Energy Policy, Extraterritoriality, and the Dormant Commerce Clause

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I. INTRODUCTION

In the face of limited federal action to address climate change, states have attempted to fill the gap by creating new energy policies designed to promote renewable electricity generation, place limits on greenhouse gas emissions, and encourage the use of low-carbon fuels. In doing so, however, states necessarily influence regional and national energy markets, leading to challenges that they are discriminating against out-of-state interests and improperly interfering with interstate markets in violation of the dormant Commerce Clause. While Commerce Clause challenges to environmental protection initiatives are nothing new, the recent Commerce Clause challenges to state clean energy policies are in some ways the mirror image of the Commerce Clause challenges to federal environmental policies of the last twenty years. The bulk of Commerce Clause challenges in the environmental law arena over the past few decades have been challenges to Congress's authority to legislate on a federal level, based on whether the subject of regulation—such as species protection, wetland regulation, or control of hazardous waste—was sufficiently connected to interstate commerce. Today, by contrast, it is the states that are creating new laws to reduce waste, promote renewable energy, reduce air pollution, and address climate change, which necessarily affect regional, national, and sometimes even international energy structures and markets. Thus, the complaint by plaintiffs in these cases is that the state's efforts are *too* connected to interstate commerce and thus exceed the state's authority to regulate.

This Article will focus specifically on potential challenges to state energy policy based on the "extraterritoriality doctrine" of the dormant Commerce Clause. In doing so, it considers two recent lawsuits involving dormant Commerce Clause challenges to state energy policy. The first is the lawsuit against the State of California over its Low Carbon Fuels Standard (LCFS) program on grounds that it discriminates against Midwest ethanol producers in favor of California ethanol producers and regulates extraterritorially in violation of the dormant Commerce Clause. The second is the lawsuit by the State of North Dakota, the North Dakota lignite coal industry, and regional electric cooperatives against the State of Minnesota over provisions of its Next Generation Energy Act (NGEA). The NGEA prohibits new coal-fired electricity generation in the state and prohibits imports of new coal-fired generation from outside the state without accompanying CO_2 offsets. In that case the plaintiffs allege, among other things, that the law discriminates against out-of-state coal interests and regulates extraterritorially in violation of the dormant Commerce Clause. This Article will discuss both of the cases in detail to highlight the potential challenges associated with state efforts to use energy policy to address climate change, and to suggest how to place those cases in today's dormant Commerce Clause jurisprudence.

In both the California and Minnesota cases, plaintiffs allege that by attempting to influence interstate markets for fuels and electricity the states are attempting to control commerce beyond their borders. Such an argument raises critical concerns for state energy policy. Today's energy markets are interstate and interconnected, with fuels and electricity flowing in regional, national, and international markets rather than intrastate, local markets. Likewise climate change, unlike traditional forms of air pollution, is a regional, national, and international issue, with no one state or even one nation able to limit climate change solely through its own policies. But does that mean a state cannot use its own energy policy to influence the carbon intensity of the fuels and electricity used within its state borders because that policy might influence decisions outside the state? This article concludes that the answer to that question is "no," and explores why state authority to use energy policy to address climate change is consistent with principles of federalism and should not be blocked by arguments that such legislation violates the extraterritoriality doctrine of the dormant Commerce Clause. In general, if states choose to encourage more energy efficient behavior by transportation fuel providers or electricity importers who wish to participate in state retail energy markets, the dormant Commerce Clause should be no more a barrier to those choices than the hundreds of other health, safety, and environmental protection laws that influence companies selling light bulbs, appliances, and other products in interstate markets. Congress could create more uniformity in that regard by affirmatively preempting state law, as it has done with auto emissions and appliance efficiency standards, in some circumstances. But in the absence of federal preemption, dormant Commerce Clause precedent should not be used to create new barriers to energy markets where it has not done so in other commercial markets. This Article ultimately argues that courts should eliminate or significantly limit the use of the extraterritoriality doctrine as a separate branch of dormant Commerce Clause jurisprudence in most circumstances or, in the alternative, limit its application to situations where there are significant concerns that states are exceeding their authority in a manner that favors in-state interests over out-of-state interests or interferes with a strong federal policy favoring uniformity in that regulatory arena.

Part II provides background on the dormant Commerce Clause and the key Supreme Court and lower court cases that set the stage for analyzing Commerce Clause challenges to state energy policy. It focuses specifically on dormant Commerce Clause cases involving state energy and environmental policy as well as cases addressing the extraterritoriality doctrine. In doing so, it explores the tensions inherent in efforts by states to promote public health, safety, and environmental protection, which are legitimate state interests, when those policies necessarily affect the economic interests of out-of-state actors who wish to participate in state and interstate markets for fuels and electricity generation.

Part III introduces the potential challenges the dormant Commerce Clause poses to state energy policy in light of a variety of lawsuits that have been brought around the country to state efforts to promote renewable fuels and electricity through renewable portfolio standards, feed-in tariffs, renewable fuel requirements, and limits on new coal-fired power plants. It then focuses specifically on the California LCFS lawsuit and the Minnesota NGEA lawsuit to explore how plaintiffs are using the extraterritoriality doctrine of the dormant Commerce Clause to limit state efforts to use energy policy to address climate change and other environmental policy goals.

Part IV considers what lessons can be learned from the dormant Commerce Clause challenges to the California and Minnesota laws with a specific focus on the relationship between these laws and interstate markets for fuels and electricity. Putting aside the hotly contested issue in both cases of whether the laws discriminate against out-of-state interests in favor of in-state interests, the fact remains that, like much state regulation, these laws impact interstate markets for goods and services, specifically, energy goods and services. Plaintiffs in the two cases use this fact to argue that the laws impermissibly control out-of-state activities and interfere with interstate markets in violation of the dormant Commerce Clause. But to accept this argument would require courts to severely limit state energy policies to address climate change and to meet other legitimate state policy goals despite the fact that federal law gives states broad authority to regulate the use of fuels, electricity, and other energy sources within state borders. Certainly, Congress has authority to regulate these issues on a national basis and may preempt state action in these areas. But the existence of this federal authority should not, on its own, eliminate a state's authority to set state energy policy even if such actions may influence decisions made by out-of-state companies to participate in those state markets. While the state may not meet those goals by discriminating against out-of-state economic interests, the fact that state policy may influence actions of both in-state and out-of-state interests that wish to participate in the state's energy markets need not automatically run afoul of the dormant Commerce Clause based on the extraterritoriality doctrine.

II. THE DORMANT COMMERCE CLAUSE AND ITS JURISPRUDENCE

The Commerce Clause of the U.S. Constitution grants Congress the power "[t]o regulate Commerce . . . among the several states."[1] The Supreme Court has also interpreted this clause to include a negative, or "dormant," provision that restricts states from engaging in economic protectionist behavior that discriminates against or burdens interstate commerce.[2]

The first question in any dormant Commerce Clause challenge is whether the state law discriminates against interstate commerce. A state law discriminates against interstate commerce if it is facially discriminatory, has a discriminatory purpose, or is discriminatory in effect.[3] If a court determines that a state law discriminates against interstate commerce based on point of origin or other geographic factors, it will apply strict scrutiny and invalidate the law unless the state can show that the law protects a legitimate state interest and that the law is the only reasonable means of protecting that interest.[4] State laws that discriminate include those that block imports, tax out-of-state goods but not in-state goods, or otherwise give facial preference or have a purpose or effect of giving preference to in-state resources or goods at the expense of out-of-state resources or goods.[5] Local laws, in addition to state laws, can violate the

1. U.S. CONST. art. I, § 8, cl. 3.

2. New Energy Co. of Ind. v. Limbach, 486 U.S. 269, 273–74 (1988); Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511, 522 (1935). Because the dormant Commerce Clause doctrine is based on Congress's power to regulate commerce, Congress may by statute exempt state laws from dormant Commerce Clause scrutiny. *See* Northwest Airlines, Inc. v. Kent, 510 U.S. 355, 373 & n.19–20 (1994).

3. *See* Daniel K. Lee & Timothy P. Duane, *Putting the Dormant Commerce Clause Back to Sleep: Adapting the Doctrine to Support State Renewable Portfolio Standards*, 43 ENVTL. L. 295, 300–02 (2013).

4. C & A Carbone, Inc. v. Town of Clarkston, 511 U.S. 383, 392 (1994); Maine v. Taylor, 477 U.S. 131, 151–52 (1986); City of Phila. v. New Jersey, 437 U.S. 617, 624 (1978).

5. *See* CAROLYN ELEFANT & EDWARD A. HOLT, CLEAN ENERGY ALLIANCE, THE COMMERCE CLAUSE AND THE IMPLICATION FOR STATE RENEWABLE PORTFOLIO STANDARD PROGRAMS 5–7 (2011); *Fort Gratiot Sanitary Landfill, Inc. v. Mich. Dep't of Natural Res.*, 504 U.S. 353, 367 (1992) (holding that a state regulation providing that solid waste generated outside the county could not be accepted for disposal without authorization from the receiving county was facially discriminatory); *New Energy Co.*, 486 U.S. at 279–80

dormant Commerce Clause. For instance, in the often-cited case of *Dean Milk v. Madison*,[6] the Supreme Court invalidated a local ordinance that required all milk sold in the City of Madison, Wisconsin to be pasteurized within five miles of the city limits on grounds that it was "erecting an economic barrier protecting a major local industry against competition" from outside the state.[7]

By contrast, if a court determines that a state law is facially neutral and there is no evidence of discriminatory purpose or effect, it will apply a flexible balancing test, known at the "*Pike* balancing test," (after the case of *Pike v. Bruce Church, Inc*.) that considers whether the burdens imposed on interstate commerce are "clearly excessive" in relation to the local benefits.[8] Courts almost always invalidate state laws that are found to be discriminatory and are thus subject to strict scrutiny but often uphold state laws that are not discriminatory but nevertheless burden interstate commerce and are thus subject to the *Pike* balancing test.[9] There are also

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(finding Ohio's income tax credit limited to in-state ethanol producers to be facially discriminatory); City of Phila. v. New Jersey, 437 U.S. 617, 624, 628 (1978) (holding that a New Jersey ban on out-of-state garbage was discriminatory against out-of-state resources and thus "virtually per se invalid."); W. Lynn Creamery Co. v. Healy, 512 U.S. 186 (1994) (holding that a tax on all milk sales coupled with a subsidy for in-state milk production discriminated against interstate commerce and was invalid).

6. 340 U.S. 349 (1951).

7. *Id.* at 354. It was no defense that the ordinance also applied to milk producers within the State of Wisconsin outside the five-mile limit. *Id.* at 354, n.4.

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

9. *Compare* Or. Waste Sys., Inc. v. Dep't of Envtl. Quality, 511 U.S. 93, 100–01 (1994) (finding per se discrimination in case of state law that imposed a higher surcharge on foreign waste brought into the state for disposal than for domestic waste); *C & A Carbone*, 511 U.S. at 390, 392–93 (1994) (local ordinance requiring that solid waste handled within town borders be brought to town's transfer station was facially discriminatory and per se invalid); *W. Lynn Creamery Co.*, 512 U.S. 186 (holding that a tax on all milk sales coupled with a subsidy for in-state milk production resulted in discrimination against out-of-state milk producers and was invalid); Healy v. Beer Inst., 491 U.S. 324 (1989) (applying strict scrutiny), *with* United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth., 550 U.S. 330 (2007) (holding county flow control ordinance directing both in-state and out-of-state waste to county-owned recycling facility did not discriminate against out of state interests and that the benefits of increasing recycling to promote health and safety in the county outweighed any burden on interstate commerce under the *Pike* balancing test); Am. Trucking Ass'ns, Inc. v. Mich. Pub. Serv. Comm'n, 545 U.S. 429 (2005) (finding flat fee of $100 on trucks engaged in intrastate commercial hauling regulated evenhandedly to all carriers making domestic journeys and thus did not violate the Commerce Clause). *But see* Maine v. Taylor, 477 U.S. 131, 151 (1986) (upholding Maine statute prohibiting imported baitfish even though it facially discriminated against interstate commerce because the state established it had no other reasonable alternative means to protect its aquatic ecosystem and the state had "authority to protect the health and safety of its citizens and the integrity of its natural resources."); Brown-Forman Distillers Corp v. New York State Liquor Authority, 476 U.S. 573, 579 (1986) (recognizing that "that there is no clear line separating the category

some defenses states can rely on to avoid Commerce Clause challenges beyond attempting to rebut claims of facial discrimination or discriminatory effect. These include the "market participant" defense, which permits a state to discriminate against interstate commerce when the state is participating in the market itself by selling or purchasing goods or favoring a state-owned entity rather than merely regulating the market.[10]

Beyond the determination of whether a state law discriminates against interstate commerce, courts also consider as part of the dormant Commerce Clause analysis whether a state law reaches beyond its jurisdiction and attempts to control conduct outside the state's borders. Under this "extraterritoriality principle," a state law that is not facially discriminatory may still be invalid under a strict scrutiny test if it has the "practical effect" of regulating commerce outside the state's borders, or effectively "controls the conduct of those engaged in commerce occurring wholly outside the State."[11] A related concern that arises in these cases is that inconsistent state laws regulating out-of-state behavior may impose conflicting obligations on participants in interstate markets.[12]

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of state regulation that is virtually per se invalid under the Commerce Clause, and the category subject to the Pike v. Bruce Church balancing approach.").

10. *See United Haulers Ass'n*, 550 U.S. at 334; Hughes v. Alexandria Scrap Corp., 426 U.S. 794, 806 (1976). *See also* Lee & Duane, *supra* note 3, at 300–12.

11. *See generally* Earl M. Maltz, *How Much Regulation is Too Much—An Examination of Commerce Clause Jurisprudence*, 50 GEO. WASH. L. REV. 47, 78 (1981) ("When a state statute burdens both domestic and foreign producers, in-state interests typically can be expected to safeguard this concern. By contrast, when . . . the challenged regulation disadvantages only the out-of-state producers, this 'internal political check' is absent. Thus, adherents to this theory conclude that such regulations should be subject to stricter judicial scrutiny."); ERIN PARLAR, MICHAEL BABAKITIS, & SHELLEY WELTON, LEGAL ISSUES IN REGULATING IMPORTS IN STATE AND REGIONAL CAP AND TRADE PROGRAMS 20–21 (Columbia Ctr. for Climate Change ed. 2012); Hunt v. Wash. State Apple Advertising Comm'n, 432 U.S. 333, 350, 353 (1977) (finding state statute prohibiting individual state grading designs on closed apple containers, and permitting only the U.S. grading system or no system at all, had the practical effect of burdening interstate sales and discriminating against Washington apples); *Beer Inst.*, 491 U.S. at 337–38 (Connecticut statute requiring alcohol wholesalers to ensure their prices were no higher than those in neighboring states had the practical effect of discriminating against interstate commerce and extraterritorially regulated out-of-state markets); Bibb v. Navajo Freight Lines, Inc., 359 U.S. 520, 529 (1959) (finding statute requiring use of contoured mudguards in Illinois, while almost all other states required a different type of mudguard, had the practical effect of impermissibly burdening interstate markets).

12. *See, e.g.*, *Beer Inst.*, 491 U.S. at 337 (finding statute's extraterritorial regulatory effect was likely to create inconsistent legislation); Michael J. Ruttinger, *Is There a Dormant Extraterritoriality Principle? Commerce Clause Limits on State Antitrust Laws*,

Yet neither the Supreme Court nor lower courts have established with any real clarity when effects felt beyond the borders of the regulating state amount to impermissible extraterritorial legislation.[13] The following sections explore the trajectory of dormant Commerce Clause cases in the context of (1) challenges to state laws attempting to promote sustainable energy policy and environmental protection goals, and (2) allegations of extraterritorial regulation. As states make additional efforts to protect the environment through innovative energy policy measures, they necessarily impact interstate energy markets for fuels and electricity. As a result, the cases discussed below help determine the potential limits on those efforts as well as insight as to how courts have addressed these contemporary challenges in the context of an uncertain dormant Commerce Clause jurisprudence.

106 MICH. L. REV. 545, 549–50 (2007) (advocating an alternative "Inconsistency Principle" to clarify when the extraterritoriality principle will implicate dormant Commerce Clause scrutiny; namely, when regulations impose inconsistent obligations on an out-of-state defendant).

13. *See* Jack L. Goldsmith & Alan O. Sykes, *The Internet and the Dormant Commerce Clause*, 110 YALE L.J. 785, 789 (2001) (stating that the extraterritoriality aspects of the dormant Commerce Clause "are unsettled and poorly understood"); Katherine J. Florey, *State Courts, State Territory, State Power: Reflections on the Extraterritoriality Principle in Choice of Law and Legislation*, 84 NOTRE DAME L. REV. 1057, 1060, 1068 (2009) ("[W]e know that '[f]or the most part, states may not legislate extraterritorially, whatever exactly that means.'. . . [T]he Supreme Court has not developed a uniform standard for assessing the proper scope of state legislative jurisdiction." (internal citations omitted)). *Compare Beer Inst.*, 491 U.S. at 336–37 (finding statute that had impacts "wholly outside the State's borders" impermissibly imposed Connecticut's law extraterritorially), *and* Brown-Forman Distillers Corp. v. New York State Liquor Authority, 476 U.S. 573, 581–82 (1986) (New York statute prohibiting distillers from making sales anywhere in the United States at prices lower than prices in New York impermissibly "forc[ed] a merchant to seek regulatory approval in one state before undertaking a transaction in another" and "directly regulate[d] interstate commerce"), *with* Pacific Merchant Shipping Ass'n v. Goldstene, 639 F.3d 1154, 1181–82 (9th Cir. 2011), *cert denied*, 133 S. Ct. 22 (2012) (No. 10-1555) (California's restrictive vessel fuel use rules were valid exercises of the state's police power in response to the "severe environmental problems confronting California" and did not regulate extraterritorially); Int'l Dairy Foods Ass'n v. Boggs, 622 F.3d 628, 647 (6th Cir. 2010) (finding Ohio statute regulating milk labeling did not require labelers to apply Ohio law to their labeling practices in states other than Ohio, and thus did not extraterritorially regulate "to impede or control the flow of milk products across the country.").

