
NOTE

Pacific Merchant II's Dormant Commerce Clause Ruling: Expanding State Control over Commerce Through Environmental Regulations

Erin Tanimura*

TABLE OF CONTENTS

INTRODUCTION	421
I. BACKGROUND	424
A. <i>California's Vessel Fuel Rules</i>	424
B. <i>Dormant Commerce Clause Doctrine</i>	427
II. NINTH CIRCUIT DORMANT COMMERCE CLAUSE PREEMPTION ANALYSIS IN <i>PACIFIC MERCHANT II</i>	430
A. <i>Pacific Merchant II: Challenge to the Vessel Fuel Rules</i>	430
B. <i>The VFR Do Not Violate the Dormant Commerce Clause</i> ...	433
III. THE <i>PACIFIC MERCHANT II</i> DORMANT COMMERCE CLAUSE RULING WILL IMPACT COMMERCIAL REGULATIONS.....	436
A. <i>The Pacific Merchant II Dormant Commerce Clause Analysis Marks a Revitalization and Expansion of the Court's Use of the Tiered System and Balancing Test To Uphold Potentially Burdensome Environmental Regulations</i>	436

* Copyright © 2013 Erin Tanimura. Senior Notes & Comments Editor, UC Davis Law Review; J.D. Candidate, UC Davis School of Law, 2014; B.A. Integrative Biology & History, UC Berkeley, 2010. Thanks to Tiffany Gilliam, Marvin Cho, Channpreet Singh, and the other members of the UC Davis Law Review whose hard work brought this piece to publication. Thanks to my friends for their encouragement. Thanks also to Professor J. Angelo DeSantis for providing insight and advice as I wrote this Note. Above all, thanks to my parents, Sheila and Glenn, and my siblings for their unwavering love and support.

B. <i>States Will Increase Regulations Concerning Maritime Activity and Commercial Regulations Generally</i>	446
C. <i>Increased Regulations Suggest Increased Collaboration</i>	452
CONCLUSION.....	453

INTRODUCTION

California contains half of America's top ten most polluted cities.¹ The legislature and state agencies must combat the drastic health effects of air and other pollution through environmental regulations as substantial as the environmental threats themselves.² It should be no surprise that California leads the nation in enacting strict, expansive environmental regulations.³

California is also home to two of the nation's ten largest ports.⁴ Competing interests traditionally present in coastal zones take on special significance in port regions, where national and international commercial interests collide with local interests.⁵ In these port regions, state environmental regulations affect the greater maritime

¹ See AM. LUNG ASS'N, STATE OF THE AIR 2012 12-13 (2012), <http://www.stateoftheair.org/2012/assets/state-of-the-air2012.pdf> (ranking California's cities high in ozone pollution, short-term particle pollution, and year-round particle pollution); Morgan Brennan, *America's Most Polluted Cities*, FORBES (Apr. 27, 2012), <http://www.forbes.com/sites/morganbrennan/2012/04/27/americas-most-polluted-cities/> (listing Bakersfield as the first most polluted city and Los Angeles as the third).

² See Charles W. Schmidt, *California Out in Front*, 115 ENVTL. HEALTH PERSP. A144, A145-46 (2007), available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC1849903/pdf/ehp0115-a00144.pdf>.

³ See *id.* (explaining the California legislature's response to "some of the worst environmental problems in the country," including air pollution and climate change, with "some of the strongest environmental laws ever passed"); see, e.g., Erin Dooling, *The Need for Comprehensive Action to Abate Ocean Pollution by Flame Retardants*, 17 OCEAN & COASTAL L.J. 347, 355, 367 (2012) (discussing California's pioneering role as the first state to take legislative action banning certain chemical flame retardants based on the "precautionary principal").

⁴ See *Ports — Crucial Coastal Infrastructure*, NOAA'S STATE OF THE COAST, <http://stateofthecoast.noaa.gov/ports/welcome.html> (last visited Nov. 11, 2012) (listing the nation's top 150 ports with Long Beach as the fifth largest, Los Angeles as the eighth largest, and Richmond and Oakland falling among the nation's top forty).

⁵ Competing interests traditionally present in coastal zones include public interests in tidelands, private development interests, and government interests in marine resources. See, e.g., *Am. Petroleum Inst. v. Knecht*, 456 F. Supp. 889, 896, 919 (C.D. Cal. 1978) (illustrating Congressional action to deal with "competing interests" by enacting the Coastal Zones Management Act and noting that attempts to accommodate all interested parties created "a morass of problems between the private sector, the public sector, the federal bureaucracy, the state legislature, the state bureaucracy, and all of the administrative agencies"); Denise J. Dion Goodwin, *Massachusetts's Chapter 91: An Effective Model for Stewardship of Coastal Lands*, 5 OCEAN & COASTAL L.J. 45, 45 (2000) (explaining Massachusetts's role in protecting the public's interest in tidelands). See generally Michael W. Reed, *Port and Coastal State Control of Atmospheric Pollution from Merchant Vessels*, 3 SAN DIEGO J. CLIMATE & ENERGY L. 205 (2012) (discussing California's attempts to balance local interests in combatting air pollution with maritime commercial interests).

community, including commercial interests far outside of California's borders.⁶

In 2009, the California Air Resources Board ("CARB") proposed and implemented new environmental regulations, the Vessel Fuel Rules ("VFR").⁷ CARB adopted the VFR to combat excessive adverse health effects within California by requiring that marine vessels visiting California ports use cleaner fuels.⁸ By mandating cleaner fuels and imposing penalties for noncompliance,⁹ the VFR place significant economic burdens on the maritime shipping industry.¹⁰

The Pacific Merchant Shipping Association ("PMSA"), a maritime shippers' mutual benefit corporation, challenged California's VFR in federal court.¹¹ The association alleged that the federal Submerged Lands Act preempted the VFR.¹² The District Court for the Eastern

⁶ See Reed, *supra* note 5, at 230 (controlling merchant vessels via "port state control" is a customary international law practice, but it may include "unreasonable reaching" by port states).

⁷ Pac. Merch. Shipping Ass'n v. Goldstene (*Pacific Merchant II*), 639 F.3d 1154, 1158 (9th Cir. 2011), *cert. denied*, 133 S. Ct. 22 (2012); see CAL. CODE REGS. tit. 13, § 2299.2 (2012); *id.* tit. 17, § 93118.2 (2012).

⁸ *Pacific Merchant II*, 639 F.3d at 1158, 1160; see CAL. ENVTL. PROT. AGENCY AIR RES. BD., INITIAL STATEMENT OF REASONS FOR RULEMAKING: FUEL SULFUR AND OTHER OPERATIONAL REQUIREMENTS FOR OCEAN-GOING VESSELS WITHIN CALIFORNIA WATERS AND 24 NAUTICAL MILES OF THE CALIFORNIA BASELINE app. E3-1, E3-2 to E3-3, E3-5 to E3-6 (2008) [hereinafter CARB, INITIAL STATEMENT 2008], available at <http://www.arb.ca.gov/regact/2008/fuelogv08/fuelogv08.htm> (assessing ocean going vehicle's negative health impacts for the San Francisco Bay Area and communities near Long Beach and Los Angeles); see also *id.* at app. G-1 (predicting that the number of premature deaths that would be avoided with VFR implementation would increase from 264 in 2010 to 333 in 2014).

⁹ See tit. 13, § 2299.2; tit. 17, § 93118.2.

¹⁰ See CARB, INITIAL STATEMENT 2008, *supra* note 8, at VIII-16 to VIII-21 (discussing the potential costs per ship to ships of different size, use, and number of port visits and noting that the VFR "could potentially affect the ability of California ports and California based vessel operators to compete with ports and vessel operators outside California due to the slight increase in operating costs"); *infra* text accompanying notes 42-46 (discussing the high fuel costs and compliance costs).

¹¹ *Pacific Merchant II*, 639 F.3d at 1161.

