Dormant Commerce Clause Review of a Lifecycle Analysis Regulation: *Rocky Mountain Farmers Union v. Corey*

Justin N. Leonelli

Abstract

Global warming has become the forefront leading environmental issue of the twenty-first century. After decades of neglect by our society, there is now a general consensus among scientists, politicians, and the general public that the world can no longer afford to be ignorant of this issue. There is a major threat that global warming is on the verge of posing serious environmental and economic effects. Concern about these negative effects has fostered proposals for potentially costly legislation to limit activities that contribute to global warming. This case note addresses a new, unique form of environmental legislation known as lifecycle analysis regulations. The constitutionality of lifecycle analysis regulations is a gray area in the law and has facilitated inconsistent decisions in different jurisdictions. Part I of this case note explores the origin of California's recent enactment of a lifecycle analysis regulation, the Low Carbon Fuel Standard (LCFS). Part II analyzes a recent decision, Rocky Mountain Farmers Union v. Corey*, which hinged on the constitutionality of the Low Carbon Fuel Standard. Part III delves into the history of the dormant Commerce Clause and addresses where the constitutional doctrine stands today. Lastly, Part IV argues why the Court of Appeals was correct in ruling that California's LCFS, as a lifecycle analysis regulation, does not constitute facial discrimination or extraterritorial regulation. More importantly, it will also set forth an overlooked reason for leaving California's LCFS implemented as valid legislation: Congress' implied will.*

Part I: The Development of California's Low Carbon Fuel Standard

California's efforts to protect the environment have been pioneering, with particular concern for emissions from the transportation sector.[1] Since the mid 1950's California has acted at the state level to regulate air pollution from motor vehicles by prohibiting the sale of unapproved commerce.[2] Based on this longstanding history of concern, the first federal emission standards drew largely on California's experience to fashion and to improve the national efforts at emissions control.[3] The Clean Air Act's comprehension and uniform federal legislation governing air pollution prevention and control, emissions standards, acid rain reduction, permits, and stratospheric ozone protection, also draws upon California's expertise in the area.[4] When instituting uniform federal regulations for air pollution in the Clean Air Act, "Congress consciously chose to permit California to blaze its own trail with minimum federal oversight."[5] To illustrate this point, Section 209(a) of the Clean Air Act expressly prohibits state regulation of emissions from motor vehicles.[6] However, the same section allows California to adopt its own standards if it determines that the State standards are *at least* as protective of public health and the welfare of the general public as the applicable federal standards.[7]

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[1] Rocky Mountain Farmers Union v. Corey, 730 F.3d 1070, 1077 (9th Cir. 2013) *cert. denied*, 134 S. Ct. 2875 (2014), *cert. denied sub nom.* Am. Fuel & Petrochemical Mfrs. Ass'n v. Corey, 134 S. Ct. 2875 (2014), *cert. denied*, 134 S. Ct. 2884 (2014).
[2] Motor & Equip. Mfrs. Ass'n, Inc. v. E.P.A., 627 F.2d 1095, 1109 (D.C. Cir. 1979).
[3] *Id*. at 1110.
[4] Rocky Mountain Farmers Union v. Goldstene, 843 F. Supp. 2d 1042 (E.D. Cal. 2011) *aff'd sub nom*. Rocky Mountain Farmers Union v. Corey, 730 F.3d 1070 (9th Cir. 2013).
[5] *Corey*, 730 F.3d at 1078 (quoting Ford Motor Co. v. EPA, 606 F.2d 1293, 1297 (D.C. Cir. 1979)) [MEMA].
[6] 42 U.S.C.A. § 7543(a) (1990).
[7] *Id*. § 7543(b) (emphasis added).

Other states are bound to follow either the federal standards or the California standards, but are not permitted to adopt standards of their own.[8]

The auto industry, energy industry and other fuel based industries vigorously objected to this "waiver provision and [were] adamant that the nature of [its] manufacturing mechanism required a single national standard in order to eliminate undue economic strain on the industry."[9] However, Congress continued to encourage California to "expand its pioneering efforts at adopting and enforcing motor vehicle emission standards different from and in large measure more advanced than the corresponding federal program; in short, to act as a kind of laboratory for innovation."[10] Congress continues to endorse California's role as a pioneer in developing air-quality standards, even through warnings of possible damage to the nation's economy.

As threats of global warming became a more serious concern throughout the nation, California felt especially vulnerable. Climate change could seriously affect some of California's largest industries, including agriculture, wine, skiing, recreation and commercial fishing and forestry, in addition to many other tourist attractions.[11] Faced with these threats, the California legislature enacted Assembly Bill 32, the Global Warming Solutions Act of 2006.[12] The goal of this act was to reduce California greenhouse gas ("GHG") emissions to their 1990 level by the year 2020.[13] The California Air Resource Board ("CARB") was empowered to design emission-reduction

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[8] *Id*. § 7507.
[9] *Core*y, 730 F.3d at 1079 (quoting MEMA, 627 F.2d at 1109).
[10] *Id*.
[11] *Corey*, 730 F.3d at 1079.
[12] *Id*.
[13] *Id*.

regulations to meet this goal.[14] CARB implemented a three-step approach designed to lower GHG emissions from the transportation sector: (1) reducing emissions at the tailpipe by establishing progressively stricter emissions limits for new vehicles ("Tailpipe Standards"); (2) integrating regional land use, housing, and transportation planning to reduce the number of "vehicle miles traveled" each year ("VMT Standards"); and (3) lowering the embedded GHGs in transportation fuel by adopting the Fuel Standard to reduce the quantity of GHGs emitted in the production of transportation fuel.[15] While the Tailpipe and VMT standards work on the demand side, the Fuel Standard is directed at the supply side, by reducing the carbon intensity[16] of transportation fuels that are burned in California.[17]

In January of 2007, "the California governor issued Executive Order S-01-07, which directed CARB to adopt regulations that would reduce the average GHG emissions attributable to California's fuel market by ten percent by" the year 2020.[18] In response, CARB developed the Low Carbon Fuel Standard.[19] The Fuel Standard "applies to nearly all transportation fuels currently consumed in California and any fuels developed in the future."[20] "[T]he Fuel Standard [implemented] a declining annual cap on the average

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[14] *Id.*
[15] *Id.*
[16] "A fuel's carbon intensity is the amount of lifecycle greenhouse gas emissions caused by production and transportation of the fuel. Carbon dioxide is the namesake gas of carbon intensity values, but it is not the only GHG. Others, such as methane, exert a more potent greenhouse effect than carbon dioxide [but are exceedingly rare]." *See* CARB's Initial Statement of Reasons for the Fuel Standard ("ISOR") IV-1 (proposed March 5, 2009).
[17] *Corey*, 730 F.3d at 1079-80.
[18] *Id.* at 1080.
[19] *Id.*
[20] *Id.*

carbon intensity of California's transportation-fuel market."[21] "To comply with the Fuel Standard, a fuel blender must keep the average carbon intensity of its total volume of fuel below the Fuel Standard's annual limit."[22] Producers of fuel with a carbon intensity score greater than the standard set by the LCFS can meet the standard by selling more lower-carbon fuels, using banked credits, or purchasing credits from other fuel providers.[23] This raises the value of lower-carbon fuels and decreases the value of higher carbon-intensity fuels.[24]