A. Energy and Environmental Cases Under the Dormant Commerce Clause

Examples of discriminatory laws involving environmental and energy policy include laws prohibiting hydroelectric power plants from selling power out-of-state, laws requiring power plants to burn a particular percentage of in-state coal, laws requiring all solid waste generated in a town to pass through a local processing center, laws imposing a hazardous waste disposal fee only on hazardous waste generated outside the state, or tax credits to users of in-state renewable fuels.[14] Other state laws that do not discriminate may still violate the dormant Commerce Clause under the *Pike* balancing test if the burden imposed on interstate commerce is "clearly excessive" in relation to the local benefits.[15] Local benefits such as energy conservation or protecting environmental health or safety can justify a burden on interstate commerce, but efforts to subsidize in-state industries generally cannot.[16]

For instance, in 1982, in *New England Power Co. v. New Hampshire*,[17] the U.S. Supreme Court struck down a New Hampshire law that prohibited the export of hydroelectric power produced by a federally-licensed facility in the state. The Court stated that the issue in the case was "whether a state can

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14. *See, e.g.*, C & A Carbone, Inc. v. Town of Clarkstown, 511 U.S. 383, 392 (1994) (local ordinance requiring solid waste to be processed at town's transfer station was *per se* invalid); New Energy Co. of Ind. v. Limbach, 486 U.S. 269, 279 (1988) (Ohio income tax credit for ethanol produced in-state was facially discriminatory, resulting in "favorable tax treatment for *Ohio*-produced ethanol" only); New England Power Co. v. New Hampshire, 455 U.S. 331, 341–44 (1982) (finding New Hampshire public utility order requiring hydroelectric power company to sell power only to in-state consumers facially restricted the flow of interstate commerce); Oklahoma v. Wyoming, 502 U.S. 437, 455–57 (1992) (Oklahoma statute requiring Oklahoma coal-fired electric generating plants producing power for in-state sale or use to burn a minimum of 10% Oklahoma-mined coal was facially discriminatory); ELEFANT & HOLT, *supra* note 5, at 5–6 (discussing cases). *See also* Ill. Commerce Comm'n v. FERC, 721 F.3d 764, 776 (7th Cir. 2013) (stating in dicta that "Michigan's first argument—that its law forbids it to credit wind power from out of state against the state's required use of renewable energy by its utilities—trips over an insurmountable constitutional objection. Michigan cannot, without violating the commerce clause of Article I of the Constitution, discriminate against out-of-state renewable energy.").

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

16. *See* ELEFANT & HOLT, *supra* note 5, at 7–8 (citing cases); Christine A. Klein, *The Environmental Commerce Clause*, 27 HARV. ENVTL. L. REV. 1, 4 (2003) (noting that the Supreme Court has been skeptical of environmental justifications for state laws subject to dormant Commerce Clause challenges).

17. 455 U.S. 331 (1982).

constitutionally prohibit the exportation of hydroelectric energy produced within its borders by a federally-licensed facility, or otherwise reserve for its own citizens the 'economic benefit' of such hydroelectric power."[18] In holding that New Hampshire could not do so, the Court also noted that New Hampshire could not terminate its out-of-state transmission of hydroelectricity "without substantial alterations in the regional transmission systems to which its hydroelectric facilities are connected."[19]

Likewise, in 1988, in *New Energy Co. v. Limbach*, the Supreme Court invalidated a state tax credit to promote in-state renewable fuels.[20] An Ohio law awarded a tax credit for each gallon of ethanol sold as a component of gasohol by fuel dealers only for ethanol produced in Ohio or, if the ethanol was produced in another state, if that state provided similar tax benefits to ethanol produced in Ohio.[21] The Court rejected the argument that the Ohio law did not discriminate but instead simply encouraged other states to grant similar tax benefits, which would spur the interstate sale of ethanol.[22] Relying on prior case law, the Court reasoned that such laws, rather than promoting free trade among the states, are a "threat of economic isolation" to force other states to enter into reciprocity agreements, and are thus subject to strict scrutiny under the dormant Commerce Clause.[23] The Court also rejected the argument that any discrimination was justified because the purpose of the law was to encourage the use of ethanol, which would reduce harmful exhaust emissions, thus promoting a legitimate health and safety goal.[24] The Court acknowledged the ability of the states to regulate to protect health and safety, and that the use of ethanol generally furthers that goal, but it found no reason to believe ethanol produced in Ohio was any healthier than ethanol produced in other states.[25] In sum, the Court found that the law was facially discriminatory, that Ohio's subsidy for in-state producers of ethanol was not specifically tailored to protect public health, and concluded that any health benefit achieved pursuant to the statute was "merely an occasional and accidental effect of achieving what is its purpose, favorable tax treatment for *Ohio*-produced ethanol."[26]

Finally, the Court has historically invalidated most state laws that prohibit the import or export of solid or hazardous waste on alleged public health

18. *New England Power Co.*, 455 U.S. at 333.
19. *Id.* at 343 n.10.
20. New Energy Co. of Ind. v. Limbach, 486 U.S. 269, 279–80 (1988).
21. *New Energy Co*., 486 U.S. at 271.
22. *Id.* at 275–77.
23. *Id*. at 274–75.
24. *Id.* at 279–80.
25. *Id*. at 279.
26. *Id.* (emphasis in original).

and environmental protection grounds.[27] In *Philadelphia v. New Jersey*,[28] *Oregon Waste Disposal Systems, Inc. v. Department of Environmental Quality*,[29] and *Fort Gratiot Landfill, Inc. v. Michigan Department of Natural Resources*,[30] the Court rejected various arguments that banning the disposal of out-of-state waste would protect public health, safety, or the environment. In each of these cases, along with similar cases where states imposed higher surcharges on the disposal of out-of-state waste,[31] the Court found no reason to differentiate between in-state waste and out-of-state waste for purposes of protecting public health and the environment.

Until recently, laws banning the export of waste in favor of processing or recycling at local facilities (often referred to as "flow control laws") such as the one at issue in *C & A Carbone v. Town of Clarkston*,[32] met a similar fate, with the Court holding that such laws merely protect the in-state waste processing industry from out-of-state competition.[33] In 2007, however, the Court refined that analysis somewhat in *United Haulers Ass'n v. Oneida-Herkimer Solid Waste Management Authority*, and found that so long as a county flow control law directed waste to a public facility for processing, the law was not discriminatory on its face because it treated private industry within the jurisdiction and outside the jurisdiction equally,

27. *See, e.g.*, City of Phila. v. New Jersey, 437 U.S. 617, 627 (1978); C & A Carbone v. Clarkstown, 511 U.S. 383, 393 (1994) ("States and localities may not attach restrictions to exports or imports in order to control commerce in other States.").

28. 437 U.S. 617, 626–27 (1978) ("[I]t does not matter whether the ultimate aim of ch. 363 is to reduce the waste disposal costs of New Jersey residents or to save remaining open lands from pollution . . . whatever New Jersey's ultimate purpose, it may not be accomplished by discriminating against articles of commerce coming from outside the State unless there is some reason, apart from their origin, to treat them differently.").

29. 511 U.S. 93, 107 (1994) ("Even assuming that landfill space is a 'natural resource,' 'a State may not accord its own inhabitants a preferred right of access over consumers in other States to natural resources located within its borders.'") (citing *Philadelphia*, 437 U.S. at 627).

30. 504 U.S. 353, 361 (1992) (finding statute prohibiting out-of-state generated waste from being processed absent an affirmative plan by the processing county did not involve an issue of hazardous waste, and no claim was made regarding health and safety).

31. *Or. Waste Disposal Sys., Inc.*, 511 U.S. at 107 (finding Oregon's statute imposing a higher surcharge on out-of-state generated waste was not invulnerable to Commerce Clause challenge despite the state's argument that the goal of the statute was "resource protectionism" rather than economic protectionism).

32. *C & A Carbone*, 511 U.S. 383.

33. *Id.* at 392–93.

resulting in no facial discrimination against interstate commerce.[34] Once there was no discrimination against interstate commerce, the Court analyzed the law in question under the *Pike* balancing test and relied on the "significant health and environmental benefits" conferred on county citizens from the county processing facility.[35] According to the Court, the ordinance "conferr[ed] significant health and environmental benefits upon the citizens of the Counties" by not charging for many recycling services, thus creating incentives for recycling and responsible disposal of hazardous waste, and by stricter enforcement of recycling laws through routing all recyclables through one facility.[36]

Even in instances where there has been discrimination against interstate commerce, the Supreme Court has, in at least one case, upheld preferences for in-state products on environmental, health, or safety grounds when the state can show no non-discriminatory means of achieving an important health, safety, or environmental protection interest. For instance, in 1986, in *Maine v. Taylor*,[37] the Court upheld a Maine statute prohibiting imported, live baitfish, because of the risk of such baitfish carrying parasites not common to wild fish in Maine that would threaten Maine fisheries. The Court held that even though the statute discriminated against interstate commerce, Maine presented satisfactory evidence of a legitimate local interest in protecting its "unique and fragile fisheries" and further recognized that Maine lacked alternative nondiscriminatory alternatives that would advance that interest.[38] The Court agreed with the district court that "the constitutional principles underlying the commerce clause cannot be read as requiring the State of Maine to sit idly by and wait until potentially irreversible environmental damage has occurred or until the scientific community agrees on what disease organisms are or are not dangerous before it acts to avoid such consequences."[39] The Court concluded that "[t]his is not a case of arbitrary discrimination against interstate commerce; the record suggests that Maine has legitimate reasons, 'apart from their origin, to treat [out-of-state baitfish] differently.'"[40]

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34. 550 U.S. 330, 345 (2007).
35. *United Haulers Ass'n*, 550 U.S. at 346–47.
36. *Id. See also* Chem. Waste Mgmt. v. Hunt, 504 U.S. 334, 349 (1992) (Rehnquist, C.J., dissenting) ("States may take actions legitimately directed at the preservation of the State's natural resources, even if those actions incidentally work to disadvantage some out-of-state waste generators.").
37. Maine v. Taylor, 477 U.S. 131 (1986).
38. *Taylor*, 477 U.S. at 140–41, 151.
39. *Id*. at 148 (quoting U.S. v. Taylor, 585 F. Supp. 393, 397 (D. Me. 1984)).
40. *Id*. at 151–52 (citing City of Phila. v. New Jersey, 437 U.S. 617, 627 (1978)). Notably, Justice Stevens dissented, stating that there was "something fishy about this case" and questioned why Maine should be allowed to facially discriminate against bait fish from other states when no other states had such laws and when there was significant uncertainty

The Court has also upheld nondiscriminatory laws enacted to promote public health and environmental goals even if they may burden out-of-state industries and benefit in-state industries. For instance, in 1981, in *Minnesota v. Clover Leaf Creamery*,[41] the Court upheld a statute banning the retail sale of milk in nonreturnable, non-refillable plastic containers to reduce consumption of energy and waste disposal.[42] In enacting the statute, the state legislature hoped to create a new market for recyclable milk containers even though it acknowledged that such a market did not exist at that time, and producers might need to switch, in the short term, to nonreturnable, non-recyclable paperboard containers while the new market developed.[43] The Court held that the law did not discriminate against out-of-state interests in favor of in-state interests even though the evidence showed that plastic resin, the raw material used for making plastic nonreturnable milk jugs, was produced entirely by non-Minnesota firms while pulpwood, used for making paperboard milk containers, was a major Minnesota product and at that time, the paperboard milk containers would likely be the short-term substitute for the banned plastic containers.[44]

Nevertheless, the Court found the law applied to in-state and out-of-state milk producers alike and did not discriminate. Thus, the Court applied the *Pike* balancing test and upheld the law, finding that any burden on the out-of-state plastics industry was not clearly excessive "in light of the substantial state interest in promoting conservation of energy and other natural resources and easing solid waste disposal problems . . . ."[45]
The Court concluded by stating that "[a] nondiscriminatory regulation serving substantial state purposes is not invalid simply because it causes some business to shift from a predominantly out-of-state industry to a predominantly in-state industry."[46] It also cited an earlier case, *Exxon Corp. v. Governor of Maryland*,[47] for the proposition that the Commerce

about the possible ecological effects from the presence of parasites and nonnative species in shipments of out-of-state baitfish. *Id.* at 153 (Stevens, J., dissenting).

41. 449 U.S. 456 (1981).
42. *Clover Leaf Creamery*, 449 U.S. at 471–72.
43. *Id*. at 465–67.
44. *Id*. at 472–73.
45. *Id*. at 473.
46. *Id*. at 474.
47. 437 U.S. 117 (1978).

Clause "protects the interstate market, not particular interstate firms, from prohibitive or burdensome regulations."[48]

In recent years, lower courts have also upheld laws that may adversely impact out-of-state market participants and benefit in-state market participants so long as the law regulates evenhandedly and the state can point to a legitimate environmental or energy policy goal.[49] For instance, in 2011, in *American Petroleum Institute v. Cooper*,[50] the U.S. District Court for the District of North Carolina upheld a law requiring fuel distributors to sell both gasoline blended with ethanol (E10 or "blendstock") and unblended gasoline to fuel marketers and retailers in the state. In enacting the law, the state wished to promote the use of ethanol by increasing the number of participants in the blending market and thus reduce dependence on foreign oil. According to the state, without the statute, "it would be possible for suppliers to monopolize blending of fuel, completely excluding local marketers from participating in the blending process."[51] With the state statute, local marketers had the option to blend fuel themselves prior to sale and take advantage of the excise tax credits for blending ethanol with gasoline, thus potentially increasing the number of ethanol blenders in the state.[52] Out-of-state fuel suppliers challenged the law, alleging that when suppliers have the option of only selling blendstock, they predominantly ship blendstock on the interstate pipelines, which allows for reduced distribution costs and increased efficiency.[53] The plaintiffs argued that the statute prevented these efficiencies by requiring suppliers to ship full octane unblended fuel in addition to blendstock, thus requiring suppliers to ship more products. They also cited the potential for distribution and storage disruptions.[54]

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48. *Clover Leaf Creamery*, 449 U.S. at 474 (quoting Exxon Corp. v. Governor of Maryland, 437 U.S. 117, 127–28 (1978)). *Id*. at 126 ("The fact that the burden falls on some interstate companies does not, by itself, establish a claim of discrimination against interstate commerce.").

49. Pac. Merch. Shipping Ass'n v. Goldstene, 639 F.3d 1154, 1180–81 (9th Cir. 2011), *cert. denied*, 133 S. Ct. 22 (2012) (No. 10-1555); Constr. Materials Recycling Ass'n Issues and Educ. Fund Inc. v. Burack, 686 F. Supp. 2d 162 (D.N.H. 2010); *Proceeding on Motion of the Commission Regarding a Retail Renewable Portfolio Standard*, Order Regarding Retail Renewable Portfolio Standard, 235 P.U.R. 4th 414 (N.Y. Pub. Serv. Comm'n 2004); Zenith/Kremer Waste Sys., Inc. v. Western Lake Superior Sanitary Dist., 572 N.W. 2d 300 (Minn. 1997); Cotto Waxo Co. v. Williams, 46 F.3d 790 (8th Cir. 1995); Portland Pipe Line Corp. v. Envtl. Imp. Comm'n, 307 A.2d 1 (Me. 1973).

50. American Petroleum Institute v. Cooper, 835 F. Supp. 2d 63 (E.D.N.C 2011), *aff'd in part, rev'd in part on other grounds*, 718 F.3d 347 (4th Cir. 2013).

51. *American Petroleum Institute*, 835 F. Supp. 2d at 88.

52. *Id.* at 73.

53. *Id.* at 68, 87.

54. *Id*. at 87.

