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Looking Beneath the Surface of *Rocky Mountain Farmers Union* and Dormant Commerce Clause Challenges to State Environmental Efforts

Stephanie Postal*

With Congress in a state of perennial gridlock, California has taken action in the fight against global warming and made notable progress in reducing its greenhouse gas emissions. Since the transportation sector is California’s single largest source of greenhouse gas emissions, the state designed the Low Carbon Fuel Standard to measure and reduce greenhouse gas emissions from transportation fuels. Trade groups, unhappy with this move, challenged the Low Carbon Fuel Standard on dormant Commerce Clause grounds. The district court found the Low Carbon Fuel Standard unconstitutional, but the court of appeals reversed, allowing the regulations to take effect. This Note explores the reasons for these opposite outcomes. It argues that judges’ values play an important role in judicial decision making in general, and in dormant Commerce Clause inquiries in particular. As judges have different values, this leads to inconsistent and unclear dormant Commerce Clause case law. To address this problem, judges should employ deference in these cases, focus dormant Commerce Clause inquiries on whether the challenged statute or regulation discriminates in practical effect, and require evidence of actual discrimination.

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INTRODUCTION

Just as the federal government implements environmental regulations to protect and improve water and air quality via the Environmental Protection Agency (EPA), state governments implement environmental regulations via state environmental agencies. In the absence of a federal climate change plan, the California state legislature enacted Assembly Bill 32 in 2006 to reduce the state’s greenhouse gas (GHG) emissions. In 2007 Governor Arnold Schwarzenegger specifically directed the California Air Resources Board (CARB) to design the Low Carbon Fuel Standard (LCFS) in order to reduce GHGs emitted during the production, delivery, and consumption of all transportation fuels sold in the state.

The dormant Commerce Clause (DCC) is an implied Constitutional limit that prohibits states from discriminating against out-of-state interests, unduly burdening interstate commerce, or impermissibly regulating conduct outside the state. In Rocky Mountain Farmers Union v. Goldstene, a collection of farmers, corn ethanol producers, and fuel refiners brought a DCC challenge against California’s LCFS. In 2011, the United States District Court for the Eastern District of California ruled that the LCFS violated the DCC, but in 2013 a split panel of the United States Court of Appeals for the Ninth Circuit

reversed the district court’s ruling. The Ninth Circuit remanded the case to the district court to determine if the ethanol provisions of the LCFS discriminated in purpose or practical effect and denied the request for rehearing en banc. The Supreme Court also denied the request to hear the case.

This Note analyzes the circuit and district courts’ opposing conclusions in Rocky Mountain Farmers Union to illustrate the influential role values can play in DCC cases. It suggests the broad definition of discrimination in the DCC context leaves room for the values of individual judges to influence whether a state law is upheld in DCC cases. Each DCC inquiry is fact specific, which means there is rarely precedent that is directly on point. Hence state environmental regulations may be invalidated or upheld based on the relative importance judges place on environmental regulation versus economic interests, creating an inconsistent DCC jurisprudence. To avoid the idiosyncratic and unpredictable outcomes characteristic of current DCC case law, the doctrine must be applied using a principled and consistent method. This Note argues that courts should apply the DCC by focusing on whether the evidence shows that there has been actual discrimination in practical effect.

Part I of this Note provides background on the DCC. The LCFS and its challenged provisions are outlined in Part II. Part III describes the decisions of the district court and Ninth Circuit in Rocky Mountain Farmers Union. Part IV discusses how judges’ different values or priorities vis-à-vis environmental and economic concerns may impact judicial decisions in general and how the different values expressed by the district court and Ninth Circuit may have led to the opposing outcomes in Rocky Mountain Farmers Union. In Part V, this Note argues that in DCC challenges courts should constrain their focus to whether there is evidence that demonstrates discrimination in practical effect.

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6. Rocky Mountain Farmers Union v. Goldstene, 843 F. Supp. 2d at 1078–79; Rocky Mountain Farmers Union v. Corey, 730 F.3d 1070, 1078 (9th Cir. 2013).
7. Rocky Mountain Farmers Union v. Corey, 730 F.3d 1070, 1078 (9th Cir. 2013); Rocky Mountain Farmers Union v. Corey, 740 F.3d 507, 508 (9th Cir. 2014).
I. DORMANT COMMERCE CLAUSE BACKGROUND

Part I.A outlines the principles of the modern DCC. In Part I.B, this Note identifies and discusses areas of uncertainty within the DCC. Part I.C introduces scholarly observations about the impact of the DCC on environmental protections. Finally, Part I.D highlights predominant criticisms by Supreme Court justices.

A. Principles and Examples

The Commerce Clause of Article I, Section 8 of the Constitution, states that Congress has the power “[t]o regulate commerce . . . among the several States.”12 From this positive grant of power, courts have inferred a negative aspect that prohibits states from discriminating against or placing an undue burden on interstate commerce.13 This implicit aspect of the Commerce Clause is known as the “negative” or “dormant” Commerce Clause. Since the DCC is an exceptionally broad topic, this Note will confine its analysis to modern DCC jurisprudence and will not discuss the market-participant doctrine or state taxation of interstate commerce.14

According to the Supreme Court, a principal purpose of the DCC is guarding against economic protectionism: “[T]he dormant Commerce Clause is driven by concern about ‘economic protectionism that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors.’”15 Another purpose is protecting out-of-state parties who cannot address the burdens of a state law through political recourse and are therefore reliant on the DCC to protect their interests.16

A court’s first and most crucial step in analyzing whether a state law violates the DCC is determining whether the law “regulates evenhandedly with only ‘incidental’ effects on interstate commerce, or discriminates against interstate commerce.”17 In the DCC context, discrimination is broadly defined and “simply means differential treatment of in-state and out-of-state economic

15. Dep’t of Revenue of Ky., 553 U.S. at 337–38 (quoting New Energy Co. of Ind. v. Limbach, 486 U.S. 269, 273–74 (1998)). Economic isolation is another term for states acting in an economically protectionist manner. Id. at 338.
interests that benefits the former and burdens the latter."\(^{18}\) A state law can be
discriminatory on its face, in its purpose, or in its practical effect.\(^{19}\) When a
state law is discriminatory, it is “virtually per se invalid”\(^{20}\) and will be
evaluated under a strict scrutiny test. To survive DCC strict scrutiny, the state
must show both that the law “serves a legitimate local purpose, and that this
purpose cannot be served as well by available nondiscriminatory means.”\(^{21}\)
State laws that are discriminatory are almost certain to be struck down under
the DCC’s strict scrutiny test—a finding of discrimination is practically
outcome determinative.\(^ {22}\) Only once, in \textit{Maine v. Taylor}, has the Supreme
Court found that a discriminatory state law has met the requirements of the
strict scrutiny test.\(^ {23}\)

The Supreme Court has evaluated whether a state law is discriminatory in
numerous contexts. In \textit{City of Philadelphia v. New Jersey}, the Court found a
New Jersey statute that prohibited waste “collected outside the territorial limits
of the State” from being imported into New Jersey to be discriminatory on its
face.\(^ {24}\) The Court also found the statute discriminated against out-of-state
interests in its “plain effect” because it effectively closed New Jersey’s borders
to out-of-state waste.\(^ {25}\) Similarly, in \textit{Wyoming v. Oklahoma}, the Supreme Court
invalidated an Oklahoma statute that required 10 percent of the coal used in
Oklahoma coal-fired generating plants to be mined in-state.\(^ {26}\) The Court stated
that by expressly reserving 10 percent of fuel sourcing for in-state coal,
Oklahoma excluded coal mined in other states solely based on origin and thus
discriminated against interstate commerce on its face and in effect.\(^ {27}\) In
contrast, in \textit{Minnesota v. Clover Leaf Creamery Co.}, the Court held that a
Minnesota statute banning the sale of milk in nonreturnable, nonrefillable
plastic containers but allowing paperboard containers was not discriminatory
and did not violate the DCC.\(^ {28}\) The Court found the Minnesota statute was not

\(^{22}\) ERWIN CHEMERINSKY, \textit{CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES} 442 (4th ed. 2011)
(“State laws that discriminate rarely are upheld, while nondiscriminatory laws are infrequently
invalidated.”).
\(^{23}\) 477 U.S. 131, 138, 152–53; David S. Day, \textit{The “Mature” Rehnquist Court and the Dormant
\(^{24}\) 437 U.S. 617, 619 n.2, 628 (1978). In a strict analysis of facial discrimination, a court would
consider only the text of the statute. See Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520
\(^{25}\) \textit{City of Philadelphia}, 437 U.S. at 627, 629.
\(^{27}\) \textit{Id.}
purposes were environmental: to reduce waste, reduce energy consumption, and conserve natural
resources. \textit{Id.} at 458–59. The Court stated that even when states legislate in environmental protection
discriminatory because its restrictions were not based on where the milk or containers came from.\textsuperscript{29}