In order to determine the total carbon intensity of a given transportation fuel, the Fuel Standard uses a "lifecycle analysis."[25] The lifecycle analysis analyzes factors such as (1) growth and transportation of the fuel; (2) efficiency of production; (3) type of electricity used to power the plant; (4) fuel used for thermal energy; (5) milling process used; (6) transportation of the fuel to the blender in California; and (7) conversion of land to agricultural use.[26] Inasmuch as GHGs mix in the atmosphere, "all emissions related to transportation fuels used in California pose the same local risk to California citizens."[27] For example, one ton of carbon dioxide emitted when fuel is produced in Nebraska or Mexico has the same harmful effect on Californians as much as one ton of carbon dioxide emitted in Sacramento.[28] The reasoning behind the lifecycle analysis is simple: "[A]ll GHGs emitted before the fuel enters a vehicle's gas tank would be excluded from

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[21] *Id.*
[22] *Id.*
[23] *Goldstene*, 843 F. Supp. 2d at 1051.
[24] *Id.*
[25] *Corey*, 730 F.3d at 1080.
[26] *Id.* at 1083.
[27] *Id.* at 1080.
[28] *Id.* at 1081.

California's regulation [if a lifecycle analysis were not used]."[29] "[Fuels] generate or avoid emissions at different stages of their production, transportation, and use, depending on when the conversion to fuel requires or displaces energy."[30] "An accurate comparison is possible only when it is based on the entire lifecycle emissions of each fuel."[31] In other words, CARB designed the Fuel Standard to account for emissions associated with all aspects of the production, refining, and transportation of a fuel, with the aim of reducing total GHG emissions. This lifecycle analysis applies to both ethanol based fuel and crude oil based fuel.[32]

Part II: Rocky Mountain Farmers Union v. Corey

Considering the vast restrictions implemented by the Low Carbon Fuel Standard, many businesses and trade groups, both inside and outside the state, began to argue that "[it] places too high of a burden on refiners and fuel makers, which will ultimately affect supply and drive prices up at the pump."[33] In December of 2009, the Rocky Mountain Farmers Union, among others, filed actions in the U.S. District Court for the Eastern District of California challenging CARB's implementation of the LCFS.[34] Plaintiffs sought a preliminary injunction and moved for summary judgment, arguing that the LCFS violated the dormant Commerce Clause.[35] Their argument hinged on the

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[29] *Id.*
[30] *Id.*
[31] *Id.*
[32] *Corey*, 730 F.3d at 1080-84.
[33] Jason Derean, *Court Upholds Calif.'s Low Carbon Fuel Standard,* Bloomberg Business Week, Sept. 19, 2013, http://www.businessweek.com/ap/2013-09-19/court-upholds-calif-dot-s-low-carbon-fuel-standard.
[34] Rocky Mountain Farmers Union v. Goldstene, 843 F. Supp. 2d 1042, 1047 (E.D. Cal. 2011) *aff'd sub nom*. Rocky Mountain Farmers Union v. Corey, 730 F.3d 1070 (9th Cir. 2013).
[35] *Goldstene,* 843 F. Supp. at 1047.

contention "that the LCFS discriminates against interstate commerce, regulates transactions occurring outside of the state, and imposes substantial burdens on interstate commerce that . . . exceed any putative benefits."[36]

In return, CARB filed a motion to dismiss and cross-motion for summary judgment, arguing that California has broad authority to regulate fuels pursuant to Section 211(c)(4)(B) ("Section B") of the Clean Air Act.[37] CARB's argument hinges on the fact that California receives special consideration under the Clean Air Act.[38] In particular, CARB argues that Section B specifically authorizes California to control fuels and expressly authorizes the LCFS.[39] In order to better understand Section B, it must be read in conjunction with Section 211(c)(4)(A) ("Section A"). Section A states that "[e]xcept as otherwise provided in [Section B] . . . no State (or political subdivision thereof) may prescribe or attempt to enforce, for purposes of motor vehicle emission control, any control or prohibition respecting any characteristic or component of a fuel or fuel additive in a motor vehicle or motor vehicle engine."[40] Section B then goes on to exempt California by stating, "California is the only state that qualifies for the [Section A] preemption exemption."[41] CARB argues that the plain language of Section B "authorizes California to adopt fuel regulations that burden interstate commerce.[42] CARB submits that in enacting Section B, "'Congress explicitly conferred on California the authority to regulate fuels sold in California but manufactured both inside and outside

[36] *Id.* at 1052.
[37] *Id.* at 1054.
[38] *Id.* at 1050.
[39] *Id.*
[40] 42 U.S.C.A. § 7543(a) (1990).
[41] *Id*. § 7543(b).
[42] *Goldstene,* 843 F.Supp2d at 1068.

of California,' and that as a result 'Congress directly authorized California to regulate a significant aspects of interstate commerce.'"[43] In other words, CARB argues that what might otherwise be a Commerce Clause violation, that in enacting Section B, "Congress was keenly aware that allowing and encouraging California to set a stricter emission standard would affect interstate commerce."[44] By Congress explicitly granting California the authority to regulate fuels, CARB concludes that Section B authorizes California to adopt regulations that violate the Commerce Clause.[45]

In determining whether or not the LCFS was subject to Commerce Clause scrutiny, the District Court analyzed the scope of the Commerce Clause. "The Commerce Clause is in its negative aspect . . . a limitation on the regulatory authority of the states."[46] "Thus, although a state has power to regulate commercial matters of local concern, a state's regulations violate the Commerce Clause if they are discriminatory in nature or impose an undue burden on interstate commerce."[47] "For a state regulation to be removed from the reach of the dormant Commerce Clause, congressional intent must be unmistakably clear."[48] "'As a result, to authorize a Commerce Clause violation, Congress must do more than simply authorize a State to regulate in an area, it must "affirmatively contemplate otherwise invalid state legislation' and clearly express its intent to 'remove federal Constitutional constraints.'"[49] Additionally, defendants bear the

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[43] *Id.* at 1069.
[44] *Id.*
[45] *Id.*
[46] *Id.*
[47] *Id.*
[48] *Id.* at 1069 (quoting South-Central Timber Dev., Inc. v. Wunnicke, 467 U.S. 82, 91 (1984)).
[49] *Id.*

burden of "demonstrating this clear and unambiguous intent."[50] Therefore, in order for plaintiffs' Commerce Clause claims to fail as a matter of law, CARB had the burden of establishing that "Congress expressly, unmistakably, and unambiguously authorized California to violate the Commerce Clause."[51]