In upholding the law, the court found that the state's goal of promoting the use of blended fuel and reducing dependence on foreign oil was a rational state interest, that the law was a legitimate means of doing so by encouraging new participants in the ethanol market, and that the alleged burdens on interstate commerce and out-of-state producers were speculative. The court also concluded that the law regulated evenhandedly even though all of the petroleum suppliers were out-of-state. The court found that in-state marketers would have to weigh the risks and benefits of participating in the blending process and thus the burdens of the law did not fall only on out-of-state interests.[55] Although the U.S. Court of Appeals for the Fourth Circuit vacated in part and remanded the case to the district court on plaintiffs' preemption challenge to the North Carolina law, the plaintiffs did not raise the Commerce Clause claim on appeal and thus the court of appeals did not address it.[56]

Likewise, in 2010, in *Construction Materials Recycling Association Issues and Education Fund v. Burack*,[57] the U.S. District Court for the District of New Hampshire upheld a New Hampshire law that banned the combustion of most construction and demolition ("C&D") waste in the state and excluded it from the definition of biomass fuels, thus preventing C&D waste from participating in the biomass fuels market in the state.[58] Although the plaintiffs, participants in the C&D disposal market, acknowledged the law was facially neutral because it treated C&D debris generated within New Hampshire and imported from out-of-state the same, they argued that the legislation's real purpose was protectionist. The plaintiffs argued that the law was intended to "benefit New Hampshire's virgin wood producers in the local market for biomass fuel at the expense of out-of-state providers of C&D debris who wished to compete with virgin wood producers."[59] Plaintiffs also argued "that the C&D legislation has a discriminatory effect even if it was not intended to discriminate against out-of-state interests because it entirely foreclosed out-of-state C&D debris sellers from competing in the New Hampshire biomass fuel market."[60]

55. *Id*. at 87–88.
56. American Petroleum Institute v. Cooper, 718 F.3d 347 (4th Cir. 2013).
57. 686 F. Supp. 2d 162 (D.N.H. 2010).
58. *Constr. Materials Recycling Ass'n Issues and Education Fund*, 686 F. Supp. 2d at 165, 172–23.
59. *Id.* at 167.
60. *Id.*

The court applied the *Pike* balancing test and rejected the plaintiffs' arguments.[61] The court found that the law was aimed at the protection of public health and the environment rather than the promotion of local commerce.[62] One of the provisions of the law amended an existing statute that was enacted to "protect public health, to preserve the natural environment, and to conserve precious and dwindling natural resources through the proper and integrated management of solid waste." Another provision, which excluded C&D debris from the definition of biomass fuels, made "clear that its goal was to promote 'local renewable fuels' that can 'improv[e] air quality and public health, and mitigat[e] against the risks of climate change.'"[63] The court found that the evidence did not support the plaintiffs' arguments that the burden would fall primarily on out-of-state firms or that in-state firms would benefit from the law. The court also found that there was no evidence that the law would impose an undue burden on interstate commerce. Instead:

> Construing the evidence in the light most favorable to the plaintiffs, the record at best suggests that an unknown number of regional producers of C & D-derived fuel will suffer unquantified reductions in profits if they are denied access to the New Hampshire biomass fuel market. A dormant Commerce Clause claim, however, cannot be based merely on a showing that a challenged statute will cause individual out-of-state businesses to lose profits. . . . This is especially true in cases such as the present one, where the legislation at issue is reasonably targeted at important public health and environmental concerns.[64]

Together, these cases show that the Supreme Court and lower courts have acknowledged the important role of the states in developing policies to promote renewable energy and protect the environment. Clearly, states may not discriminate against out-of-state interests in pursuing such policies. Nevertheless, so long as the state regulates evenhandedly, the fact that these laws may burden specific out-of-state firms whose products no longer meet the new state standards or benefit specific in-state firms whose products do meet those standards does not in itself result in a violation of the dormant Commerce Clause.

B. The Role of the Extraterritoriality Doctrine

As noted earlier, beyond the determination of whether a state law discriminates against interstate commerce and is subject to strict scrutiny, or whether it regulates evenhandedly and is subject to the *Pike* balancing test, courts also consider separately whether a state law, even if it does not

61. *Id.* at 169–73.
62. *Id.* at 169.
63. *Id.* at 167 (citing N.H. REV. STAT. ANN. § 362-F-1 (2007)).
64. *Id.* at 172–73.

discriminate, regulates activities wholly beyond state borders and thus violates the "extraterritoriality doctrine." In those circumstances, courts generally apply strict scrutiny and strike down the state law in question as unconstitutional.[65]

1. The Supreme Court Price-Affirmation and Business Cases

For instance, in 1935, in *Baldwin v. G.A.F. Seelig, Inc.*,[66] a New York statute set the minimum prices for milk purchased from New York producers and banned resale of milk purchased for less than the minimum price from out-of-state producers.[67] Thus, in order to sell out-of-state milk in New York, a milk wholesaler was required to pay a particular price out-of-state: a price dictated by New York. The Court found that the statute improperly set out-of-state milk prices and held the statute unconstitutional.[68]

Likewise, in 1986, in *Brown-Forman Distillers Corp. v. New York State Liquor Authority*,[69] the Court struck down the state's Alcoholic Beverage Control Law, which prohibited distillers from selling alcohol to New York wholesalers at prices higher than the lowest prices they were charging wholesalers elsewhere in the country.[70] The Court found that the effect of the regulation was to either force distillers to change their out-of-state promotions to comply with the New York statute, or to force states to change their regulatory standards to permit distillers to alter prices in those states in order to comply with the New York regulation.[71] Thus, the Court concluded that New York had "project[ed] its legislation" into other states and directly regulated commerce therein in violation of the dormant Commerce Clause.[72]

65. *See, e.g.*, Healy v. Beer Inst., 491 U.S. 324 (1989); ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 453–54 (4th ed. 2011) (discussing the trend in Supreme Court dormant Commerce Clause cases of finding discrimination more often where there is a greater disparate impact on out-of-state participation in an in-state market).
66. 294 U.S. 511 (1935).
67. *Baldwin*, 294 U.S. at 519.
68. *Id*. at 528.
69. 476 U.S. 573 (1986).
70. *Brown-Forman Distillers Corp*., 476 U.S. at 581–82.
71. *Id.* at 583–84.
72. *Id.*

A few years later in 1989, in *Healy v. Beer Institute*,[73] the Court struck down a Connecticut statute requiring out-of-state shippers of beer to ensure their prices in Connecticut were no higher than prices in bordering states. The Court followed its prior precedent, and held that the dormant Commerce Clause precluded "the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State."[74] The Court stated that a statute has extraterritorial effects when (1) it has the practical effect of regulating activity wholly outside the state's borders regardless of legislative intent and (2) it has the potential of creating conflicts if other states were to adopt similar legislation.[75] According to the Court, these limitations "reflect the Constitution's special concern both with the maintenance of a national economic union unfettered by state-imposed limitations on interstate commerce and with the autonomy of the individual States within their respective spheres."[76]

In reaching its decision in *Healy*, the Court relied not only on the earlier price-affirmation cases but also on its 1982 decision in *Edgar v. Mite*.[77] In that case, the plaintiffs challenged the Illinois Business Takeover Act, which required any takeover offer for the shares of a target company to be registered with the Secretary of State.[78] A "target company" was defined as a corporation or other issuer of securities of which shareholders located in Illinois own 10% of the class of equity securities subject to the offer, or for which any two of the following three conditions are met: the corporation has its principal executive office in Illinois, is organized under the laws of Illinois, or has at least 10% of its stated capital and paid-in surplus represented within the State.[79] The Secretary of State then could call a hearing during a specified period if he believed it was necessary to protect the shareholders of the target company and could deny the offer under certain circumstances.[80]

The Court struck down the law on dormant Commerce Clause grounds, finding that the law had "a sweeping extraterritorial effect" and imposed

73. 491 U.S. 324 (1989).

74. *Healy*, 491 U.S. at 336 (quoting Edgar v. MITE Corp., 457 U.S. 624, 642–43 (1982) (plurality opinion) ("The critical inquiry is whether the practical effect of the regulation is to control conduct beyond the boundaries of the State.")).

75. *Id.* at 336–37.

76. *Id*. at 335–36.

77. 457 U.S. 624 (1982).

78. *Edgar*, 457 U.S. at 626–27.

79. *Id.*

80. *Id*. at 627.

"a direct restraint on interstate commerce."[81] The Court found that the law would prevent transactions not only with the target company's shareholders in Illinois (which in the present case were only a quarter of the shareholders), but also any transactions with other shareholders outside Illinois, thus interfering with interstate commerce.[82] The Court also noted that the law would apply even if none of the shareholders were residents of Illinois because the law applied to any corporation with its principle place of business, executive officer, or 10 percent of capital in the state.[83] "Thus the Act could be applied to regulate a tender offer which would not affect a single Illinois shareholder."[84]

Notably, in each of the cases described above, the state's purpose was to protect economic interests within the state, whether they were the interests of Illinois companies and investors, New York and Connecticut liquor retailers and consumers, or New York milk producers. Nevertheless, as shown below, even when states have regulated to protect public health and safety rather than economic interests, courts have still invoked the extraterritoriality principle if states impose requirements on out-of-state transactions or create the risk of conflicting regulations among the states in a way that would unduly burden interstate commerce.

2. *The Supreme Court Transportation Cases*

The Court has conducted similar analyses in cases involving interstate transportation of goods on the nation's highways and railways. For instance, in 1945, in *Southern Pacific Co. v. Arizona*, the Court invalidated an Arizona statute limiting train length on the grounds that compliance with the statute required longer trains from other states to be broken up before crossing Arizona's borders.[85] Under the Arizona law, the only option to avoid this disruption was for other states to adopt Arizona's train length limits—a clear imposition of Arizona's regulatory authority on other states.[86] Further, the Court found the safety benefits of shorter train lengths

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81. *Id*. at 642. It is important to note, however, that there was no majority for the portion of Justice White's opinion that contains the extraterritoriality analysis.
82. *Id.*
83. *Id.*
84. *Id.*
85. 325 U.S. 761, 773 (1945).
86. *Id.* The Court in *Southern Pacific Co.* stated that the legislation would have the effect of requiring other states to either adopt the lowest train length limit of any of the

relative to unregulated trains to be "dubious" at best.[87] "[This] case differs from those where a state, by regulatory measures affecting [ ] commerce, has removed or reduced safety hazards without substantial interference with the interstate movement of trains."[88] The Court also declared that national uniformity in the regulation of railroads was "practically indispensable to the operation of an efficient and economical national railway system."[89]

Likewise, in 1959, in *Bibb v. Navajo Trucking Freight Lines*, the Court applied similar reasoning to invalidate an Illinois statute requiring that all trucks use a specific type of mudguard within state borders.[90] Almost every other state used a mudguard style different than the type required by the Illinois regulation. The Court thus held that "[t]his is one of those cases—few in number—where local safety measures that are nondiscriminatory place an unconstitutional burden on interstate commerce."[91] According to the Court, a state which imposes a design that conflicts with that of almost all other states "may sometimes place a great burden of delay and inconvenience on those interstate motor carriers entering or crossing its territory." Thus, without a showing that the new safety standard is so compelling and innovative that other states should give way, such an interference with interstate commerce is too big a burden.[92]

While the Court's analyses in the cases described above were conducted pursuant to what appears to be an early version of the *Pike* balancing test,[93] the analysis also resembles the extraterritorial regulation cases because of the concerns regarding states regulating out-of-state activity. In the train

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states the train passes through or to break up and reconstitute interstate trains entering states with different restrictions on train length. *Id.* at 773.

87. *Id*. at 779.

88. *Id.*

89. *Id*. at 771.

90. 359 U.S. 520 (1959).

91. *Bibb*, 359 U.S. at 529.

92. *Id*. at 529–30.

93. *See generally* James C. Preston, Note, Constitutional Law—Commerce Clause—*Commerce Clause Challenges to State Highway Safety Regulations Are to Be Reviewed under a Highly Deferential Standard*, 28 VILL. L. REV. 708 (1983) (discussing the Court's balancing approach to reviewing the dormant Commerce Clause challenges in state highway safety regulation cases); Laura L. Ritzman, Note, Kassel v. Consolidated Freightways Corp.: *Limitations on a State's Power to Legislate in the Area of Interstate Commerce*, 1982 DET. C.L. REV. 931, 934 (1982) (explaining the Court's adoption in *Southern Pacific Co.* of the "balance test" weighing local benefits against the burden on "the free flow of interstate commerce."); S.C. State Highway Dep't v. Barnwell Bros., 303 U.S. 177, 187 (1936) (finding state regulation of highways was a legitimate local interest similar to other regulations burdening both interstate and intrastate commerce that "have been sustained even though they materially interfere with interstate commerce.").

and truck cases, the need for uniformity among the states to allow the free travel of goods and services along the nation's interstate highways and railways seems clear and was certainly a priority for the Court at the time those cases were decided. In other cases, however, there may be stronger arguments in favor of state autonomy to protect public health, safety, and the environment. Indeed, commentators have suggested that such scrutiny of state regulation is inappropriate except in cases of clearly discriminatory legislation.[94] They argue that "[s]tates are allowed to make their own regulatory judgments about scores of issues. The mere fact that states may promulgate different substantive regulations of the same activity cannot possibly be the touchstone for illegality" under the dormant Commerce Clause.[95] Notably, companies that do business in multiple states have always had to comply with varying laws on a range of consumer protection, business regulation, public health, safety, and environmental issues and, unless Congress preempts those laws in favor of federal uniformity, principles of federalism argue in favor of state autonomy in the absence of discrimination against out-of-state interests or an undue burden on interstate commerce.[96] Further, limitations on states' power to regulate within their own jurisdictions may have the problematic effect of imposing the laws of other states on the state whose regulation was originally being challenged.[97]

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94. *See* Donald H. Regan, *Siamese Essays: (I)* CTS Corp. v. Dynamics Corp. of America *and Dormant Commerce Clause Doctrine; (II) Extraterritorial State Legislation*, 85 MICH. L. REV. 1865, 1881 (1987) ("The commercial enterprise that chooses to operate in more than one state must simply be prepared to conform its various local operations to more than one set of laws. The Constitution does not give an enterprise any special privileges just because it happens to operate across state lines.").

95. Goldsmith & Sykes, *supra* note 13, at 806–07 (proposing that cases concerning extraterritoriality should be analyzed under the *Pike* balancing test to ensure that the "regulatory benefits were [not] illusory while the costs of complying with the local regulation were severe.").

96. *See, e.g.*, Pharm. Research & Mfrs. v. Walsh, 538 U.S. 644, 668–70 (2003) (finding that Maine prescription drug rebate program did not regulate extraterritorially because it did not regulate out of state prices, tie Maine prices to out-of-state prices, or attempt to subsidize in-state sales).

97. Maltz, *supra* note 11, at 82 (critiquing Bibb v. Navajo Freight Lines, Inc., 359 U.S. 520 (1959): "[T]he Court allowed a trucking company to invoke the commerce clause to force Illinois to accept the policies of other states on the issue of mudguards—policies presumably adopted without any consideration of the needs of desires of the government and people of Illinois. To interpret the commerce clause in a manner so fundamentally inconsistent with the basic concepts of state sovereignty seems totally inappropriate.").

3. *Lower Court Environmental and Energy Cases Involving the Extraterritoriality Doctrine*

Several decisions in the lower courts have addressed in more detail this tension between states' efforts to promote health, safety, and environmental goals and the potential for improper extraterritorial regulation. For instance, in 1995, in *Cotto Waxo Co. v. Williams*, the U.S. Court of Appeals for the Eighth Circuit upheld a Minnesota statute prohibiting all sales in the state of sweeping compounds that contained petroleum products.[98] The plaintiff argued that the law constituted extraterritorial regulation because it affected wholly out-of-state conduct by preventing the plaintiff from selling its product on the wholesale market in Minnesota where it would be resold to out-of-state retailers and end users. The court rejected the argument, stating:

> . . . a statute has extraterritorial reach when it necessarily requires out-of-state commerce to be conducted according to in-state terms. The statutes in *Seelig* and *Brown-Forman* have an extraterritorial reach not present in the Minnesota Act. The Act does not, either by its terms or in practical effect, necessarily affect out-of-state commerce. The Act does not require Cotto Waxo to conduct its commerce according to Minnesota's terms. Clearly, the Act has affected Cotto Waxo's participation in interstate commerce. Nevertheless, the Act itself is indifferent to sales occurring out-of-state. Cotto Waxo is able to sell to out-of-state purchasers regardless of Cotto Waxo's relationship to Minnesota. We conclude that the Act does not suffer from an unconstitutional extraterritorial reach.[99]

The court went on to reject the plaintiff's argument that the court should still apply strict scrutiny to the statute because the law negatively impacted the plaintiff's business outside of Minnesota and thus discriminated against interstate commerce. The court reasoned that:

> Negatively affecting interstate commerce is not the same as discriminating against interstate commerce. In a Commerce Clause context, "discrimination" means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter. . . . The Act does not favor in-state businesses or disfavor out-of-state businesses. Regardless of the product's point of origin or point of destination, the Act forbids its sale in Minnesota. Therefore, the Act does not directly burden interstate commerce and strict scrutiny does not apply.[100]

Applying the *Pike* balancing test, the court found that the law did burden interstate commerce, as the plaintiff had submitted uncontested evidence that its Minnesota distributors refused to purchase the plaintiff's petroleum-

98. 46 F.3d 790, 794–95 (8th Cir. 1995).
99. *Cotto Waxo Co.*, 46 F.3d at 794.
100. *Id.*

based sweeping compounds after passage of the law. The court also found the law benefitted the public. According to the legislative history, the Act would protect the environment by "encourag[ing] conservation by cutting down on non-energy uses of petroleum, and will prevent soil and water contamination by reducing the amount of petroleum in landfills."[101] The court concluded that "protecting the environment is clearly a legitimate public benefit."[102] Nevertheless, the court reversed the district court's grant of summary judgment for the state on grounds that the evidence supporting both the burden on interstate commerce and the benefits to the public was insufficient and required further development at trial.[103]

More recently in 2010, in *International Dairy Foods Association v. Boggs*,[104] the U.S. Court of Appeals for the Sixth Circuit upheld an Ohio labeling law prohibiting certain statements on dairy products with regard to the use or nonuse of antibiotics or growth hormones. The dairy producers challenging the law on dormant Commerce Clause grounds argued that the law should be subject to strict scrutiny because it regulated extraterritorially.[105] The plaintiffs argued that Ohio's law required them to create a nationwide label that met Ohio's requirements as a result of the complex distribution channels for their product and the costs associated with multiple labels.[106] The court rejected this argument, stating:

> . . . unlike the price-affirmation statutes, which directly tied their pricing requirements to the prices charged by the distillers in other states, the Ohio Rule's labeling requirements have no direct effect on the Processors' out-of-state labeling conduct. That is to say, how the Processors label their products in Ohio has no bearing on how they are required to label their products in other states (or vice versa). Nor does compliance with the Ohio Rule raise the possibility that the Processors would be in violation of the regulations of another state—the key problem with the New York statute in *Brown–Forman*. The Rule accordingly does not purport to "regulate conduct occurring wholly outside the state."[107]

The court also rejected the plaintiffs' reliance on *Southern Pacific Co. v. Arizona*,[108] which invalidated the Arizona train length statute, stating

