *restrain* the activities of states, not to offer them “special solicitude.” Given these considerations, it is troubling if California and Judge O’Neill rested their analysis of California’s local interest simply on its status as a state and by substituting the name of California for that of Massachusetts in the Supreme Court’s reasoning, since that reasoning does not reach the Commerce Clause by its terms, and does not serve the same interests.

Despite the questions remaining about this analysis, if it is upheld it creates a valuable precedent for states wishing to regulate global warming. It adopts an expansive reading of *Massachusetts v. EPA*, suggesting that for *any* legal test requiring a state to assert an interest in global warming, *any* state has such an interest. The State does not appear to need to allege any further facts to benefit from this analysis. For example, under the “land ownership” rationale that Judge O’Neill did not use, a state wishing to assert a local interest in climate change would have to demonstrate that it owns land or other interests that would suffer harm because of the specific

214. *Id.* at 522 (internal quotation marks omitted).

215. *Id.* at 522–23.

216. *See id.* at 523.

217. *Rocky Mountain Farmers Union v. Goldstene*, 843 F. Supp. 2d 1071, 1083 (E.D. Cal. 2011), *rev’d sub nom. Rocky Mountain Farmers Union v. Corey*, 730 F.3d 1070 (9th Cir. 2013).

218. *See Massachusetts v. EPA*, 549 U.S. at 520.

predicted effects of global warming. For some states, like California, this burden is not likely to be very difficult: California owns substantial portions of its coastline, which suggests that it would have a similar argument as Massachusetts had that it would be injured as a land owner due to rising sea levels.²¹⁹ However, landlocked states, such as Iowa, could not assert similar injuries; they might have to develop other arguments for how they would be injured as land-owners due to other predicted local effects of climate change. For example, states might be able to allege that predicted droughts and other weather phenomena tied to climate change would damage their natural resources. This would involve a good deal of factual analysis, and would present a more challenging burden in such cases.

Finally, another positive development arising out of this opinion, from the point of view of states wishing to regulate climate change, is the lack of importance of redressability. Judge O'Neill declined even to address the Plaintiffs' arguments that climate change could not be a legitimate local purpose because the state could not alter its outcome. In the standing context, as in *Massachusetts v. EPA*, a plaintiff's injury must be redressable to establish standing: plaintiffs must demonstrate that, even if the court ruled in their favor, the result would have some impact on their injury.²²⁰ This prong, too, would be challenging for a state to prove: California would almost certainly fail to demonstrate that the reductions in CI from the LCFS (10 percent by 2020) would result in less global climate change overall.²²¹ Redressability has never been an explicit factor in evaluating a legitimate local purpose, however; courts have not analyzed this question.²²² The term "local interest" implies that the locality has some interest in the outcome, but not necessarily that the locality can *alter* the outcome. Moreover, the analysis in *Massachusetts v. EPA* offers some relief to parties attempting to assert a local interest in climate change: the court wrote that "[a] reduction in domestic emissions would slow the pace of global emissions increases, no matter what happens elsewhere."²²³ That is, even if emissions continue to rise globally, the fact that a state makes even the smallest reduction still reduces the emissions relative to what *would* have been current emissions had the state not acted.

219. See, e.g., *How Beaches Work: Recreation & Preservation*, COASTAL CLASH, KQED, <http://www.kqed.org/w/coastalclash/recreation.html> (last visited Oct. 9, 2013).

220. See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992).

221. See *infra* text accompanying note 251.

222. In a review of Westlaw cases discussing both redressability and legitimate local purpose, redressability is only discussed in reference to standing; it does not enter the legitimate local purpose analysis.

223. *Massachusetts v. EPA*, 549 U.S. at 526.

3. Extraterritoriality

As an alternative argument, the Plaintiffs alleged that the LCFS regulated extraterritoriality. If true, this would require a court to employ the strict scrutiny test. Therefore, if the LCFS either discriminated or regulated extraterritorially, the strict scrutiny test would be appropriate. These two ways of getting to strict scrutiny are often muddled, however, and some courts refuse to employ extraterritoriality at all. Nevertheless, the Plaintiffs strongly alleged that it applied here.

The Plaintiffs argued that the LCFS should receive strict scrutiny because, “[i]n actuality and in practical effect, [it] regulates conduct and commerce occurring wholly outside of California.”²²⁴ Tied in with this argument of factual extraterritorial regulation, the Plaintiffs consistently emphasized that the “purpose of assigning carbon intensity values to fuels used in California is to change behavior occurring completely outside the state.”²²⁵ They insisted that the State was regulating “how out-of-state corn ethanol producers and importers” behave by “encouraging regulated parties to minimize the assumed carbon emissions throughout the putative lifecycle of a fuel,” since the LCFS took into consideration purely Midwestern “farming, crop yields, harvesting practices, crop collection and transportation, fuel used in production, and energy efficiency of production” as well as the distance the product traveled.²²⁶ Worse, the scheme took “indirect land use” into account, which the Plaintiffs cast as the “breathtaking extraterritoriality” of the LCFS.²²⁷ In sum, the Plaintiffs argued, “the LCFS unconstitutionally projects California state policy outside its borders.”²²⁸