In its Motion to Dismiss Order, the District Court rejected CARB's argument that Section B insulated Defendants from Commerce Clause scrutiny.[52] After citing to a variety of cases, the court found that, "[a] federal provision that exempts a state law from preemption under another federal statute is insufficient to exempt the state law from the requirements of the Commerce Clause."[53] The court also noted that the Clean Air Act provides nothing in the text or history of its legislation that clearly evidences Congress' intent in Section B to extend to California "new powers."[54] CARB could not demonstrate that through Section B of the Clean Air Act, Congress "affirmatively contemplated and authorized California to (i) discriminate against other states; (ii) engage in extraterritorial regulation of conduct outside of California; and (iii) impose burdens on interstate and foreign commerce that clearly outweigh local benefits."[55] For the preceding reasons, the District Court concluded that CARB had failed to bear their burden to establish by clear and unmistakable evidence that Congress intended to exempt the LCFS from scrutiny under the Commerce Clause.[56]

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[50] *Id.* at 1069 (quoting Wyoming v. Oklahoma, 502 U.S. 437, 458 (1992)).
[51] *Id.* at 1069.
[52] *Id.*
[53] *Id.*
[54] *Id.* at 1070.
[55] *Id.*
[56] *Id.*

The District Court next addressed the standard of review for the Commerce Clause claim. In determining the standard of review, if the court found that the LCFS overtly discriminates against interstate commerce or impermissibly regulates interstate commerce, then the court was to apply a strict scrutiny analysis.[57] However, if the court found that the LCFS was nondiscriminatory, then the Court was to apply the *Pike* balancing test: whether the burden imposed on interstate commerce is clearly excessive in relation to the putative local benefits.[58]

Plaintiffs contended that the LCFS was subject to strict scrutiny analysis because it discriminates against out-of-state interests.[59] "A law or regulatory scheme can discriminate against out-of-state interests in three different ways: (1) facially; (2) exercising extraterritorial control; or (3) in practical effect."[60] Plaintiffs argue that the LCFS discriminates in all three ways.[61]

The District Court ruled that the LCFS discriminates against interstate commerce both facially and by exercising extraterritorial control.[62] The court based its reasoning on three main factors. First, the court found that the LCFS discriminates against out-of-state fuels by taking into consideration that location of the production facility and distance the product travels when calculating carbon intensity scores.[63] Second, the court found that the LCFS differentiates among fuel sources based on "activities inextricably intertwined with origin; assigning carbon intensity scores based in part on the electricity powering

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[57] Rocky Mountain Farmers Union v. Goldstene, 843 F. Supp. 2d 1087, 1047 (E.D. Cal. 2011).
[58] *Id*. at 1085.
[59] *Id*.
[60] *Id*.
[61] *Id*.
[62] *Id*. at 1090-93.
[63] *Id*. at 1087.

facilities that produce fuel.[64] In other words, out-of-state fuel facilities more often rely on polluting power sources (particularly coal) than California does. Third, the court found that the LCFS unconstitutionally regulates activities outside its borders by using a formula to compute carbon intensity scores that has an input for lifecycle GHG emissions associated with the production of a fuel, while those emissions occur outside of California.[65] Because of this unequal carbon intensity scoring, the District Court reasoned that the LCFS creates an economic barrier against products of another state and thus impermissibly discriminates on its face against out-of-state entities.[66]

Once a state law is shown to discriminate against interstate commerce, the burden falls on the State to demonstrate both that the statute or regulation "serves a legitimate local purpose," and that its purpose could not be served as well by available nondiscriminatory means.[67] While the District Court found that the LCFS serves a local and legitimate interest to reduce the risks of global warming, it ruled that CARB failed to meet its burden of establishing that that there are no nondiscriminatory means to serve this purpose.[68]

In the District Courts conclusion, it recognized that the federal government could permissibly use a lifecycle analysis approach in federal regulations of carbon intensity.[69] However, the federal government has not chosen to do so. In passing the LCFS, the court held that California impermissibly usurped the powers of the federal government and

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[64] *Id*.
[65] *Id*. at 1091-93.
[66] *Id.* at 1090.
[67] *Id.* at 1093.
[68] *Id.* at 1093-94.
[69] *Id*. at 1094.

reached beyond its boundaries to regulate wholly outside of its border.[70] The District Court granted Rocky Mountain's request for a preliminary injunction concluding that the Fuel Standard violated the dormant Commerce Clause.[71]

CARB timely appealed the District Court's judgments and ruling on the motion for preliminary injunction to the United States Court of Appeals for the Ninth Circuit.[72] On appeal, the same issue was presented: whether the LCFS, implemented by CARB in furtherance of California's Global Warming Solutions Act, impermissibly violated the dormant Commerce Clause.[73] The Court of Appeals ruled in favor of CARB, reversing the lower court's decision and holding that "the [LCFS] does not facially discriminate against out-of-state commerce. Further, the [LCFS] does not violate the dormant Commerce Clause's prohibition on extraterritorial regulation."[74]

The court first noted that "[f]or dormant Commerce Clause purposes, discrimination simply means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter."[75] Under the dormant Commerce Clause, "[i]f a statute discriminates against out-of-state entities on its face, in its purpose, or in its practical effect, it is unconstitutional unless it serves a legitimate local purpose, and [that] purpose could not be served as well by available, nondiscriminatory means."[76] Absent this type of discrimination, "[the court] will uphold the law, unless the burden

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[70] *Id.*
[71] Rocky Mountain Farmers Union v. Corey, 730 F.3d 1070, 1086 (9th Cir. 2013) *cert. denied,* 134 S. Ct. 2875 (2014), *cert. denied sub nom.* Am. Fuel & Petrochemical Mfrs. Ass'n v. Corey, 134 S. Ct. 2875 (2014), *cert. denied*, 134 S. Ct. 2884 (2014).
[72] *Corey*, 730 F.3d at 1086.
[73] *Id.* at 1078.
[74] *Id.*
[75] *Id.* at 1087.
[76] *Id.*

imposed on interstate commerce is clearly excessive in relation to the putative local benefits (this is known as the *Pike Balancing Test).*"[77]

To begin its discussion, the court examined the argument that the factors the LCFS uses to calculate carbon intensity scores prejudice out-of-state producers.[78] The court held that the district court erred by ignoring GHG emissions related to: (1) the electricity used to power the conversion process, (2) the efficiency of the fuel plant, and (3) the transportation of the fuel products.[79] The court stated, "All factors that affect carbon intensity are critical to determining whether the [LCFS] gives equal treatment to similarly situated fuels."[80]

The Court of Appeals disagreed with the District Court's holding that two factors used to calculate carbon intensity scores were discriminatory: transportation and electricity source.[81] The court explained that "these factors bear on the reality of GHG emissions . . . [and that if California] is to have any chance to curtail GHG emissions, it must be able to consider all factors that cause those emissions."[82] Transportation as a carbon intensity factor was found to be valid because it applies evenly to all fuels and measures real difference in the harmful effects of GHG emissions.[83] Additionally, the electricity used to power fuel production facilities is also valid because the "LCFS treats the electricity used by all producers the same way based on the real risks posed by