101. *Id.*
102. *Id*. at 794 (citing Maine v. Taylor, 477 U.S. 131, 148 (1986)).
103. *Id.* at 795.
104. 622 F.3d 628 (6th Cir. 2010).
105. *Int'l Dairy Foods Ass'n*, 622 F.3d at 646–48.
106. *Id.* at 647.
107. *Id.* (citing Brown–Forman Distillers Corp. v. N.Y. State Liquor Auth., 476 U.S. 573, 582 (1986)).
108. 325 U.S. 761, 773 (1945).

that unlike the Arizona statute the Ohio law does not "impede or control the flow of milk products across the country."[109] Unlike railroads which require nationwide standards, the FDA in this case had acknowledged the power of states to regulate the labeling of products from cows not treated with hormones.[110] Thus, the court rejected the argument that the law regulated extraterritorially.[111] In applying the *Pike* balancing test, the court found more than ample evidence that the state's consumer protection goals outweighed any alleged impacts on interstate commerce.[112]

By contrast, in 2013, in *American Beverage Association v. Snyder*,[113] the Sixth Circuit reached a different conclusion with regard to a Michigan statute that required returnable bottles to include a state-specific mark. Because Michigan has a 10-cent deposit on bottles, and most states have no deposit and a few states have a 5-cent deposit, Michigan was losing money from people purchasing bottles in other states (with no deposit or a 5-cent deposit) and returning them in Michigan to receive the 10-cent deposit.[114] While the bottle law encouraged recycling, the state was losing between $15 million and $30 million every year in Michigan deposits.[115]

Thus, Michigan enacted a new law that required bottlers to use a Michigan-specific label for all bottles sold in the state. The label could be used only in Michigan or in states with a bottle deposit that had a labeling law similar to Michigan's.[116] Violation of the law could result in criminal penalties. The court held that the law did not facially discriminate against interstate commerce, and did not have a discriminatory purpose or effect, but nevertheless struck down the law on the grounds that it impermissibly regulated extraterritorial markets. In reaching the decision, the court noted that the case presented "a novel issue of an 'unusual extraterritoriality question' that has not been addressed by the Supreme Court or any other court."[117]

The court found that the Michigan labeling law improperly regulated extraterritorial conduct because the bottling industry could only sell bottles with the Michigan label in Michigan, and could not sell bottles with the Michigan label anywhere else unless those states took specific actions to

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109. *Int'l Dairy Foods Ass'n*, 622 F.3d at 647–48.
110. *Id*.
111. *Id.* at 648.
112. *Id.* at 649–50. Notably, in an earlier part of the decision, the court had invalidated certain provisions of the law on First Amendment grounds but upheld the others, which were then analyzed under the dormant Commerce Clause.
113. 735 F.3d 362 (6th Cir. 2013).
114. *American Beverage Ass'n*, 735 F.3d at 367.
115. *Id.*
116. *Id.* at 374–75.
117. *Id*. at 367.

pass laws similar to Michigan's law.[118] As a result the court found that "Michigan's unique-mark requirement not only requires beverage companies to package a product unique to Michigan but also allows Michigan to dictate where the product can be sold."[119] Applying strict scrutiny, the court found that Michigan had failed to explore reasonable alternatives to address bottle return fraud that did not regulate extraterritorially, such as requiring a proof of purchase receipt upon return or limiting the number of bottles than could be redeemed by any individual.[120]

Notably, the decision was subject to two concurring opinions one of which, by Judge Sutton, questioned the continuing role of the extraterritoriality doctrine.[121] Judge Sutton agreed with the result, but questioned whether the extraterritoriality doctrine should remain a branch of dormant Commerce Clause jurisprudence at all. He reviewed the history of the dormant Commerce Clause and stated that its original purpose was to draw a line between the "separate spheres" of states and the federal government and to ensure that the states did not exceed their jurisdiction and regulate in areas reserved for the federal government.[122] But as the nature of commerce changed, the lines between state and federal authority blurred and the Supreme Court's interpretation of the Commerce Clause changed. As Judge Sutton noted, in the 1930s and 1940s, the federal government established power over traditionally local activities and the states began to regulate commerce that would cross state lines, ending the federal government's exclusive authority over interstate commerce.[123] Today, we have "largely overlapping spheres of authority" so that "a State may fix the price of natural gas drilled within its borders and purchased at the wellhead, even when 90 percent of the gas will be shipped out of state" and, correspondingly, "the Federal Government may regulate local loan

118. *Id.* at 376.
119. *Id.*
120. *Id.* at 375.
121. *Id.* at 377 (Sutton, J., concurring). The other concurring opinion was written by Judge Rice, who agreed with the majority's holding but wrote separately to state that: (1) it is the risk of potential conflict between multiple state regulations rather than actual conflict that rendered the law extraterritorial; and (2) once a law is found to be extraterritorial, it must be struck down and there is no ability for the state to justify the law, in contrast to the situation where a law is found to be discriminatory and the state can still attempt to prove the law is the only reasonable means to protect a legitimate state interest. *Id.* at 381–82 (Rice, J., concurring).
122. *Id.*
123. *Id.*

sharking that never crosses state lines."[124] Thus, Judge Sutton suggested that the extraterritoriality doctrine as "a freestanding branch of the dormant Commerce Clause [ ] is a relic of the old world with no useful role to play in the new[.]" He concluded that the purpose of the Commerce Clause today was not to patrol the separate spheres of government but to prevent discrimination against out-of-state entities in favor of in-state ones. And, as this case illustrated, the extraterritoriality doctrine today often has nothing to do with in-state favoritism.[125]

Moreover, "the modern reality is that States frequently regulate activities that occur entirely within one State but that have effects in many."[126] Judge Sutton gave the example of California's strict auto emission standards, which have the practical effect of impacting car companies in any state with lower auto emission standards (which is virtually all states) and thus has extraterritorial effects.[127] All of the options car companies have available to address the discrepancy in emission standards—i.e., producing separate models for California, selling only California-compliant cars nationwide and incurring higher costs, or stop selling cars in the California market—impact business and commerce in other states.[128] He also gave the example of the Ohio milk labeling law the Sixth Circuit upheld in 2010[129] and a Vermont law that required light bulbs to come with labels warning of the dangers of mercury that the U.S. Court of Appeals for the Second Circuit upheld in 2001.[130] In light of these changes in Commerce Clause doctrine, interstate markets, and the regulatory authority of states, Judge Sutton called for eliminating the extraterritoriality doctrine and limiting judicial inquiry to determining whether the law is per se discriminatory or, in the alternative, invalid under the *Pike* balancing test.[131]

One of the more complicated recent dormant Commerce Clause cases involved federal maritime law, state regulation, and interstate fuel markets, and illustrated the modern role states have played in regulating energy

124. *Id.* at 378.
125. *Id*.
126. *Id*. at 379.
127. *Id*.
128. *Id*.
129. *Id*. at 379 (citing Int'l Dairy Foods Ass'n v. Boggs, 622 F.3d 628 (6th Cir. 2010)).
130. *Id*. (citing Nat'l Elec. Mfrs. Ass'n v. Sorrell, 272 F.3d 104 (2d Cir. 2001)).
131. *Am. Beverage Ass'n*, 735 F.3d at 379–80 (Sutton, J. concurring). *See* Note, *Sixth Circuit Invalidates Michigan Statute Requiring Bottle Manufacturers to use Unique Mark on All Bottles Sold Within Michigan*, 126 HARV. L. REV. 2435, 2435 (2013) (stating that using the *Pike* balancing test in place of the extraterritoriality doctrine "would ensure that harmful extraterritorial laws are struck down, without unnecessarily invalidating beneficial, unburdensome laws.").

policy, climate change, and air pollution. In 2011, in *Pacific Merchant Shipping Association v. Goldstene*,[132] the U.S. Court of Appeals for the Ninth Circuit considered whether California could regulate fuel-use in shipping vessels located more than three miles from the California coast in order to address significant air quality concerns in Southern California. Although the case involved the interplay between federal maritime law, state territorial boundaries, and preemption, the court also analyzed whether the fuel regulations were invalid under the extraterritoriality doctrine. The court held that the rules did not violate the extraterritoriality doctrine or discriminate against interstate commerce because: (1) the central purpose of the rules was to protect the health and well-being of California citizens; (2) the rules have only an incidental or indirect effect on interstate commerce; and (3) they do not appear to discriminate against out-of-state interests.[133] The court concluded by stating:

> We are clearly dealing with an expansive and even possibly unprecedented state regulatory scheme. However, the severe environmental problems confronting California (especially Southern California) are themselves unusual and even unprecedented. Under the circumstances, we do not believe that the Commerce Clause or general maritime law should be used to bar a state from exercising its own police powers in order to combat these severe problems.[134]

Thus, the court placed significant emphasis on the unique environmental challenges California faces, and allowed the state to impose fuel restrictions on vessels even though it resulted in the state regulating the shippers' actions outside the state. However, the court noted that the case presented "a highly unusual and challenging set of circumstances" and that the regulatory scheme "pushes a state's legal authority to its very limits, although the state ha[s] clear justifications for doing so."[135] On extraterritoriality, the court recognized the importance of uniformity but stated that the court was not confronted with a state attempting to regulate conduct in another state or another country.[136] Instead, California's regulation applied only to ships within 24 miles of the state's coast.[137] It contrasted that situation, however, with a hypothetical California regulation requiring automobiles

132. 639 F.3d 1154, 1181 (9th Cir. 2011), *cert. denied*, 133 S. Ct. 22 (2012) (No. 10-1555).
133. *Pac. Merch. Shipping Ass'n*, 639 F.3d at 1179–80.
134. *Id*. at 1181–82.
135. *Id.* at 1162.
136. *Id*. at 1180.
137. *Id*. at 1180–81.

driving from Arizona to switch to certain kinds of fuels 24 miles from the California border, implying that the result might be different in such a case.[138]

Supreme Court and lower court holdings in the extraterritoriality cases demonstrate the importance of a law's purpose and actual effect on out-of-state transactions in the courts' determinations of whether the law violates the dormant Commerce Clause. A state's law controlling the flow of goods to the state from sources beyond the state's borders may be upheld when the law burdens only the transactions between the state and the outside entity, and not the outside entity's transactions with other states.[139] By contrast, if the law attempts to regulate sales outside of the state enacting the regulation, it may be struck down on extraterritoriality grounds.[140] While states may invoke public health, safety, and environmental protection arguments in support of their laws, courts have proved unwilling to defer to states' assertions of these legitimate local purposes when the law directly regulates out-of-state transactions.[141]

III. STATE ENERGY POLICY AND CLIMATE CHANGE INITIATIVES: THE CALIFORNIA AND MINNESOTA EXAMPLES

With this case law in mind, Part III turns to recent lawsuits challenging state efforts to use energy policy to meet climate change and environmental goals. While the federal government has made efforts to promote renewable fuels and low-carbon electricity through tax benefits, grants, and a renewable fuels standard, it has so far failed to enact major legislation such as a carbon tax, cap-and-trade framework, or a renewable energy standard as other countries have done to provide a more comprehensive approach to today's environmental and climate change challenges.[142] States, however, have attempted to fill this gap by enacting major energy policy legislation governing fuels, renewable electricity, and programs to more significantly promote new energy technologies.[143] As of 2013, 29 states and the District of Columbia had enacted Renewable Portfolio Standards (RPSs) or renewable energy goals.[144] Generally, RPSs require that by 2020 or 2030,

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138. *Id*. at 1180.

139. *See, e.g.*, Cotto Waxo Co. v. Williams, 46 F.3d 790 (8th Cir. 1995).

140. *See, e.g.*, American Beverage Ass'n v. Snyder, 735 F.3d 362 (6th Cir. 2013).

141. *See, e.g.*, Healy v. Beer Inst., 491 U.S. 324 (1989).

142. *See generally* E. Donald Elliott, *Why the United States Does Not Have a Renewable Energy Policy*, 43 ENVT'L LAW REPORTER 10095 (2013).

143. *See generally* CENTER FOR CLIMATE AND CLEAN ENERGY SOLUTIONS, CLEAN ENERGY STANDARDS: STATE AND FEDERAL POLICY OPTIONS AND IMPLICATIONS (2011), http://www.c2es.org/publications/clean-energy-standards-state-federal-policy-options-implications.

144. *See* U.S. Dep't of Energy, Database of State Incentives for Renewables and Efficiency (DSIRE), *available at* http://www.dsireusa.org/documents/summarymaps/RPS_

15%, 25%, or another set percentage of electricity sold to retail customers in the state must be produced by renewable energy sources, with significant variations on the resources that "count" and the percentages required.[145] States and local governments have also adopted feed-in tariffs to spur renewable energy generation (particularly rooftop solar energy), created mandates for renewable fuels, and placed limits on new coal-fired power plants.[146] All of these initiatives are efforts to reduce GHG emissions and all of these initiatives have the effect of influencing decisions by in-state and out-of-state actors regarding electricity and fuel generation, transport, sale, and use.[147]

The remainder of this Part discusses in detail California's LCFS regulation and Minnesota's NGEA provisions that limit the use of new coal-fired power in the state. Both of these programs are ambitious and innovative in their efforts to use energy policy to meet climate change goals.[148] Both sets of laws have also been subject to legal challenge, with the plaintiffs in those cases arguing that the states are discriminating against interstate commerce and regulating extraterritorially.[149] Neither state, however, is alone in its efforts.[150] With regard to renewable fuels, California has the most extensive program (discussed in more detail in Part III.A.) and the only one implemented so far. Oregon, though, has prepared formal rules for a low carbon fuel standard to reduce GHG

map.pdf; Alexandra B. Klass, *Climate Change and the Convergence of Environmental and Energy Law*, 24 FORDHAM ENVTL. L. REV. 190–91 (2013) (summarizing state RPS policies).

145. U.S. Dep't of Energy, *supra* note 144; Klass, *supra* note 144, at 191.

146. *See* U.S. Energy Info. Admin., Most States Have Renewable Portfolio Standards (Feb. 3, 2012), http://www.eia.gov/todayinenergy/detail.cfm?id=4850; U.S. Dep't of Energy, *supra* note 144; *infra* notes 151–59 (discussing state limits on coal-fired power and transportation fuels).

147. *See e.g.*, Klass, *supra* note 144 at 191–92.

148. *See generally* Sue Retka Schill, *California LCFS to Meet 10 Percent Carbon Reduction Goals by 2013*, BIOMASS MAGAZINE, June 2013, http://biomassmagazine.com/articles/9106/california-lcfs-to-meet-10-percent-carbon-reduction-goal-by-2020; AMERICAN COUNCIL ON RENEWABLE ENERGY, RENEWABLE ENERGY IN MINNESOTA, RENEWABLE ENERGY IN THE STATES: MIDWESTERN REGION, 16−17 (Oct. 2013) http://www.acore.org/files/pdfs/states/Minnesota.pdf.

149. Rocky Mountain Farmers Union v. Goldstene, 843 F. Supp. 2d 1071, 1087–89 (E.D. Cal. 2011); Rocky Mountain Farmers Union v. Corey, 730 F.3d 1070 (9th Cir. 2013); North Dakota v. Swanson, Civil No. 11-3232 (SRN/SER) 2012 WL 4479246, at *10–11 (D. Minn. Sept. 30, 2012).

150. *Renewable and Alternative Energy Portfolio Standards*, CENTER FOR CLIMATE AND ENERGY SOLUTIONS, http://www.c2es.org/node/9340 (last visited March 26, 2014).

emissions from fuels by ten percent over 10 years.[151] Other states have taken steps toward developing their own low carbon fuel standards.[152] Northeast states have joined together to develop a regional low carbon fuel standard, the Northeast/Mid-Atlantic Clean Fuels Standard.[153] Moreover, the U.S. government has its own renewable fuel standard (RFS), which imposes mandates nationwide on fuel producers to blend biofuels into the nation's liquid fuel supply.[154]

As for limits on new coal-fired power, starting in 2007, Minnesota banned new coal-fired power in the state and imports of new coal-fired power from out of state in the absence of CO_2 emission offsets (discussed in more detail in Part III.B). However, Minnesota is not alone in its efforts. In 2006, California prohibited retail utilities in California from entering into long-term financial commitments with in-state and out-of-state electric generation sources unless they meet GHG performance standards established by the California PUC.[155] In 2007 the State of Washington enacted a GHG performance standard for baseload electricity that is similar to California's standard.[156] Both sets of performance standards result in a ban on new coal-fired power in those states. In 2009, Oregon imposed a 1,100 pound of CO_2/megawatt hour performance standard on facilities generating baseload electricity, and the state prohibits utilities from entering into long-term commitments with in-state or out-of-state baseload electricity providers that do not meet that standard, effectively banning any new commitments for coal-fired power use in the state.[157] While prior Oregon law had allowed utilities to offset new emissions by reducing existing emissions, the 2009 statute does not allow for offsets.[158] In

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151. *World Map of Regional Policies*, NAT'L LOW CARBON FUEL STANDARD PROJECT, http://nationallcfsproject.ucdavis.edu/map/#or (last visited March 28, 2014); SUE LANGSTON, ET. AL, FINAL REPORT, OREGON LOW CARBON FUEL STANDARDS, STATE OF OREGON DEPARTMENT OF ENVIRONMENTAL QUALITY (2011); *See* Ben Jacklet, *Fuel Fight Revs Up in Salem*, SUSTAINABLE BUS. OR., (2013), *available at* http://sustainable businessoregon.com/articles/2013/02/fuel-fight-revs-up-in-sale.html?page=all.

152. *See, e.g.*, *Low Carbon Fuel Standards*, DEP'T OF ECOLOGY, STATE OF WASH., http://www.ecy.wa.gov/climatechange/fuelstandards.htm.

153. SONIA YEH, ET. AL., NATIONAL LOW CARBON FUEL STANDARD: TECHNICAL ANALYSIS REPORT 20 (2012) (reporting that governors of eleven Northeastern states signed a memorandum of understanding in 2009 to commit to developing a Clean Fuels Standard program).