The State argued that the LCFS did not violate any of the three extraterritoriality principles it argued were important: it did not regulate behavior occurring wholly outside the State; it did not threaten economic Balkanization; and it did not *only* regulate interstate commerce (leaving California-only commerce alone).²²⁹ By breaking up the inquiry in this way, the State could “divide and conquer,” attempting to defuse the Plaintiffs’ arguments that extraterritorial effects alone satisfied this test. First, it insisted that the LCFS was not *regulation* of out-of-state behavior, but instead it was simply treating that behavior differently once its products arrived in California.²³⁰ That is, creating a market-based system with values was not regulation of what occurred in the Midwest: if the fuel producers

224. Complaint, *supra* note 39, para. 84.

225. *Id.* (emphasis added).

226. *Id.*

227. Memorandum in Support of Motion for Summary Judgment, *supra* note 165, at 14.

228. Complaint, *supra* note 39, at 18.

229. Defendants’ Memorandum, *supra* note 168, at 14.

230. *Id.*

complied with California's regulations, it would be "to compete for business in California, not because there is any legal requirement" to do so.²³¹ California emphasized that its regulations imposed no requirements on fuels not sold in California.²³² Next, it argued that the LCFS did not cause economic Balkanization because it imposed no "transportation penalty and no trade barriers," and it did not regulate the channels of interstate commerce.²³³ Here again, the State distinguished its market tool from a regulation: while transportation was a factor in the LCFS's calculations, the regulations did not impose trade barriers. Producers could import into California as much as they liked.

Judge O'Neill agreed with the Plaintiffs.²³⁴ In holding that the LCFS controlled extraterritorial conduct, he created an alternative basis for his use of the strict scrutiny test. His rationale centered on the Plaintiffs' arguments about practical effects: "Defendants cannot dispute that the 'practical effect' of the regulation would be to control" the farming practices and other factors occurring in the Midwest that were conducive to higher CI scores.²³⁵ He also enlisted some of the Plaintiffs' "purpose" rationale, reminding California that its regulations situated it as the primary regulator of the GHG intensity of Midwestern corn ethanol production.²³⁶ Finally, he found that California's detailed regulations requiring producers to get California's approval before changing their transportation method amounted to "'forc[ing] a merchant to seek regulatory approval in one State before undertaking a transaction in another,' causing the LCFS to 'directly regulate[] interstate commerce.'"²³⁷

As elsewhere, this question raises conceptual difficulties. California is undoubtedly correct that the LCFS does not directly regulate extraterritorial conduct; it only touches those fuels that actually enter California. More importantly, the LCFS does not regulate or restrict at all—it merely provides a framework for a market-based program. At no point would any fuel be restricted from entry; it may simply be much more expensive to import.²³⁸ By this same token, the Plaintiffs and Judge O'Neill are also correct that the LCFS must have the effect of altering behavior outside California's borders. At the very least, the LCFS is intended to have the effect of reduc-

231. *Id.* at 15.

232. *Id.*

233. *Id.* at 18.

234. *Rocky Mountain Farmers Union v. Goldstene*, 843 F. Supp. 2d 1071, 1091 (E.D. Cal. 2011), *rev'd sub nom. Rocky Mountain Farmers Union v. Corey*, 730 F.3d 1070 (9th Cir. 2013).

235. *Id.*

236. *Id.* at 1091–92.

237. *Id.* at 1092 (quoting *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 582 (1986)).

238. As discussed below, the Ninth Circuit found similar difficulties in the lower court's reasoning.

ing the amount of GHG emissions associated with the fuels it imports, which would mean either that the imported fuels are produced differently over time (and California's regulations effected a change in farming or other production methods elsewhere), or that outside parties would make a different decision about which fuels to make available in California. In either event, some different choice would be made outside California's borders due to the regulatory scheme within the state. If this is enough to qualify as extraterritorial regulation, then perhaps the result is correct.

In his Extraterritoriality section, Judge O'Neill draws in language about "practical effects," which is another, separate way for a state to discriminate and be subject to the strict scrutiny test.²³⁹ He concluded that California "cannot dispute that the 'practical effect' of [the LCFS] would be to control" the land use practices in the Midwest and Brazil that resulted in higher carbon emissions.²⁴⁰ He did not hold, however, that the LCFS discriminated against interstate commerce in practical effect; his application of the strict scrutiny test was instead based on his holdings that the LCFS discriminated facially and regulated extraterritorially.²⁴¹

Ultimately, however, Judge O'Neill's conception of extraterritoriality and discriminatory effects cuts too broadly. If every state regulation that has some impact on interstate markets is deemed to be extraterritorial or to have discriminatory effects, then states' abilities to operate without implicating the Commerce Clause is decidedly constricted. The LCFS is best thought of as an information-gathering mechanism; it places no restrictions on products or actors, and it operates blindly with respect to in-state and out-of-state parties (i.e., the same regime applies within and without). It is true that there are necessarily impacts outside of California, but the other tests—discrimination and the *Pike* balancing test—exist to smoke out this type of issue. Therefore, extraterritoriality and practical effects are both too broad if they encompass this situation. As the Ninth Circuit found,²⁴² extraterritoriality is not a good fit for understanding the LCFS. It remains to be seen whether the district court will, on remand, find that the LCFS discriminates against interstate commerce in practical effect.