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[77] *Id.*
[78] *Id.* at 1088.
[79] *Id.*
[80] *Id.*
[81] *Id.* at 1090.
[82] *Id.*
[83] *Id.* at 1091.

different sources of generation."[84] Many Midwest producers have largely located their plants near cheap and carbon intensive sources of coal-fired electricity generation.[85] "Drawing electricity from the coal-fired grid might be the easiest and cheapest way to power an fuel plant. But the dormant Commerce Clause does not guarantee that fuel producers may compete on the terms they find most convenient."[86]

The Court of Appeals next considered the argument that the LCFS regulates extraterritorial conduct because it controls how out-of-state ethanol producers maker their product.[87] The court emphasized that the LCFS 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, and it imposes no civil or criminal penalties on non-compliant transactions completed wholly outside the state.[88] Instead, it "encourages the use of cleaner fuels through a market system that applies only to fuel blenders in California and the producers who contract with them."[89]

The court looked to illustrate its point with a Supreme Court case. In *Pharm. Research & Mfrs. Of Am. V. Walsh*, 123 S.Ct. 1855 (2003), Maine had encouraged drug companies to enter into rebate agreements favorable to Maine consumers.[90] If a company refused, Maine subjected that company's Medicaid sales to "prior authorization," reducing the company's sales and market share in Maine.[91] The drug companies argued that the rebate provision controlled the terms of their sales to distributors entirely outside

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[84] *Id.* at 1092.
[85] *Id*. at 1091.
[86] *Id*. at 1091-1092.
[87] *Id.* at 1101.
[88] *Id.* at 1102-03.
[89] *Id.* at 1103.
[90] *Id.*
[91] *Id.*

the state.[92] The Court declined to extend the doctrine, noting that Maine "did not regulate the price of any out-of-state transaction or tie the price of its in-state products to out-of-state prices."[93] Maine's hope to alter the decisions of the drug companies was permissible because Maine did not seek to control them.[94] States may not mandate compliance with their preferred policies in wholly out-of-state transactions, but they are free to regulate commerce and contracts within their boundaries with the goal of influencing out-of-state choices of market participants.[95]

The court of appeals then explained that while California cannot impose its own regulatory standards on another jurisdiction, it may regulate with reference to local harms, structuring its internal markets to set incentives for firms to produce less harmful products for sale in California.[96] By implementing the LCFS, the court concluded "California properly based its regulation on the harmful properties of fuel. It [did] not control the production or sale of fuel wholly outside California."[97]

The Court of Appeals concluded its discussion with public policy reasons support its decision.[98] The court recognized that California faces tremendous risk from climate change and that California is uniquely vulnerable to the perils of global warming.[99] It is CARB's job to institute a solution that recognizes the costs of harmful carbon emissions.[100] The court stressed that "California should be encouraged to continue and to

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[92] *Id.*
[93] *Id.*
[94] *Id.*
[95] *Id.*
[96] *Id.* at 1104.
[97] *Id.*
[98] *Id.* at 1106.
[99] *Id.*
[100] *Id.*

expand its efforts to find a workable solution to lower carbon emission. If no such solution is found, California residents and people worldwide will suffer great harm. . . If the [LCFS] works, encouraging the development of alternative fuels by those who would like to reach the California market, it will help ease California's climate risks and inform other states as they attempt to confront similar challenges."[101]

Thus, because the Court of Appeals did not find the LCFS to be facially discriminatory, the case will go back to the District Court for a trial under the *Pike Balancing Test:* whether the burden imposed on interstate commerce is clearly excessive in relation to the putative local benefits.[102] Before trial, the Plaintiffs can ask for a rehearing *en banc* in the Ninth Circuit, although those are rarely granted. It is likely that the legal challenge to the LCFS case will end up in the U.S. Supreme Court. The LCFS impacts a national energy industry that generates tens of billions of dollars of economic activity. Those adversaries of the LCFS are confident they stand on sound legal ground: the dormant Commerce Clause.

Part III: History of the dormant Commerce Clause

The Commerce Clause is rooted in the United States Constitution, which provides that Congress shall have the power "[t]o regulate Commerce . . . among the several States."[103] Although the Clause speaks in terms of power bestowed upon Congress, "[t]he Court long has recognized that it also limits the power of the States to erect barriers against interstate trade."[104] The dormant Commerce Clause, the negative aspect of the Commerce Clause, "directly limits the power of the States to discriminate against

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[101] *Id.* at 1107.
[102] *Id.*
[103] U.S. CONST. art. I, § 8, cl. 3.
[104] Lewis v. BT Inv. Managers, Inc., 447 U.S. 27, 35 (1980).

interstate commerce."[105] This is one of the few constitutional doctrines effectively utilized to promote the core economic rights implicit in the Constitution.[106]

However, the dormant Commerce Clause is only invoked when Congress has not enacted valid, federal legislation.[107] When Congress enacts valid legislation, the legal issue is one of "preemption."[108] "[T]here is no doubt that Congress can preclude, displace, or "preempt" state law.[109] The Supremacy Clause of the United States Constitution provides that if there is a conflict between federal law and state law, the resolution is clear: the state law is simply invalid.[110] Additionally, when Congress intends to 'occupy the field,' all state law in the area is preempted.[111] However, this article is concerned exclusively with the dormant Commerce Clause.

The history and theory underlying the dormant Commerce Clause is well developed. The Founding Fathers put precedence on the belief that that Nation's economy needed to be centrally regulated in order to prosper.[112] Without such central regulation, there was concern that the states would act unilaterally and against the greater

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105 Jennifer L. Larsen, *Discrimination in the Dormant Commerce Clause*, 49 S.D. L. REV. 844, 845 (2004).
106 *Id.* at 866.
107 Patricia Weisselberg, *Shaping the Energy Future in the American West: Can California Curb Greenhouse Gas Emissions from Out-of-State, Coal-Fired Power Plants Without Violating the Dormant Commerce Clause?,* 42 U.S.F. L. REV. 185, 205 (2007).
108 *Id.*
109 U.S. CONST. art. VI, cl. 2.
110 *Id.*
111 Crosby v. National Foreign Trade Council, 530 U.S. 363, 372-73 (2000) (providing that field preemption occurs where the scheme of federal regulation is so pervasive as to make reasonable the inference that Congress left no room for the states to supplement it).
112 THE FEDERALIST No. 22 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (arguing that "there is no object, either as it respects the interests of trade or finance, that more strongly demands a federal superintendence [than the power to centrally regulate commerce]").

good of the United States.[113] During the 1970's, the dormant Commerce Clause evolved into a two-tier model comprised of the "discrimination" tier and the "undue burden" tier.[114] However, in the past few decades the undue burden tier has been nearly abandoned.[115] In every dormant Commerce Clause decision since 1990, if the Court has analyzed the state statute at issue under the discrimination tier, the regulation has been found unconstitutional.[116] Consequently, only when the state regulation is analyzed under the balancing tier does it have a realistic chance at survival.[117] In order to fully appreciate the modern approach to the dormant Commerce Clause, it is important to understand the circumstances under which the doctrine was established and how it developed over time.