If the state law is found to be evenhanded rather than discriminatory, it faces a much lower level of scrutiny in the form of the \textit{Pike} balancing test.\textsuperscript{30} Under the \textit{Pike} balancing test, a state law “will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.”\textsuperscript{31} For example, in \textit{Minnesota v. Clover Leaf Creamery Co.}, the Supreme Court applied the \textit{Pike} balancing test by evaluating whether in-state businesses would profit at the expense of out-of-state businesses.\textsuperscript{32} The Court took into consideration the fact that pulpwood was a “major Minnesota product” while plastic resin producers, who stood to be harmed, were located entirely outside of Minnesota.\textsuperscript{33} The Court found that this higher burden on out-of-state plastics producers was not clearly excessive in comparison to the environmental benefits.\textsuperscript{34} Because the statute was nondiscriminatory and survived the \textit{Pike} balancing test, the Court held that the statute did not violate the DCC.\textsuperscript{35}

In addition to prohibiting discrimination against interstate commerce, the DCC forbids any state statute “that directly controls commerce occurring wholly outside the boundaries of a State.”\textsuperscript{36} This prohibition is referred to as the extraterritoriality doctrine and the “critical inquiry is whether the practical effect of the regulation is to control conduct beyond the boundaries of the State.”\textsuperscript{37}

In evaluating whether a state statute or regulation exceeds the limits of a state’s authority, courts also consider “how the challenged statute may interact with the legitimate regulatory regimes of other States and what effect would arise if not one, but many or every, State adopted similar legislation.”\textsuperscript{38} This risk of inconsistent or conflicting regulations being adopted by different states is sometimes referred to as “economic Balkanization.”\textsuperscript{39} The national economic union of the states, which allows the U.S. to compete against foreign entities in commerce, is the primary rationale for guarding against Balkanization.\textsuperscript{40} The Court has stated that no state “may place itself in a position of economic

\textsuperscript{29} \textit{Id.} at 471–72.
\textsuperscript{30} \textit{Id.}
\textsuperscript{31} \textit{Wyoming}, 502 U.S. at 455 n.12.
\textsuperscript{32} \textit{Pike v. Bruce Church, Inc.}, 397 U.S. 137, 142 (1970).
\textsuperscript{33} \textit{Minnesota}, 449 U.S. at 472–73.
\textsuperscript{34} \textit{Id.} at 473–74.
\textsuperscript{35} \textit{Id.}
\textsuperscript{36} \textit{Id.}
\textsuperscript{38} \textit{Id.}
\textsuperscript{39} \textit{Id.}
\textsuperscript{40} \textit{Hughes v. Oklahoma}, 441 U.S. 322, 325 (1979).
\textsuperscript{40} \textit{See Baldwin v. G.A.F. Seelig, Inc.}, 294 U.S. 511, 523 (1935) (“The Constitution was . . . framed upon the theory that the peoples of the several states must sink or swim together.”).
isolation” or use its powers to establish “an economic barrier against competition with the products of another state.”41 However, the pursuit of a national economic union “unfettered by state-imposed limitations on interstate commerce” is tempered by concern for the autonomy of individual states.42

B. Grey Zones of the DCC

There are multiple areas within the DCC that remain unclear—they have either not yet been fleshed out by the Supreme Court or the rules stated by the Court do not reflect the analyses that courts tend to employ.

Courts perform the most crucial and outcome-determinative aspect of the DCC analysis, the finding of whether a state law is discriminatory, with only vague language to guide them.43 Courts must determine where to draw the line between discriminatory statutes and those with permissible “incidental” effects in each case. In Pike v. Bruce Church, Inc., the Court described statutes with “only incidental” effects on interstate commerce as non-discriminatory.44 In Hughes v. Oklahoma, the Court stated the determination a court must make is “whether the challenged statute regulates evenhandedly with only ‘incidental’ effects on interstate commerce, or discriminates against interstate commerce.”45 Because the definition of discrimination in the DCC context is so capacious and DCC cases tend to be fact specific, lower courts are left to distinguish “discrimination” from “incidental burdens” with little guidance.46

Oregon Waste Systems, Inc. v. Department of Environmental Quality of Oregon (Oregon Waste) illustrates the problematic lack of guidance.47 There the Supreme Court ruled that the DCC barred even a small difference in fees between in-state waste and out-of-state waste—a holding seemingly at odds with prior statements that incidental burdens were permissible.48 In Oregon Waste the majority and dissent disagreed about whether the higher surcharge on out-of-state waste was incidental or discriminatory.49 The Oregon Department of Environmental Quality set the surcharge for out-of-state waste at $2.25 per ton, compared to a surcharge for in-state waste of $0.85 per ton.50 The majority

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41. H.P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525, 538 (1949); Baldwin, 294 U.S. at 527.
43. A finding that a state law is discriminatory means it must withstand strict scrutiny. The strict scrutiny test in the Equal Protection context, which is similar to the DCC’s strict scrutiny test, has been called “strict in theory, but fatal in fact.” Fullilove v. Klutznick, 448 U.S. 448, 519 (1980) (Marshall, J., concurring).
44. 397 U.S. 137, 142 (1970).
45. 441 U.S. 332, 336 (1979) (citation omitted).
46. Austin, supra note 10, at 82–83.
49. Id. at 108.
50. Id. at 93.
concluded this distinction was discriminatory.\textsuperscript{51} Chief Justice William Rehnquist disagreed and dissented: “The surcharge works out to an increase of about $0.14 per week for the typical out-of-state solid waste producer.”\textsuperscript{52}

In \textit{Brown-Forman Distillers Corp. v. New York State Liquor Authority} (\textit{Brown-Forman}), the Supreme Court recognized this problematic ambiguity and acknowledged “there is no clear line separating” discriminatory from non-discriminatory state laws.\textsuperscript{53} The Court stated “in either situation, the critical consideration is the overall effect of the statute.”\textsuperscript{54} \textit{Brown-Forman} suggests that it may not always be possible or appropriate to separate DCC analysis into the traditionally distinct phases of a discrimination inquiry and the subsequent application of either strict scrutiny or the \textit{Pike} balancing test. More importantly, the language in \textit{Brown-Forman}’s also leaves room for courts to base their discrimination determination on a relatively objective inquiry—the practical effect of the statute.

Another area the Supreme Court has not fully elucidated is the appropriate DCC analysis when a state law discriminates or makes a distinction, but does so on the basis of something other than origin. In the past the Court has explained that whatever a state’s ultimate purpose, it may not discriminate against out-of-state goods “unless there is some reason, apart from their origin, to treat them differently.”\textsuperscript{55} For example, in \textit{Chemical Waste Management, Inc., v. Hunt} (\textit{Chemical Waste}), the Alabama legislature imposed an additional fee of $72 per ton on out-of-state waste.\textsuperscript{56} The Court noted there was no showing that out-of-state waste was more hazardous than in-state waste, and consequently held the fee was facially discriminatory, did not pass strict scrutiny, and violated the DCC.\textsuperscript{57} Yet the Court suggested that if the out-of-state waste had been more hazardous, the discrimination might have been permissible: “The burden is on the State to show that the discrimination is demonstrably justified by a valid factor unrelated to economic protectionism.”\textsuperscript{58} Likewise, in \textit{Oregon Waste} the Court remarked:

\begin{quote}
[O]f course, if out-of-state waste did impose higher costs on Oregon than in-state waste, Oregon could recover the increased cost through a differential charge on out-of-state waste, for then there would be a “reason, apart from its origin,
\end{quote}

\begin{itemize}
\item \textsuperscript{51} \textit{Id.} at 98.
\item \textsuperscript{52} \textit{Id.} at 108–09 (Rehnquist, C.J., dissenting).
\item \textsuperscript{53} 476 U.S. 573, 579 (1986).
\item \textsuperscript{54} \textit{Id.}
\item \textsuperscript{56} 504 U.S. at 343.
\item \textsuperscript{57} \textit{Id.} at 342, 344–48.
\item \textsuperscript{58} \textit{Id.} at 344 (emphasis in original) (internal quotation marks and citations omitted).
\end{itemize}
why solid waste coming from outside the [State] should be treated differently.\textsuperscript{59}

Because it is exceedingly rare for a state law to survive strict scrutiny under the DCC, the Court’s language in these cases arguably demonstrates that strict scrutiny should not be applied when discrimination is based on a factor other than origin. It would be disingenuous for the Court to have repeatedly discussed this possibility but then still subject such a law to strict scrutiny.