239. *Rocky Mountain Farmers Union v. Goldstene*, 843 F. Supp. 2d 1071, 1091 (E.D. Cal. 2011), *rev'd sub nom. Rocky Mountain Farmers Union v. Corey*, 730 F.3d 1070 (9th Cir. 2013).

240. *Id.*

241. *Id.* at 1105. As discussed below, the Ninth Circuit remanded to determine whether the LCFS discriminated in practical effect.

242. *See generally Rocky Mountain Farmers Union v. Corey*, 730 F.3d 1070 (9th Cir. 2013) (reversing "the district court's decision that the Fuel Standard is an impermissible extraterritorial regulation").

4. Alternatives

In the strict scrutiny test, once a legitimate local purpose has been identified, the final step is to determine whether there were any non-discriminatory alternatives the State could have used to achieve that interest without impacting interstate commerce.²⁴³ As the Plaintiffs argued that no legitimate local purpose was present, they put forth no arguments about alternatives in their briefs.²⁴⁴ However, the State and the court did continue to this step after agreeing that global warming was a legitimate local purpose. Here, however, they disagreed.

The State argued to the district court that there were no alternatives that would allow California to reduce its carbon footprint. It emphasized that “a lifecycle analysis is the only effective way to regulate emissions from transportation fuels.”²⁴⁵ According to the State, any other method would “miss critical contributors to the lifecycle and may result in greater, rather than lower, emissions overall,” making AB 32’s desired 10 percent reduction in emissions “impossible to achieve.”²⁴⁶

Judge O’Neill disagreed. He found that because California could have reduced its carbon footprint through other schemes, specifically a carbon tax, it had alternatives.²⁴⁷ Like his finding that global warming was a legitimate local purpose, Judge O’Neill spent relatively little time on this section of his analysis. He emphasized that it was California’s burden to demonstrate that there were no “other nondiscriminatory means” to achieve reductions in greenhouse gas emissions.²⁴⁸ He found that California had failed to do so, but that affidavits presented by the Plaintiffs had suggested a few. These included adopting “an LCFS that does not contain the discriminatory components”; “a tax on fossil fuels”; and “regulating only tailpipe GHG emissions in California.”²⁴⁹ The court noted that California “speculate[d] that [tailpipe GHG emissions regulation only] may result in greater . . . emissions overall, though CARB stated that GHG emissions could be reduced by increasing vehicle efficiency or reducing the number of vehicle miles traveled.”²⁵⁰ Judge O’Neill conceded that “these approaches may be less desirable, for a number of reasons,” but that concession did not alter the fact that California had “failed to establish there are no nondis-

243. See *Maine v. Taylor*, 477 U.S. 131, 151–52 (1986).

244. See, e.g., Memorandum in Support of Motion for Summary Judgment, *supra* note 165 at 9–10.

245. Defendants’ Memorandum, *supra* note 168, at 13.

246. *Id.*

247. *Rocky Mountain Farmers Union v. Goldstene*, 843 F. Supp. 2d 1071, 1093–94 (E.D. Cal. 2011), *rev’d sub nom. Rocky Mountain Farmers Union v. Corey*, 730 F.3d 1070 (9th Cir. 2013).

248. *Id.* at 1093.

249. *Id.* at 1093–94 (internal quotation marks omitted).

250. *Id.* at 1094 (internal quotation marks omitted).

criminary means by which California could serve its purpose of combating global warming through the reduction of GHG emissions.”²⁵¹

One question arising from Judge O’Neill’s analysis of alternatives is the burden of proof. Some of the only helpful discussions on this step of the strict scrutiny test comes from *Maine v. Taylor*, in which the Supreme Court deferred to the district court’s finding that Maine had no alternatives but to ban the importation of baitfish to control invasive species.²⁵² There, the Court looked for “scientifically accepted techniques” to accomplish the valid state goals.²⁵³ Therefore, the necessities of science do play a role here; California is owed deference in its assertions about the requisites for creating a functional system. Judge O’Neill’s analysis implies that a regime that addresses the legitimate local purpose, whether or not it does so *well*, suffices as a reasonable alternative. A question that remains largely unanswered in the case law is how similar an alternative must be in order for it to be a legitimate alternative, and who bears the burden of demonstrating its suitability. The *Maine v. Taylor* Court offers little guidance, except that a district court’s finding of no alternatives should receive some deference. It does not provide a standard for when a district court’s finding that alternatives *did* exist should be overturned.