¹² *Id.* The Submerged Lands Act of 1953 vests title and ownership to "lands beneath navigable waters within the boundaries of the respective States, and the natural resources within such lands and waters," in the states. Submerged Lands Act, 43 U.S.C. § 1311 (2012). This ownership and exclusive jurisdiction extends three geographical miles seaward from a state's coastline. *Id.* §§ 1301, 1312. By vesting title to the submerged land, the Act allows a coastal state to "exercise its jurisdiction and laws over matters occurring there" unless preempted by federal law. Louisa S. Porter et al., *Maritime Law & Aviation Torts: Navigating Through Troubled Waters*, FED. LAW., Nov./Dec. 2002, at 24, 27 n.14. The act confirms the federal government's ownership of land seaward of the three-mile limit. See Submerged Lands Act §§ 1331, 1332;

District of California denied PMSA's summary judgment motion.¹³ The Ninth Circuit granted the interlocutory appeal and reviewed the regulations de novo in *Pacific Merchant II*.¹⁴ On appeal, the court examined the Submerged Lands Act claim and further analyzed preemption claims under the dormant Commerce Clause and general maritime law.¹⁵ Finding no preemption, the Ninth Circuit allowed the extensive, possibly unparalleled regulatory scheme to stand.¹⁶

This Note argues that the *Pacific Merchant II* dormant Commerce Clause ruling will impact the relationship between commercial law and environmental policy. The ruling will positively affect states' environmental policy goals, but it will negatively impact maritime commerce and may ultimately disadvantage other business and commercial interests. This Note looks critically at the Ninth Circuit's decision in order to understand the significance of the ruling's impact on future environmental regulations. Part I provides an examination of the California VFR and the dormant Commerce Clause doctrine.¹⁷ Part II examines the Ninth Circuit's dormant Commerce Clause preemption analysis.¹⁸ Part III discusses the effects of the *Pacific Merchant II* dormant Commerce Clause ruling on the relationship between business and commercial law and environmental policy.¹⁹ First, *Pacific Merchant II*'s analysis deemphasized significant maritime economic concerns.²⁰ In doing so, the court reinvigorated and expanded its use of the dormant Commerce Clause's tiered system and

United States v. Louisiana, 446 U.S. 253, 256 (1980).

¹³ See *Pac. Merch. Shipping Ass'n v. Goldstene*, No. 2:09-CV-01151MCEEFB, 2009 WL 2777778, at *8 (E.D. Cal. Aug. 28, 2009), *aff'd*, 639 F.3d 1154 (9th Cir. 2011).

¹⁴ See *Pacific Merchant II*, 639 F.3d at 1162-64.

¹⁵ See *id.* at 1162 (explaining that the dormant Commerce Clause and general maritime law preemption claims were preserved).

¹⁶ See *id.* at 1181 ("We are clearly dealing with an expansive and even possibly unprecedented state regulatory scheme."). Some academics suggest that — in light of the VFR's expansive nature — the Ninth Circuit should have decided differently. See, e.g., Bradley D. Easterbrooks, Comment, *Overreach on the High Seas?: Whether Federal Maritime Law Preempts California's Vessel Fuel Rules*, 39 PEPP. L. REV. 645 (2012) (addressing the jurisdictional and preemption questions and arguing that the "VFR are likely preempted" under "current case precedent").

¹⁷ See discussion *infra* Part I (explaining the VFR history and federal dormant Commerce Clause analysis).

¹⁸ See discussion *infra* Part II (recounting the *Pacific Merchant II* analysis and introducing the issues discussed in Part III).

¹⁹ See discussion *infra* Part III (analyzing the potential effects of *Pacific Merchant II* on future dormant Commerce Clause analyses and state commercial regulations).

²⁰ See discussion *infra* Part III.A (discussing concerns voiced by the maritime shipping industry, such as increased fuel costs).

balancing test to uphold potentially burdensome environmental regulations.²¹ This expansion will impact future dormant Commerce Clause analyses.²² Second, states will likely respond by regulating maritime economic activity traditionally outside of their reach to meet environmental policy goals.²³ Finally, as business and commercial regulations increase, so too will animosity toward environmental regulations.²⁴ Increased collaboration among competing interests will be essential to counter opposition by business and commercial groups against environmental regulations.²⁵

I. BACKGROUND

A. California's Vessel Fuel Rules

In 2007, prior to implementation of the VFR, CARB adopted the Marine Vessel Rules.²⁶ Like the VFR, the Marine Vessel Rules regulated ocean-going vessels as a means of reducing California's air pollution.²⁷ But the Marine Vessel Rules regulated emissions, not vessel fuels.²⁸ Specifically, they restricted auxiliary diesel engine emissions from maritime vessels traveling within twenty-four miles of the California Coast.²⁹

PMSA sued CARB, claiming that the Clean Air Act and the Submerged Lands Act preempted the Marine Vessel Rules.³⁰ In *Pacific*

²¹ See discussion *infra* Part III.A (examining the court's return to the dormant Commerce Clause analysis espoused in *Barber v. Hawai'i*, 42 F.3d 1185 (9th Cir. 1994)).

²² See discussion *infra* Part III.A (arguing that the expanded practice will impact future dormant Commerce Clause analyses in the Ninth Circuit, and potentially other federal circuits, though the scope of the impact is presently unknown).

²³ See discussion *infra* Part III.B (analogizing California's VFR to Minnesota's ballast water statute, upheld by the Sixth Circuit, and predicting that other states will follow California's lead; arguing further that states will likely regulate greenhouse gases).

²⁴ See discussion *infra* Part III.C (suggesting that harsh regulations on business and commercial groups will cause resentment).

²⁵ See discussion *infra* Part III.C (arguing the need for increased cooperation).

²⁶ *Pac. Merch. Shipping Ass'n v. Goldstene (Pacific Merchant I)*, 517 F.3d 1108, 1111 (9th Cir. 2008); see also *Pac. Merch. Shipping Ass'n v. Goldstene (Pacific Merchant II)*, 639 F.3d 1154, 1158 (9th Cir. 2011) (explaining the VFR's history), *cert. denied*, 133 S. Ct. 22 (2012).

²⁷ *Pacific Merchant II*, 639 F.3d at 1159.

²⁸ *Id.*

²⁹ *Pacific Merchant I*, 517 F.3d at 1109.

³⁰ *Id.* at 1110. The Clean Air Act, codified at 42 U.S.C. §§ 7401-7671(q) (2012), generally "promote[s] reasonable Federal, State, and local governmental actions . . .

Merchant I, the Ninth Circuit agreed with PMSA's first claim and held that the Marine Vessel Rules were emissions standards preempted by the Clean Air Act.³¹ The court did not reach the Submerged Lands Act question.³²

CARB enacted the VFR in response to the Ninth Circuit's ruling in *Pacific Merchant I*.³³ In *Pacific Merchant I*, the court indicated that fuel regulations — rather than emissions standards — might survive a Clean Air Act preemption challenge.³⁴ CARB retooled the Marine Vessel Rules, concentrating on regulating fuel rather than emissions.³⁵ Although different in the means they employ, the Marine Vessel Rules and VFR are equivalent in substance, effectuating CARB's environmental policies and health goals.³⁶

The VFR require vessel operators to use cleaner, low-sulfur fuels on ocean-going vessels within Regulated California Waters.³⁷ Regulated

for [air] pollution prevention." 42 U.S.C. § 7401(c) (2012). The Clean Air Act directs the Environmental Protection Agency Administrator to prescribe limits on air pollutants from new motor vehicles or new motor vehicle engines if the pollutant "may reasonably be anticipated to endanger public health or welfare." *Id.* § 7521(a)(1). Absent a waiver, states may not "adopt or attempt to enforce" their own emission standards on new motor vehicles or new motor vehicle engines. *Id.* § 7543(a)-(b). See sources cited *supra* note 12 for a definition of the Submerged Lands Act.

³¹ *Pacific Merchant I*, 517 F.3d at 1114.

³² See *id.* at 1115.

³³ See *Pacific Merchant II*, 639 F.3d at 1159; see Easterbrooks, *supra* note 16, at 670-71 ("CARB sought to avoid preemption under the CAA by reframing the VFR as fuel content regulations, rather than as direct emissions caps."); Seth Mansergh, Note, *Out the Smokestack: Retooling California's Marine Vessel Rules for Federal Authorization*, 39 GOLDEN GATE U. L. REV. 331, 345-46 (2009) (explaining that CARB responded to *Pacific Merchant I* by "promulgating new regulations to limit emissions from ocean-going vessels based on the authority granted in section 209(d)'s 'in-use exception'").