The first Supreme Court case interpreting the meaning of congressional silence in a commerce context was *Gibbons v. Ogden*.[118] While the Court found that there was actual conflict between federal and state law, thus giving rise to a preemption issue, Justice Marshall did acknowledge that the federal commerce power was exclusive.[119] In other words, Justice Marshall conceded that the federal commerce power implicitly

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[113] THE FEDERALIST No. 42 (James Madison) (Clinton Rossiter ed., 1961) (stating, "A very material object of this power was the relief of the States which import and export through other States, from the improper contributions levied on them by the latter").
[114] Jennifer L. Larsen, *Discrimination in the Dormant Commerce Clause,* 49 S.D. L. REV. 844 (2004).
[115] *Id.*
[116] *Id.*
[117] *Id.* at 851-52.
[118] Gibbons v. Ogden, 22 U.S. 1, 3 (1824). In *Gibbons v. Ogden,* New York had granted an exclusive steamboat-operating license, which was ultimately owned by Ogden. *Id.* Gibbons obtained a federal license to operate his vessel between New York and New Jersey, but was enjoined by the New York courts from sailing it in New York waters because of Ogden's monopoly. *Id.* Gibbons argued that the New York monopoly violated the federal commerce power. *Id.*
[119] *Gibbons*, 22 U.S. at 3.

forbids the states from taking any action that affects interstate commerce. Although this Supreme Court decision did not make any dispositive holding about the effect of congressional silence on states' regulatory powers, it was foundational because it opened up the door to future claims against states' influence on interstate commerce.

It was not until 1851, when the Court brought forth the substance of the dormant Commerce Clause by focusing on whether the subject matter being regulated was "local" or "national."[120] In *Cooley v. Board of Wardens,* the Court affirmed a Pennsylvania law that required ships entering or leaving the port of Philadelphia to hire a local pilot.[121] The Court ruled that states were free to regulate those aspects of interstate commerce that were of such a local nature as to require different treatment from state to state.[122] The Supreme Court found Pennsylvania's regulation was permissible because pilotage in local harbors was a subject appropriate for local control.[123] Although the basic policy behind *Cooley* has remained in effect – that the dormant Commerce Clause blocks some but not all state regulations that affect interstate commerce – there were at least two major shortcomings in the *Cooley* case: First, courts had trouble distinguishing between those subjects that required uniform federal regulation, and those that needed diverse local regulation.[124] Second, *Cooley* looked merely to the subject being regulated, but did not consider how extensively the states' regulation affected interstate commerce. [125]

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[120] Cooley v. Bd. of Wardens of Port of Philadelphia, to Use of Soc for Relief of Distressed Pilots, Their Widows & Children, 53 U.S. 299 (1851).
[121] *Id.*
[122] *Id.* at 300.
[123] *Id.* at 299.
[124] Laurence H. Tribe, *American Constitutional Law*, 407 (2nd ed. 1988).
[125] *Id.*

In the years following the *Cooley* decision, it had become clear that "the classification of regulatory subject matter as 'national' or 'local' was more conclusory than explanatory."[126] To remedy these shortcomings, Supreme Courts began to focus on the method of challenged regulation, attempting to ascertain the extent to which the state action interferes with interstate commerce. This analysis was first conducted by categorizing the effects of state regulation on interstate commerce as either "direct" or "indirect."[127]

In *Atchison, T. & S.F. Ry. Co. v. R.R. Comm'n of State of California*, a state statute was upheld requiring railroad cars to us electric headlights of a specified minimum capacity.[128] The Court reasoned that because the regulatory impact was felt by interstate commerce "only indirectly, incidentally, and remotely," the statute should be appropriately upheld.[129] Conversely, state regulations affecting interstate commerce were continuously struck down during the "direct" and "indirect" era if "the regulatory impact upon interstate commerce was deemed so substantial as to be a 'direct' burden" on interstate commerce.[130]

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[126] *Id.* at 408.
[127] Carter v. Carter Coal Co., 298 U.S. 238, 307 (1936) (stating, "[t]he distinction between a direct and an indirect effect turns, not upon the magnitude of either the cause or the effect, but entirely upon the manner in which the effect has been brought about").
[128] Atchison, T. & S.F. Ry. Co. v. R.R. Comm'n of State of California, 283 U.S. 380 (1931).
[129] *Id.* at 386; *see also* Smith v. State of Alabama, 124 U.S. 465 (1888) (upholding a state law requiring that all locomotive engineers within the state be licensed by a state board of examiners); Erb v. Morasch, 177 U.S. 584 (1900) (municipality may restrict train speed within city limits); Chicago, R.I. & P. Ry. Co. v. State of Ark., 219 U.S. 453 (1911) (state may require three brakemen on freight trains over 25 cars).
[130] Laurence H. Tribe, *American Constitutional Law*, 407 (2nd ed. 1988); *see also* Seaboard Air Line Ry. Co. v. Blackwell, 244 U.S. 310 (1917) (striking down state law requiring railroad trains to check their speed before coming to any public crossing. Under the requirement, an interstate train would have been obliged to come almost to a

However, the distinction between "direct" and "indirect" effects upon interstate commerce proved to be no more satisfactory than the "local" versus "national" distinction. As in many legal doctrines, it is difficult to reconcile the results of the dormant Commerce Clause decisions. In recent years, there has been a "near unanimous consensus regarding the central policy concern of the doctrine. Under the dormant commerce clause doctrine, the states may not engage in economic protectionism by [discriminating against or burdening] interstate commerce."[131] This consensus lead to the development and adoption of a two-tiered approach in analyzing dormant Commerce Clause cases: cases are reviewed under either the "discrimination" tier or the "balancing" tier (also known as "undue burden" standard).[132]

A. Discrimination Tier

Under the discrimination tier, "discrimination" has been often defined as "directly burdening, in any form or under any guise, the prosecution of interstate business."[133] There are three ways a statute may "discriminate" against out-of-state entities: (1) facially, (2) in its purpose, or (3) in its practical effect.[134] If a state regulation or statute is found to discriminate against interstate commerce in any one of the preceding three ways, the law is invalid *per se* unless it can survive a strict scrutiny analysis.[135] In order to pass a strict scrutiny analysis, it must be shown that the statute "serves a legitimate local

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complete stop as many as 124 times within 123 miles, increasing the time required to get from Atlanta to South Carolina by more than six hours).

[131] David S. Day, *The Rehnquist Court and the Dormant Commerce Clause Doctrine: The Potential Unsettling of the "Well-Settled Principles"*, 22 U. TOL. L. REV. 675, 678 (1991).