Since the district court’s findings of fact are the jumping-off point for the future analysis in the *Maine v. Taylor* framework, Judge O’Neill’s finding that a carbon tax was an alternative is very important. With the carbon tax as the alternative California must compare the LCFS to, there are additional problems: the carbon tax would either be discriminatory in exactly the same way as the LCFS,²⁵⁴ or else would be equally as ineffective as the LCFS would be without the location-based CI factors. That is, if California enacted a pure carbon tax on the amount of GHGs emitted by the burning of various fuels, the tax would not capture the extraneous GHG emissions associated with the production of the fuels.²⁵⁵ This is, of course, the precise problem the LCFS sought to remedy in the cap-and-trade scheme: it could have based its cap-and-trade regime on the pure chemical properties of the fuels, but it elected to include the other factors in the CI score for accuracy’s sake and to prevent leakage.²⁵⁶ The carbon tax context is no different in this regard; no matter how California chooses to raise the cost of emitting

251. *Id.*

252. *Maine v. Taylor*, 477 U.S. 131, 146 (1986).

253. *Id.*

254. *See generally Oregon Waste Sys., Inc. v. Env’tl. Quality Comm’n*, 511 U.S. 93, 99–100 (1994) (discussing state taxes that discriminate against interstate commerce).

255. Appellants’ Opening Brief, *supra* note 190, at 99–100.

256. The Plaintiffs pointed out that nearly all ethanol in the United States is fungible: 98 percent of it is derived from corn, and corn ethanol made anywhere by any process is completely identical to all other corn ethanol. *See Complaint, supra* note 39, para. 14.

GHGs, it must capture all sources of GHG emissions related to a fuel in order to do so accurately. No one disputes that these factors include, for example, distance transported and land use.

The above criticism of the carbon tax approach demonstrates the importance of the uncertainty regarding alternatives: after *Maine v. Taylor*, it is unclear how good an alternative must be in order for it to be considered an alternative. Here, the alternative appears no better than the existing law: both violate the dormant Commerce Clause, under Judge O'Neill's reasoning, if they accurately capture all GHG emissions related to a fuel. If the only alternative that might serve the same purposes for a legitimate state interest is also discriminatory against interstate commerce, this creates a more compelling argument for the proposition that there are no alternatives at all, and that even a discriminatory law should survive strict scrutiny. In other words, if all of California's regulatory options necessarily involve a discriminatory CI score, then there are no alternatives and the law must be upheld, even if there are several choices of *which type* of discriminatory regime to enact.

On the other hand, if the only alternative that the court provides can be shown not to produce the benefits California desires to serve its legitimate local purpose, this is another strong argument that there are in fact no alternatives. This is the result if California's alternative is to enact a CI-less carbon tax or simply strip the CI from the LCFS. In either case, it would not capture the true GHG impact of the fuels, and would encourage opportunistic "fuel shuffling" to avoid the impact of the LCFS.²⁵⁷ For example, a Midwestern producer whose lifecycle emissions are 10 percent higher than a California producer's (in terms of fuel consumed in California) might receive treatment in the market as if its emissions were equal to the California producer's, as long as the fuels are chemically identical. California would be operating a regulatory regime that significantly underestimated GHG emissions, and California would not be able to accurately say that it had reduced its total GHG emissions as required by the overall purpose of AB 32.

Implicit in these issues is the question of how effective a state's regime must be. That is, if California had to show that its regime, whether the LCFS or a carbon tax, would actually make measurable decreases in global climate change, this would probably be fatal; California produces just a fraction of the United States' total emissions, which are in turn just 19 percent of global emissions—so a 20 percent reduction in California emissions alone, of which the LCFS is just a small part, could not meaningfully

257. See Defendants' Memorandum, *supra* note 168, at 13.

change the global climate.²⁵⁸ On the other hand, if California can enact a discriminatory law that has no alternatives, even if it merely makes the “right moves” but does not reduce climate change, it is in a better position. If California’s regime goes any distance at all towards its stated goal, it might pass muster. This consideration is analogous to the divisive discussion of redressability in the standing context in *Massachusetts v. EPA*. There, the majority and dissent split over whether the states and other plaintiffs had Article III standing, given that—even if the EPA regulated motor vehicle emissions—the harm might nevertheless continue.²⁵⁹

Finally, an issue left unaddressed is what bearing, if any, the seriousness of a problem the state is trying to fix has on consideration of alternatives. For example, if the LCFS regulated not carbon but instead a pollutant that only caused mildly itchy skin in a small portion of the population, would the suitability of the alternatives be less important? As above, this is a question on which the case law provides little guidance. In *Maine v. Taylor*, there was no discussion of how the seriousness of the invasive species problem bore on the stringency of measures Maine could undertake. It stands to reason, however, that the greater the peril, the more seriously courts should take attempts to curb it.

B. Ninth Circuit Appeal

Within days of the judgment from the Eastern District of California, the State appealed to the Ninth Circuit. The Ninth Circuit then granted a stay of the district court’s injunction on April 23, so the LCFS remained in effect pending the outcome of the appeal.²⁶⁰ In their briefs, the parties largely reasserted their allegations from the district court. The State appeared much more concerned with the consideration of alternatives.²⁶¹ After all, it knew that if the Ninth Circuit agreed with Judge O’Neill that the strict scrutiny test was appropriate and that global warming was a legitimate local purpose, the State could win if it could only convince the Ninth Circuit that there were no alternatives.