154. *Renewable Fuel Standard*, U.S. ENVIRONMENTAL PROTECTION AGENCY, http://www.epa.gov/otaq/fuels/renewablefuels/.

155. CAL. PUB. UTIL. CODE § 8341 (West 1994 & Supp. 2012).

156. *See* WASH. REV. CODE § 80.80.040 (setting standards for all baseload electric generation to govern utilities in the state that enter into long-term contracts).

157. OR. REV. STAT. §§ 757.536(1)(a)–(b) (West 2013).

158. *See* Dustin Till, *New Oregon Climate Laws Expands Emission Performance Standards, GHG Reporting, and Energy Efficiency Programs*, MARTEN LAW, Aug. 26,

New York, the Power New York Act of 2011 resulted in the New York Department of Environmental Conservation setting CO_2 emission limits from new major electric generating facilities that effectively prohibit new coal-fired power generation in the state, but the regulations do not cover electricity imports.[159]

Parts A and B discuss the California and Minnesota laws and the legal challenges that have been brought to invalidate them, with a particular focus on the plaintiffs' extraterritoriality doctrine arguments. The debate over extraterritoriality in the context of these cases highlights the difficulty states face in using energy policy to meet environmental and climate change goals as a result of the regional, national, and international nature of energy markets. Indeed, it is precisely because state energy policies can influence regional, national, and even international fuel and electricity markets that they are more vulnerable to dormant Commerce Clause challenges.

A. Legal Challenges to California's Low Carbon Fuel Standard Regulation

California's LCFS regulation was developed as part of California's Global Warming Solutions Act, also known as AB 32, which set goals to reduce GHG emissions in California to 1990 levels by 2020. As one of the mechanisms intended to meet that goal, along with provisions relating to renewable electricity generation and other climate change policies, the California Air Resources Board (CARB) developed the LCFS regulation,

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2009 ("In a notable departure from [prior Oregon law], S.B. 101 does not contain provisions allowing facilities to achieve compliance through offsets. Thus, S.B. 101 effectively prohibits Oregon utilities from building new coal-fired power plants, extending the life of existing coal plants, or entering into long-term purchase agreements with coal plants located outside the state.").

159. *See* N.Y. Dept. of Env. Conserv., In the Matter of Proposed Part 251 and Proposed Part 487, at http://www.dec.ny.gov/docs/legal_protection_pdf/parts251and487 hr.pdf; N.Y. Dept. of Env. Conserv., Press Release, *DEC Adopts Ground-Breaking Power Sector Regulations to Analyze Possible Environmental Impacts and Limit CO_2 Emissions from Power Plants*, June 28, 2012, *available at* http://www.dec.ny.gov/press/ 83269.html; Center for Climate and Energy Solutions, *New York Proposes Greenhouse Gas Emission Standards for Power Plants*, *available at* http://www.c2es.org/us-states-regions/news/2012/new-york-proposes-greenhouse-gas-emission-standards-power-plants; Environmental Defense Fund, *States Have Led the Way in Curbing Carbon Pollution from New Power Plants*, *available at* http://www.edf.org/sites/default/files/State_GHG_ standards_3-13-2012.pdf (summarizing state laws).

effective April 2010.[160] The goal of the LCFS regulation is to lower emissions associated with transportation fuels, and requires oil refiners and distributors to lower GHG emissions by reducing the carbon intensity of their fuels by at least 10 percent by 2020.[161] In California, transportation emissions are the state's largest single source of GHG emissions, constituting 40% of the state's total emissions.[162] The following sections detail the regulations implementing the LCFS and the lawsuit alleging, among other things, that the California law violates the dormant Commerce Clause.

1. *California's Legislation and its Implementation*

The LCFS regulation establishes a 2010 baseline carbon intensity (CI) for gasoline, fuels that replace gasoline, and fuels that replace diesel in California.[163] The regulation then requires each supplier of vehicular transportation fuels to reduce the average carbon intensity of fuels from that baseline by set amounts annually between 2011 and 2020.[164] CI is determined by calculating "lifecycle greenhouse gas emissions" associated with a "fuel pathway," which encompasses all emissions associated with the fuel, from production source to destination.[165] The LCFS regulation also allows suppliers to generate credits for exceeding the CI reduction required

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160. Notice of Approval of Regulatory Action, Cal. Office of Administrative Law (Apr. 15, 2010) OAL File No. 2010-0304-01 S, *available at* http://www.arb.ca.gov/regact/2009/lcfs09/oalapplcfs.pdf.

161. CAL. AIR RES. BD., ESTABLISHING NEW FUEL PATHWAYS UNDER THE CALIFORNIA LOW CARBON FUEL STANDARD: PROCEDURES AND GUIDELINES FOR REGULATED PARTIES AND FUEL PROVIDERS 1 (Aug. 2, 2010), *available at* http://www.arb.ca.gov/fuels/lcfs/122310-new-pathways-guid.pdf.

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

163. Declaration of Michael Scheible in Support of Opposition to Plaintiffs' Motion for Preliminary Injunction ¶ 26, Rocky Mountain Farmers Union v. Goldstene, 843 F. Supp. 2d 1042 (E.D. Cal. 2011) (No. 02234). The 2010 baseline CI is based on California's average consumption of gasoline and diesel fuels.

164. CAL. AIR RES. BD., ESTABLISHING NEW FUEL PATHWAYS UNDER THE CALIFORNIA LOW CARBON FUEL STANDARD: PROCEDURES AND GUIDELINES FOR REGULATED PARTIES AND FUEL PROVIDERS 1 (Aug. 2, 2010), *available at* http://www.arb.ca.gov/fuels/lcfs/122310-new-pathways-guid.pdf. If a fuel provider supplies a fuel that has a lower CI than the standard for that year, the provider accumulates a credit. If the fuel has a higher CI than the CI standard, the party will accumulate a deficit.

165. CARB, ESTABLISHING NEW FUEL PATHWAYS UNDER THE CALIFORNIA LOW CARBON FUEL STANDARD: PROCEDURES AND GUIDELINES FOR REGULATED PARTIES AND FUEL PROVIDERS, 1 (Aug. 2, 2010), *available at* http://www.arb.ca.gov/fuels/lcfs/122310-new-pathways-guid.pdf. CI values are calculated by a standard greenhouse gas emissions equation (gCO2e/MJ is the unit of measurement), which provides total greenhouse gas emissions on a CO2 equivalent basis per unit of energy for a fuel.

that year, creating the opportunity for a trading market in credits among suppliers nationwide.[166]

Traditionally, a fuel was analyzed in terms of the emissions released as the fuel is used, such as when natural gas is burned in a power plant or gasoline is combusted in a vehicle. But the California regulation uses a lifecycle analysis of each fuel to determine the fuel's CI.[167] A lifecycle analysis for carbon emissions for fuels includes both the direct and indirect emissions from the production, transportation, and consumption of the fuel in vehicles.[168] Unlike California's existing tailpipe emissions standards which target only the GHG emissions from fuel combustion in vehicles, the lifecycle GHG analysis includes both emissions from fuel combustion in vehicles and all GHGs emitted in connection with the fuel's production, thus creating the potential for greater net GHG emissions reductions.[169]

With regard to ethanol, while all ethanol emits similar amounts of CO_2 at the time of combustion, the lifecycle carbon emissions associated with the production of ethanol from different processes can vary substantially. Factors affecting emissions include the feedstock used (corn, sugar, etc.); the energy source used to convert the feedstock into ethanol (natural gas, wind, coal); how far the feedstock has to travel to production facilities; how far the ethanol has to travel to be used in vehicles in California; and the type of transportation (trucks, trains, etc.) used for those trips. As a result, corn grown primarily in the Midwest has only a short distance to travel to ethanol plants in the Midwest, which favors Midwest ethanol under the corn transportation metric as compared to California ethanol plants, which must transport the Midwestern corn a much greater distance before it can be made into ethanol. However, while the ethanol produced in the Midwest must travel a greater distance to be used in California

166. UNION OF CONCERNED SCIENTISTS, LOW CARBON FUEL STANDARD: REDUCING GLOBAL WARMING POLLUTION FROM CALIFORNIA'S TRANSPORTATION FUELS (Feb. 2009), *available at* http://www.ucsusa.org/assets/documents/clean_vehicles/ca-low-carbon-fuel-standard-fact-sheet_final.pdf. If a fuel provider supplies a fuel that has a lower CI than the standard for that year, the provider accumulates a credit. If the fuel has a higher CI than the CI standard, the party will accumulate a deficit; Jonathan Rubin & Paul N. Leiby, *Tradable Credits System Design and Cost Savings for a National Low Carbon Fuel Standard for Road Transport*, 56 ENERGY POLICY 16–28 (2013).

167. CAL. AIR RES. BD., LOW CARBON FUEL STANDARD: QUESTION AND ANSWER GUIDANCE DOCUMENT (VERSION 1.0) 2 (June 10, 2011), *available at* http://www.arb.ca.gov/fuels/lcfs/LCFS_Guidance_(Final_v.1.0).pdf.

168. *Id.*; Powerpoint: Presentation to the California Air Resources Board LCFS Land Use Change Expert Workgroup: Carbon Emission Factors Subworkgroup (Aug. 17, 2010).

169. Rocky Mountain Farmers Union v. Corey, 730 F.3d 1070, 1081 (9th Cir. 2013).

vehicles, the California pathway is assigned an overall higher CI value for transportation because transporting corn results in higher emissions than transporting ethanol.[170]

The LCFS regulation establishes LCFS "Lookup Tables" assigning specific average CIs to fuels based on the amount of GHGs emitted over the lifecycle of the fuel. For example, according to CARB's assessment, as reflected in Table 6 of the Lookup Tables, Midwest ethanol produced using coal for heat and electricity generates a CI over twenty percent higher than that of gasoline, a difference in net lifecycle emissions that tailpipe standards alone do not address.[171] Thus, CARB's LCFS takes into account all aspects of fuel production, refining, and transportation, with the goal of reducing total GHG emissions.[172]

Table 6 in the Lookup Tables contains one set of fuel pathways, including different CI values for different types of fuels, separated by those processes that are correlated with location and those that are not correlated with location.[173] For example, milling process and source of thermal energy used in the production of the fuel are not correlated with location and thus are individually labeled while transportation, efficiency, and electricity are correlated with plant location (Midwest, Brazil, or California).[174] Emissions resulting from feedstock transportation are not directly proportionate to distance traveled, but rather assess total distance traveled, total mass and volume transported, and efficiency of the method of transport.[175] Because California grows no corn for ethanol and its producers import raw corn (bulkier and heavier than refined ethanol shipped from Brazil and the Midwest), California ethanol produces the most transportation emissions while Midwest ethanol produces the least.[176]

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170. *See* Declaration of Michael Scheible in Support of Opposition to Plaintiffs' Motion for Preliminary Injunction ¶ 45, Rocky Mountain Farmers Union v. Goldstene, 843 F. Supp. 2d 1042 (E.D. Cal. 2011) (No. 02234).

171. Rocky Mountain Farmers Union v. Corey, 730 F.3d at 1081 (9th Cir. 2013). *See* Declaration of Michael Scheible in Support of Opposition to Plaintiffs' Motion for Preliminary Injunction ¶ 45, Rocky Mountain Farmers Union v. Goldstene, 843 F. Supp. 2d 1042 (E.D. Cal. 2011) (No. 02234).

172. *Rocky Mountain Farmers Union*, 730 F.3d at 1080–81. CARB then assigns a cumulative CI value to an individual fuel lifecycle, or "pathway."

173. *Id*. at 1084. In determining total CI values for each ethanol pathway, for example, the California model considers total CI by assessing such factors as: (1) feedstock growth and transportation; (2) efficiency of production; (3) electricity used to power the plant; (4) thermal energy fuel source; (5) milling process; (6) transportation of fuel to blender in California; and (7) conversion of land to agricultural use.

174. *Id*. at 1083. California ethanol plants are, on average, newer and use less thermal energy and electricity in production than plants in the Midwest, where much of the electricity used in production is generated by coal-fired power plants.

175. *Id*.

176. *Id*.

However, California's combination of more efficient plants and greater access to low-carbon electricity outweighs Midwest ethanol's lower transportation emissions and results in an overall lower CI value for California ethanol.[177]

In the Lookup Tables, fuels are distinguished by different pathway descriptions (e.g., under ethanol from corn, "Midwest average" and "California average") and are assigned a total CI score based on a direct effects emissions value and an indirect effects emissions value.[178] California's fuel market is diverse, and includes fuels from many different "feedstocks," or source materials. Comparing emissions by different feedstocks at different stages of feedstock production, transportation, and use is only possible when based on the total lifecycle emissions of each fuel pathway.[179] CARB uses the "CA-GREET"[180] model, which factors in California's strict environmental regulations and low-carbon electricity supply to model lifecycle emissions for fuels used in California.[181]

Fuel providers can comply with the LCFS CI reporting requirements via two methods. The first is by identifying the appropriate "default pathway" from the default pathways schedule issued by CARB (Table 6) for fuels it predicted would appear in the California market.[182] The default pathways provide average values for the CA-GREET factors for these fuels. Fuel providers selling fuel under a default pathway may rely on that pathway in reporting the CI for that fuel.[183]

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177. *Id.* at 1084.

178. Low Carbon Fuel Standard 2011 Program Report, Final Draft (Dec. 8, 2011), http://www.arb.ca.gov/fuels/lcfs/workgroups/advisorypanel/20111208_LCFS%20program%20review%20report_final.pdf.

179. *Rocky Mountain Farmers Union*, 730 F.3d at 1081.

180. STATE OF CALIFORNIA AIR RESOURCES BOARD EXPERT WORKING GROUP: LOW CARBON FUEL STANDARD–INDIRECT EFFECTS SUBGROUP ON INDIRECT EFFECTS OF OTHER FUELS 7–8, http://www.arb.ca.gov/fuels/lcfs/workgroups/ewg/010511-final-rpt-alternative-modeling.pdf. The Greenhouse Gases, Regulated Emissions, and Energy Use in Transportation Model (GREET) was developed by Argonne National Laboratory to model lifecycle emissions of different fuels. The model calculates the carbon intensities of different fuels using both direct and indirect lifecycle emissions. The CARB approach to modeling such indirect effects as land use change is a variant of the GREET model, developed to assess lifecycle GHG emissions of corn ethanol. *See also* Detailed California-Modified GREET Pathway for Corn Ethanol, CARB (Feb. 27, 2009), http://www.arb.ca.gov/fuels/lcfs/022709lcfs_cornetoh.pdf.

181. *Rocky Mountain Farmers Union*, 730 F.3d at 1082.

182. *Id.*

183. *Id.*

The second method allows ethanol providers with higher-than-average efficiency plants to apply for individualized CI values.[184] CARB recognized that the Lookup Tables' pathway averages for Midwest corn ethanol may not be accurate for specific ethanol producers (e.g., producers who do not conform to the average Midwest production model envisioned by CARB's model). Providers must compare their calculated CI value to the closest CI value in the Lookup Tables, making sure their calculated value is equal to or lower than the table value and corresponds to a substantially similar reference pathway (i.e., a provider must compare a calculated CI value for corn ethanol with a corn ethanol pathway in the table).[185] If approved, the specialized fuel pathway is added to the Lookup Table and is available to all fuel providers.[186] By applying for individual assessments, some Midwest plants have already obtained CI scores lower than California producers.[187] The Midwest producers that have obtained individualized pathways either co-generate heat and electricity or use a renewable source for thermal energy.[188]

At the outset of the LCFS program, commentators questioned whether there were sufficient fuel sources available to meet LCFS goals, and how fuel producers would be able to achieve the reductions the law requires.[189] Reviews of the LCFS program, however, have found sufficient appropriate

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184. *See* CARB, ESTABLISHING NEW FUEL PATHWAYS UNDER THE CALIFORNIA LOW CARBON FUEL STANDARD: PROCEDURES AND GUIDELINES FOR REGULATED PARTIES AND FUEL PROVIDERS (Aug. 2, 2010), *available at* http://www.arb.ca.gov/fuels/lcfs/122310-new-pathways-guid.pdf; *Method 2 Carbon Intensity Applications*, CARB, *available at* http://www.arb.ca.gov/fuels/lcfs/2a2b/2a-2b-apps.htm (showing applications and CARB approvals of applications for individualized carbon intensity pathways).

185. CARB, ESTABLISHING NEW FUEL PATHWAYS UNDER THE CALIFORNIA LOW CARBON FUEL STANDARD: PROCEDURES AND GUIDELINES FOR REGULATED PARTIES AND FUEL PROVIDERS, at 5–6. In calculating the CI value, providers must factor revised fuel production, storage, and transport into the direct CI value.

186. *Id*. at 1–2 (Aug. 2, 2010), at http://www.arb.ca.gov/fuels/lcfs/122310-new-pathways-guid.pdf.

187. *Rocky Mountain Farmers Union*, 730 F.3d at 1082; Brief of Defendant-Appellants at 46, Rocky Mountain Farmers Union v. Goldstene, Nos. 12-15131, 12-15135 (9th Cir. Jan. 20, 2012); Brief for Appellees at 32, Rocky Mountain Farmers Union v. Goldstene, *appeal docketed*, Nos. 12-15131, 12-15135 (9th Cir. Jan. 20, 2012); Declaration of Michael Scheible in Support of Opposition to Plaintiffs' Motion for Preliminary Injunction ¶¶ 62–64; Rocky Mountain Farmers Union v. Goldstene, 843 F. Supp. 2d 1042 (E.D. Cal. 2011) (No. 02234). These include Midwest natural gas-fired plants that are more efficient than those described in the LCFS Table. One example is a Kansas ethanol plant that uses a waste wheat slurry stream from a wheat processing plant in its feedstock mix.