[132] Jennifer L. Larsen, *Discrimination in the Dormant Commerce Clause,* 49 S.D. L. REV. 844, 850 (2004).

[133] Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511, 522 (1935).

[134] Larsen, *supra* note 49, at 854.

[135] *Id*. at 851.

purpose, and that purpose could not be served as well by available, nondiscriminatory means."[136]

1. Facial Discrimination

The first type of discrimination, facial discrimination, is found within the text of the statute.[137] An early example of facial discrimination can be found in *Baldwin v. G.A.F. Seelig, Inc.*[138] This case involved a New York attempt to set minimum prices to be paid by New York milk dealers to New York Milk producers.[139] The Statute also prohibited retail sales in New York of out-of-state milk, if the milk had been purchased at a lower price than the one set for purchases within New York.[140] The admitted purpose of the statute was to make sure that New York's farmers could earn an adequate income.[141] However, the Supreme Court held the Act unconstitutional. Justice Cardozo claimed that the statute "set a barrier to traffic between one state and another as effective as if customs duties, equal to the price differential, had been laid upon the thing transported."[142] The Court concluded in ruling, "Neither the power to tax nor the police power may be used by the state of destination with the aim and effect of establishing an economic barrier against competition with the products of another state or the labor of its residents."[143] In this case, only out-of-state entities were directly burdened. Therefore, the likelihood of abuse was great because no New York constituency was likely to fight against it.

[136] Maine v. Taylor, 477 U.S. 131 (1986).
[137] Larsen, *supra* note 49, at 861-62.
[138] Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511 (1935).
[139] *Id.* at 519.
[140] *Id.*
[141] *Id.* at 523.
[142] *Id.* at 521.
[143] *Id.* at 527.

Another clear case of facial discrimination is presented in *Chemical Waste Management, Inc. v. Hunt.*[144] The Court reviewed an Alabama statute regulating hazardous waste disposal.[145] The statute imposed a base fee for the disposal of hazardous waste, and an additional fee if such waste was produced out-of-state.[146] The Court held that this statute facially discriminate against out-of-state waste producers.[147] The Alabama statute clearly provided that the waste generated out-of-state was subject to higher taxes.[148] Consequently, there was different treatment of out-of-state interests compared to the treatment of in-state interests.

In *Baldwin* and *Chemical Waste Management*, only out-of-state entities were directly discriminated against. However, facial discrimination can also be found when the discrimination is against both out-of-state and in-state entities. Some would argue that discrimination is the unequal treatment of in-state and out-of-state interest and that a statute cannot be considered discriminatory when its burdens fall on both in-state as well as out-of-state interests.[149] However, this argument was further considered in *Dean Milk Co. v. City of Madison.*[150] In *Dean Milk*, the Court reviewed the constitutionality of an ordinance that regulated the sale of milk in Madison, Wisconsin.[151] The statute prescribed that all milk sold in Madison must be produced at a facility located within five miles of the City.[152] This prohibited, in effect, out-of-state and in-state milk processors

[144] Chem. Waste Mgmt., Inc. v. Hunt, 504 U.S. 334 (1992).
[145] *Id.* at 337.
[146] *Id.* at 338.
[147] *Id.* at 334.
[148] *Id.* at 342.
[149] C & A Carbone, Inc. v. Town of Clarkstown, N.Y., 511 U.S. 383, 391 (1994).
[150] Dean Milk Co. v. City of Madison, Wis., 340 U.S. 349 (1951).
[151] *Id.* at 350.
[152] *Id.*

that were located more than five miles outside of the City from selling milk within the City.[153] The Court ruled that it was immaterial that in-state interests were burdened in addition to out-of-state interests.[154] Therefore, the Court held that the statute was facially discriminatory.[155]

2. Discrimination In Effect

The second type of discrimination, "discrimination in effect," is found when the effect of the statute or regulation is discriminatory.[156] This type of discrimination is illustrated in the classic case of *West Lynn Creamery, Inc. v. Healy*.[157] The State imposed an order that required every dealer of milk to make a monthly premium payment into the Massachusetts Dairy Equalization Fund.[158] This premium applied to all dealers equally, whether they were located in-state or out-of-state, and regardless of where the milk was purchased, sold or distributed.[159] Standing on its own, this statute was not facially discriminatory. However, another statute provided that the funds from the Massachusetts Dairy Equalization Fund were to be distributed to all in-state milk dealers.[160] Again, this latter statute is also non-discriminatory. Nonetheless, the Court ruled that when the two statutes operate together they create a scheme that discriminates against out-of-state milk dealers.[161] "Although the tax also applies to milk produced in Massachusetts, its effect on Massachusetts producers is entirely offset by the subsidy provided exclusively to

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153 *Id.* at 354.
154 *Id.*
155 *Id.*
156 Jennifer L. Larsen, *Discrimination in the Dormant Commerce Clause*, 49 S.D. L. Rev. 844, 855 (2004).
157 W. Lynn Creamery, Inc. v. Healy, 512 U.S. 186 (1994).
158 *Id.* at 190.
159 *Id.*
160 *Id.* at 191.
161 *Id.* at 194.

Massachusetts dairy farmers. Like an ordinary tariff, the tax is thus effectively imposed only on out-of-state products."[162] Therefore, the Court deemed the pricing scheme discriminatory in effect and thus, unconstitutional.[163]

Another example of discrimination in effect was found in *C & A Carbone, Inc. v. Town of Clarkstown.*[164] The city of Clarkstown, New York enacted an ordinance that required all waste collected within the City to be processed at the local transfer station.[165] Although the statute did not discriminate based upon origin of the waste, residence of the waste hauler, or where the waste would ultimately be deposited, the Court concluded that the ordinance was nonetheless discriminatory in effect.[166] The Court found that the ordinance directed haulers to use a certain processing facility, instead of allowing them the option to choose where to process the waste they collected.[167] The Court held that, "[al]though the Clarkstown ordinance may not in explicit terms seek to regulate interstate commerce, it does so nonetheless by its practical effect and design."[168]

3. Discriminatory Purpose

A third type of discrimination, "discriminatory purpose," occurs when the statute or regulation is enacted with a discriminatory purpose.[169] Courts will often look to the motives, objectives and ends of the legislative body in pursuing a finding of

[162] *Id.*
[163] *Id.* at 207.
[164] C & A Carbone, Inc. v. Town of Clarkstown, N.Y., 511 U.S. 383 (1994).
[165] *Id.* at 383.
[166] *Id.* at 394.
[167] *Id.* at 391.
[168] *Id.* at 394.
[169] S. Dakota Farm Bureau, Inc. v. Hazeltine, 340 F.3d 583, 593 (8th Cir. 2003).

discriminatory purpose.[170] Because evidence of purpose is hard to find, the courts use this method of finding discrimination less frequently.[171] There are, however, instances in which courts find the purpose of state legislation is discriminatory.