³⁴ See *Pacific Merchant I*, 517 F.3d at 1115 (finding the Marine Vessel Rules were not mere "in-use requirements" allowed under Clean Air Act section 209(d), codified at 42 U.S.C. § 7543(d), because the Marine Vessel Rules' plain language "regulates emissions, not fuel").

³⁵ *Pacific Merchant II*, 639 F.3d at 1159.

³⁶ See Easterbrooks, *supra* note 16, at 670-71.

³⁷ CAL. CODE REGS. tit. 13, § 2299.2(a) (2012); *id.* tit. 17, § 93118.2(a) (2012); CAL. ENVTL. PROT. AGENCY AIR RES. BD., FINAL STATEMENT OF REASONS FOR RULEMAKING 1 (2008) [hereinafter CARB, FINAL STATEMENT 2008], available at <http://www.arb.ca.gov/regact/2008/fuelogy08/fuelogy08.htm>. California's VFR target fuel-sulfur content, which combat high levels of sulfur dioxide and particulate matter from commercial vessels. See generally JAMES GUSTAVE SPETH, THE BRIDGE AT THE EDGE OF THE WORLD: CAPITALISM, THE ENVIRONMENT, AND CROSSING FROM CRISIS TO SUSTAINABILITY 50-51 (2008) (stating that on average, global sulfur dioxide emissions increased nine percent each decade between 1980 and 2005); Daniel A. Lack, *Impact of Fuel Quality Regulation and Speed Reductions on Shipping Emissions: Implications for Climate and Air Quality*, 45 ENVTL. SCI. & TECH.

California Waters include waters within twenty-four nautical miles of the California baseline.³⁸ The fuel sulfur restrictions only apply to vessels that “call,” or visit, at a California port.³⁹ They do not apply to vessels merely passing through Regulated California Waters without making a port visit.⁴⁰

The estimated cost of compliance is high. The VFR impose escalating fuel sulfur-content restrictions on auxiliary diesel engines, main engines, and auxiliary boilers.⁴¹ CARB calculated that the cleaner fuels would cost ship operators \$30,000 per California port call.⁴² Industry-wide, these per-port visits amount to an aggregate incremental cost of \$360 million per year, or \$1.5 billion through the end of 2014.⁴³ But the cost of noncompliance per port visit is higher. The VFR impose heavy fees each time a vessel visits a port in noncompliance with the fuel regulations.⁴⁴ The fees range from \$45,500 for a first-time violation to \$182,000 for the fifth or higher violation.⁴⁵ PMSA discussed the high costs associated with the VFR and the difficulties of compliance in the Ninth Circuit.⁴⁶

9052, 9052 (2011) (noting the “shipping industry emits (globally) 3 times more SO₂ than road traffic” and recognizing the “contribution of commercial shipping to air pollution has been recognized as significant” in recent years).

³⁸ Tit. 13, § 2299.2(b)(1)(F); tit. 17, § 93118.2(b)(1)(f). The U.S. baseline is the “the low-water line along the coast as marked on NOAA nautical charts in accordance with the articles of the Law of the Sea.” *U.S. Maritime Limits & Boundaries*, NOAA OFFICE OF COAST SURVEY, <http://www.nauticalcharts.noaa.gov/csdl/mbound.htm> (last visited Nov. 12, 2012).

³⁹ Tit. 13, § 2299.2(c)(1); tit. 17, § 93118.2(c)(1).

⁴⁰ See tit. 13, § 2299.2(c)(1); tit. 17, § 93118.2(c)(1).

⁴¹ Beginning in 2009, the VFR capped the sulfur content of marine gas oil at 1.5% by weight and of marine diesel oil at 0.5%. See tit. 13, § 2299.2(e)(1); tit. 17, § 93118.2(e)(1). On August 1, 2012, the marine gas oil sulfur maximum decreased to 1%; the marine diesel oil cap remained at 0.5%. See tit. 13, § 2299.2(e)(1); tit. 17, § 93118.2(e)(1). The marine gas and diesel oil caps will both decrease to 0.1% sulfur by weight on January 1, 2014. See tit. 13, § 2299.2(e)(1); tit. 17, § 93118.2(e)(1). The VFR also establish recordkeeping, recording, and monitoring requirements. Tit. 13, § 2299.2(e)(2); tit. 17, § 93118.2(e)(2).

⁴² *Pac. Merch. Shipping Ass’n v. Goldstene (Pacific Merchant II)*, 639 F.3d 1154, 1159 (9th Cir. 2011), *cert. denied*, 133 S.Ct. 22 (2012).

⁴³ *Id.*; see CARB, INITIAL STATEMENT 2008, *supra* note 8, at app. G-1 (calculating total added fuel costs to increase from \$275 million in 2010 to \$362.7 million in 2014).

⁴⁴ See tit. 13, § 2299.2(h)(5); tit. 17, § 93118.2(h)(5). Further, anyone found violating a provision or requirement of the VFR “is subject to the penalties, injunctive relief, and other remedies specified in the Health and Safety Code[.]” Tit. 17, § 93118.2(f)(1).

⁴⁵ See tit. 13, § 2299.2(h)(5); tit. 17, § 93118.2(h)(5).

⁴⁶ See Brief for Appellant at 34-35, *Pac. Merch. Shipping Ass’n v. Goldstene*, 639

B. *Dormant Commerce Clause Doctrine*

PMSA challenged the VFR under the dormant Commerce Clause⁴⁷ — the negative converse of the Commerce Clause.⁴⁸ The Commerce Clause grants Congress the power to regulate foreign and interstate commerce.⁴⁹ The Framers gave Congress this plenary power to avoid the patchwork of economic regulations that characterized interstate commerce in the nation's early years.⁵⁰ Express congressional legislation in a particular area, or regarding a specific subject, preempts state regulations affecting commerce in the same area.⁵¹

The dormant Commerce Clause doctrine relates closely to the Commerce Clause.⁵² The doctrine interprets the Constitution's affirmative grant of power to Congress as imposing a negative restraint

F.3d 1154 (9th Cir. 2011) (No. 09-17765), 2010 WL 5813087, at *34-35.

⁴⁷ *Pacific Merchant II*, 639 F.3d at 1162.

⁴⁸ Paul V. McCord, *The Dormant Commerce Clause and the MBT Credit and Incentive Scheme: You Can't Get There from Here*, 53 WAYNE L. REV. 1431, 1447 (2007) (“[T]he positive grant of power in the Commerce Clause implies a negative converse . . .”).

⁴⁹ U.S. CONST. art. I, § 8, cl. 3 (granting Congress the power to “regulate Commerce with foreign Nations, and among the several States”).

⁵⁰ See *Hughes v. Oklahoma*, 441 U.S. 322, 325 (1979); see also Peter C. Felmlly, *Beyond the Reach of States: The Dormant Commerce Clause, Extraterritorial State Regulation, and the Concerns of Federalism*, 55 ME. L. REV. 467, 469-70 (2003) (explaining that the early Court interpreted the Framers' intent for the Commerce Clause to avoid the colonies' “tendencies toward economic Balkanization”).

⁵¹ See *Hughes*, 441 U.S. at 325-26.