The State emphasized its technical expertise and precision in developing the LCFS, leaning on the State’s serious scientific objectives.²⁶² It implied, therefore, that it was not discriminating due to any forbidden

258. *Global Greenhouse Gas Emissions Data*, U.S. ENVTL. PROTECTION AGENCY, <http://www.epa.gov/climatechange/ghgemissions/global.html> (last visited Nov. 6, 2013).

259. *Massachusetts v. EPA*, 549 U.S. 497, 544 (2007).

260. Appellants’ Opening Brief, *supra* note 190, at 9.

261. *See generally id.* (opening discussion of the dormant Commerce Clause issue with a detailed explanation of the “science-based” nature of the LCFS and its necessity in achieving California’s purpose, and closing the argument with another discussion of the unavailability of alternatives).

262. *Id.* at 1–2.

protectionist motive; rather, it was using scientific principles to measure and reduce the amount of carbon emitted in the whole lifecycle of fuels in California.²⁶³ California also argued forcefully that, even if the strict scrutiny test applied, there were no viable alternatives for the three main goals: reducing carbon intensity, quantifying carbon intensity, and spurring development of lower-carbon fuels.²⁶⁴ Since the LCFS “reduces the carbon intensity of transportation fuels,” the State argued, it “captures emission reductions that cannot be captured by measures requiring GHG reductions from vehicles or fewer vehicle miles traveled.”²⁶⁵ Furthermore, the State argued that lifecycle analysis—looking at every input to fuels’ carbon intensity—was “the only scientifically accepted and effective approach to accurately quantify emissions fuels and increase the use of lower carbon fuels.”²⁶⁶ Finally, the “LCFS also spurs the innovation of next-generation fuels that are necessary to achieve the emissions reductions.”²⁶⁷

In support of its conclusion that “[n]o alternative regulation can achieve these objectives,” California showed that the suggested alternatives demonstrably would not achieve the objectives.²⁶⁸ For example, regulations of tailpipe emissions would not suffice because “California already regulates vehicle emissions,” and the State had shown “that it cannot secure an additional 16 million metric tons of emissions reductions yearly by solely regulating vehicle emissions and ignoring the types of fuel consumed”—reductions the LCFS would achieve.²⁶⁹ Similarly, it argued that what the district court called a non-discriminatory LCFS would amount to “[s]electively choosing the elements of a fuel’s lifecycle,” which would “render[] the determination of carbon intensity meaningless.”²⁷⁰

The Ninth Circuit handed down a dormant Commerce Clause decision in late August 2013 that appears to have presaged its thinking as it prepared the *Rocky Mountain Farmers Union* opinion: in *Association des Eleveurs de Canards v. Harris*, the court held that a California law banning foie gras (the fatty liver of force-fed ducks) neither discriminated against interstate commerce nor directly regulated interstate commerce.²⁷¹ In holding that the law was nondiscriminatory, the court pointed out that location had nothing to do with the ban: all products based on the force-feeding of ducks, no matter

263. *See id.*

264. *Id.* at 98.

265. *Id.*

266. *Id.*

267. *Id.*

268. *Id.* at 98–100.

269. *Id.*

270. *Id.* at 99.

271. *Ass'n des Eleveurs de Canards et D'Oies v. Harris*, 729 F.3d 937 (9th Cir. 2013).

where they originated, were equally affected.²⁷² This suggested that the court was sympathetic to the authority of states to regulate materials for moral or ethical reasons, even if such regulation would eliminate a market for a good. At the same time, the foie gras opinion left open the possibility that bans taking location into account, arguably including the LCFS, would incur a different result.

Next, the court held that the foie gras law did not directly regulate interstate commerce (was not extraterritorial) because it was not aimed at out-of-state producers—it applied equally in- and out-of-state—and because it only banned a way of producing foie gras, rather than banning the entire product.²⁷³ This was the strongest signal that the Ninth Circuit might look favorably upon the LCFS: as in the foie gras ban, the LCFS took a purely procedural look at products, without regard to location. Similarly, the LCFS did not ban high-CI corn ethanol, but merely made it more expensive to sell it in California.

On September 18, 2013, the Ninth Circuit released its opinion in the *Rocky Mountain Farmers Union* case, which now bore the caption *Rocky Mountain Farmers Union v. Corey*.²⁷⁴ In a consolidated opinion deciding the dormant Commerce Clause challenge to both the state's crude oil standards as well as the LCFS, Judge Gould wrote for the majority that the LCFS neither facially discriminated against interstate commerce nor regulated extraterritorially.²⁷⁵ The court vacated the preliminary injunction and remanded to the district court to determine whether the LCFS “discriminate[d] in purpose or in practical effect.”²⁷⁶ If it did neither, the court of appeals directed the district court to apply the *Pike* balancing test.²⁷⁷

In reaching this result, Judge Gould painted a sympathetic picture of California's legislation and regulations.²⁷⁸ He noted initially that California “has long been in the vanguard of efforts to protect the environment, with a particular concern for emissions from the transportation sector.”²⁷⁹ Gould recounted California's pioneering role in the Clean Air Act's development,

272. *Id.* at 948.

273. *Id.* at 948–50.