In addition, the contours of a Balkanization analysis—where a court considers how the statute at issue would interact with similar statutes of other states—are fuzzy.\textsuperscript{60} It is unclear whether regulations in other states must be actual and imminent, or whether mere hypothetical regulations suffice for a court to make a finding that Balkanization is likely to occur. There are indications, however, that the Supreme Court leans towards the former view. In one Commerce Clause case, the Court refused to entertain arguments that “other local governments might impose differing requirements as to air pollution” when there was no suggestion that any competing or conflicting regulations existed.\textsuperscript{61} The Ninth Circuit appears split on the issue. In a recent DCC challenge to a California statute banning the sale of foie gras produced by force-feeding, the Ninth Circuit dismissed the plaintiff’s allegation of Balkanization as “based on speculation.”\textsuperscript{62} In contrast, Judge Smith’s dissent to the Ninth Circuit’s denial of rehearing en banc in \textit{Rocky Mountain Farmers Union} stated that the challenged regulation “threatens to Balkanize our national economy” and the negative effects on the national economic union were not speculative because several states had filed amicus briefs.\textsuperscript{63} Judge Smith cited a news article discussing California’s pledge to “align its energy policies with Oregon, Washington, and British Columbia” and argued that this clustering of states was the type of Balkanization the Commerce Clause intended to prevent.\textsuperscript{64}

\textbf{C. The Commerce Clause in Environmental Cases}

The DCC has the ability to meaningfully affect state environmental protections. For instance, the ability of states to control solid waste disposal was significantly impacted by a series of waste management statutes and ordinances struck down by the Supreme Court on DCC grounds.\textsuperscript{65} A sharp

\begin{itemize}
\item \textsuperscript{60} See Healy v. Beer Institute, Inc., 491 U.S. 324, 336 (1989).
\item \textsuperscript{61} Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440, 448 (1960).
\item \textsuperscript{62} Ass’n des Eleveurs de Canards et D’oies du Quebec v. Harris, 729 F.3d 937, 945 n.4, 951 (9th Cir. 2013).
\item \textsuperscript{63} 740 F.3d 507, 512–13 (9th Cir. 2014) (denial of rehearing en banc) (Smith, J., dissenting).
\item \textsuperscript{64} \textit{Id.} at 518 n.6.
\end{itemize}
decrease in the number of U.S. landfills in the 1980s and 1990s resulted in waste traveling a greater distance before disposal, often from more urbanized states to more rural states. The waste control problem during this period has been described as a crisis and a “mini-civil war” between the states over trash. States that wanted to avoid the stigma, smells, or potential health hazards associated with becoming a “dumping ground” for trash enacted statutes and ordinances to protect their landfill space. The Supreme Court’s DCC decisions invalidating these rules had far-reaching implications, such as making it difficult for states to secure financing for solid waste facilities that can cost hundreds of millions of dollars. Recent DCC challenges to states’ efforts to reduce GHG emissions in energy generation and implement renewable portfolio standards underscore that the DCC continues to be used to challenge state environmental measures. Professor Christine Klein studied Commerce Clause decisions involving environmental protections between 1978 and 2001 and concluded that the Supreme Court invalidated both federal and state protections by reducing the scope of the affirmative Commerce Clause while simultaneously increasing the scope of the DCC. Of the eleven cases involving environmental protections that came before the Supreme Court on affirmative or DCC grounds during this time, Maine v. Taylor was the only case in which the Court upheld an

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68. Engel, supra note 66, at 1505, 1511; Murray & Spence, supra note 67, at 75–76.


72. 477 U.S. 131 (1986). In Maine v. Taylor, a Maine statute banning the import of baitfish was found to be discriminatory on its face but withstood strict scrutiny. Id. at 138, 152. The Court deferred to the district court’s findings of fact and gave weight to scientific experts who testified that imported baitfish posed significant threats to Maine’s fisheries. Id. at 144–46, 140–41. Central to the Court’s decision was the fact that there was no way to test shipments of baitfish for the harmful parasites or
environmental protection.  

Klein found that the Court narrowed the scope of the affirmative Commerce Clause by describing wetlands regulated by the federal government as noncommercial. Yet in DCC cases Klein found that the Court described land, water and fish regulated by states as market commodities and invalidated state laws as undue interferences with interstate commerce. These inconsistent characterizations have been used by the Court as a rhetorical device to bolster its environmental hostility. State efforts to protect the environment were not the only ones to fall victim to these inconsistent characterizations of natural resources—federal laws protecting the environment also proved constitutionally vulnerable. During this time, the Court invalidated federal environmental protections by reducing the jurisdiction of the U.S. Army Corps of Engineers to regulate fill of wetlands and struck down state laws that attempted to manage solid waste disposal, groundwater exports, and fish exports. According to Professor Klein, the Supreme Court showed animosity toward regulation in general and environmental protection in particular during this period.

Jay Austin of the Environmental Law Institute makes it clear that the Supreme Court’s DCC decisions have interfered with state efforts to solve environmental problems, and the states have noticed. Austin analyzed state briefs in DCC cases and found that many states have called for the Court to more tightly couple the application of the DCC to its underlying goal of eliminating economic protectionism. In particular, the Court has stretched the concept of discrimination so far that the DCC has strayed from its anti-protectionism purpose. One problem states have with the current doctrine is that they have no opportunity to demonstrate that challenged laws have nonnative species. Id. at 141–43. Testing procedures that had not yet been developed were, in the Court’s view, not an available nondiscriminatory alternative, and were therefore beyond the “reasonable efforts” that states must undertake to avoid restraining the flow of commerce. Id. at 147–48.

73. Klein, supra note 71, at 251–52.
74. Id. at 226, 246.
75. Id. at 246; Christine A. Klein, The Environmental Commerce Clause, 27 HARV. ENVTL. L. REV. 1, 5 (2003) (hereinafter Environmental Commerce Clause).
76. Environmental Commerce Clause, supra note 75 at 4.
77. Klein, supra note 71, at 226.
79. Austin, supra note 10, at 91.
compelling nondiscriminatory purposes.\textsuperscript{82} This is especially apparent in cases where there is little or no evidence that the state law imposes actual burdens on out-of-state parties.\textsuperscript{83}

Austin also stated that the fact-specific nature of both strict scrutiny review and the \textit{Pike} balancing test provide “wide leeway for judicial discretion” and make the doctrine “unduly susceptible to judicial legislation.”\textsuperscript{84} He noted that broad judicial discretion is particularly inappropriate in a judicially created doctrine that lacks a basis in constitutional text.\textsuperscript{85}

\textbf{D. Supreme Court Criticisms of the Dormant Commerce Clause}

Dissents are a common feature of Supreme Court DCC cases. Many justices have criticized the doctrine and called for it to be reformed. Justice Clarence Thomas has been an especially outspoken critic of the DCC, pointing out that it lacks a textual basis in the Constitution and is based on inconsistent or incomplete theories.\textsuperscript{86} In particular, Justice Thomas has argued that the \textit{Pike} balancing test “surely invites us, if not compels us, to function more as legislators than as judges.”\textsuperscript{87} He has further contended that balancing tests can produce disparate or inconsistent results, because “distinctions turned on subtle policy judgments,”\textsuperscript{88} and has called for the Court to abandon the DCC entirely as a “failed jurisprudence.”\textsuperscript{89}

Justice Antonin Scalia has also criticized the DCC and referred to portions of the Court’s DCC jurisprudence as a “quagmire.”\textsuperscript{90} In his critiques, Justice Scalia has described the Court’s DCC decisions as “arbitrary, conclusory, and irreconcilable with constitutional text” and “inherently unpredictable—unpredictable not just because we have applied its standards poorly or inconsistently, but because it requires us and the lower courts to accommodate,

\textsuperscript{82} Austin, supra note 10, at 83, 87.
\textsuperscript{83} Id. at 87.
\textsuperscript{84} Id. at 82–83.
\textsuperscript{85} Id. at 83.
\textsuperscript{86} “The negative Commerce Clause has no basis in the text of the Constitution, makes little sense, and has proved virtually unworkable in application . . . . [N]either of the Court’s proffered theoretical justifications—exclusivity or preemption-by-silence—currently supports our negative Commerce Clause jurisprudence, if either ever did.” \textit{Camps Newfound/Owatonna, Inc. v. Town of Harrison}, 520 U.S. 564, 610–11, 617 (1997) (Thomas, J., dissenting).
\textsuperscript{87} Id. at 619. “We have used the [negative Commerce] Clause to make policy-laden judgments that we are ill equipped and arguably unauthorized to make.” \textit{Id.} at 618. (Thomas, J., dissenting).
\textsuperscript{88} Id. at 620 (Thomas, J., dissenting); \textit{United Haulers Ass’n v. Oneida-Herkimer Solid Waste Mgmt. Auth.}, 550 U.S. 330, 349 (2007) (Thomas, J., concurring).
\textsuperscript{89} \textit{Camps Newfound/Owatonna}, 520 U.S. at 610 (Thomas, J., dissenting).
\textsuperscript{90} \textit{West Lynn Creamery, Inc. v. Healy}, 512 U.S. 186, 210 (1994) (Scalia, J., concurring). Justice Scalia stated that he would be willing to enforce the DCC in two situations: (1) against state laws that facially discriminate, and (2) “against a state law that is indistinguishable from a type of law previously held unconstitutional by this Court. . . . Applying this approach . . . is not always easy, since once one gets beyond facial discrimination our negative-Commerce-Clause jurisprudence becomes (and long has been) a quagmire.” \textit{Id.} (citation omitted).
like a legislature, the inevitably shifting variables of a national economy.” He has repeatedly criticized balancing tests in general, and the *Pike* balancing test in particular, as improper for courts to engage in. Additionally, Chief Justice Rehnquist expressed federalism concerns and frustrations with the DCC in multiple dissents. He believed that the Court had “limited authority to review state legislation under the commerce clause” and doing so could intrude on the “fundamental right of the States to pass laws to secure the safety of their citizens.” Moreover, he found that “safety and protectionist motives cannot be separated,” and that the “hopelessly confused” DCC jurisprudence gave no guidance to states or others as to which laws were valid.