⁵² See generally Brannon P. Denning, *Reconstructing the Dormant Commerce Clause Doctrine*, 50 WM. & MARY L. REV. 417, 427-48 (2008) (tracing the full history and evolution of the dormant Commerce Clause from its origins in the Marshall and Taney Courts to the modern “balancing” approach); Felmlly, *supra* note 50, at 471-84 (providing a history of the dormant Commerce Clause doctrine and explaining the development of the “extraterritoriality principal”). The dormant Commerce Clause doctrine is messy and provides an arena for lively scholarly debate concerning the doctrine's scope, modern approach, and future. See Denning, *supra*, at 422 (noting that while the dormant Commerce Clause rules are “easy to recite,” their application is “notoriously difficult”); see also Jim Chen, *A Vision Softly Creeping: Congressional Acquiescence and the Dormant Commerce Clause*, 88 MINN. L. REV. 1764, 1764-65 (2004) (proposing a solution to the dormant Commerce Clause controversy, but conceding that many dormant Commerce Clause opponents consider it the “Voldemort of American constitutional law . . . the provision that must not be named”). Scholars frustrated with the courts' inconsistent application seek to reconcile the discrepancies. See Denning, *supra*, at 422 n.10 (listing the major dormant Commerce Clause studies, general treatments, and important critiques). Much of this scholarship is outside the scope of this Note, but it is important to recognize the inconsistencies in the doctrine's application and recent advocacy for change in any dormant Commerce Clause discussion.

on the states.⁵³ States may not substantially burden or otherwise improperly interfere with express congressional action concerning interstate and foreign commerce.⁵⁴ The doctrine also protects Congress's latent power from state encroachment: absent express action, courts may find state legislation unconstitutional if it substantially affects national or foreign commerce.⁵⁵

In its dormant Commerce Clause jurisprudence, the Supreme Court divides state regulations affecting interstate commerce into two broad categories.⁵⁶ The first category includes regulations that directly burden interstate commerce or discriminate against out-of-state interests.⁵⁷ Regulations in this "discriminatory" category are essentially invalid *per se*.⁵⁸ These facially discriminatory restrictions may be

⁵³ *Fednav, Ltd. v. Chester (Fednav I)*, 505 F. Supp. 2d 381, 397 (E.D. Mich. 2007), *aff'd*, 547 F.3d 607 (6th Cir. 2008); *see Or. Waste Sys., Inc. v. Dep't of Envtl. Quality*, 511 U.S. 93, 98 (1994); *see also* *Felmly*, *supra* note 50, at 472 (explaining that while the Marshall Court recognized that the Commerce Clause contained a "negative aspect" early on, the Court "did not embrace the doctrine until the mid to late nineteenth century").

⁵⁴ *See Or. Waste Sys.*, 511 U.S. at 98; *Fednav I*, 505 F. Supp. 2d at 397; *see also* *Felmly*, *supra* note 50, at 468 (explaining the Supreme Court's recognition of an "implied limitation" on states' power to legislate even when Congress is silent).

⁵⁵ *Fednav, Ltd. v. Chester (Fednav II)*, 547 F.3d 607, 624 (6th Cir. 2008); *see Japan Line, Ltd. v. Los Angeles Cnty.*, 441 U.S. 434, 449 (1979) (citing *Michelin Tire Corp. v. Wages*, 423 U.S. 276 (1976)) (discussing the Framers' concern that "the Federal Government must speak with one voice when regulating commercial relations with foreign governments"); *Pac. Merch. Shipping Ass'n v. Goldstene (Pacific Merchant II)*, 639 F.3d 1154, 1177 (9th Cir. 2011), *cert. denied*, 133 S. Ct. 22 (2012).

⁵⁶ *Pacific Merchant II*, 639 F.3d at 1177; *see Or. Waste Sys.*, 511 U.S. at 99; *Barber v. Hawai'i*, 42 F.3d 1185, 1194 (9th Cir. 1994). *But see Felmly*, *supra* note 50, at 477 (arguing that the Court essentially uses three levels of scrutiny under the modern dormant Commerce Clause by distinguishing between statutes that facially discriminate against interstate commerce, discriminate "in purpose or effect," and those that are "facially neutral" but unduly burden interstate commerce). *See generally* Ashby Carlton Davis, Comment, *Taking from the State and Giving to the Union: Dissolving Member State Sovereignty Through the Noble Goal of Establishing a Common Market*, 21 J. TRANSNAT'L L. & POL'Y 207, 220-26 (2012) (describing the evolution of Supreme Court dormant Commerce Clause jurisprudence and explaining in detail the two categories of state regulations).

⁵⁷ *Or. Waste Sys.*, 511 U.S. at 99; *Kleenwell Biohazard Waste & Gen. Ecology Consultants, Inc. v. Nelson*, 48 F.3d 391, 395 (9th Cir. 1995).

⁵⁸ *Or. Waste Sys.*, 511 U.S. at 99. Compare David S. Day, *The "Mature" Rehnquist Court and the Dormant Commerce Clause Doctrine: The Expanded Discrimination Tier*, 52 S.D. L. REV. 1, 47 (2007) (recognizing that the upper tier uses "strict scrutiny"), and Denning, *supra* note 52, at 421-22 (explaining that the upper tier uses "strict scrutiny"), with Timothy J. Slatery, Note, *The Dormant Commerce Clause: Adopting a New Standard and a Return to Principle*, 17 WM. & MARY BILL RTS. J. 1243, 1258 (2009) (implying that courts do not currently use "strict scrutiny" by proposing federal

upheld if no less discriminatory alternative is available, and if the state can demonstrate a legitimate, non-economic local interest.⁵⁹

The second category of regulations includes restrictions that only incidentally burden interstate commerce.⁶⁰ This category includes state statutes that apply regulations even-handedly and support legitimate local benefits.⁶¹ Courts review these more limited restrictions using the balancing test outlined in *Pike v. Bruce Church*.⁶² Under the *Pike* balancing test, courts will uphold these statutes unless their burden on commerce is clearly extreme when compared to the alleged local benefits.⁶³ If a compelling state interest exists, courts look to the degree of local benefit.⁶⁴ Courts will uphold statutes with a higher burden on commerce if a substantial local purpose can justify the restrictions.⁶⁵

Along with *Pike* balancing considerations, courts must consider a state regulation's potential extraterritorial effects and its practical ramifications.⁶⁶ Even if a compelling state interest exists, a state may not legislate commerce that occurs entirely outside of its borders.⁶⁷

courts use the standard to review facially discriminatory or facially neutral laws).

⁵⁹ *Or. Waste Sys.*, 511 U.S. at 100-01 (citing *New Energy Co. v. Limbach*, 486 U.S. 269, 278 (1988)); *Kleenwell Biohazard Waste*, 48 F.3d at 395.

⁶⁰ *See Or. Waste Sys.*, 511 U.S. at 99; *Kleenwell Biohazard Waste*, 48 F.3d at 395; *Barber*, 42 F.3d at 1194.

⁶¹ *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

⁶² *Kleenwell Biohazard Waste*, 48 F.3d at 395, 399 (explaining the “*Pike* balancing test” and outlining the requirements a plaintiff must meet before a court can apply it); *see Hughes v. Oklahoma*, 441 U.S. 322, 331 (1979) (citing *Pike*, 397 U.S. at 141-42); *Pac. Merch. Shipping Ass'n v. Goldstene (Pacific Merchant II)*, 639 F.3d 1154, 1177 (9th Cir. 2011), *cert. denied*, 133 S. Ct. 22 (2012) (explaining that regulations in the second category “are reviewed under a balancing test”).

⁶³ *Pike*, 397 U.S. at 142.

⁶⁴ *Id.*

⁶⁵ *See id.*

⁶⁶ *See Healy v. Beer Inst., Inc.*, 491 U.S. 324, 335-36 (1989) (“The principles guiding this assessment . . . reflect the Constitution’s special concern both with the maintenance of a national economic union . . . and with the autonomy of the individual States within their respective spheres.”); *Pacific Merchant II*, 639 F.3d at 1178 (considering potential extraterritorial effects alongside *Pike* balancing considerations, but considering traditional balancing test factors apart from factors considered when regulations have foreign and international implications); *Felmlly*, *supra* note 50, at 483-91 (discussing the line of cases in which the “extraterritoriality principal” recently evolved under the dormant Commerce Clause doctrine, and noting that commentators question the principal’s characterization as a dormant Commerce Clause issue). *But see id.* at 495 (noting lower courts’ difficulty in applying the principal and determining whether conduct occurs wholly outside of a state’s borders).

⁶⁷ *Healy*, 491 U.S. at 336 (citing *Edgar v. MITE Corp.*, 457 U.S. 624, 642 (1982));

Legislation burdening foreign commerce may violate the Commerce Clause if it substantially affects federal commercial uniformity.⁶⁸ Finally, regulatory schemes may have practical consequences: other states may follow suit and adopt similar extraterritorial regulatory systems, creating inconsistent commercial obligations.⁶⁹ These effects may counter the Commerce Clause's original purpose of avoiding a patchwork system of national commerce.⁷⁰ The Ninth Circuit used this framework to analyze PMSA's dormant Commerce Clause challenge to California's VFR.