274. *Rocky Mountain Farmers Union v. Corey*, 730 F.3d 1070 (9th Cir. 2013). Richard Corey had replaced James Goldstene as Executive Officer of the California Air and Resources Board in April 2013. *ARB Announces Appointment of New Executive Officer*, AIR RESOURCES BOARD, CAL. ENVTL. PROTECTION AGENCY (Apr. 5, 2013), <http://www.arb.ca.gov/newsrel/newsrelease.php?id=424>.

275. *Rocky Mountain Farmers Union v. Corey*, 730 F.3d at 1078.

276. *Id.*

277. *Id.*

278. *Id.*

279. *Id.*

for example, leading to its leadership in passing AB 32.²⁸⁰ He noted that the LCFS served an important purpose in California's comprehensive attempts to lower its greenhouse gas emissions: it was the supply-side regulation aiming at the sources of GHG emissions that the other two prongs of California's vehicle standards could not reach.²⁸¹

Gould first framed his analysis by determining "which ethanol pathways are suitable for comparison," because without this step, he could not find whether similarly-situated producers were being treated differently and therefore discriminated against.²⁸² He wrote that "[e]ntities are similarly situated for constitutional purposes if their products compete against each other in a single market."²⁸³ Therefore, the district court erred in "excluding Brazilian ethanol from its analysis," which would have shown that California was not discriminating against out-of-state producers.²⁸⁴

Furthermore, the district court 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," which were factors correlated with location but were independently valid ways to determine CI.²⁸⁵ Without a careful analysis of the differences between pathways, Gould concluded, "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."²⁸⁶

Most importantly, Gould recognized that merely treating location as a factor was not facially discriminatory; the State could still show that there was "some reason, apart from their origin, to treat" different regions' products differently.²⁸⁷ In other words, since there were valid scientific bases above and beyond mere location of origin to treat the different pathways differently, they did not facially discriminate.²⁸⁸ The default pathways in Table 6 "do categorize fuels by their origin, but the carbon intensity values on that table are not assigned based on the out-of-state character of

280. *Id.* at 1078–79.

281. *Id.* at 1079–80. The "Tailpipe Standards," as CAL. CODE REGS. tit. 13, § 1961.1 (2012) is known, established "progressively stricter emissions limits for new vehicles," whereas the vehicle miles traveled ("VMT Standards"), CAL. GOV'T CODE §§ 65080–81 (West, Westlaw through Ch. 800 of 2013 Reg.Sess., all 2013–2014 1st Ex.Sess. laws, and Res. Ch. 123), integrated "regional land use, housing, and transportation planning to reduce the number of 'vehicle miles traveled' annually. *See* Rocky Mountain Farmers Union v. Corey, 730 F.3d at 1079–80.

282. *Id.* at 1088.

283. *Id.*

284. *Id.*

285. *Id.*

286. *Id.* at 1089.

287. *Id.* (quoting *Philadelphia v. New Jersey*, 437 U.S. 617, 627 (1978)).

288. *Id.*

fuels”; instead, they were assigned based on objective principles.²⁸⁹ Therefore, there was no facial discrimination.²⁹⁰

Likewise, Gould made short work of the argument that California was regulating in a protectionist manner.²⁹¹ Instead, he demonstrated that the regulations provided no special economic benefit to California.²⁹² Moreover, California did not need to alter its regime simply because ethanol producers in the Midwest were more likely to be close to higher-carbon sources of electricity; “the dormant Commerce Clause does not guarantee that ethanol producers may compete on the terms they find most convenient.”²⁹³

Finally, Gould concluded that it was not facially discriminatory to “draw one of the regional categories along its boundary” when California defined itself as a region in Table 6.²⁹⁴ Again here, he concluded that the State had acted reasonably in using its political boundary as a category to compute CI, as long as it continued to treat sources evenhandedly.²⁹⁵ The generalizations in Table 6 merely “balance the desire for a precise assessment with the need to reduce the compliance costs of the system.”²⁹⁶

Regarding extraterritoriality, Gould wrote that the “Fuel Standard regulates only the California market,” and would not control the behavior of out-of-state firms.²⁹⁷ It could merely incentivize their behavior, and therefore it did not regulate extraterritorially.²⁹⁸ Furthermore, the requirement that blenders “report any material change to a pathway’s production and transportation process before it can generate Fuel Standard credits” was not extraterritorial regulation, because it only applied when a blender sought to continue selling its goods in California.²⁹⁹

From a policy standpoint, Gould acknowledged both the dire need that prompted California to legislate in this way, and the importance of deferring somewhat to states’ autonomy in our federal system.³⁰⁰ Moreover, a federalist argument helped Gould conclude that this statute did not put the nation at risk of economic Balkanization.³⁰¹ The Plaintiffs had urged that California’s law would encourage other states to adopt similar but not iden-

289. *Id.* at 1098.

290. *Id.*

291. *Id.* at 1099.

292. *See id.* at 1098–99.

293. *Id.* at 1091–92 (citing *Exxon Corp. v. Governor of Md.*, 437 U.S. 117, 127 (1978)).

294. *Id.* at 1096.

295. *Id.* at 1096–97.

296. *Id.* at 1095.