II. CALIFORNIA’S LOW CARBON FUEL STANDARD

The LCFS, a regulation that applies to all fuel sold in California, was challenged on DCC grounds in *Rocky Mountain Farmers Union*. Part II outlines the challenged provisions of California’s LCFS.

The LCFS was promulgated to measure and reduce the GHG emissions of transportation fuels sold in California. In 2006 the California legislature enacted Assembly Bill 32, the California Global Warming Solutions Act, which resolved to reduce California’s GHG emissions to their 1990 level by 2020. In January 2007 Governor Arnold Schwarzenegger issued an executive order that directed CARB to promulgate regulations to reduce average GHG emissions from California’s fuels by 10 percent by the year 2020. The agency did so, and the LCFS became effective on January 12, 2010.

California targeted transportation fuels because transportation-related emissions are California’s single largest source of GHG emissions—they comprise more than 40 percent of the state’s GHG emissions. CARB
developed a multipronged approach to reducing transportation emissions by decreasing consumption of transportation fuels and reducing the GHGs emitted by the fuel consumed.\textsuperscript{100}

The LCFS measures the carbon intensity, or GHG emissions per unit of energy, of transportation fuels.\textsuperscript{101} It requires parties who sell transportation fuel in California to report and keep the average carbon intensity of their total volume of fuel below a specified limit.\textsuperscript{102} The LCFS reduces California’s GHG emissions by reducing the average carbon intensity of California fuels; it does this in part through annual reductions in the allowed carbon intensity.\textsuperscript{103} Fuels with carbon intensities above the applicable annual limit generate deficits, while fuels with carbon intensities below the annual limit generate credits.\textsuperscript{104} California’s LCFS created a market where these credits may be traded, banked (carried over into a future year), or used to offset deficits.\textsuperscript{105} Fuel sellers can choose to comply with the LCFS by using fuels that fall below the allowed carbon intensity or by using credits or purchasing additional credits in the market.\textsuperscript{106}

A transportation fuel’s carbon intensity is determined by a lifecycle analysis which incorporates GHG emissions over the fuel’s lifetime.\textsuperscript{107} GHG emissions are measured during production, distribution, and, finally, consumption of a fuel.\textsuperscript{108} For example, ethanol is made by fermenting and distilling organic feedstocks into alcohol in a resource-intensive process that requires electricity and steam.\textsuperscript{109} Large amounts of carbon dioxide can be emitted during ethanol production.\textsuperscript{110} The lifecycle analysis for corn-based ethanol includes carbon intensities for the (1) growth of feedstock (corn), including a credit for GHGs absorbed during photosynthesis and its
transportation to the processing facility; (2) efficiency of production;\textsuperscript{111} (3) type of electricity used during production; (4) fuel used for thermal energy during production; (5) milling process used during production; (6) credit for animal-feed co-products (distillers’ grains); (7) transportation of the fuel to California; (8) conversion of the land to agricultural use; and (9) combustion of the fuel in a motor vehicle.\textsuperscript{112} By incorporating emissions generated in producing a fuel and transporting it to California, the LCFS measures all GHGs emitted by a transportation fuel from cradle to grave, and reflects the entire lifecycle of the fuel.\textsuperscript{113}

The carbon intensities of individual lifecycle components are accumulated into a “pathway,” which represents the total carbon intensity of a particular fuel.\textsuperscript{114} CARB created default pathways for gasoline and gasoline substitutes that were expected to be sold in California.\textsuperscript{115} These default pathways are available for fuel producers to use and are found in Table 6 of the LCFS.\textsuperscript{116} Table 6 is a lookup table for gasoline and gasoline substitutes and contains carbon intensity values for default and individualized pathways.\textsuperscript{117} The pathway descriptions in Table 6 specify the region of production, milling process, co-product, and source of thermal energy used to produce the fuel.

Fuel producers can comply with the reporting requirements of the LCFS using either default pathways or Method 2.\textsuperscript{118} Method 2 allows producers with carbon intensities lower than the default pathways to register an individualized pathway with CARB.\textsuperscript{119} By using Method 2, fuel producers can replace the carbon intensity of one or more of a default pathway’s components with their actual values.\textsuperscript{120} When a producer uses Method 2 to reduce a fuel’s carbon intensity, the sellers who purchase this fuel will benefit from additional credits.\textsuperscript{121}

\textsuperscript{111} Efficiency is a factor of how much thermal energy and electricity are used in the production process. \textit{Rocky Mountain Farmers Union}, 730 F.3d 1070, 1083 (9th Cir. 2013).

\textsuperscript{112} CARB Opening Brief, supra note 100, at 20–21, 26.

\textsuperscript{113} This is also referred to as “well-to-wheel” GHG emissions. See id. at 20.

\textsuperscript{114} \textit{CAL. CODE REGS.} tit. 17, § 95481(a)(14) (2014).

\textsuperscript{115} \textit{Rocky Mountain Farmers Union}, 730 F.3d at 1082.

\textsuperscript{116} § 95486. Default pathways contain average values for a given location of production, milling process, animal feed co-product, source of thermal energy, type of electricity, efficiency of production, and transportation. An example of a corn-based ethanol pathway is a Midwest ethanol producer, using a dry mill process, producing dry distillers’ grains, using 80 percent natural gas and 20 percent biomass as its source of thermal energy. \textit{Id}.

\textsuperscript{117} \textit{Id}.

\textsuperscript{118} Id. Method 2A allows a regulated party to replace one or more of the default pathway’s values. \textit{Id}. § 95486(c). To qualify for Method 2A, the proposed pathway must be five or more gCO2E/MJ lower than the default and the regulated party must expect to provide more than ten million gasoline gallon equivalents of this fuel in California per year. \textit{Id}. § 95486(e)(2). Method 2B allows producers to propose an entirely new pathway and has no threshold requirements. \textit{Id}. § 95486(d)-(e).

\textsuperscript{119} \textit{Id}. § 95486.

\textsuperscript{120} \textit{Id}.

\textsuperscript{121} See id. § 95485.
III. ROCKY MOUNTAIN FARMERS UNION

Part III outlines the DCC challenges brought against the LCFS and the decisions of the district court and Ninth Circuit in the Rocky Mountain Farmers Union case. Part III.A describes the allegations and holdings with respect to facial discrimination. Part III.B sets out the extraterritoriality and Balkanization claims and holdings.

In 2009, a collection of farmers, corn ethanol producers, and fuel refiners challenged California’s LCFS, alleging that it violated the DCC. In December 2011, the U.S. District Court for the Eastern District of California issued three opinions and found that the LCFS facially discriminated against out-of-state ethanol and impermissibly regulated extraterritorial conduct. The district court held that the LCFS violated the DCC because CARB failed to establish that its purpose could not be achieved through other nondiscriminatory means and issued a preliminarily injunction enjoining enforcement of the LCFS. In 2013, a split Ninth Circuit panel reversed and remanded the case for the district court to apply the Pike balancing test to the crude oil provisions and determine whether the ethanol provisions discriminated in purpose or effect. In 2014, in another split opinion, the Ninth Circuit denied the petition for rehearing en banc. The Supreme Court denied certiorari.

A. Facial Discrimination

In Rocky Mountain Farmers Union v. Goldstene, the Rocky Mountain Farmers Union (RMFU) alleged that the LCFS facially discriminated against out-of-state ethanol by assigning higher carbon intensities to corn-based ethanol produced in the Midwest compared to corn-based ethanol produced in California. The RMFU relied upon carbon intensity values of default pathways listed in Table 6 of the LCFS to argue that Midwest ethanol was...
assigned less favorable carbon intensities than California ethanol. The RMFU asserted that although ethanol produced in different regions has “identical physical and chemical properties,” Midwest corn-based ethanol was assigned a 10 percent higher carbon intensity than California corn-based ethanol, reflecting a differential treatment of in-state and out-of-state interests.