II. NINTH CIRCUIT DORMANT COMMERCE CLAUSE PREEMPTION ANALYSIS IN *PACIFIC MERCHANT II*

A. *Pacific Merchant II: Challenge to the Vessel Fuel Rules*

In 2009, PMSA again challenged California's ocean-going vessel regulations in federal court.⁷¹ This time, the United States District Court for the Eastern District of California ruled against PMSA.⁷² The court denied PMSA's summary judgment motion, holding that the Submerged Lands Act did not preempt the VFR.⁷³ Further, the court

Pacific Merchant II, 639 F.3d at 1178; see Felmly, *supra* note 50, at 483-84.

⁶⁸ See *Pacific Merchant II*, 639 F.3d at 1178; see also Anthony J. Colangelo, *The Foreign Commerce Clause*, 96 VA. L. REV. 949, 966 (2010) (describing limits on state legislation as stricter under the "dormant Foreign Commerce Clause" than under the "dormant Interstate Commerce Clause" because of the need for federal uniformity). Within the context of maritime commerce, federal commercial uniformity is closely intertwined with uniformity in admiralty law. See *Pac. Merch. Shipping Ass'n v. Aubry*, 918 F.2d 1409, 1424 (9th Cir. 1990) ("Our circuit has also acknowledged the importance of uniformity in admiralty law."). See generally David J. Bederman, *Uniformity, Delegation and the Dormant Admiralty Clause*, 28 J. MAR. L. & COM. 1 (1997) (discussing the development of the Admiralty Clause alongside the evolving dormant Commerce Clause); Jason R. Harris, *Opting Out of Admiralty Law?: Uniformity vs. Freedom of Contract in the Selection of State Choice of Law*, 34 TUL. MAR. L.J. 167, 168 (2009) (examining maritime contracts' "choice of law" provisions and comparing admiralty law's substantial interest in federal uniformity with another substantial interest — the "freedom to contract").

⁶⁹ See *Healy*, 491 U.S. at 336 (explaining that courts must evaluate "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"); *Pacific Merchant II*, 639 F.3d. at 1178.

⁷⁰ See *Healy*, 491 U.S. at 336-37; *Pacific Merchant II*, 639 F.3d. at 1178.

⁷¹ *Pac. Merch. Shipping Ass'n v. Goldstene*, No. 2:09-CV-01151MCEEFB, 2009 WL 2777778, at *1 (E.D. Cal. Aug. 28, 2009), *aff'd*, 639 F.3d 1154 (9th Cir. 2011).

⁷² *Id.* at *8.

⁷³ *Id.* PMSA did not challenge the Rule under the Clean Air Act. *Id.*

found PMSA presented no evidence to support the claim that the Rule would burden navigation or commerce.⁷⁴ The District Court dismissed PMSA's case against CARB.⁷⁵ The Ninth Circuit granted an interlocutory appeal to review the District Court's judgment de novo.⁷⁶

Aside from the usual legal contentions, PMSA's appellate brief highlighted controversial issues with the dormant Commerce Clause analysis.⁷⁷ PMSA first discussed the VFR's physical reach and the resulting effect on extraterritorial commerce.⁷⁸ The Submerged Lands Act and Commerce Clause preemption challenges were intertwined.⁷⁹ Under the Submerged Lands Act, state authority to regulate maritime commerce only extends three-miles seaward.⁸⁰ PMSA argued that California could not enforce the VFR or regulate commerce past the three-mile mark, regardless of its environmental and health interests.⁸¹

PMSA argued that California's VFR violated the principles of federal uniformity in maritime commercial law.⁸² The Rules required thousands of vessels traveling through a 14,000 square mile zone beyond the Submerged Lands Act boundaries to purchase and use a specific type of fuel.⁸³ The federal interest in uniformity may allow for limited local control for significant local concerns.⁸⁴ PMSA argued, however, that no court ever extended this control to include state authority over all marine vessels — both U.S.- and foreign-flagged — so far beyond a state's territorial boundaries.⁸⁵

PMSA then argued the VFR should fall within the first category of regulations burdening interstate commerce — those that facially discriminate or otherwise substantially affect interstate commerce.⁸⁶

⁷⁴ *Id.* at *6.

⁷⁵ *Id.* at *8.

⁷⁶ *Pac. Merch. Shipping Ass'n v. Goldstene (Pacific Merchant II)*, 639 F.3d 1154, 1162 (9th Cir. 2011), *cert. denied*, 133 S. Ct. 22 (2012). The case qualified for immediate appeal because it involved a contentious, controlling question of law. *Id.* at 1161-62.

⁷⁷ *See* Brief for Appellant, *supra* note 46, at 10-18.

⁷⁸ *See id.* at 10-15.

⁷⁹ *See id.* at 10.

⁸⁰ *Id.* at 13; *see* sources cited *supra* note 12 (defining the Submerged Lands Act). For a brief history of the Submerged Lands Act and an outline of its major provisions, *see* JOSEPH J. KALO ET AL., *COASTAL AND OCEAN LAW: CASES AND MATERIALS* 419-22 (3d ed. 2007).

⁸¹ *See* Brief for Appellant, *supra* note 46, at 13.

⁸² *Id.* at 11.

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *See id.* at 34-35.

The District Court categorized the VFR as relating to pollution, not maritime commerce.⁸⁷ In arguing that this was too narrow, PMSA highlighted both the actual costs associated with VFR compliance and the effect on extraterritorial conduct.⁸⁸

CARB estimated that the new fuel would cost vessel operators approximately \$30,000 per port call.⁸⁹ Eight PMSA members would jointly make over 2,600 port calls in the first year of regulations — amounting to approximately \$78.5 million in increased fuel costs.⁹⁰ PMSA argued that these financial effects were not only direct but substantial.⁹¹

Further, PMSA contended that the VFR directly regulated the conduct on vessels engaged in international maritime commerce.⁹² The VFR compel ships to switch fuels twenty-four miles out at sea and require sufficient documentation of the process.⁹³ They also impose heavy fines for noncompliance.⁹⁴ These considerations, PMSA argued, were substantial.⁹⁵ In highlighting these economic effects, PMSA urged the Ninth Circuit to apply first-tier dormant Commerce Clause scrutiny; this would avoid the balancing test likely fatal to their argument.⁹⁶ The Ninth Circuit reviewed these issues on appeal, but ultimately disagreed with PMSA's arguments.⁹⁷

⁸⁷ *Id.* at 13-14.

⁸⁸ *Id.* at 13-14, 17.

⁸⁹ *Id.* at 17; CARB, INITIAL STATEMENT 2008, *supra* note 8, at VIII-16 (noting that the cost to individual businesses would vary based on the number of vessels visiting California ports, the number of port visits per vessel, and the power generated by the vessels' engines).

⁹⁰ Brief for Appellant, *supra* note 46, at 35.

⁹¹ *Id.*

⁹² *Id.* at 34-35.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ Cf. Catherine Gage O'Grady, *Targeting State Protectionism Instead of Interstate Discrimination Under the Dormant Commerce Clause*, 34 SAN DIEGO L. REV. 571, 574-75 (1997) (arguing that the tier of scrutiny applied is outcome determinative, so attorneys litigating dormant Commerce Clause cases focus on convincing the court that the regulation does or does not fall within the first tier).

⁹⁷ See *Pac. Merch. Shipping Ass'n v. Goldstene (Pacific Merchant II)*, 639 F.3d 1154, 1178-82 (9th Cir. 2011), *cert. denied*, 133 S. Ct. 22 (2012).