In *Kassel v. Consolidated Freightways Corp.*, the Court found unconstitutional an Iowa statute that prohibited double-tractor trailers in excess of sixty-five feet in length from using its highways.[172] The alleged purpose of the statute was to increase safety on Iowa highways because double tractor-trailers were not as safe as singles.[173] The Court relied on three factors to determine the statute was enacted with a discriminatory purpose: First, the Court decided that the safety objectives of the statute were 'illusory.'[174] Second, the Court opined that the statute disproportionately burdened out-of-state interests.[175] Third, the Court relied on statements made by Iowa's governor indicating he supported the ban on double tractor-trailers because it benefited Iowa-based companies.[176] Based on the preceding factors, the Court determined that Iowa's purpose in enacting the regulation was to burden interstate trucking.[177]

B. Undue Burden Tier

Under the second tier, "undue burden," if a state law is found to be non-discriminatory but has incidental effects on interstate commerce, it will be found valid unless "the burden imposed on such commerce is clearly excessive in relation to the

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[170] Jennifer L. Larsen, *Discrimination in the Dormant Commerce Clause*, 49 S.D. L. Rev. 844, 855 (2004).
[171] *Id.*
[172] Kassel v. Consol. Freightways Corp. of Delaware, 450 U.S. 662, 665 (1981).
[173] *Id.* at 667.
[174] *Id.* at 694.
[175] *Id.* at 663.
[176] *Id.* at 685.
[177] *Kassel*, 450 U.S. at 677.

putative local benefits."[178] In applying the balancing test, courts consider a number of factors such as whether a local purpose is legitimate, whether less burdensome alternatives exist, and the extent of the burden in light of its local benefits.[179]
This test, also known as the *Pike Balancing Test,* was brought to bear in Minnesota v. Clover Leaf Creamery Company.[180] In *Clover Leaf*, the Supreme Court examined a Minnesota statute that banned the retail sale of milk in plastic, nonreturnable, and non-refillable containers.[181] The justification of this enactment was fear of energy waste and natural resource depletion.[182] When the statute was challenged on the ground that it imposed an unreasonable burden on interstate commerce, the Court applied a dormant Commerce Clause analysis.[183] After the Court found the statute to be non-discriminatory, it then applied the balancing test to determine whether the burden imposed on interstate commerce was clearly excessive in relation to the putative local benefits.[184] The Court concluded that the statute's burden on interstate commerce was minor in that there would be little inconvenience to dairies in having to use different types of packaging in Minnesota as compared to surrounding states.[185]

Another illustration of the undue burden, balancing test can be found in *Norfolk Southern Corporation v. Oberly*.[186] In that case, there was a challenge against the Delaware Coastal Zone Act, which plaintiffs argued would impede the coal export

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[178] Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970).
[179] Will Sears, *Full-Impact Regulations and the Dormant Commerce Clause*, 39 Colum. J. Envtl. L. 157, 166 (2014).
[180] Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456 (1981).
[181] *Id.* at 456.
[182] *Id.* at 459.
[183] *Id.* at 457.
[184] *Id.*
[185] *Id.*
[186] Norfolk S. Corp. v. Oberly, 822 F.2d 388 (3d Cir. 1987).

trade.[187] The Court stated that although the statute was not discriminatory, it was appropriate to apply the balancing test to weigh the burdens and benefits.[188] The court identified the benefits of the statute as "[t]he protection of the coastal environment from transfer facility pollutant emissions and the industrial development that might result from the presence of such transfer operations."[189] The Court then found that any burden this statute imposes on interstate commerce, such as a slight increased cost to do business with Delaware, is exceedingly minor.[190] Therefore, the Court held that the Delaware Coastal Zoning Act was constitutional.[191]

C. Extraterritorial Regulation

As previously stated, the undue burden tier is rarely used to find a state law unconstitutional. Another principle way to strike down nondiscriminatory regulation is with a finding of "extraterritorial control." Extraterritorial control is a principle that holds a state "may not project its legislation into other states."[192] In the modern era, the Supreme Court has rarely held that statutes violate the extraterritoriality doctrine.[193] However, many prominent cases where violations did occur involved similar price affirmation statutes. In *Brown-Forman,* New York required liquor distillers to affirm that the prices of beverages sold in state were no higher than the lowest prices in other

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[187] *Id.* at 390.
[188] *Id.* at 405.
[189] *Id.* at 406.
[190] *Id.*
[191] *Id.*
[192] Peter C. Felmly, *Beyond the Reach of States: The Dormant Commerce Clause, Extraterritorial State Regulation, and the Concerns of Federalism*, 55 ME. L. REV. 467, 484 (2003).
[193] Rocky Mountain Farmers Union v. Corey, 730 F.3d 1070, 1101 (9th Cir. 2013) *cert. denied*, 134 S. Ct. 2875 (U.S. 2014) *cert. denied*, 134 S. Ct. 2875 (U.S. 2014) *cert. denied*, 134 S. Ct. 2884 (U.S. 2014).

states.[194] New York was able to enforce this bar by threatening to revoke distiller's licenses.[195] The Court held that because "the affirmation law had the effect of not only forcing distilleries to abandon promotional plans in other states, but also forcing other states to alter their regulatory schemes, [the legislation was invalid] as a direct restraint on interstate commerce."[196] In so holding, the Court expressly established the extraterritorial control principle that a state may not regulate transactions occurring beyond its borders.[197]

Another similar case evincing the principle of extraterritorial control is *Healy v. Beer Institute, Inc.*[198] In that case, the Connecticut statute required that out-of-state shippers of beer affirm that their products sold to Connecticut wholesalers are no higher than the prices at which those products are sold in the bordering States of Massachusetts, New York, and Rhode Island.[199] After finding that the statute impermissibly controlled commercial activity occurring in the surrounding states, the Court held that the statute exerted extraterritorial control and was thus invalid.[200]

D. Inconsistent Regulation

Courts may also find state law unconstitutional by implementing the "inconsistent regulation" principle. The inconsistent regulations principle is designed to combat two regulatory schemes: (1) state regulations that, if adopted by other states, would impermissible hinder interstate commerce; and (2) state regulations that, if adopted by

[194] Brown-Forman Distillers Corp. v. New York State Liquor Auth., 476 U.S. 573 (1986).
[195] *Id.*
[196] Felmly, *supra* note 55, at 485.
[197] *Id.*
[198] Healy v. Beer Inst., Inc., 491 U.S. 324 (1989).
[199] *Id.* at 324.
[200] *Id.*

other states, would require affected parties to violate the law of other states.[201] This principle was utilized in *American Trucking Associations, Inc. v. Scheiner*.[202] In that case, Pennsylvania had imposed a flat tax upon all trucks using its highways, regardless of whether they engaged in interstate or intrastate commerce. [203] The Court struck down the tax after find that if each state adopted such a law, "there is no conceivable doubt that commerce among the states would be deterred."[204]