297. *Id.* at 1101.

298. *Id.* at 1105–06.

299. *Id.* at 1104.

300. *Id.* at 1081–82, 1095.

301. *Id.* at 1101.

tical legislation of their own, which would create an unworkable mix of laws, crippling interstate commerce.³⁰² Gould dismissed this concern, remarking that “[i]f we were to invalidate regulation every time another state considered a complementary statute, we would destroy the states’ ability to experiment with regulation.”³⁰³

In general, therefore, the Ninth Circuit’s majority ruling found that California’s careful scientific choices defeated the broad-brush picture of the dormant Commerce Clause that the Plaintiffs had put forward. For the purposes of facial discrimination, the court held, reasons matter: since California had well-reasoned methods behind its choices of how to calculate CI, it was not discriminatory.³⁰⁴

The court remanded to the district court to determine whether the LCFS discriminated in purpose or in practical effect. Of course, Gould advocated strongly in dicta that California had no discriminatory purpose, and demonstrated that the LCFS did not on the whole produce a discriminatory effect on interstate commerce given the low CI of Brazilian sugarcane.³⁰⁵ These remarks are forceful suggestions to the lower court not to hold that the strict scrutiny test applies for these reasons. If the lower court agrees with Gould’s suggestions, it is then directed to apply the *Pike* balancing test, and determine whether the LCFS imposes burdens on interstate commerce that are “‘clearly excessive’ in relation to its local benefits.”³⁰⁶

Judge Murguia filed a separate opinion, concurring in part and dissenting in part.³⁰⁷ She dissented fully from the Court’s opinion regarding the dormant Commerce Clause analysis of the LCFS.³⁰⁸ She objected to the majority’s focus on the statute’s purpose to help determine whether it discriminated; instead, she would “look only to the text of the LCFS to determine if it facially discriminates against out-of-state ethanol.”³⁰⁹ From Supreme Court precedents, she reasoned that any statute “accord[ing] more preferential treatment” to in-state parties at the expense of out-of-state parties would be facially discriminatory.³¹⁰ In Murguia’s view, this reasoning is appropriate because the majority should have placed its judgments about California’s reasonableness in the second step of the test, when it examined

302. Appellees’ Brief at 44, *Rocky Mountain Farmers Union v. Corey*, 730 F.3d 1070 (9th Cir. 2013) (Nos. 12-15131, 12-15135).

303. *Rocky Mountain Farmers Union v. Corey*, 730 F.3d at 1105.

304. *Id.* at 1089–90.

305. *See, e.g., id.* at 1090, 1092–93, 1096, 1105–06.

306. *Id.* at 1078.

307. *Id.* at 1107–10.

308. *Id.*

309. *Id.* at 1108.

310. *Id.*

whether the purported reasons for the discrimination were valid.³¹¹ In other words, the correct application of the strict scrutiny test would not involve any consideration of the State's reasons for enacting a potentially discriminatory statute until after the court determines, from the text alone, whether the statute does discriminate.³¹²

Having determined that the LCFS facially discriminated based on its text alone, Murguia would have held that there were alternatives to the discrimination and therefore the LCFS was not valid.³¹³ Murguia's analysis here was a little puzzling: she suggested that California could have "treated ethanol produced in efficient plants more favorably than ethanol from inefficient plants—rather than taking the shortcut of assuming that plants outside of California are less efficient," without considering what would have happened if California plants tended to be more efficient than out-of-state plants.³¹⁴ She also quoted counsel for California at oral argument stating that "It's not our position that the LCFS is the only way the lifecycle could be used. It's our position that the lifecycle is the only way to accurately measure [GHG] emissions from transportation fuels'" without addressing the inherent problem with that sentence: if there are alternatives, but those alternatives do not "accurately measure" the substance being measured, are they truly alternatives?³¹⁵

C. Pike Arguments

If the lower court on remand finds that the LCFS does not discriminate in purpose or effect, the program will be subjected to the much more forgiving *Pike* balancing test. That test is applied to state laws that do not facially discriminate and do not regulate extraterritoriality, but that have effects in interstate commerce.³¹⁶ There, courts will strike down the state law only if the effects on interstate commerce outweigh the putative local benefits of the law.³¹⁷ By its terms and in its application, this test is much more forgiving to states. In stark contrast with the strict scrutiny test, under which virtually every state law is deemed unconstitutional, the *Pike* test rarely results in the law being struck down.

Under a *Pike* balancing test, the court will evaluate whether the burdens on interstate commerce were outweighed by the benefits the State obtained from the regime. Here, the burdens are that Midwestern producers are

311. *Id.* at 1108–09.

312. *Id.*

313. *Id.* at 1110.

314. *Id.* at 1109.

315. *Id.* (emphasis omitted).

316. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

317. *Id.*

subject to higher compliance costs than California producers, and as a result, they may lose market share over time. California buyers may face disincentives to buy Midwestern ethanol, because its higher CI value would be costly for them.³¹⁸ Due to California's large size, this would potentially mean significant losses.