188. *Rocky Mountain Farmers Union*, 730 F.3d at 1084.

189. *See generally* ICF INTERNATIONAL, CALIFORNIA'S LOW CARBON FUEL STANDARD: COMPLIANCE OUTLOOK FOR 2020 (2013), *available at* http://www.ceres.org/resources/reports/california2019s-low-carbon-fuel-standard-compliance-outlook-for-2020 (outlining various compliance scenarios that would fulfill CARB's 2020 emission reduction goals).

fuels are available, and that compliance with LCFS requirements can likely be achieved through modest adjustments in the diversity of fuel types used in California.[190] To date, regulated parties under the LCFS have succeeded in lowering the CI of California's transportation fuels, but more low carbon fuel investment is still necessary to meet the program's 2020 goals.[191]

2. The Lawsuit

Ethanol producers in the Midwest sued the State of California to invalidate and enjoin the LCFS program on grounds that it discriminates against interstate commerce, constitutes extraterritorial regulation of interstate commerce, and places undue burdens on interstate commerce under the *Pike* balancing test. In 2011, in *Rocky Mountain Farmer's Union v. Goldstene*, the U.S. District Court for the Eastern District of California enjoined implementation of the LCFS program, holding that it violates the dormant Commerce Clause because it discriminates against out-of-state energy producers and attempts to regulate activities outside of California's borders.[192]

In *Rocky Mountain Farmers Union*, the district court determined that the transportation component of the CI analysis—which factors in the distance a fuel travels from production source to California—facially discriminates against out-of-state ethanol producers.[193] In a separate decision released the same day, the court also rejected CARB's argument that specific provisions in the federal Clean Air Act allowing California (but no other states) to regulate fuels and fuel additives for motor vehicle emissions control should exempt the state from dormant Commerce Clause scrutiny.[194]

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190. *Id*.
191. *Compare* Sonia Yeh, Julie Witcover & Jeff Kessler, Status Review of California's Low Carbon Fuel Standard 1 (2013) *with* BILL HUDSON, CALIFORNIA AIR RESOURCES BOARD'S (CARB'S) LOW CARBON FUEL STANDARD (LCFS): LIKELY IMPACT ON MIDWEST CORN ETHANOL, THE PROEXPORTER NETWORK (JUNE 10, 2009), https://www.proexporter.com/library/documents/99/29_PRX_CARBdetailAnal.pdf (stating that CARB's LCFS compliance schedule "will prove impossible to meet" without development of commercial technology for cellulosic ethanol).
192. Rocky Mountain Farmers Union v. Goldstene, 843 F. Supp. 2d 1071, 1094 (E.D. Cal. 2011).
193. *Rocky Mountain Farmers Union*, 843 F. Supp. 2d at 1087.
194. Rocky Mountain Farmers Union v. Goldstene, 843 F. Supp. 2d 1042 (E.D. Cal. 2011).

Finding facial discrimination, the district court explained that a less stringent balancing test applies to legislation that regulates in-state and out-of-state entities equally.[195] The LCFS did not satisfy this threshold because the regulatory standards facially discriminate against interstate commerce by giving California ethanol a lower CI value relative to out-of-state sources despite the identical make-up of the fuel sources themselves.[196] The court maintained that states may not

> 'discriminate against an article of commerce by reason of its origin or destination out of state . . . The central rationale for the rule against discrimination is to prohibit state or municipal laws whose object is local economic protectionism' . . . In this context, 'discrimination simply means differential treatment of in-state and out-of-state economic interests that benefit the former and burdens the latter.'[197]

In particular, the court focused on the fact that California penalized Midwestern ethanol through its CI analysis based on transportation and out-of-state electricity assumptions, both of which discriminate on the basis of location.[198]

The court rejected the idea that discrimination was avoided because ethanol plants could submit their own specialized CI fuel pathways if their processes or electricity sources were less carbon intensive than the default tables. The court focused on the fact that approval of new fuel pathways was within the state agency's discretion and, more importantly, the existence of the alternative pathways simply highlighted the discriminatory nature of the default tables. Thus, the court found that the law "impermissibly discriminates on its face against out-of-state entities."[199]

The district court went on to find that the regulations were subject to strict scrutiny for another reason: the LCFS controls extraterritorial conduct. Even apart from the plain language of the statute, the court found that "[t]he critical inquiry is whether the practical effect of the regulation is to control conduct beyond the boundaries of the state."[200] To make that determination, the court must consider "how the challenged statute may interact with the legitimate regulatory regimes of other States and what effect would arise if not [just] one, but many or every, State adopted similar legislation."[201] The court found that the law regulates "deforestation in South America, how Midwest farmers use their land, and how ethanol plants in

195. *Id.* at 1084–85.
196. *Id*. at 1088–89.
197. *Rocky Mountain Farmers Union*, 843 F. Supp. 2d at 1085–86 (citing C & A Carbone v. Town of Clarkstown, 511 U.S. 383, 390 (1994); Oregon Waste Disposal Systems, Inc. v. Department of Environmental Quality, 511 U.S. 93, 99 (1994)).
198. *Id.* at 1088–89.
199. *Id.* at 1090.
200. *Id.*
201. *Id*.

the Midwest produce animal nutrients."[202] The court also noted, based on the plaintiffs' briefs, that most production of corn ethanol occurs entirely outside of California.[203]

The court rejected the state's argument that the law's effects merely influenced the market, and did not require ethanol producers to engage in or limit any particular activities outside the state.[204] Instead, the court found that because the regulations provided incentives to adopt production measures that resulted in lower emissions, the law attempted to control conduct outside the state.[205] The court also held that the LCFS program created the potential for conflict with other states' regulations because ethanol producers "would be hard-pressed to satisfy the requirements of 50 different LCFS regulations which may [require] 50 different levels of reduction over 50 different time periods."[206] The court further found that the LCFS impermissibly regulated the "channels of interstate commerce" because it required CARB approval of changes in the fuel's transportation method (i.e., truck, rail, ship transport, or some combination) before giving producers CI credits.[207] The court held that this forced producers to seek California regulatory approval before taking action in another state, thus causing the LCFS to "directly regulate interstate commerce."[208]

The court agreed with the state that "the LCFS serves a legitimate and local interest," to reduce the risks of global warming despite the global nature of the problem, and cited *Massachusetts v. EPA*, in which the Supreme Court recognized states' legitimate interest in reducing global warming.[209] The court then turned to the question of whether California could achieve its goal of reducing global warming using nondiscriminatory alternatives, and found the state failed to establish such alternative means were not available.[210] According to the court, other nondiscriminatory alternatives could include regulating only tailpipe GHG emissions in California, or adopting a tax on fossil fuels with the goal of reducing GHG

202. *Id*. at 1090–91.
203. *Id.* at 1090.
204. *Id*. at 1091.
205. *Id.* at 1091–92.
206. *Id.* at 1092–93.
207. *Id*. at 1092.
208. *Id*. at 1092 (citing Brown-Forman Distillers Corp. v. New York, 406 U.S. 57, 582 (1986)).
209. *Id*. at 1093 (citing Massachusetts v. EPA, 549 U.S. 497, 519 (2007)).
210. *Id*. at 1093.

transportation emissions.[211] While acknowledging that the available alternatives to the LCFS "may be less desirable," the court found that California failed to show that no nondiscriminatory means existed.[212] For the court, this failure to establish the law as the only way to achieve emissions reduction goals invalidated the regulation under the dormant Commerce Clause.[213] The district court enjoined the regulations but the U.S. Court of Appeals for the Ninth Circuit stayed the injunction pending resolution of the appeal.[214]

In September 2013, the U.S. Court of Appeals for the Ninth Circuit reversed the district court's decision that the LCFS facially discriminated against interstate commerce and violated the extraterritoriality doctrine.[215] It remanded the case to the district court to determine whether the LCFS discriminated in purpose or effect and, if the district court determined that it did not, directed the district court to analyze the LCFS under the *Pike* balancing test.[216]

On the issue of facial discrimination against out-of-state corn ethanol, the court of appeals stated first that a law is not facially discriminatory simply because it affects in-state and out-of-state interests unequally.[217] Instead, the question is whether California's decision to assign different CI values to ethanol from different locations was based solely on origin or whether there was some reason apart from origin to treat them differently.[218] The court concluded that the LCFS considers location only to the extent that location affects the actual GHG emissions associated with a default pathway.[219] If that ethanol pathway imposes higher costs on California by virtue of its greater GHG emissions, there is a nondiscriminatory reason for the higher CI value.[220] The court noted that California could not successfully promote low carbon-intensity fuels and decrease GHG emissions associated with those fuels if it ignored the real

211. *Id*. at 1093–94.
212. *Id*. at 1094.
213. *Id.* at 1093 ("Once a state law is shown to discriminate against interstate commerce; either on its face or in practical effect,' or to exercise extraterritorial control, the burden falls on the State to demonstrate *both* that the statute 'serves a legitimate local purpose,' *and* that this purpose could not be served as well by available nondiscriminatory means." (citing Hughes v. Oklahoma, 441 U.S. 322, 336 (1979)).
214. *Energy Law Alert: California Permitted to Enforce Low Carbon Fuel Standard Pending Appeal*, STOEL RIVES LLP (Apr. 30, 2012), http://www.stoel.com/showalert.aspx?Show=9482.
215. Rocky Mountain Farmers Union v. Corey, 730 F.3d 1070, 1077 (9th Cir. 2013).
216. *Id.* at 1107.
217. *Id*. at 1089.
218. *Id*.
219. *Id*.
220. *Id.* at 1089–90.

factors behind GHG emissions, which include transportation and source of electricity used to produce the ethanol.[221] According to the court "the dormant Commerce Clause does not guarantee that ethanol producers may compete on the terms they find most convenient."[222] The court deferred to CARB's "expert regulatory judgment" in aligning the regional ethanol categories as it did,[223] and pointed out numerous times that ethanol producers could seek individualized CI determinations if the regional categories did not adequately reflect their emissions.[224] The court ended its discussion of facial discrimination by declaring that its conclusion "is reinforced by the grave need in this context for state experimentation" to address increasing GHG emissions and the potentially disastrous consequences to California's coastline, labor force, and lands.[225]

On the issue of whether the LCFS constituted extraterritorial regulation in violation of the dormant Commerce Clause, the court of appeals rejected the argument that the LCFS regulated transactions and activities outside of California.[226] Instead, it found with regard to the LCFS:

221. *Id*. at 1090.
222. *Id*. at 1092.
223. *Id*. at 1096.
224. *Id.* at 1082, 1084.
225. *Id*. at 1097.
226. *Id.* at 1101.

> It says nothing at all about ethanol produced, sold, and used outside California, it does not require other jurisdictions to adopt reciprocal standards before their ethanol can be sold in California, it makes no effort to ensure the price of ethanol is lower in California than in other states, and it imposes no civil or criminal penalties on non-compliant transactions completed wholly out of state.[227]

The court explained that even though states may not require compliance with their laws in wholly out-of-state transactions, "they are free to regulate commerce and contracts within their boundaries with the goal of influencing out-of-state choices of market participants."[228] The court also rejected the district court's conclusion that adoption of similar legislation by other states would "balkanize" the fuel market.[229] It failed to find evidence that similar regulations in other states would make it difficult or impossible for ethanol producers to meet the various state requirements.[230] It noted that a few other states were considering similar legislation but 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."[231] The court concluded its discussion by stating that California "should be encouraged to continue and to expand its efforts to find a workable solution to lower carbon emissions, or to slow their rise."[232] Regarding the dormant Commerce Clause, it declared:

> It does not invalidate by strict scrutiny state laws or regulations that incorporate state boundaries for good and non-discriminatory reasons. It does not require that reality be ignored in lawmaking.[233]

The court of appeals thus reversed the district court's decision on facial discrimination and extraterritoriality and remanded for entry of partial summary judgment in favor of CARB on those issues. It then directed the district court to determine whether the ethanol provisions discriminate in purpose or effect and, if not, to apply the *Pike* balancing test.[234]

The decision was subject to a dissent by Judge Murguia, who agreed with the district court that the simple existence of Table 6, which gives some California ethanol more favorable treatment than some out-of-state ethanol, constitutes facial discrimination.[235] In other words, the majority's consideration of CARB's purpose for treating ethanol produced in different regions differently was contrary to Supreme Court precedent, which

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227. *Id.* at 1102–03.
228. *Id*. at 1103.
229. *Id.* at 1104–05.
230. *Id*.
231. *Id.*
232. *Id*. at 1107.
233. *Id*.
234. *Id*.
235. *Id.* at 1108 (Murguia, J., concurring in part and dissenting in part).

instructs the court to determine whether the regulation is discriminatory before considering the reasons for that discrimination.[236]

The ethanol producers then sought en banc review of the panel decision but the full Ninth Circuit denied rehearing en banc.[237] There was a dissent from the rehearing denial by Judge Smith, joined by six other judges, and a concurrence supporting the rehearing denial by Judge Gould, who authored the Ninth Circuit panel decision. In his dissent, Judge Smith focused primarily on the following points: (1) precedent requires that a state law be found facially discriminatory if there is any differential treatment between in-state and out-of-state economic interests that benefits the former and burdens the latter, regardless of whether there is a legitimate reason for the differential treatment; (2) the regulations seek to control conduct in other states because they penalize out-of-state practices and land use decisions associated with the production of ethanol; and (3) the regulations threaten to "balkanize" the national economy.[238]

In his concurring opinion supporting the denial of rehearing en banc, Judge Gould made several points: (1) California is free to regulate commerce within its borders even if the regulations have an ancillary goal of influencing the choices of actors in other states; (2) some states are already joining California in its innovative efforts to reduce GHG emissions from fuels, countering the argument that California is "balkanizing" the national economy; (3) the district court may still find the law discriminates in purpose or practical effect and is subject to strict scrutiny even though the law does not facially discriminate; (4) a geographic distinction that affects in-state and out-of-state interests differently is not facially discriminatory so long as there is a reason apart from origin to treat those interests differently; (5) the LCFS's provisions are based on carbon emissions and not for the purpose of benefitting local companies at the expense of foreign companies; and (6) California's efforts, while incremental to start, could lead to broader action by other states and/ or the federal government which supports the idea of states as "laboratories of democracy."[239]

236. *Id*.
237. Rocky Mountain Farmers Union v. Corey, 740 F.3d 507 (9th Cir. 2014) (denial of en banc review).
238. *Id.* at 512–17 (Smith, J. dissenting).
239. *Id.* at 509–12 (Gould, J., concurring).

B. Minnesota's Next Generation Energy Act and Ban on New Coal-Fired Electricity

Moving from the West Coast to the Midwest, the State of Minnesota is also attempting to reduce air emissions and combat climate change but in this case through restrictions on coal-fired power plants rather than on transportation fuels. The sections that follow discuss the Minnesota NGEA with particular focus on its restrictions on power generated from new coal-fired power plants. It explains the law itself, the impact on Minnesota's neighbor, North Dakota, and the lawsuit North Dakota has filed against Minnesota raising preemption and dormant Commerce Clause claims.

1. The Minnesota Legislation and its Implementation

In 2007, Minnesota enacted the NGEA, which includes provisions that (1) require utilities to generate a certain percentage of electricity for retail sale from renewable energy sources, (2) promote energy conservation, and (3) attempt to address climate change by limiting GHG emissions.[240] The goal of the statute is to "reduce statewide greenhouse gas emissions across all sectors producing those emissions to a level at least 15 percent below 2005 levels by 2015, to a level at least 30 percent below 2005 levels by 2025, and to a level at least 80 percent below 2005 levels by 2050."[241] With regard to coal-fired power, the statute provides that after August 1, 2009, no person shall (1) construct a new large energy facility within the state, (2) import power from a new large energy facility built outside the state, or (3) enter into a long-term power purchase agreement that would contribute to statewide power sector CO_2 emissions unless there is a corresponding offset of CO_2 emissions.[242] Because of the size of the facilities covered and the exception for natural gas-fired power facilities, the law applies most directly to coal-fired power plants in Minnesota built after 2007 as well as post-2007 coal-fired power plants outside Minnesota that wish to import power to Minnesota.[243]

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240. Next Generation Energy Act of 2007, ch. 136-S.F. No. 145, 1, https://www.revisor.mn.gov/data/revisor/slaws/2007/0/136.pdf.
241. MINN. STAT. § 216H.02, subd. 1.
242. MINN. STAT. § 216H.03, subd. 3 and 4.
243. *See* MINN. STAT. § 216H.03, subd. 1 (defining "new large energy facility"); Chris Heineman et al., *Minnesota's Next Generation Energy Act: Why Dismantle a Program that Works?* MINNPOST (2011), http://www.minnpost.com/community-voices/2011/03/minnesotas-next-generation-energy-act-why-dismantle-program-works.

2. North Dakota's Role in Minnesota Electricity Markets and the Lawsuit Challenging the NGEA

Minnesota imports one-third of its electricity and over one-half of those imports come from Manitoba Hydro.[244] For the two-thirds of electricity generated from Minnesota power plants, over 50 percent of that in-state generation uses coal, most of which is imported from Wyoming and Montana.[245] Despite this current reliance on coal, the state is moving away from coal, as demonstrated by federal government statistics showing that Minnesota's reliance on coal dropped from approximately 66 to 53 percent from 2000 to 2010.[246] North Dakota is home to eight coal-fired power plants, including some owned by Minnesota utilities. These plants burn North Dakota's lignite coal deposits.[247] Most North Dakota power generation is exported to Minnesota.[248]

In 2011, the State of North Dakota, North Dakota lignite coal companies, and certain electric cooperatives with members in multiple Midwestern states sued to invalidate the NGEA. Among other claims, the plaintiffs alleged that the NGEA violates the dormant Commerce Clause because it discriminates against out-of-state interests, imposes an excessive burden on interstate commerce, and regulates extraterritorially.[249] The plaintiffs also

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244. Riordan Frost, *Energy in Minnesota: The Carbon Conflict*, MINNESOTA 2020 (Aug. 21, 2011), http://www.mn2020.org/issues-that-matter/economic-development/energy-in-minnesota-the-carbon-conflict (coal imported from out of state comes primarily from Montana and Wyoming).