The district court found that the LCFS and Table 6 “explicitly differentiate among ethanol pathways based on origin (Midwest vs. California)” and activities “inextricably intertwined with origin” (electricity supplier and interstate transportation). The district court stated that “[w]hile these factors do not overtly discriminate based on location, they do assign favorable assumptions to California while penalizing out-of-state competitors.” The court found the LCFS was facially discriminatory and therefore strict scrutiny was warranted. In applying strict scrutiny, the district court found that CARB had not shown that its goal of reducing global warming could not be achieved through nondiscriminatory alternative means. Accordingly, the district court granted summary judgment to the RMFU on their DCC claims and also granted a preliminary injunction enjoining CARB from enforcing the LCFS.

In Rocky Mountain Farmers Union v. Corey, a majority of the Ninth Circuit rejected the district court’s conclusion that the LCFS facially discriminated against out-of-state ethanol based on origin and factors “inextricably intertwined with origin.” The Ninth Circuit stated that CARB assigned different carbon intensities to ethanol from different regions for reasons other than origin. The court found that because all sources of ethanol compete in the same market, the district court erred in excluding Brazilian ethanol from its comparison. The Ninth Circuit also found that since the carbon intensities of the default pathways differed based on scientific data, rather than prejudicial presumptions, the district court erred in ignoring GHG emissions related to electricity used in ethanol production, efficiency of ethanol production, and transportation of feedstock, ethanol, and co-products.

131. Rocky Mountain Ethanol, 843 F. Supp. 2d at 1086.
132. Id.
133. Id. at 1087.
134. Id. at 1088.
135. Id. at 1085, 1089–90.
136. Id. at 1093.
137. Id. at 1105.
139. Id.
140. Id. at 1088. The portion of Table 6 used by the Ninth Circuit appears in an appendix to the ruling. Id. at 1110–11.
141. Id. at 1088–89.
The Ninth Circuit analogized to the Supreme Court’s reasoning in *Oregon Waste* to explain why the higher carbon intensities of default Midwest ethanol pathways were not facially discriminatory. In *Chemical Waste*, the Supreme Court reasoned that if waste generated out-of-state waste imposed a higher risk or cost to the state, an additional fee reflecting this higher risk would have a reason other than the origin of the waste for treating them differently. This same logic was echoed two years later in *Oregon Waste*. In turn, the Ninth Circuit found that the greater GHG emissions caused by ethanol produced outside of California were a higher cost imposed on California.

The Ninth Circuit majority also found that the LCFS was not an economically protectionist regulation. The court reasoned that the LCFS did not “isolate California” and protect California ethanol producers because the lowest ethanol carbon intensity values had been achieved by Midwest and Brazilian producers using Method 2. The court highlighted the fact that California ethanol producers were assessed a higher carbon intensity component for transportation than Midwest producers because the corn used by California producers had to be imported and because more GHGs are emitted by importing raw corn into California than importing refined ethanol. In addition, the court noted that Midwest ethanol producers were not “hostage” to the default Midwest pathways; under the LCFS all ethanol producers are free to generate their own lower-emitting electricity and register individualized pathways reflecting lower carbon intensities. The Ninth Circuit used statements from *Exxon Corp. v. Governor of Maryland* to explain that the Commerce Clause protects against prohibitive or burdensome regulations, but does not protect against a state law changing the operation of a market.

Thus, the DCC did not require CARB to ignore the “real differences in carbon intensity.”

The Ninth Circuit majority also found that CARB’s use of regional categories in Table 6 of the LCFS and aggregation of ethanol producers was

144. *Rocky Mountain Farmers Union*, 730 F.3d at 1089–90.
145. 504 U.S. at 344.
147. *Id.* at 1090–92.
148. *Id.* at 1091.
149. *Id.* at 1091–92.
150. *Id.* at 1091–92.
152. *Rocky Mountain Farmers Union*, 730 F.3d at 1092.
153. *Id.*
154. *Id.* at 1093.
reasonable, and held that CARB was not facially discriminatory in constructing the regional categories.\textsuperscript{155} The opinion noted that although CARB’s use of averages would burden some producers and benefit others, CARB chose regional categories based on specific and well-founded reasons.\textsuperscript{156} In particular, the court found that pathway components such as transportation, electricity generation, and plant energy use were correlated with location, and that it was reasonable for CARB to aggregate producers in California, the Midwest and Brazil under regional identifiers.\textsuperscript{157} The court noted that with respect to transportation, ethanol produced in each of the three regions had distinct transportation requirements, and CARB’s choice of regional categories “produced accurate carbon intensity values.”\textsuperscript{158} With respect to regional electricity supplies, the court reasoned that differentiating into three reasons again made sense because more than 80 percent of Brazil’s electricity was hydroelectric, and California had decarbonized its electricity supply by using more natural gas, nuclear, and hydroelectric power than the Midwest.\textsuperscript{159} The Ninth Circuit found that it would place significant burdens on both CARB and ethanol producers to require individual values for every producer.\textsuperscript{160} The court described the availability of individualized pathways as a safety valve that could be used to alleviate misrepresentation of ethanol producer’s carbon intensities.\textsuperscript{161}

Judge Mary Murguia dissented in part, and would have held that the LCFS facially discriminated against out-of-state ethanol.\textsuperscript{162} She argued that in determining whether a state law facially discriminates, courts should look only at the text of the law and not consider its purpose.\textsuperscript{163} According to Judge Murguia, when a state law is found to be facially discriminatory, a state’s reasons for implementing the law should only be considered as part of the application of strict scrutiny.\textsuperscript{164} Judge Murguia stated that the majority was wrong to consider CARB’s reasons while deciding if the LCFS was facially discriminatory.\textsuperscript{165} She applied strict scrutiny to the LCFS and found that

\begin{itemize}
  \item \textsuperscript{155} \textit{Id.} at 1093–94, 1097.
  \item \textsuperscript{156} \textit{Id} at 1093–94, 1096.
  \item \textsuperscript{157} \textit{Id.} at 1094.
  \item \textsuperscript{158} \textit{Id.} at 1096. The court noted that ethanol producers in California must import raw corn from the Midwest, which is bulkier and heavier to transport than refined ethanol, resulting in a higher transportation component for California ethanol than Midwest ethanol in the default pathways. \textit{Id.} at 1083, 1096. Because Brazilian ethanol is shipped by efficient ocean tankers, its transportation component was also less than California ethanol, even though the distance traveled was much greater. \textit{Id.} at 1083.
  \item \textsuperscript{159} \textit{Id.} at 1083 n.4, 1091, 1096.
  \item \textsuperscript{160} \textit{Id.} at 1094.
  \item \textsuperscript{161} \textit{Id.} at 1096.
  \item \textsuperscript{162} \textit{Id.} at 1107–09 (Murguia, J., concurring in part and dissenting in part).
  \item \textsuperscript{163} \textit{Id.} at 1108.
  \item \textsuperscript{164} \textit{Id.}
  \item \textsuperscript{165} \textit{Id.}
\end{itemize}
CARB did not meet the requirement of showing that it could not achieve its goals in a nondiscriminatory manner.\(^\text{166}\)

**B. Extraterritorial Regulation and Balkanization**

In *Rocky Mountain Farmers Union v. Goldstene*, the RMFU also alleged that the LCFS violated the DCC’s extraterritoriality aspect by attempting to control conduct wholly outside California.\(^\text{167}\) Because ethanol pathways in the LCFS include emissions related to land use and animal feed co-products, the RMFU argued that CARB was trying to control “how Midwest farmers used their land and how ethanol plants in the Midwest produce animal nutrients.”\(^\text{168}\) The district court found that the “practical effect” of the LCFS would be to control Midwest farming practices, conduct occurring wholly outside of California.\(^\text{169}\) The district court also found that by requiring producers to supply maps and other documentation related to transportation, California was impermissibly requiring producers to seek “regulatory approval in one State before undertaking a transaction in another.”\(^\text{170}\)

The Ninth Circuit rejected the district court’s finding of extraterritorial regulation and explained that the LCFS differed from state laws the Supreme Court had found to violate the extraterritoriality doctrine.\(^\text{171}\) Unlike the district court, the Ninth Circuit reasoned that by considering transportation, farming practices, and land use factors, CARB was providing incentives rather than controlling these out-of-state activities.\(^\text{172}\) Because the LCFS regulates only the California fuel market, it is free to set incentives that influence out-of-state choices of market participants.\(^\text{173}\) The Ninth Circuit found that the risk of conflict with similar statutes in other states was minimal because CARB was only regulating fuel sold within California.\(^\text{174}\)

**IV. THE ROLE OF VALUES IN ROCKY MOUNTAIN FARMERS UNION**

The broad definitions and fact-specific inquiries of the DCC leave judges applying it considerable leeway. The doctrine does not provide specific guidance either through its rules or precedents and has led to unpredictable outcomes. It is therefore important to understand the role that values of individual judges can play, as well as the values commonly at issue in environmental laws and regulations. Parts IV.A and IV.B present an overview

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166. *Id.* at 1108–09.
168. *Id.* at 1090–91.
169. *Id.* at 1091.
170. *Id.* at 1092 (quoting *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*., 476 U.S. 573, 582 (1986)).
171. *Rocky Mountain Farmers Union*, 730 F.3d 1070, 1101–06 (9th Cir. 2013).
172. *Id.* at 1103.
173. *Id.* at 1101–04.
174. *Id.* at 1105.
of judicial and environmental values respectively. With an awareness of the values lurking in the background, in Part IV.C this Note looks beneath the surface of the opinions of the district court and Ninth Circuit in Rocky Mountain Farmers Union to analyze the different underlying values present. The resulting understanding of the doctrine as it is applied by these courts is used to generate recommendations for a principled and predictable method of applying the DCC in Part V.