In its briefs, the State argued that, even if the Plaintiffs were correct that the Midwestern ethanol would lose market share over time, this loss did not amount to a dormant Commerce Clause violation. As the State noted, the Plaintiffs' "bleak scenarios" about the burden imposed upon them "lack evidentiary support."³¹⁹ Moreover, the State insisted, it had procedures in place to allow producers to request an individualized CI score, so that no producer would be forced to operate under an unduly high averaged score.³²⁰

The strongest argument for the State here, of course, is that *Pike* is a balancing test: even if the Midwestern producers would face systemic and significant losses compared with other producers, these losses must be examined in the context of the threat of climate change. California's sovereign interest in protecting itself, both as a State and as a land-owner, and in protecting its citizens and businesses, from the projected damage wrought by climate change would almost certainly outweigh partial, and scientifically justified, losses by some Midwestern ethanol producers. On balance, therefore, the LCFS will almost certainly survive a *Pike* balancing test on remand.

V. POLICY ALTERNATIVES

After the mostly-favorable Ninth Circuit ruling, California has less to fear, for the time being. It is still possible that the Plaintiffs will seek en banc review or certiorari to the United States Supreme Court. Otherwise, on remand to the Eastern District of California, the lower court could also find that the statute fails the more deferential *Pike* balancing test. However, given how lenient the *Pike* test generally is, it is unlikely that this statute would fail. This is especially likely given how great the benefits are that California hopes to obtain from reducing greenhouse gas emissions.

If the LCFS must still be changed after en banc review or a potential ruling by the Supreme Court that the statute is discriminatory, California would need to alter the discriminatory aspects of the law. The district court

318. See Brief of the AFPM Plaintiffs-Appellees at 2, *Rocky Mountain Farmers Union v. Corey*, 730 F.3d 1070 (9th Cir. 2013) (Nos. 12-15131, 12-15135).

319. Appellants' Reply Brief at 12, *Rocky Mountain Farmers Union v. Corey*, 730 F.3d 1070 (9th Cir. 2013) (Nos. 12-15131, 12-15135).

320. See Appellants' Opening Brief, *supra* note 190, at 24–25, 61.

focused mainly on Table 6 of the LCFS, wherein the State appeared to add 10 percent CI to all Midwestern corn and ethanol.³²¹ The State could therefore rewrite this section and issue more findings about precisely why the 10 percent figures were appropriate. Alternatively, it could recalculate the figures entirely, and ensure that the figures truly reflect the CI of the fuels.

Of course, there would be serious difficulties with this approach. The whole idea of Table 6 was to reduce the administrative burden, both on the state and on regulated entities: the average CIs were intended to save time and not require parties to painstakingly calculate individual CI values. Additionally, the LCFS allows entities to request a customized CI value; this alternative approach might essentially eliminate that option and make it the default. All fuels might receive a customized CI value, and the program would probably require far greater funding and resources to administer.

If the Ninth Circuit en banc, or the Supreme Court, were to adopt the view that all consideration of transportation was discriminatory, California would be in a much more difficult bind. The State might then need to strip its CI calculations of everything but the behavior taking place in California and the chemical properties of the fuels. This would, as the State pointed out in its briefs, render the CI illogical and toothless: California would be expending its resources to regulate fuels that were chemically identical, and perhaps to regulate the seed to tank production of California ethanol, but it would not be able to accurately measure how much carbon it was reducing through its efforts. The out-of-state carbon inputs, including transportation, would go uncalculated.³²²

If transportation is indeed discriminatory, it may make more sense for California to scrap the LCFS regime in favor of something like a carbon tax. However, such a tax could implicate the dormant Commerce Clause case law on state taxes—the same strict scrutiny analysis could apply to a state attempting to impose tariffs on out-of-state goods.³²³

However, for the moment, the LCFS appears to be out of the woods. As described in Section IV.C, it has every chance of surviving the *Pike* balancing test, and there is no reason to believe now that the Ninth Circuit's holdings about the absence of discrimination in the LCFS will be overturned.

321. CAL. CODE REGS. tit. 17 § 95486 tbl.6 (2012).

322. See Appellants' Opening Brief, *supra* note 190, at 98–101.

323. See, e.g., *Oregon Waste Sys., Inc. v. Env'tl. Quality Comm'n*, 511 U.S. 93, 99–100 (1994).

CONCLUSION

The *Rocky Mountain Farmers Union* case provides a window into the dormant Commerce Clause issues states will face as they enact laws to address global climate change. First, they will have to dodge the strict scrutiny test by enacting laws that courts agree are non-discriminatory. If they fail, as California did here, they must demonstrate that they had no plausible alternatives in the service of a legitimate local purpose. Despite an otherwise-unfavorable ruling, Judge O'Neill's opinion ruled that global warming was a legitimate local purpose, apparently for all states, without question. This will be a valuable piece of case law for other states fighting similar challenges, as it apparently absolves them from having to argue about their specific, factual harms from climate change. Ultimately, however, it makes more sense given the logic of the dormant Commerce Clause, and given the unique challenges of climate change, for future courts to employ the *Pike* balancing test in considering a carefully-crafted law like the LCFS. This approach will allow courts properly to balance the state's approach facing a considerable threat to health and safety.