245. *See* EIA, *Minnesota Profile Overview*, July 2012, http://www.eia.gov/state/?sid=MN#tabs-4; U.S. Dept. of Energy, *Clean Energy in My State: Minnesota Electricity Generation*, http://apps1.eere.energy.gov/states/electricity_generation.cfm/state=MN; *MRES Joins North Dakota Suit Against Minnesota Over Its Energy Policy, Missouri River Energy Services*, MISSOURI RIVER ENERGY SERVICES (Nov. 2, 2011), http://www.mrenergy.com/uploads/files/MRES_Today_11-28-11.pdf.

246. EIA, *supra* note 245 (reporting that 53% of electricity generated in Minnesota came from coal-fired electric power plants in 2011 and that Minnesota ranked fourth in the nation in net electricity generated from wind energy that year); Frank Jossi, *Do Minnesota Coal Curbs Overstep Authority?* FINANCE & COMMERCE, July 17, 2012, *available at* http://finance-commerce.com/2012/07/do-minnesota-coal-curbs-overstep-authority/.

247. David Shaffer, *N.D. Can Press on with Lawsuit Over Coal Generated Electricity*, MINNEAPOLIS STAR TRIB., Oct. 1, 2012, *available at* http://www.startribune.com/business/172134481.html.

248. Jossi, *supra* note 246.

249. Complaint at 27–29, 34–35, North Dakota v. Swanson, No. 0:11-cv-03232 (D. Minn. 2011).

alleged that the NGEA is preempted by the Clean Air Act (CAA) and the Federal Power Act (FPA).[250]

In September 2013, the parties brought cross motions for summary judgment on the preemption claims and the dormant Commerce Clause claims.[251] On the issue of extraterritoriality, the plaintiffs argued that the NGEA does not prohibit goods that are themselves inherently different or dangerous, distinguishing *Maine v. Taylor*.[252] According to the plaintiffs, once generated, "electricity is electricity and there is no difference in the electrons based on how they came into existence."[253] They argued that because the NGEA's prohibition focuses on the manufacture of electrons rather than the quality of the goods themselves, Minnesota is regulating electricity generation that occurs wholly in other states in violation of the extraterritoriality doctrine.[254] Moreover, the plaintiffs contended that the offset exemption for electricity generated out-of-state further illustrates the extraterritorial reach of the statute because it forces a generator or importer to seek regulatory approval in advance before importing electricity that would contribute to the state's power sector carbon emissions.[255] This, in turn, "forc[es] a merchant to seek regulatory approval in one state before undertaking a transaction in another," in violation of the extraterritoriality doctrine based on *Brown-Forman Distillers Corp*.[256] Plaintiffs also cited *Southern Pacific Co. v. Arizona* and *Bibb v. Navajo Freight Lines* in support of their arguments that the extraterritoriality doctrine invalidates the NGEA separate and apart from the traditional framework used for dormant Commerce Clause challenges based on discriminatory intent and discriminatory effect.[257]

In their own summary judgment motion, the defendants addressed the extraterritoriality doctrine by arguing that the NGEA regulates only in-state

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250. Complaint at 30, 31-34, 36-37, North Dakota v. Swanson, No. 0:11-cv-03232 (D. Minn. Nov. 2, 2011).

251. Defendants' Motion for Summary Judgment, North Dakota v. Swanson, Docket No. 0:11-cv-03232 (D. Minn., filed Nov. 2, 2011), filed Sept. 5, 2013; Plaintiffs' Motion for Summary Judgment, North Dakota v. Swanson, Docket No. 0:11-cv-03232 (D. Minn., filed Nov. 2, 2011), filed Sept. 5, 2013.

252. Plaintiffs' Memorandum of Law in Support of Motion for Summary Judgment at 25, North Dakota v. Swanson, Docket No. 0:11-cv-03232 (D. Minn., filed Nov. 2, 2011), filed Sept. 5, 2013.

253. *Id*. at 25.

254. *Id.* at 25–26.

255. *Id*. at 26.

256. *Id*. at 26; *See* Brown-Forman Distillers Corp. v. New York State Liquor Auth., 476 U.S. 573, 582 (1986).

257. Plaintiffs' Memorandum of Law in Support of Motion for Summary Judgment, 28–29, North Dakota v. Swanson, Docket No. 0:11-cv-03232 (D. Minn., filed Nov. 2, 2011), filed Sept. 5, 2013. *See* Bibb v. Navajo Freight Lines, 359 U.S. 520 (1959); Southern Pac. Co. v. State of Ariz. ex rel. Sullivan, 325 U.S. 761 (1945).

entities and in-state activities and imposes no direct limitations on commerce occurring entirely outside of Minnesota.[258] According to the defendants, out-of-state utilities can continue emitting carbon from electricity generation; they must only comply with the NGEA when they choose to import that electricity into Minnesota.[259]

In April 2014, the district court granted in part the plaintiff's motion for summary judgment.[260] It declined to rule on the plaintiff's preemption claims[261] and also did not reach the claims that the NGEA discriminated against interstate commerce.[262] Instead, the court found that the NGEA regulated extraterritorially and violated the dormant Commerce Clause on that basis.[263] In reaching that decision, the court focused on the provisions of the NGEA stating that (1) "no person shall" import power from a new large energy facility that would contribute to statewide power sector carbon dioxide emissions without offsets and (2) "no person shall" enter into a new long-term power purchase agreement that would increase power sector carbon dioxide emissions without offset.[264]

The court rejected arguments by Minnesota and by the environmental group amici that it should decline to rule on the plaintiffs' claims on grounds of standing, ripeness, and abstention.[265] Minnesota argued that the plaintiffs could not point to any injury they had sustained or any long-term power purchase agreements they had refrained from entering into because of the NGEA and that any claim that their business operations were inhibited by the law were speculative.[266] The environmental group amici argued that the court should abstain from deciding the case until the Minnesota Public Utilities Commission and Minnesota courts determined the reach of the law, in particular whether it applies broadly to all electricity transactions within the Mid-Continent Independent System Operator (MISO) or more narrowly to cover only direct transactions with

258. Defendants' Memorandum of Law in Support of Motion for Summary Judgment at 21, North Dakota v. Swanson, Docket No. 0:11-cv-03232 (D. Minn., filed Nov. 2, 2011), filed Sept. 5, 2013.
259. *Id.* at 21.
260. North Dakota v. Heydinger, No. 11-CV-3232 (SRN/SER), 2014 WL 1612331 (D. Minn. Apr. 18, 2014).
261. *Id*. at *13.
262. *Id*. at *16.
263. *Id*.
264. *Id*. at *3.
265. *Id*. at *11–12.
266. *Id*. at *10.

Minnesota entities.[267] In rejecting these arguments, the court pointed to instances where the Minnesota Department of Commerce had stated that the NGEA would potentially apply to electric cooperatives with members in multiple states that intended to sell power on the MISO market, on grounds that some of that electricity bid into the MISO market could make its way into Minnesota.[268] Although Minnesota subsequently declined to apply the NGEA to these types of transactions, the court found the threat of such a broad application of the law to these types of transactions adversely impacted the business dealings of the electric cooperative plaintiffs, which was sufficient to confer standing on the plaintiffs and render the case ripe for review and inappropriate for abstention.[269]

On the merits, the court refused to adopt the state's narrow interpretation of the NGEA, which would limit the "no person shall" language to persons located or operating in Minnesota.[270] Instead, it read the language broadly to impose no knowledge requirement or locational requirement, which meant that that the law would cover any power sold into the MISO market from any location and ultimately dispatched by MISO to any location, since there is no way to track or monitor the path of specific electrons once they enter the MISO grid.[271] Because such a reading of the law would control market transactions where the buyers and sellers were both outside of Minnesota and require them to obtain Minnesota approval for the out-of-state transaction, the court concluded that the law has an extraterritorial reach.[272] Specifically, the court stated that:

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267. *Id*. at *12. MISO is a federally-approved, independent, non-profit organization known as a "regional transmission organization" or "RTO." RTOs coordinate and monitor the transmission of electricity within a multi-state region. *Id*. at *1–2. Today, most of the country except for the Southeast and Intermountain West is part of an RTO or a similar organization, known as an Independent System Operator ("ISO"). *See About 60% of the U.S. Electric Supply is Managed by RTOs*, TODAY IN ENERGY (Apr. 4, 2011), http://www.eia.gov/todayinenergy/detail.cfm?id=790. MISO operates and controls the electric transmission grid in parts of 10 states in the Midwestern and southern United States, including in North Dakota, Minnesota, and Wisconsin. MISO monitors electricity supply and demand within its region and operates energy and capacity markets within that region, including day-ahead and hourly transmission markets to match supply and demand. *See About Us*, MIDCONTINENT INDEP. SYS. OPERATOR, https://www.misoenergy.org/AboutUs/Pages/AboutUs.aspx (last visited Apr. 28, 2014). *See also* North Dakota v. Heydinger, No. 11-CV-3232 (SRN/SER), 2014 WL 1612331 at *1–2 (D. Minn. Apr. 18, 2014).

268. North Dakota v. Heydinger, No. 11-CV-3232 (SRN/SER), 2014 WL 1612331 at *5, 12, 22 (D. Minn. Apr. 18, 2014).

269. *Id*. at *11–12.

270. *Id*. at *14.

271. *Id*.

272. *Id*. at *22.

> [T]he transmission of electricity over the MISO grid does not recognize state boundaries. Therefore, when a non-Minnesota entity injects electricity into the grid to satisfy its obligations to a non-Minnesota member [of a multi-state electric cooperative], it cannot ensure that the electricity will not travel to and be removed in—in other words, be imported to and contribute to statewide power sector carbon dioxide emissions in—Minnesota. . . . Likewise, non-Minnesota entities that enter into long-term power purchase agreements for capacity to satisfy their non-Minnesota load cannot ensure that the electricity, when bid into the MISO market and dispatched, will not travel to and be removed in—in other words, increase statewide power sector carbon dioxide emissions in—Minnesota.[273]

The court relied on the "boundary-less nature of the electricity grid" to distinguish the *Cotto-Waxo Co.*,[274] *National Electric Manufacturers Ass'n*,[275] and *Rocky Mountain Farmers Union*[276] cases which involved "tangible products (sweeping compounds, light bulbs, and ethanol, respectively) that could be shipped directly from point A to point B."[277]

IV. MOVING FORWARD: STATE ENERGY POLICY, INTERSTATE ENERGY MARKETS, AND THE QUESTION OF EXTRATERRITORIALITY

The California LCFS case and the Minnesota NGEA case raise important questions about the role of states in promoting clean energy and addressing climate change in the face of Congressional inaction. As noted earlier, both the California and Minnesota cases involve preemption challenges to the states' laws in addition to dormant Commerce Clause challenges. The final result of these preemption challenges, like the dormant Commerce Clause challenges, remains to be seen as the cases work their way through the courts. Similar lawsuits beyond the scope of this article involve dormant Commerce Clause challenges to state renewable portfolio standards (RPSs) that express preferences for renewable electricity generated within the state over renewable electricity generated outside the state.[278] All of these

273. *Id*.
274. Cotto Waxo Co. v. Williams, 46 F.3d 790 (8th Cir. 1995).
275. Nat'l Elec. Mfr. Ass'n v. Sorrell, 272 F.3d 104 (2d Cir. 2001).
276. Rocky Mountain Farmers Union v. Corey, 730 F.3d 1070 (9th Cir. 2013).
277. North Dakota v. Heydinger, No. 11-CV-3232 (SRN/SER), 2014 WL 1612331, at *23 (D. Minn. Apr. 18, 2014).
278. *See, e.g.*, Illinois Commerce Comm'n v. FERC, 721 F.3d 764, 776 (7th Cir. 2013) (stating in dicta that Michigan's RPS, which preferences in-state renewable resources over out-of-state renewable resources, discriminates against out-of-state renewable energy in violation of the dormant Commerce Clause); Steven Ferry, *Threading the Constitutional Needle with Care: The Commerce Clause Threat to the New Infrastructure of Renewable Power*, 7 TEX. J. OF OIL, GAS & ENERGY L. 59 (2012) (discussing which state RPSs contain

cases raise important federalism questions regarding the extent to which states can create policies to address climate change and protect the environment without running afoul of federal laws granting regulatory authority to federal agencies like FERC (the preemption issues) or judicial doctrines limiting state interference with or discrimination against interstate commerce (the dormant Commerce Clause issues).

Focusing on the dormant Commerce Clause challenges exclusively for present purposes, however, raises the fundamental question of how the California and Minnesota state energy policy cases detailed above fit within the existing dormant Commerce Clause jurisprudence. Particularly with regard to extraterritoriality concerns, the question is whether the states' goals in promoting clean energy and attempting to address climate change should distinguish these cases from the bulk of authority in this area.

As any first-year student of constitutional law knows, different categories of dormant Commerce Clause cases tell different stories about the law. There are the milk cases, such as *Dean Milk Company*[279] and *West Lynn Creamery*[280] where the Court's focus was on eliminating state and local efforts to protect local milk producers from out of state competition. There are the waste import cases such as *Oregon Waste Systems*[281] and *Philadelphia v. New Jersey*[282] where the Court prevented states from isolating themselves from the national waste disposal market by banning disposal of out-of-state waste or charging higher fees for such disposal. There are also the waste export cases such as *C&A Carbone*[283] and *Fort Gratiot Sanitary Landfill*[284] where states attempted to ban the export of waste in order to promote in-state disposal markets at the expense of out-of-state waste disposal competitors, thus following the pattern of the earlier milk cases. In each of these waste cases, the court was concerned about the economic protection of in-state waste facilities or states walling themselves off from the waste disposal problem.[285] Moving on to the coal

preferences for in-state renewable resources and the dormant Commerce Clause threats to such laws).

279. Dean Milk Co. v. Madison, 340 U.S. 349 (1951).

280. W. Lynn Creamery Co. v. Healy, 512 U.S. 186 (1994) (coupling a tax on milk sold in the state with a subsidy for in-state milk production funded by the tax discriminates based on the geography of production).

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

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

283. C & A Carbone, Inc. v. Town of Clarkstown, N.Y, 511 U.S. 383 (1994).

284. Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep't. of Natural Res., 504 U.S. 353, 354–55 (1992).

285. *Id.* at 353–54. *But see* United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth., 550 U.S. 330 (2007) (where the state itself chose to promote recycling by establishing its own facility and requiring all waste within its jurisdiction to be processed

cases, the state laws in Illinois and Indiana attempting to protect in-state coal facilities and prevent utilities from purchasing cleaner burning coal from outside the state in order to meet new, national air pollution regulations met a similar fate.[286]

All these cases are examples where the evidence established that the primary motivation of the state law was to protect the business and economic interests of local firms and individuals at the expense of out-of-state interests. Even where the state alleged it was regulating to protect public health and the environment, like in the waste cases, the court focused on the fact that the waste from any particular state was identical and thus, on its own, presented no additional harm to public health or the environment.

Then there are the extraterritoriality cases. In some of these cases, particularly the price affirmation cases, the Court's holding and reasoning in each case do not seem particularly relevant to the California and Minnesota disputes. In *Baldwin*,[287] *Brown-Forman*,[288] and *Healy*,[289] the intent of the laws in question was to protect in-state industries and consumers, and required the plaintiffs to take particular business-related actions in other states in order to comply with the target state's law. The U.S. Supreme Court has not yet decided an extraterritoriality case involving environmental protection or energy policy. But the lower courts have, and their analyses are instructive. In the Ohio milk labeling case, *International Dairy Foods*,[290] it was important to the Sixth Circuit that the state's goal was to protect public health and that producers could use the Ohio label in other states if they wished. By contrast, in the Michigan case, *American Beverage Association*,[291] while the ultimate goal of the state recycling program was to reduce solid waste and thus protect the environment, the label required on bottles in Michigan could not be used in any other state, thus placing burdens on companies engaged in interstate beverage sales. Still, though, the focus of the case was primarily economic, in that the reason the state passed the new law was because it was losing money on its bottle deposit program. In the California vessel fuel case, *Pacific Merchant Shipping*

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there, the market participant exception to the dormant Commerce Clause allows the state to promote that policy).

286. *See* Alliance for Clean Coal v. Miller, 44 F.3d 591 (7th Cir. 1995); Alliance for Clean Coal v. Bayh, 72 F.3d 556 (7th Cir. 1995).

287. Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511 (1935).