A. How Values Affect Judicial Decision Making

Numerous books and articles have explored various models of judicial decision making.175 These models can be used as a framework to analyze the opinions of the district court, Ninth Circuit majority, and Ninth Circuit dissent in the Rocky Mountain Farmers Union cases. The resulting insight deepens our understanding of how the DCC functions in the environmental law context.

The attitudinal model, for example, “claims that judges’ decisions are best explained by the political preferences that they bring to their cases,”176 that judges “decide[] disputes in light of the facts of the case vis-à-vis [their] ideological attitudes and values.”177 On the other end of the spectrum, the legal or legalism model theorizes that judges’ decisions are determined by statutes, constitutional provisions, and precedents.178 Many scholars and commentators have dismissed both the attitudinal and legal models as overly simplistic and concluded that judicial decision making is a complex process and the product of multiple factors.179

Judge Richard Posner explains that “open area[s],” spaces where judges have decisional discretion, are created by legalism’s inability to decide the outcome of cases.180 In these open areas, judges cannot just apply the existing rules of law and therefore make law as “occasional legislators.”181 Judges bring preconceptions such as political opinions, policy judgments, and personal factors to their cases.182 The behavior of judges is also influenced by strategic factors, such as the impact of dissenting in a particular case, and institutional factors, such as the structure of a judicial career and its incentives.183 Posner

176. POSNER, supra note 175, at 19–20.
177. SEGAL & SPAETH, supra note 175, at 86.
178. PACELLE ET AL., supra note 175, at 2.
179. Id. at 199–201.
180. POSNER, supra note 175, at 9.
181. Id. at 5.
182. Id. at 9–10. Personal factors may include temperament, background characteristics such as race and sex, and personal and profession experience. Id. at 10.
183. Id. at 10–11.
describes each judge as navigating these open areas using their own unique mode of reasoning, balancing intuition, pragmatism, and external constraints.\textsuperscript{184}

In the DCC context, the fact-specific and case-by-case nature of the inquiries means there are not likely to be many factually analogous precedents.\textsuperscript{185} The DCC’s broad definition of discrimination also provides judges a large “open area” to navigate. Judges have vast discretion in analyzing state laws under the DCC and personal views and preferences may be more likely to play a role. In addition to a judge’s thoughts about the environment or economics, ideology about the role of states and balance of federalism may influence a judge’s decision by creating initial presumptions.

\section*{B. Values at Stake in Environmental Law}

Environmental laws and regulations often involve two areas of deeply held values: ecology and economics.\textsuperscript{186} Further complicating matters, when it comes to determining societal priorities and preferences, ecology and economics are frequently in opposition.\textsuperscript{187} In addition, many environmental resources or goods do not have a market value and are not easily monetized.\textsuperscript{188} Cost-benefit analyses and funding decisions related to environmental resources are therefore permeated with value implications.\textsuperscript{189} Ecosystem services, for instance, are difficult to translate into economic value because until the demand for a good exceeds its supply, there is often no market for it.\textsuperscript{190} As Professor Jonathan Adler pointed out “[m]any environmental policy questions are matters of subjective value preferences.”\textsuperscript{191}

Additional factors complicate the analysis of environmental injuries. Environmental law often deals with injuries to the natural environment that are geographically widespread and may only be fully realized in the future.\textsuperscript{192} Environmental injuries frequently continue over time, come from multiple causes, and may increase in severity to the point of irreversibility.\textsuperscript{193} The

\textsuperscript{184} See \textit{id.} at 107, 125, 376. External constraints include metrics used to monitor judicial performance, such as backlog, reversal rate, demeanor, and complaints. \textit{id.} at 131.

\textsuperscript{185} Austin, \textit{supra} note 10 at 82–83.

\textsuperscript{186} See HOLLY DOREMUS ET AL., ENVIRONMENTAL POLICY LAW 22 (2012).

\textsuperscript{187} See \textit{id}.

\textsuperscript{188} \textit{Id.} at 19.

\textsuperscript{189} See \textit{id.} at 18–19.

\textsuperscript{190} Geoffrey Heal, Valuing Ecosystem Services, 3 ECOSYSTEMS 24, 24 (2000).


\textsuperscript{193} \textit{Id.} at 747.
complexity of the environment also means that environmental injuries are uncertain and hard to predict in advance.\(^{194}\)

Consider global warming. Climate change is caused by atmospheric GHGs that absorb infrared radiation from the sun, trapping heat in the atmosphere.\(^ {195}\) There is broad scientific consensus that human activities resulting in the accumulation of GHGs in the atmosphere are the primary cause of global warming.\(^ {196}\) Yet, here consensus ends and uncertainty begins. The atmosphere, like many natural resources, is a collective or public good. Public goods are non-excludable, non-rivalrous, and often suffer from market failures due to externalities.\(^ {197}\) There are innumerable sources of GHG emissions, including natural and anthropogenic emitters.\(^ {198}\) Emissions from locations throughout the globe contribute to global warming.\(^ {199}\) Carbon dioxide, the primary GHG emitted by human activities,\(^ {200}\) persists for up to 200 years in the atmosphere after it is emitted.\(^ {201}\) If scientists forecast emissions will continue to increase, is it worth taking action in the short-term or is it better to wait and see? How much harm will result from inaction? How much regulation should we put in place? Who should bear the costs? The list of questions goes on.

In the face of such uncertainty, a person’s views on the appropriate level of GHG emission regulation and the acceptable degree of burden on economic interests are likely to reflect the value they place on the environment. As Professor Richard Lazarus wrote, "[t]he extent to which a person, including a Supreme Court Justice, cares about environmental protection seems especially susceptible to being defined by their own personal experiences with the natural environment."\(^ {202}\) In turn, because the DCC has such broad and flexible rules, judges with different preferences for environmental or economic interests may apply different presumptions of validity for a state law or regulation. Beyond this initial starting point, judges who place a high value on economic interests may be less likely to find that the impacts of a challenged law are merely incidental and therefore more likely to apply strict scrutiny.

\(^ {194}\) Id.


\(^ {197}\) Nick Hanley et al., Introduction to Environmental Economics 16–22 (2d ed. 2013).

\(^ {198}\) Intergovernmental Panel on Climate Change, Climate Change 2001, supra note 195, at 5.

\(^ {199}\) Id. at 8.


\(^ {201}\) Climate Change 2001, supra note 195, at 38.

\(^ {202}\) Lazarus, supra note 192, at 766. “A Justice’s affinity for the natural environment, in turn, influences his or her conceptualization of the legal issues presented in an environmental protection setting.” Id.
C. Contrasting Values in Rocky Mountain Farmers Union

There is a sharp contrast between the opinions of the district court and the Ninth Circuit. It is especially visible in the different starting presumptions of the two courts. The district court presumed California was acting in a protectionist manner. The circuit court presumed that states are deserving of deference. In addition, the courts evince different opinions concerning the constitutional scope of state action. The district court held that the LCFS violated the DCC in multiple ways and enjoined its enforcement. Its interpretation of the DCC would severely limit the ability of states to regulate in either the environmental or business realms. The district court employed the DCC to protect business interests. In contrast, the Ninth Circuit deferred to the state legislature’s decision to reduce GHG emissions, as well as the regulations promulgated by CARB.

The district court’s opinion displayed great skepticism towards CARB’s scientific findings and the LCFS. For example, the court gave little weight to CARB’s assertion that the carbon intensities assigned to default pathways in Table 6 were the result of scientific factors unrelated to location. The district court referred to CARB’s statements concerning electricity sources in California and the Midwest as “assumptions.” Furthermore, the ruling found that even if CARB’s “overtly favorable assumptions” were true, the LCFS was facially discriminatory for favoring California ethanol producers. Finally, the district court used quotation marks around the word “scientific” when introducing CARB’s explanation of carbon intensity factors not based on location.