B. *The VFR Do Not Violate the Dormant Commerce Clause*

The Ninth Circuit examined the VFR and found no dormant Commerce Clause violation.⁹⁸ The court first considered whether the VFR fell into the first or second category of regulations burdening interstate commerce.⁹⁹ To make this initial determination, the court first examined the VFR's purpose and then their effects on the flow of interstate commerce.¹⁰⁰ CARB adopted the VFR to protect Californians' health and well-being against marine vessels' harmful emissions.¹⁰¹ The purpose was not economic and did not disguise state favoritism or other impermissible protection of California's economic interests.¹⁰² Finally, they did not facially discriminate against out-of-state interests, as they applied evenly to all marine vessels, including those operating exclusively within the twenty-four mile boundary.¹⁰³

The Ninth Circuit first considered *Ray v. Atlantic Richfield Co.*¹⁰⁴ There, the Supreme Court upheld a Washington law requiring a tug escort for oil tankers traveling through Puget Sound.¹⁰⁵ The Tanker Law imposed a cost equivalent to less than one cent per barrel of oil for a 120,000 ton tanker.¹⁰⁶ Nothing suggested it would impede the free and efficient flow of commerce.¹⁰⁷ Similarly, the Ninth Circuit found that the VFR did not substantially impede interstate and foreign commerce.¹⁰⁸ Thus, California's far-reaching environmental regulatory scheme only incidentally burdened interstate commerce and fell within the second category of regulations.¹⁰⁹

Because the regulations fell in the second category, the Ninth Circuit turned to the balancing test.¹¹⁰ The court reviewed general maritime law considerations along with the traditional dormant

⁹⁸ *See id.*

⁹⁹ *Id.* at 1179.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.* (citing *Ray v. Atl. Richfield Co.*, 435 U.S. 151, 179 (1978)).

¹⁰⁵ *Ray v. Atl. Richfield Co.*, 435 U.S. 151, 179-80 (1978).

¹⁰⁶ *Id.* at 180.

¹⁰⁷ *Id.* at 179-180.

¹⁰⁸ *Pacific Merchant II*, 639 F.3d at 1179.

¹⁰⁹ *Id.*

¹¹⁰ *Id.* The Ninth Circuit did not discuss this analysis as the "Pike balancing test," but courts often use this term to discuss the burdens versus benefits analysis associated with the dormant Commerce Clause. *See supra* text accompanying notes 61-65.

Commerce Clause balancing analysis.¹¹¹ It ultimately found that California's interests outweighed the regulations' extraterritorial effects.¹¹²

The court further considered the VFR's potential conflicts with federal interests in commercial uniformity and with international environmental regulations.¹¹³ The federal government has the primary responsibility for foreign relations and international trade.¹¹⁴ It further maintains a special interest in federal uniformity when regulating environmental concerns on the high seas.¹¹⁵ However, the court distinguished between deep ocean water regulation — where federal interest in uniformity takes precedence — and coastal environmental regulation.¹¹⁶ The court considered the VFR's effects in each of these areas.¹¹⁷ The VFR did not regulate conduct wholly outside of California's territorial limits, within another state, within a foreign nation's waters, or in the open ocean.¹¹⁸ Rather, they only governed vessels within the state's territorial waters.¹¹⁹ Any incidental burdens on extraterritorial activity did not render the VFR invalid.¹²⁰

The court then considered California's interest in upholding the VFR and weighed this interest against the burdens on interstate commerce.¹²¹ California had an especially powerful interest associated with the VFR.¹²² Marine vessels cause substantial air pollution in California, especially in the Southern California Basin.¹²³ The air pollution subjects Californians to harmful and sometimes life-threatening effects, including cancer, asthma, and heart disease.¹²⁴ Recognizing environmental protection as a legitimate state interest,

¹¹¹ *Pacific Merchant II*, 639 F.3d at 1179.

¹¹² *Id.* at 1182.

¹¹³ *See id.* at 1179-80.

¹¹⁴ *Id.* at 1179.

¹¹⁵ *Id.* at 1180.

¹¹⁶ *Id.* at 1179-80 (citing *Chevron U.S.A., Inc. v. Hammond*, 726 F.2d 483, 492 n.12 (9th Cir. 1984)).

¹¹⁷ *See id.* at 1179.

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *See id.* at 1180-81.

¹²² *Id.*

¹²³ *See id.* at 1180-82.

¹²⁴ *See id.* at 1175-76; CARB, INITIAL STATEMENT 2008, *supra* note 8, at app. E3-2 to E3-5 (showing data to indicate increased health risks close to the ports of Long Beach and Los Angeles, and within the San Francisco Bay Area, including: an elevated cancer risk, increased premature deaths, increased cases of asthma and lower respiratory symptoms, and increased work loss days).

the Ninth Circuit found the VFR's benefits to far outweigh the opposing federal interests in preemption.¹²⁵

While the ruling focused heavily on California's environmental and health policy goals, it avoided meaningful discussion of the VFR's significant impact on maritime commerce. The Ninth Circuit did not directly address the actual costs to the maritime shipping industry in the context of the dormant Commerce Clause analysis.¹²⁶ Rather, the court briefly outlined these considerations, highlighted in the PMSA appeal, with the decision's background information.¹²⁷ While explaining the VFR, the court stated the cost of cleaner fuel and the steep fees for noncompliance.¹²⁸ But the court rationalized the costs: CARB had estimated that these fuel costs would equate to a six dollar increase per 20-foot shipping container, or only 12.5 cent increase per shipped plasma television.¹²⁹ Thus, absent from the analysis were the real, potentially significant economic concerns PMSA raised earlier. Ultimately, this absence of economic concerns will positively influence states' endeavors to enact environmental regulations, but it will negatively affect business and commercial interests.¹³⁰

PMSA appealed again, and various groups in maritime commerce wrote to support PMSA's petition for certiorari.¹³¹ The Supreme Court

¹²⁵ See *Pacific Merchant II*, 639 F.3d at 1176.

¹²⁶ See *id.* at 1177-82 (discussing the dormant Commerce Clause preemption challenge but avoiding an in-depth assessment of the actual costs to the maritime shipping industry).

¹²⁷ See *id.* at 1159-60. The Ninth Circuit also discussed the costs briefly within the Submerged Lands Act preemption analysis. See *id.* at 1176-77.

¹²⁸ *Id.* at 1159.

¹²⁹ *Id.*

¹³⁰ See discussion *infra* Part III (analyzing the decision's impact on both environmental regulations and business and commercial interests).

¹³¹ See, e.g., Brief for Maritime Law Ass'n of the United States as Amicus Curiae Supporting Petitioner at 3, *Pacific Merchant II*, 639 F.3d 1154 (No. 09-17765), 2011 WL 3252813, at *3 (stating that the Ninth Circuit's decision imperiled the uniformity of maritime law and explaining that the decision would have a substantial effect on maritime commerce and admiralty law); Brief for World Shipping Council et al. as Amici Curiae Supporting Petitioner at 5, *Pacific Merchant II*, 639 F.3d 1154 (No. 09-17765), 2011 WL 3252814, at *5 (arguing that the case presented substantial legal issues because it asked whether a state could "regulate vessels engaged in international commerce" while on the high seas). But see Brief for the United States as Amicus Curiae at 9, 18, *Pacific Merchant II*, 639 F.3d 1154 (No. 10-1555), 2012 WL 1891567, at *9, *18 (acknowledging that the issue "raise[d] important and difficult questions about the scope of a State's power to regulate seagoing vessels" but ultimately urging the Supreme Court to deny certiorari because "review at [that] juncture therefore would thus prevent the Court from considering important dimensions of the underlying controversy in this case"); but see also Craig H. Allen, *US Supreme Court*

denied certiorari and the Ninth Circuit's dormant Commerce Clause analysis stands.¹³²

III. THE *PACIFIC MERCHANT II* DORMANT COMMERCE CLAUSE RULING WILL IMPACT COMMERCIAL REGULATIONS

The Ninth Circuit's dormant Commerce Clause analysis will positively impact states' ability to achieve environmental policy goals, but negatively impact business interests, through increased commercial regulations. First, the analysis represents a revitalization and expansion of the Ninth Circuit's use of the tiered system and balancing test to uphold potentially burdensome environmental regulations. To fully appreciate the significance of *Pacific Merchant II* and its contribution to this practice, this Part will critically examine the substantial effects of the VFR on maritime commerce.¹³³ Second, states will respond by increasing regulations over maritime commerce to advance environmental policy goals.¹³⁴ Finally, these increased regulations will cause business and commercial groups to resent environmental regulations. Increased collaboration among interested parties will be essential — especially in the maritime context — to minimize businesses' frustration with environmental regulations and better achieve state environmental policy goals.¹³⁵

A. The *Pacific Merchant II* Dormant Commerce Clause Analysis Marks a Revitalization and Expansion of the Court's Use of the Tiered System and Balancing Test To Uphold Potentially Burdensome Environmental Regulations

The *Pacific Merchant II* dormant Commerce Clause analysis deemphasized significant commercial concerns faced by the maritime shipping industry.¹³⁶ Government regulatory agencies and maritime

Rejects PMSA's Challenge to California's Vessel Fuel Rule, PAC. MAR. MAGAZINE, Aug. 2012, at 26, 28, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2130573 [hereinafter *Supreme Court*] (“[A]bsent from the DOJ brief is any discussion of whether the US government agrees with the assertion that individual state and local governments can exercise the power normally accorded to nation-states under international law to impose conditions for entry into the nation's ports and international waters.”).