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

289. Healy v. Beer Inst., 491 U.S. 324 (1989).

290. Int'l Dairy Foods Ass'n v. Boggs, 622 F.3d 628 (6th Cir. 2010).

291. Am. Beverage Ass'n v. Snyder, 735 F.3d 362 (6th Cir. 2013).

Association,[292] the Ninth Circuit focused heavily on California's severe air emissions problems, and found that the state did not discriminate against interstate commerce and also did not regulate extraterritorially even though the rules required vessels to make business decisions regarding fuel before the vessel entered California waters. Thus, the court applied the *Pike* balancing test, and found that California's interests in preventing the harmful effects of air pollution resulting from fuel used in vessels within 24 miles of the state's coast outweighed any federal uniformity interests or impacts on interstate commerce.[293]

The courts in the California LCFS case and the Minnesota NGEA case have considered this body of case law, as will the other courts around the country reviewing state RPSs and other state laws attempting to prevent air pollution and address climate change by influencing consumer and business decisions on fuel, electricity, and other energy use. As noted earlier, courts and commentators have at times struggled with how to fit the extraterritoriality cases into the traditional dormant Commerce Clause framework that otherwise applies strict scrutiny to facially discriminatory state laws, and the more deferential *Pike* balancing test to laws that regulate evenhandedly. The Supreme Court's extraterritoriality cases make clear that "the Commerce Clause dictates that no State may force an out-of-state merchant to seek regulatory approval in one State before undertaking a transaction in another."[294] On the other hand, the Court has often upheld state laws that disadvantage out-of-state firms or industries, or result in companies being required to comply with different regulatory standards in different states.[295] Indeed, Professors Jack Goldsmith and Alan Sykes

292. Pac. Merch. Shipping Ass'n v. Goldstene, 639 F.3d 1154 (9th Cir. 2011).

293. *Pac. Merch. Shipping Ass'n*, 639 F.3d at 1179–18. *See also* Nat'l Elec. Mfrs. Ass'n v. Sorrell, 272 F.2d 104, 108–12 (1st Cir. 2001) (holding that a Vermont law requiring light bulb manufacturers to label mercury-containing products and packaging with information to inform consumers that the light bulbs contain mercury which must be recycled or disposed of as hazardous waste did not regulate extraterritorially because the law only applied to light bulbs sold in Vermont, did not require any action with regard to sales in other states, and plaintiffs could pass any increased labeling costs on to Vermont consumers if they wished).

294. *Beer Inst.*, 491 U.S. at 337.

295. United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth., 550 U.S. 330, 345 (2007) ("We hold that the County's flow control ordinances, which treat in-state private business interests exactly the same as out-of-state ones, do not 'discriminate against interstate commerce' for purposes of the dormant Commerce Clause."); Am. Trucking Ass'n, Inc. v. Mich. Pub. Serv. Comm'n, 545 U.S. 429, 438 (2005) ("An interstate firm with local outlets normally expects to pay local fees that are uniformly assessed upon all those who engage in local business, interstate and domestic firms alike."); Maine v. Taylor, 477 U.S. 131, 151–52 (1986) ("The evidence in this case amply supports the District Court's findings that Maine's ban on the importation of live baitfish serves legitimate local purposes that could not adequately be served by available nondiscriminatory

have stated that "[m]ultistate firms often face [costs keeping up with multiple regulatory regimes] with respect to varying state tax laws, libel laws, securities requirements . . . and much more."[296] They also point out that the costs and benefits of regulation can vary geographically, such as the problems associated with air emissions from automobiles in the Los Angeles area.[297] Goldsmith and Sykes also note that regulated harms often cross state boundaries and that state regulations are routinely upheld (and should be upheld) despite adverse impacts on actors outside the jurisdiction.[298] They conclude that "out-of-state costs of state regulations of cross-border externalities are commonplace and often desirable" and that "the appropriate question about these state regulations is not whether they produce out-of-state costs, but rather whether they are properly calibrated to redress local harms."[299]

In the California LCFS case, the issue becomes whether a law that considers distance traveled as a component in regulating a product is a per se violation of the dormant Commerce Clause. The district court in the *Rocky Mountain Farmers Union* case found that it was,[300] and *Dean Milk v. Madison*,[301] which the district court cited, would on the surface seem to support that conclusion.[302] But the Ninth Circuit in that same case found it is highly relevant that the reason the California law contains a transportation component in determining the CI value of fuels is to protect the environment rather than to protect specific firms in California. There is no question that transportation and production of fuel and fuel stocks have a significant, adverse environmental impact on air pollution and GHG emissions. These environmental and public health concerns were not at issue in *Dean Milk*,

alternatives."); Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 473 (1981) ("Even granting that the out-of-state plastics industry is burdened relatively more heavily than the Minnesota pulpwood industry, we find that this burden is not 'clearly excessive' in light of the substantial state interest in promoting conservation of energy and other natural resources and easing solid waste disposal problems, which we have already reviewed in the context of equal protection analysis.").

296. Goldsmith & Sykes, *supra* note 13, at 793–94.

297. *Id.* at 796.

298. *Id*. at 796, 802–03 ("The fact that a state regulation of cross-border harms has an impact on out-of-state actors cannot by itself by the touchstone for illegality under the extraterritorial-regulation strand of analysis.).

299. *Id.* at 827.

300. Rocky Mountain Farmers Union v. Goldstene, 843 F. Supp. 2d 1071, 1087–89 (E.D. Cal. 2011), *rev'd*, 730 F.3d 1070.

301. Dean Milk Co. v. Madison, 340 U.S. 349 (1951).

302. *Rocky Mountain Farmers Union*, 843 F. Supp. 2d at 1089.

where the Court rejected the city's argument that the ordinance was intended to protect public health.[303] Instead, the Court found that the main purpose of the ordinance was to create "an economic barrier protecting a major local industry against competition" arising outside the state.[304] By contrast, in the LCFS case, the Ninth Circuit found that California had legitimate public health and environmental justifications for including location in the CI score.[305]

Further, in the California LCFS case, the district court focused on the fact that the law attempts to regulate "deforestation in South America, how Midwest farmers use their land, and how ethanol plants in the Midwest produce animal nutrients."[306] If fuel producers wish to sell their product in California, they may feel pressure to make changes in their practices regarding land use, electricity use, and ethanol plant efficiency in other states. But those producers have the choice not to sell fuels in the California market and they need not seek approval from California before selling their products in other states. The fact that California law encourages increased energy efficient behavior by transportation fuel producers in other states who wish to participate in the California market is no different in principle from the hundreds of different health, safety, and appliance efficiency laws that influence companies selling cleaning products, soaps, light bulbs, appliances, and other products in interstate markets.[307]

If Congress wishes to create more uniformity regarding a particular product or standard, it may do so by preempting state law, as it has done with auto emission regulation (with the exception for California),[308] pesticide labeling,[309] and efficiency standards for appliances.[310] But in the absence of federal preemption, it is unclear why any principle in dormant Commerce Clause jurisprudence should act as a bar to state innovation in energy and environmental protection policy in the absence of evidence of the state attempting to favor in-state economic interests over out-of-state economic interests. Indeed, this was one of Judge Gould's central points in his

303. *Dean Milk Co*., 340 U.S. at 354–56 (rejecting argument that ordinance was necessary to protect public health and noting that the state health department did not testify that the geographic limitation in the ordinance was necessary to protect public health).

304. *Id.* at 354–55.

305. *See supra* notes 219–21 and accompanying text.

306. *Rocky Mountain Farmers Union*, 843 F. Supp. 2d at 1090–91.

307. *See supra* Part II.A (discussing cases).

308. *See* 42 U.S.C.A. §§ 7543(a)–7543(b) (2010) (preempting states from setting auto emission standards with the exception of California, which can apply to EPA for a preemption waiver).

309. *See* 7 U.S.C.A. § 136v(b) (2011) (preempting state requirements for labeling or packaging of pesticides).

310. *See* 42 U.S.C.A. § 6297 (2010) (preempting state requirements for appliances where U.S. Dept. of Energy has already set a federal standard for that appliance).

concurrence to the Ninth Circuit's denial of rehearing en banc in the *Rocky Mountain Farmers Union* case.[311]

The Minnesota NGEA case raises similar issues regarding the extent to which the state can regulate energy sales and purchases within the state that will necessarily impact out-of-state actors participating in regional and national energy markets like MISO. Electricity, like fuel, is an interstate market and state regulation influences decisions and imposes restrictions that affect market actors in other states. This, however, should not be the test of whether the law is constitutional, particularly if the law imposes the same restrictions on intrastate electricity generators and out-of-state electricity generators. While North Dakota has a coal industry and Minnesota does not, Minnesota firms have significant coal-fired electricity generation assets, and thus are equally impacted by the law.

Moreover, simply because a state does not have the targeted resource (in this case, coal) does not mean that attempting to reduce the use of that resource for environmental reasons is per se discriminatory in the absence of evidence of economic protectionist motives. Notably, in addition to not having a coal industry, Minnesota does not have a natural gas industry or a uranium industry, and has far fewer wind resources than North Dakota. Yet those are the resources that will be favored under the NGEA for environmental reasons, not economic protectionist reasons. Thus, whether or not the state has the targeted resource (coal in the case of Minnesota and corn in the case of California) cannot be the determining factor in a dormant Commerce Clause analysis.[312]

Some will argue that electricity is different—that electrons are fungible and cannot be tracked in the electricity grid. Thus, state policies that preference certain electricity resources over others interfere with regional and national transmission systems to an extent not present in markets for other products, even fuels, where the regulated product is more easily identified, tracked, and separated. That certainly was a primary focus of the district court's decision in the Minnesota NGEA case. While the transportation of electricity is indeed different than the transportation of other types of goods, that need not be a meaningful distinction for dormant

311. *See* Rocky Mountain Farmers Union v. Corey, 740 F.3d 507, 511 (9th Cir. 2014) (Gould, J., concurring) ("Just as a journey of 1,000 miles begins with a single step, so too must legislative action to fight global warming start somewhere. Further, once states appreciate the benefits of the LCFS, there may be a cascade of similar laws throughout the country—and perhaps federal action—aimed at stemming the tide of global warming.").

312. *See, e.g.*, Minnesota v. Clover Leaf Creamery, 449 U.S. 456, 473 (1981).

Commerce Clause purposes. So long as states restrict their policies to in-state sales of electricity, utilities and other electricity providers can enter into contracts for the appropriate generation mix, just like fuel providers in California can enter into contracts for the appropriate fuel mix, and retailers of a myriad of other consumer products, such as milk, waste, light bulbs, and chemicals can make purchasing decisions based on state policies. These state policies will in most cases have positive economic effects on some out-of-state industries that wish to participate in state energy markets and negative economic effects on others. But the extraterritoriality doctrine should not invalidate the state's energy policy decisions even if it results in adverse economic impacts on some out-of-state actors so long as the state law does not attempt to regulate wholly out-of-state transactions.[313] Although the district court in the Minnesota NGEA case read the statute broadly to reach any electricity transactions within the MISO region, such a reading does not appear to be required by the language of the statute itself, as argued by the State of Minnesota and the environmental group amici.[314] Regulating purchases of electricity between in-state utilities and out-of-state electricity producers for in-state retail sale is not the same as regulating the interstate electricity grid itself, even though the electricity that is the subject of those purchases flows through the grid. To hold otherwise is akin to holding that regulating sales of fuel that flow through interstate pipelines or sales of other products that use interstate highways also regulate extraterritorially because actors may have to change or monitor their products when transporting them across interstate lines. Such a holding would seem to go far beyond the purpose of the dormant Commerce Clause.

Finally, this is not an area where Congress has preempted state law. While Congress has granted FERC exclusive authority over wholesale electricity sales and transmission of electricity in interstate commerce, states have significant authority over fuel mix issues and retail sales of electricity. If courts attempt to eliminate this authority through the extraterritoriality doctrine, they improperly override the balance Congress has set between federal and state authority in this area. While states may not discriminate against interstate commerce even if Congress is silent, relying too heavily on the extraterritoriality doctrine here runs the risk of interfering with valid state laws meant to address significant public health and

313. *See, e.g.*, Rocky Mountain Farmers Union v. Corey, 730 F.3d 1070, 1104 (9th Cir. 2013) (states are "free to regulate commerce and contracts within their boundaries with the goal of influencing out-of-state choices of market participants"); Cotto Waxo Co. v. Williams, 46 F.3d 790 (8th Cir. 1995).

314. Defendant's Memorandum of Law in Support of Motion for Summary Judgment at 21, North Dakota v. Swanson, No. 0:11-cv-03232 (D. Minn. Sept. 5, 2013).

environmental concerns, and that do not discriminate against out-of-state interests in favor of in-state interests.[315]

Other commentators have raised these same concerns regarding developments in dormant Commerce Clause jurisprudence in the context of energy policy. According to Professor Daniel Farber, electricity regulation is an area where "[c]ourts need to give states some space to make reasonable choices, realizing that in a national electric grid, every state action is going to have repercussions outside its borders and someone will always feel mistreated somewhere."[316] Should the dormant Commerce Clause prohibit these "repercussions" through the extraterritoriality doctrine? The case law detailed in Part II appears to draw a real distinction between policies that influence decision-making actors in other states that participate in interstate markets and policies that directly regulate activities that occur wholly in other states. While that line is not always clear, without evidence of facial or purposeful discrimination against out-of-state interests, both the California and Minnesota laws appear to fall on the "influence" side of the line rather than the "out-of-state regulation" side of the line. In the absence of a stated need for national uniformity like that expressed in the early train and truck cases, state energy innovation, particularly in the face of limited federal action, should be encouraged. Judge Sutton raised these same issues in his concurring opinion in *American Beverage Association v. Snyder*.[317] He concluded that the extraterritoriality doctrine has outlived its purpose now that we no longer have easily identifiable and completely separate spheres of state and federal regulation, particularly in the environmental and energy policy realm.[318]

In light of these concerns, using the extraterritoriality doctrine to police state energy policy in the absence of discrimination seems misplaced in

315. For a discussion of dormant Commerce Clause challenges to RPSs and other state energy policy initiatives, see Lee & Duane, *supra* note 3.

316. Daniel A. Farber, *Regulators Between a Rock and a Hard Place: The Extraterritorial Dilemma*, Legal-Planet.org (June 24, 2013), http://legalplanet.wordpress.com/2013/06/24/regulators-between-a-rock-and-a-hard-place-the-extraterritorial-dilemma/. S*ee also* Daniel A. Farber, *Climate Policy and the United States System of Divided Power: Dealing with Carbon Leakage and Regulatory Linkage*, 3 TRANSNATIONAL ENVTL. L. 31, 43 (2014) ("In a unified national market, any important state regulation is likely to have some spillover effects on other markets. Rather than forming a basis for a *per se* rule, it would be better to consider these out-of-state effects on out-of-state markets as simply part of the *Pike* balancing test.").

317. American Beverage Ass'n v. Snyder, 735 F.3d 362, 377 (6th Cir. 2013) (Sutton, J. concurring).

318. *Id.* at 378.

our modern world of interconnected and interstate energy flows, where states and the federal government both have significant regulatory authority. This argues for declining to extend the application of the extraterritoriality doctrine to these types of environmental and energy policy cases, eliminating it entirely, as suggested by Judge Sutton, or otherwise limiting its scope significantly. Courts could justify declining to extend the extraterritoriality doctrine on the grounds that traditional discrimination analysis under the dormant Commerce Clause and federal preemption doctrine are, together, a sufficient check on states that might otherwise overreach on exercising regulatory authority to the detriment of interstate markets and other states.[319] Moreover, even if courts did not eliminate the extraterritoriality doctrine entirely, they could decline to apply it when a range of factors exist that tend to show that state energy policy or other state policy that impacts interstate markets does not run afoul of the principles behind the dormant Commerce Clause. These factors, many of which are also highly relevant to the dormant Commerce Clause discrimination analysis, could include: (1) the presence or absence of a motivation to protect local businesses and economic interests; (2) the nature of the regulatory justification for the state law and its weight as compared to the need for federal uniformity; (3) whether out-of-state costs are properly calibrated to redress local harms; and (4) the absence of federal preemption.

As noted earlier, federal preemption doctrine limits state action that conflicts with federal authority, and the dormant Commerce Clause addresses discrimination against out-of-state economic interests in favor of in-state economic interests. To also create a central role for the extraterritoriality doctrine as a separate and distinct barrier under the dormant Commerce Clause seems misguided, particularly in the context of energy policy where the states have always played a central role and where many state efforts today are to address environmental protection goals rather than to promote in-state industries or in-state economic interests. The current spate of lawsuits over state energy policy is an opportunity for courts to rethink the role of the extraterritoriality doctrine and eliminate or at least significantly limit its application in light of the significant role states play and have always played in state energy policy.

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319. *See, e.g.*, Pharm. Research & Mfrs. v. Walsh, 538 U.S. 644, 669–70 (2003) (declining to extend extraterritoriality analysis of price affirmation cases to Maine prescription drug rebate program); *id.* at 674–75 (Scalia J., concurring) (rejecting use of dormant Commerce Clause to invalidate legislation except for facially discriminatory legislation on grounds that it has no support in the text of the Constitution).

V. CONCLUSION

This Article explores the role of the extraterritoriality doctrine in dormant Commerce Clause jurisprudence in the context of state laws attempting to reduce GHG emissions. Despite the continuing confusion surrounding the role of the doctrine, the Supreme Court and the federal courts of appeal that have relied on the doctrine have, for the most part, invalidated laws that regulate commercial activities in other states in order to protect the economic interests of the target state's businesses or consumers. Where the state's goals are clearly to protect public health or the environment, the appellate courts have generally allowed the state law to stand. Such results appear consistent with the goal of the dormant Commerce Clause—to prevent economic discrimination against out of state interests—and focus on the local benefits and the burdens on interstate commerce. All state regulation influences decisions made by market actors in other states who wish to participate in interstate markets. This is particularly true when it comes to fuels, electricity, and other energy resources connected by interstate electric grids and fuel supply chains. However, the mere fact that an interstate market exists for a product should not limit the ability of states to enact policy measures to protect public health and the environment even it influences decisions of market actors in other states. That does not appear to be the role of the dormant Commerce Clause in general or the extraterritoriality doctrine in particular. This tension between "regulating" out of state conduct and "influencing" out of state conduct is highlighted in the California LCFS case and the Minnesota NGEA case. Both cases illustrate state efforts to reduce GHG emissions through regulating sales of energy to in-state consumers—a traditional subject of state regulation. The fact that these sales are part of interstate markets for fuels and electricity does not necessarily mean the regulations implicate the extraterritoriality doctrine. Instead, a more nuanced approach that considers discrimination, local benefits, and actual impacts on interstate commerce is more consistent with federalism principles and the goals of the dormant Commerce Clause.