While acknowledging that the lifecycles of Midwest-produced and California-produced ethanol differ, the district court imputed a discriminatory motive to CARB, reasoning “the point of the LCFS is to penalize the differences between the California and Midwest ethanol.” Before the district court’s ruling, Midwest ethanol producers had applied for twenty-two pathways under Method 2, all of which had been preliminarily approved. Despite this, the district court rejected CARB’s argument that ethanol producers can use

204. Rocky Mountain Ethanol, 843 F. Supp. 2d at 1092–93.
205. Rocky Mountain Farmers Union, 730 F.3d 1070, 1105 (9th Cir 2013).
206. See Rocky Mountain Ethanol, 843 F. Supp. 2d at 1071.
207. See id. at 1087–88.
208. Id. at 1088.
209. Id.
210. Id. at 1087–88. Transportation and electricity sources are two such factors. Id. at 1088.
211. Id. at 1088.
212. Id. at 1082. “[F]uel producers may use individualized values after receiving preliminary approval.” CARB Opening Brief, supra note 100, at 25. By June of 2012, more than 80 individualized ethanol pathways had been at least preliminarily approved and were available for use. Id.
Method 2 to create individualized pathways to overcome carbon intensity averages in default pathways.\textsuperscript{213}

In stark contrast, the Ninth Circuit stated and held to the presumption that CARB’s professed objectives and motivations were true.\textsuperscript{214} The opinion began with a description of California’s historical role in setting vehicle emissions standards and how Congress has encouraged California’s “pioneering efforts” as a “laboratory of innovation.”\textsuperscript{215} The Ninth Circuit took a holistic view of the LCFS and the way it calculates carbon intensities—the court described its origins, goals, and specific mechanisms for ethanol and crude oil.\textsuperscript{216} The opinion further explained that both supply side and demand side measures are needed to ensure California’s progress toward its goal of reducing total GHG emissions from transportation fuels.\textsuperscript{217} The court recognized that for supply-side GHG emissions to be accurately modeled, CARB must be able to account for all emissions that occur during each step of a transportation fuel’s lifecycle, including its production, transportation, and consumption.\textsuperscript{218} The Ninth Circuit took a detailed look at the components of a default ethanol pathway and how they were created.\textsuperscript{219} For example, the opinion emphasized the origin and peer-review of CARB’s model for comparing lifecycle emissions.\textsuperscript{220} The Ninth Circuit’s close examination of the LCFS may explain the majority’s decision to defend the scientific basis of carbon intensity in the LCFS rather than approaching the question of facial discrimination head-on.

Although the Ninth Circuit majority followed the Supreme Court in exploring a possible exception for state laws with “some reason, apart from their origin, to treat [out-of-state articles] differently,” this approach renders the opinion vulnerable to criticism for not following the traditional analytical framework used in DCC cases.\textsuperscript{221} Both Judge Murguia’s dissent and Judge Milan Smith’s dissent to the denial of rehearing en banc argued that the determination of facial discrimination should consider only the text of the regulation.\textsuperscript{222} Under the traditional text-only approach to facial discrimination,

\begin{itemize}
  \item \textsuperscript{213} Rocky Mountain Ethanol, 843 F. Supp. 2d at 1089–90. The district court reasoned that methods which “might allow amendment of the LCFS in a manner that might ameliorate the discriminatory impact” were no defense because CARB had sole discretion over the approval of new pathways. \textit{Id.}
  \item \textsuperscript{214} Rocky Mountain Farmers Union, 730 F.3d 1070, 1097–98 (9th Cir. 2013).
  \item \textsuperscript{215} \textit{Id.} at 1078–79 (quoting Motor & Equip. Mfrs. Ass’n v. EPA, 627 F.2d 1095, 1111 (D.C. Cir. 1979)).
  \item \textsuperscript{216} \textit{Id.} at 1079–84.
  \item \textsuperscript{217} \textit{Id.} at 1079–80.
  \item \textsuperscript{218} \textit{See id.} at 1103.
  \item \textsuperscript{219} \textit{See id.} at 1083–84.
  \item \textsuperscript{220} \textit{Id.} at 1081.
  \item \textsuperscript{221} \textit{Id.} at 1089 (quoting City of Philadelphia v. New Jersey, 437 U.S. 617, 627 (1978)).
  \item \textsuperscript{222} \textit{Id.} at 1108 (Murguia, J., concurring in part and dissenting in part); \textit{Corey}, 740 F.3d 507, 515–16 (9th Cir. 2014) (Smith, J., dissenting). Both of these opinions quoted \textit{Oregon Waste}, which stated that “the purpose of, or justification for, a law has no bearing on whether it is facially discriminatory.” 511 U.S. 93, 100 (1994). \textit{Rocky Mountain Farmers Union}, 730 F.3d at 1108 (Murguia, J., concurring in part and dissenting in part); \textit{Corey}, 740 F.3d at 516 (Smith, J., dissenting).
\end{itemize}
it would have been difficult for the Ninth Circuit majority to avoid finding that the ethanol provisions of the LCFS were facially discriminatory because Table 6’s Midwest default pathway carbon intensity values were higher than the analogous California values.

Yet the availability of individualized pathways and option to use Method 2 support the argument that the LCFS does not discriminate against out-of-state ethanol. Because ethanol producers are not required to use default pathways, the carbon intensities of CARB-provided default pathways do not tell the whole story. Ethanol producers who do not wish to use the default pathways can take an active role in determining their reported carbon intensities. The majority’s less traditional approach to analyzing facial discrimination may also be justified by the Supreme Court’s statements in Brown-Forman. As Part I.B discusses, Brown-Forman left an opportunity for a DCC approach that focuses on the effect of the state statute rather than a distinct finding of discrimination (or not) followed by the application of strict scrutiny or the Pike balancing test.

In their respective extraterritoriality analyses, the district court expressed concern about the impact of state regulations on businesses while the Ninth Circuit voiced a preference for state experimentation. The large size of the California fuel market might have played a role in the district court’s concerns—it reasoned that the “practical effect” of the LCFS would be to control Midwest farming practices and land use decisions. In contrast, the Ninth Circuit stated that the LCFS “might encourage ethanol producers to adopt less carbon-intensive policies.”

Similarly, in analyzing the potential for Balkanization, the two courts had different views. The district court worried about the difficulties ethanol producers might face in satisfying the requirements of fifty potentially different LCFS-like regulations. The Ninth Circuit, on the other hand, deemed national uniformity a question for Congress, which had the ability to follow California’s lead and set a national fuel standard. In the Ninth Circuit’s view, the LCFS was based on the “harmful properties of fuel,” and therefore California was acting within its police powers to structure its fuel market to incentivize the production of less harmful fuel.

In her dissent, Judge Murguia found the ethanol provisions to be facially discriminatory and applied the DCC’s strict scrutiny test to them. She noted that facial discrimination inquiries typically consider only the text of the statute.

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224. Id.
226. Rocky Mountain Farmers Union, 730 F.3d at 1105.
228. Rocky Mountain Farmers Union, 730 F.3d at 1105.
229. Id. at 1104.
230. Id. at 1100–09 (Murguia, J., concurring in part and dissenting in part).
Judge Murguia seemed to imply that facial discrimination should be determined solely on the basis of the default pathways in Table 6, and should not consider whether Method 2 provided an effective or acceptable safety valve.

In applying strict scrutiny, Judge Murguia speculated about ways CARB could have reduced GHG emissions without discrimination. To start, she suggested that California could have “treated ethanol produced in efficient plants more favorably than ethanol from inefficient plants—rather than taking the shortcut of assuming that plants outside of California are less efficient.” This suggestion would have required individualized pathways for all ethanol producers, a far more burdensome approach for both CARB and ethanol producers. If a given producer operated using average efficiency and electricity sources for their region, there would be no change in their fuel’s carbon intensity; they would therefore face an additional reporting burden but not receive any benefit. For a producer utilizing older or less efficient than average production plants, their individualized carbon intensity would be higher than the default pathway’s carbon intensity. The latter producer would be made worse off both in carbon intensity and administrative burden. Furthermore, these burdens would be harder for smaller producers to bear, as they have less ability to amortize the costs of complex reporting requirements.

Although Judge Murguia purported to require that California make only “reasonable efforts” to avoid restraining the flow of commerce, she did not inquire as to the reasonableness of her suggestions. Indeed, she suggested that applying Method 2 individualized pathways to all regulated parties was a “reasonable alternative, even if it is more difficult or costly to implement.” Still, the “reasonable efforts” limitation shows that although strict scrutiny can be applied in a harsh and unforgiving way, there may be room for courts to evaluate the burdens that less discriminatory means would impose on regulated parties and possibly on the state as well. In *Maine v. Taylor*, the Supreme Court considered costs and the time required to develop an alternative in its analysis of “reasonable efforts” a state must make. Judge Murguia’s dissent did not consider that by offering producers a choice between default pathways and Method 2’s individualized pathways, the LCFS provided regulated parties with flexibility. Further, Judge Murguia’s dissent did not consider that the “nondiscriminatory alternative” of Method 2 is producer-driven and provides

231. *Id.* at 1108.
232. *Id.* at 1109.
233. *Id.*
234. *Id.*
235. *See id.*
producers who felt unfairly burdened by the default pathways with an opportunity to remedy inaccurate carbon intensity assessments.237

V. RECOMMENDATIONS FOR THE DORMANT COMMERCE CLAUSE

The broad definition of discrimination and fact-specific nature of DCC inquiries means that the DCC can be molded to fit a court’s or a judge’s values. The flexibility within the DCC could be used by judges to apply the doctrine in a manner to suit their values. Because most environmental regulations involve conflicting but deeply-held values, the DCC can be an impediment to state environmental regulations. Rocky Mountain Farmers Union presents an example of how differing values of different courts can shape or drive the outcome of a DCC challenge. The tensions between the district court and Ninth Circuit majority, as well as the tensions between the Ninth Circuit majority and Judge Murguia’s dissent, show how the all-important line of discrimination can be drawn in different places.238 To avoid the continuation of an unmoored DCC doctrine being used in an unpredictable and seemingly arbitrary way, courts must apply it in a principled and uniform manner.