¹³² Pac. Merch. Shipping Ass'n v. Goldstene, 133 S. Ct. 22 (2012) (denying certiorari).

¹³³ See discussion *infra* Part III.A.

¹³⁴ See discussion *infra* Part III.B.

¹³⁵ See discussion *infra* Part III.C.

¹³⁶ See *infra* text accompanying notes 142-148 (discussing the marginalization of

shippers, including PMSA, commented on the high costs of VFR compliance when CARB first introduced the regulations in 2008.¹³⁷ PMSA reiterated the potential economic burdens in its Ninth Circuit brief.¹³⁸ Another marine shipper noted that the low-sulfur distillate fuels were hard or impossible to find in certain regions of Eastern Asia and America.¹³⁹ Lack of access to the appropriate fuels would force noncompliance costs.¹⁴⁰ The Maritime Law Association and various international shipping associations echoed these concerns in amicus briefs to the Supreme Court.¹⁴¹

The Ninth Circuit did not adequately address these tangible economic concerns in its dormant Commerce Clause analysis. The decision deemphasized the concerns, rationalizing the high fuel cost by explaining that the VFR bring only an incremental increase to, for example, each shipped television.¹⁴² Both tiers of the dormant Commerce Clause analysis demonstrate this marginalization.¹⁴³ The regulations avoided first-tier analysis based on their purpose and the determination that they did not substantially impede the free flow of commerce.¹⁴⁴ This initial framing was significant.¹⁴⁵ The VFR directly mandated fuel type, thus directly impacting vessel conduct but only

tangible economic concerns within *Pacific Merchant II*'s dormant Commerce Clause analysis).

¹³⁷ CARB, FINAL STATEMENT 2008, *supra* note 37, at 30-33 (discussing the VFR's cost impacts).

¹³⁸ See Brief for Appellant, *supra* note 46, at 30-35.

¹³⁹ CARB, FINAL STATEMENT 2008, *supra* note 37, at 31; see also CARB, INITIAL STATEMENT 2008, *supra* note 8, at app. F-2 (predicting that the low-sulfur marine distillate fuel required by the VFR would "be available for vessel operators to purchase" but noting "some uncertainty surrounding [CARB's] findings, particularly with respect to the availability of fuels to meet the [2010 and 2012] specifications").

¹⁴⁰ See CARB, FINAL STATEMENT 2008, *supra* note 37, at 31.

¹⁴¹ See *supra* Part II.C. See generally Allen, *Supreme Court*, *supra* note 131 (discussing the various fuel standards in place under MARPOL Annex VI (on the high seas), ECA (within 200 miles of North America), and CARB, and concluding that a vessel operator traveling from the Western Pacific to California could "choose to only buy and burn fuel that meets the strictest standards applicable throughout its voyage (and thereby also avoid those risky fuel-switchovers), but the cost of doing so would be considerable").

¹⁴² See *Pac. Merch. Shipping Ass'n v. Goldstene (Pacific Merchant II)*, 639 F.3d 1154, 1159 (9th Cir. 2011), *cert. denied*, 133 S. Ct. 22 (2012).

¹⁴³ See discussion *supra* Part II.B (examining *Pacific Merchant II*'s dormant Commerce Clause analysis and the Ninth Circuit's dismissal of significant economic factors).

¹⁴⁴ See discussion *supra* Part II.B.

¹⁴⁵ See Easterbrooks, *supra* note 16, at 687-88.

indirectly impacting air emissions.¹⁴⁶ Arguably, the court could have considered the VFR as air pollution regulations just as aptly as it considered them maritime commerce regulations.¹⁴⁷ Under the second-tier balancing test, the court focused its attention on the more abstract issue of federal uniformity; it weighed this issue alone against the VFR's benefits to California.¹⁴⁸ The Ninth Circuit's decision thus minimized concrete economic issues significant to PMSA and other shipping associations.

This marginalization of economic issues represents a revitalization and expansion of the court's use of the tiered system and balancing test to uphold potentially burdensome laws for public interest and environmental purposes.¹⁴⁹ The modern dormant Commerce Clause approach features varying tiers of scrutiny to evaluate state legislation.¹⁵⁰ Scholars suggest that, when no exceptions apply, the level of scrutiny used by the court is outcome determinative.¹⁵¹ Courts

¹⁴⁶ See *id.* (requiring vessels to decide whether to face fines or use low-sulfur fuel; whether to use the sea lanes under VFR control or find alternative routes; whether to call at California ports at all).

¹⁴⁷ *Id.* at 687.

¹⁴⁸ See *Pac. Merch. Shipping Ass'n v. Goldstene (Pacific Merchant II)*, 639 F.3d 1154, 1178-82 (9th Cir. 2011), *cert. denied*, 133 S. Ct. 22 (2012).

¹⁴⁹ *Pacific Merchant II* is far from unique in reflecting shifts and changes in federal courts' preemption doctrine analyses. Academics criticize what they consider inconsistent analysis. See, e.g., Craig H. Allen, *Federalism in the Era of International Standards: Federal and State Government Regulation of Merchant Vessels in the United States (Part III)*, 30 J. MAR. L. & COM. 85, 85 (1999) [hereinafter *Federalism*] (explaining that while preemption doctrines are "flexible and responsive," they are more commonly "rife with inconsistencies and subject to shifting judicial attitudes toward federalism"); John Slavich, *Environmental Issues Affecting Emerging Growth Companies*, 31 BULL. BUS. L. SEC. OF ST. B. TEX. 41, 41 (1994) (explaining court interpretation of environmental regulations at the federal, state, and local level expanded the scope of environmental liabilities and "injected uncertainty into long-standing . . . principals").

¹⁵⁰ See Felmlly, *supra* note 50, at 476 (noting that this makes the approach distinct from past methods).

¹⁵¹ See, e.g., Stanley E. Cox, *Garbage in, Garbage Out: Court Confusion About the Dormant Commerce Clause*, 50 OKLA. L. REV. 155, 168-69 (1997) (noting the Supreme Court pushed the two-tiered approach in "more mechanical and outcome determinative directions" in *Fort Gratiot Sanitary Landfill v. Michigan Department of Natural Resources*, 504 U.S. 353 (1992)); Bradford Mank, *The Supreme Court's New Public-Private Distinction Under the Dormant Commerce Clause: Avoiding the Traditional Versus Nontraditional Classification Trap*, 37 HASTINGS CONST. L.Q. 1, 10 (2009) (explaining courts' confusion and frustration concerning which scrutiny test should apply, though ultimately the choice is outcome determinative); O'Grady, *supra* note 96, at 574-75 (arguing that the court's threshold question concerning the tier of scrutiny is essentially outcome determinative); see also GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 489 (6th ed. 2009) (discussing the Equal Protection Clause and

rarely uphold statutes determined to fall into the first category of regulations burdening interstate commerce.¹⁵² Thus, courts and litigants tend to focus narrowly on whether a regulation discriminates against interstate commerce.¹⁵³ Courts use the second tier and the *Pike* balancing test to uphold legislation potentially fracturing national economic uniformity.¹⁵⁴ *Pacific Merchant II* adds to a line of Ninth Circuit cases in which the court upheld highly contentious regulations

noting that “the tier of scrutiny a court applies can be outcome determinative” in equal protection cases as well); Richard H. Fallon, Jr., *Foreword: Implementing the Constitution*, 111 HARV. L. REV. 56, 79 (1997) (explaining that in analyses involving multi-tiered scrutiny, tests that are “strict” in theory “routinely prove ‘fatal in fact’” while “rational basis review is typically so deferential as to amount to a virtual rubber stamp”). James Fox adds another level to this “outcome determinative” view and suggests that the level of scrutiny a particular circuit applies to the *Pike* balancing test is “the single best predictor of whether a law will be upheld.” James D. Fox, Note, *State Benefits Under the Pike Balancing Test of the Dormant Commerce Clause: Putative or Actual?*, 1 AVE MARIA L. REV. 175, 205-06 (2003). Evaluating the *Pike* balancing practices within each circuit, Fox further separates state benefits balancing into rational basis review, rational basis “with bite,” and “intermediate scrutiny.” *Id.* at 198. The Ninth Circuit, Fox argues, uses the rational basis “with bite” analysis and requires “evidence that the actual benefits are not ‘illusory.’” *Id.* at 203.