Part IV: Scrutinizing Lifecycle Analysis Regulations

The increasing concern over global warming has put more legislation in the courthouse, forcing judges to rule on the constitutionality of environmental regulations that utilize a unique method of evaluation: lifecycle analysis. As discussed previously, lifecycle analysis is a form of environmental regulation that "represents a cradle-to-grave approach for evaluating products and industrial systems."[205] Because the lifecycle analysis provides a more comprehensive view of a products lifecycle, it is easier to measure the entire environmental impact products have. This approach, however, poses serious constitutional difficulties because it accounts for activities taking place outside of any given state. The *Rocky Mountain Farmers* case provides for an example in which two courts scrutinizing the LCFS reached opposite conclusions regarding the validity of a lifecycle analysis under the dormant Commerce Clause. The lower court ruled that California's LCFS violated the dormant Commerce Clause because it constituted facial

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[201] Will Sears, *Full-Impact Regulations and the Dormant Commerce Clause*, 39 Colum. J. Envtl. L. 157, 169 (2014).
[202] Am. Trucking Associations, Inc. v. Scheiner, 483 U.S. 266 (1987).
[203] *Id.*
[204] *Id.* at 284.
[205] Sears, *supra* note 39, at 173.

discrimination as well as an extraterritorial regulation.[206] However, the court of appeals reversed the lower court's ruling and held that California's LCFS did not facially discriminate against interstate commerce or constitute impermissible extraterritorial control.[207] This case note will argue why the Court of Appeals was correct in ruling that California's LCFS, as a lifecycle analysis regulation, does not constitute facial discrimination or extraterritorial regulation. More importantly, it will also set forth an overlooked reason for leaving California's LCFS implemented as valid legislation: Congress' implied will.

As noted previously, facial discrimination is found when the text of the statute or regulation clearly imposes differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter. If a statute discriminates against out-of-state entities on its face, it is unconstitutional *per se* unless it serves a legitimate local purpose, and that purpose cannot be served as well by available, nondiscriminatory means.

California's LCFS does not impose differential treatment of in-state and out-of-state entities. The fuel standard does not base its treatment on a fuels origin, but rather its carbon intensity. The regulation makes no distinction between in-state and out-of-state electricity that is used to power the conversion process. The electricity used to power fuel production facilities is a valid method because it is based on real risks posed by different sources of generation. Many Midwest producers have largely located their

[206] Rocky Mountain Farmers Union v. Goldstene, 843 F. Supp. 2d 1042, 1047 (E.D. Cal. 2011) *aff'd sub nom*. Rocky Mountain Farmers Union v. Corey, 730 F.3d 1070 (9th Cir. 2013).
[207] Rocky Mountain Farmers Union v. Corey, 730 F.3d 1070, 1086 (9th Cir. 2013) *cert. denied*, 134 S. Ct. 2875 (2014), *cert. denied sub nom.* Am. Fuel & Petrochemical Mfrs. Ass'n v. Corey, 134 S. Ct. 2875 (2014), *cert. denied*, 134 S. Ct. 2884 (2014).

plants near cheap and carbon intensive sources of coal-fired electricity generation. While this economically beneficial to those energy producers, the dormant Commerce Clause does not protect out-of-state entities so they may compete on terms most convenient to themselves.

Additionally, transportation as a carbon intensity factor applies evenly to all fuels and measures real differences in the harmful effects of GHG emissions. If the transportation emissions weren't calculated into the carbon intensity analysis, it would undermine the regulation in its entirety.

Extraterritorial control is found when legislation is projected beyond the borders of one state and into another state. California's LCFS is not implemented through means of extraterritorial control. The LCFS says nothing at all about ethanol produced, sold, and used outside California. It does require other jurisdictions to adopt the standards before their fuel can be sold in California. It simply *encourages* other jurisdictions to use cleaner fuels through a market cap system that applies only to the fuel blenders in California and those producers that contract with them. Unlike *Brown Forman*,[208] California is directly burdening itself while applying an indirect and insignificant effect on other states. California is not imposing its regulatory standards on other jurisdictions. It is simply regulating with references to its local harms and is structuring its internal markets to set incentives for firms to produce less harmful products for sale in California. California is not controlling the production or sale of fuel wholly outside of California.

[208] Brown-Forman Distillers Corp. v. New York State Liquor Auth., 476 U.S. 573 (1986) (holding that because "the law had the effect of . . . forcing other states to alter their regulatory schemes, [the legislation was invalid] as a direct restraint on interstate commerce").

Furthermore, the LCFS clearly serves a legitimate local purpose that benefits not only California, but also other territories both foreign and domestic. This fact is generally settled upon. A more difficult issue arises with a showing that the purpose of the LCFS could not be served by other, nondiscriminatory means. However, a lifecycle analysis, by definition, has no equal alternatives. In order to properly implement a lifecycle analysis, one must evaluate a product from the manufacturing stage to the consumption stage. Without such continuous evaluation, a lifecycle analysis does not exist. Therefore, it is imperative that California continues to utilize the LCFS as it is not discriminatory and there is no equal, nondiscriminatory means of achieve its goal.

Even assuming that California's LCFS constitutes extraterritorial control, it must be noted that Congress has implicitly approved it. As stated earlier in the case note, California has long been a frontrunner in efforts to protect the environment. California's pioneering role in the field hasn't gone unnoticed, as the Clean Air Act drew largely on California's experience in the field. In fact, in enacting the Clean Air Act, Congress consciously permitted California to create its own means of addressing air pollution. Section 209(a) of the Clean Air Act expressly prohibits state regulation of emissions from motors vehicles. However, the same section exempts California, allowing it to adopt its own standards that are *at least* as protective as the federal regulations. Other states do not receive the same privilege and are required to follow either the federal standards or the California standards. This is because of California has a longstanding history of success and experience in the field of emissions control. Congress has put its trust in California to be a trailblazer in the field and act as a "laboratory for innovation."[209]

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

The implied will of Congress most certainly should have played a larger role in the constitutional discussion of the LCFS. It is clear that Congress has no problem with allowing California to regulate emission standards with little federal oversight. Therefore, why should the court strike the legislation down when its power to do so, the dormant Commerce Clause, comes from Congress in the first place? The dormant Commerce Clause is a strange form of judicial review, but it is *not* constitutional judicial review. The dormant Commerce Clause is based on implied congressional will. The courts have no inherent authority over the dormant Commerce Clause. Therefore, if the justification of California's LCFS is founded on congressional will, the courts have no basis in striking it down.

As demonstrated in *Rocky Mountain Farmers*, a lifecycle analysis can easily become the subject of a dormant Commerce Clause action. Although the lifecycle analysis bears importance in designing effective environmental regulation, constitutional pushback should be expected against any environmental legislation using lifecycle analysis. The unique constitutional issues that the lifecycle analysis poses, in combination with the growing awareness of global warming, will likely make it subject to much litigation in the future. The way this future litigation is handled will prove to be critical in guiding states as to what actions they may take in seeking to address grave environmental problems.