When applying the DCC, courts should exercise judicial restraint and take care not to substitute their own values for those of politically accountable state and local officers. It is particularly important to avoid judicial activism in the DCC context, because the doctrine lacks a textual basis and its justifications have shifted over time. Although Chief Justice John Roberts was writing about states as market participants when he warned “the dormant Commerce Clause is not a roving license for federal courts to decide what activities are appropriate for state and local government to undertake,” as a general matter the interference of courts should also be minimized when considering state regulations.239 Because the stated rationale of the modern DCC is to prevent economic protectionism or isolationism, courts should require evidence of an actual discriminatory effect before finding a state law discriminatory. Additionally, because judges generally lack expertise in ecology and may be unaware of the local conditions and concerns that drive a state to act, they are not in the best position to understand or decide the fate of complex environmental regulations.

One important aspect of minimizing judicial interference with state laws is for courts to invoke facial discrimination sparingly in the DCC context. The DCC is unique in that it allows courts to find state laws discriminatory either on

237. By the time of the Ninth Circuit decision, CARB had at least preliminarily approved more than 80 individualized pathways for ethanol. CARB Opening Brief, supra note 100, at 25. This indicates that ethanol producers who pursued individualized pathways were likely being allowed to use them.
239. See United Haulers Ass’n v. Oneida-Herkimer Solid Waste Mgmt. Auth., 550 U.S. 330, 343 (2007).
their face, by purpose, or by effect. Because a finding of facial discrimination requires that judges provide little explanation and engage in only a surface level look, such findings may be prone to error, especially when analyzing complex state laws or regulations. Justice Scalia wrote “what may appear to be a ‘discriminatory’ provision in the constitutionally prohibited sense—that is, a protectionist enactment—may on closer analysis not be so.” This Note therefore recommends that judges reserve findings of facial discrimination for cases where states have closed their borders (i.e., completely restricted the import or export of an item) and look searchingly at the evidence provided to determine whether there is a discriminatory effect.

Courts should also use caution in their analysis of discriminatory purpose. The analysis of whether a state law has a discriminatory purpose is problematic for multiple reasons. State statutes and regulations often have multiple (and sometimes conflicting) purposes. Additionally, legislative histories may contain isolated statements that could be construed as discriminatory. In the equal protection context, courts will not find a discriminatory purpose for a facially neutral government law or action without a showing that a discriminatory motive was a “substantial factor” or a “motivating factor” in the governmental decision. This type of initial finding is even more appropriate in the DCC context, where a finding of a discriminatory purpose alone means the state law will be subjected to strict scrutiny.

Additionally, courts should emphasize the practical effect of a challenged state law or regulation in the DCC context. The presence of a discriminatory effect can be used to smoke out state laws that are discriminatory either on their face or in purpose. Relying primarily on discriminatory effects serves the two stated purposes of the DCC: guarding against economic protectionism and protecting out-of-state parties who cannot protect their interests through the political process. Economic effects are often easy to quantify and courts

240. Erwin Chemerinsky, Constitutional Law, 473–74 (4th ed. 2013) (“The Supreme Court has held that facially neutral laws can be found to be discriminatory if they either have the purpose or the effect of discriminating against out-of-staters . . . . This is very different from analysis under the Equal Protection Clause . . . where a facially neutral law is deemed discriminatory only if there is both a discriminatory purpose and a discriminatory effect.”).

241. A focus on facial discrimination can also result in the inefficient and undesirable outcome of states spending additional time wordsmithing their laws and regulations.


243. Regulations face the same problem, as there may be potentially discriminatory statements in the state analog of an administratively required “concise general statement of their basis and purpose.” 5 U.S.C. § 553 (2012). California’s Assembly Bill 32 contained a provision requiring CARB to “evaluate the total potential costs and total potential economic and noneconomic benefits of the plan for reducing greenhouse gases to California’s economy, environment, and public health.” CAL. HEALTH & SAFETY CODE § 38561(d). The district court quoted several of these impacts from CARB’s Initial Statement of Reasons and Final Statement of Reasons. Rocky Mountain Ethanol, 843 F. Supp. 2d 1071, 1080 (E.D. Cal. 2011).


should require parties to show evidence of actual economic injury from a state law or regulation. A focus on discriminatory effects also makes the discrimination inquiry more substantive and places a clear burden on the party challenging the state law. It is hard to imagine a state law that is truly discriminatory on its face or in its purpose but is not discriminatory in effect. To implement an effects-based approach, this Note suggests adopting the standard set forth by the Ninth Circuit—that plaintiffs must present substantial evidence of actual discrimination to prevail on a discriminatory effect claim. This would help ensure courts do not find discrimination based on speculative arguments.

Furthermore, courts should also be careful not to extend the reach of the DCC through an extraterritoriality inquiry. The disparate holdings of the district court and Ninth Circuit in the Rocky Mountain Farmers Union cases show that the extraterritoriality analysis is another exercise in arbitrary line-drawing. The difference between a state law or regulation that impermissibly controls conduct outside of the state and one that merely influences conduct outside the state is not clearly demarcated. Judges should consider precedent thoughtfully to determine if the state statute or regulation at issue has an extraterritorial effect that is truly similar to one the Court has already found to violate the DCC.

Judicial restraint is also appropriate for federalism reasons. Out of respect for states as sovereigns, courts should make reasoned and careful judgments when deciding whether to uphold a state law. It is important for the integrity of the DCC that courts look below the surface to gain an honest understanding of the state law and draw their own well-reasoned conclusions rather than relying on the allegations of parties. Federal courts must adhere to a principled DCC doctrine to avoid bad precedents and uncertainty, both of which impose costs on states seeking to address their unique needs with innovative solutions. There are also important policy considerations involved. In our current era of congressional gridlock, progress is increasingly being made at the state level. Courts should honor the principle of federalism and allow states to fulfill their role as laboratories of democracy. Especially because environmental problems are increasingly complex and vary by location, state experimentation is needed to increase awareness and accelerate development of effective environmental management strategies.

246. Black Star Farms LLC v. Oliver, 600 F.3d 1225, 1234 (9th Cir. 2010) (“Plaintiffs must offer substantial evidence of an actual discriminatory effect in order to take advantage of heightened scrutiny and shift the burden of proof to the State[,]”).

247. See New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (“It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country. This Court has the power to prevent an experiment.”).

248. Jennifer Bradley, Federalism and Environmental Protection, in REDEFINING FEDERALISM 9, 10 (Douglas T. Kendall ed., 2004). “State and local legislation and experimentation are especially apt in environmental law. By its very nature, federal law cannot precisely protect all of the microclimates, watersheds, and airsheds in this vast nation.” Id.
CONCLUSION

The contests over the constitutionality and efficacy of state efforts to reduce GHG emissions will continue to unfold in the near future. The LCFS ethanol provisions are currently on remand to the district court for determination of discrimination in purpose or effect.\textsuperscript{249} CARB tracks and reports annual GHG emissions and progress toward the 2020 targets.\textsuperscript{250}

There have also been new developments in state programs to reduce GHG emissions. California’s cap-and-trade program for GHG emissions began to include transportation fuels in 2015.\textsuperscript{251} The cap-and-trade program lowers the statewide limit for GHG emissions from major sources by 3 percent each year.\textsuperscript{252} Also in 2015, Oregon adopted rules to reduce GHG emissions from transportation fuels.\textsuperscript{253} Oregon’s Clean Fuels Program, which is similar to the LCFS, has been challenged on DCC grounds by the same fuel industry group that challenged California’s LCFS.\textsuperscript{254} Despite these obstacles, a growing number of states remain committed to reducing GHG emissions. At present, state efforts are the primary tool for fighting global warming in the U.S., and they are worth watching.

\textsuperscript{249} Rocky Mountain Farmers Union, 730 F.3d 1070, 1107 (9th Cir. 2013).


\textsuperscript{252} Id.


We welcome responses to this Note. If you are interested in submitting a response for our online companion journal, Ecology Law Currents, please contact cse.elq@law.berkeley.edu. Responses to articles may be viewed at our website, http://www.ecologylawquarterly.org.