¹⁵² See sources cited *supra* note 151.

¹⁵³ See O’Grady, *supra* note 96, at 575 (arguing that this process leads courts and litigants to lose sight of the reason we ask whether laws are facially discriminatory).

¹⁵⁴ See Dan T. Coenen, *Where United Haulers Might Take Us: The Future of the State-Self-Promotion Exception to the Dormant Commerce Clause Rule*, 95 IOWA L. REV. 541, 546 (2010) [hereinafter *Where United Haulers Might Take Us*] (calling the *Pike*-balancing analysis a “tool for scuttling commerce-impeding state laws”); see also Fox, *supra* note 151, at 177 (positing that the *Pike* balancing test’s “state benefits” analysis is the “strange attractor” that shapes the flow of and “actually determines the outcome of [*Pike*] balancing cases”). See generally Ashutosh Bhagwat, *Hard Cases and the (D)evolution of Constitutional Doctrine*, 30 CONN. L. REV. 961, 990 (1998) (“[S]ignificant . . . is the argument that balancing analysis is in fact no analysis at all; it is simply a conclusion disguised as such. When engaging in balancing, a judge can explain what interests, in her view, weigh in favor of each possible conclusion, but she cannot explain why one set of interests is stronger than the other. That judgment is by its nature one of intuition, not capable of clear articulation.”).

to promote significant public interests.¹⁵⁵ It reinvigorates and expands on this trend within the context of environmental regulations.¹⁵⁶

The District Court for the District of Oregon examined the *Pike* balancing test and discussed its early application in *Evergreen Waste Systems, Inc. v. Metropolitan Service District*.¹⁵⁷ There, the court examined a local service district's ordinance banning waste haulers outside the district from disposing at a certain landfill within the district.¹⁵⁸ The regulations fell within the market participant exemption.¹⁵⁹ Under this exemption, courts shield state and local government regulations from dormant Commerce Clause scrutiny where the government entity participates in a defined market to promote local interests rather than regulate the market.¹⁶⁰ Because the

¹⁵⁵ See generally *infra* text accompanying notes 167-177 (discussing *Barber v. Hawai'i*, 42 F.3d 1185 (9th Cir. 1994)). But see Coenen, *Where United Haulers Might Take Us*, *supra* note 154, at 627 (arguing that the state self-promotion exception to the dormant Commerce Clause doctrine, recently created in *United Haulers Association, Inc. v. Oneida-Herkimer Solid Waste Management Authority*, 550 U.S. 330 (2007), and solidified in *Department of Revenue of Kentucky v. Davis*, 553 U.S. 328 (2008), may "pave the way for a significant contraction of the traditional [*Pike*]-balancing review, if not a wholesale repudiation of that methodology"); Denning, *supra* note 52, at 493 (arguing that the court already abandoned *Pike* balancing "*sub silentio*").

¹⁵⁶ This argument is distinct from the "public function exception," also known as the "state self-promotion exception." See Lawrence Fogel, Comment, *Serving a "Public Function": Why Regional Cap-and-Trade Programs Should Survive a Dormant Commerce Clause Challenge*, 2010 WIS. L. REV. 1313, 1318 n.26 (2010) (noting that the public function exception is one of many names for a particular type of dormant Commerce Clause exception in which a state may impose burdens on interstate commerce to promote itself or the general public of that state). See generally Edward A. Zelinsky, *The False Modesty of Department of Revenue v. Davis: Disrupting the Dormant Commerce Clause Through the Traditional Public Function Doctrine*, 29 VA. TAX REV. 407, 411 (2010) (arguing that recent expansions of the public function exception undermine prior case law by exempting government activity from dormant Commerce Clause scrutiny). *Pacific Merchant II* does not rely on or discuss the three cases at the heart of the modern "public function exception" doctrine: *C & A Carbone, Inc. v. Town of Clarkstown, N.Y.*, 511 U.S. 383 (1994), *United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330 (2007), and *Dep't of Revenue of Ky. v. Davis*, 553 U.S. 328 (2008).

¹⁵⁷ *Evergreen Waste Sys., Inc. v. Metro. Serv. Dist.*, 643 F. Supp. 127, 129-30 (D. Or. 1986), *aff'd*, 820 F.2d 1482 (9th Cir. 1987) (calling the analysis the "*Bruce Church* balancing test").

¹⁵⁸ *Id.* at 129.

¹⁵⁹ *Id.* at 129, 131.

¹⁶⁰ Dan T. Coenen, *Untangling the Market-Participant Exemption to the Dormant Commerce Clause*, 88 MICH. L. REV. 395, 397 (1989) ("[T]he Court has shielded from commerce clause attack blatant favoritism of local interests when a state or municipality buys printing services, sells cement, purchases goods, or hires workers.").

Metropolitan Service District acted as a market participant rather than market regulator, the Commerce Clause did not apply.¹⁶¹ However, the court proceeded to show that the District did not violate the dormant Commerce Clause even if the market participant exemption did not apply.¹⁶² The ordinance regulated even-handedly simply because it treated in-state and out-of-state waste the same.¹⁶³ The Ninth Circuit affirmed based on the same rationale.¹⁶⁴ The ordinance concerned a local government; the court may have decided differently if the regulations applied statewide.¹⁶⁵ Still, the ruling indicated early Ninth Circuit willingness to uphold regulations to promote public interest and environment-related concerns.¹⁶⁶

Barber v. State of Hawai'i adds to this trend.¹⁶⁷ Like *Pacific Merchant II*, *Barber* addresses preemption challenges under the Submerged Lands Act, dormant Commerce Clause, and maritime treaty law.¹⁶⁸ Though not an “environmental” case, *Barber* is further similar to *Pacific Merchant II* as it concerns maritime legislation adopted to promote a substantial public interest.¹⁶⁹ Hawaiian legislation imposed anchoring and mooring restrictions on boats remaining in a specific area off the state’s coast over 72 hours.¹⁷⁰ As in *Pacific Merchant II*, the court examined the legislation’s purpose and the degree it would affect interstate commerce.¹⁷¹ Hawaii adopted the regulations to address the significant threat to public safety caused by heavy seaway traffic.¹⁷² The court categorized this purpose as distinct from interstate

¹⁶¹ *Evergreen Waste Sys.*, 643 F. Supp. at 129, 131.

¹⁶² *Id.* at 129-30.

¹⁶³ *Id.*

¹⁶⁴ *Evergreen Waste Sys., Inc. v. Metro. Serv. Dist.*, 820 F.2d 1482, 1482-84 (9th Cir. 1987).

¹⁶⁵ Michael D. Diederich, Jr., *Does Garbage Have Standing?: Democracy, Flow Control and a Principled Constitutional Approach to Municipal Solid Waste Management*, 11 PACE ENVTL. L. REV. 157, 233 (1993) (distinguishing *Evergreen Waste Systems* from cases involving protectionist discrimination in the garbage trade because it involves a “bona fide attempt[] to locally manage locally generated waste”).

¹⁶⁶ See Bruce H. Aber, Note, *State Regulation of Out-of-State Garbage Subject to Dormant Commerce Clause Review and the Market Participant Exception*, 1 FORDHAM ENVTL. L. REP. 99, 107 (1989) (noting that others hoping to restrict out-of-state waste would look favorably on the ruling).

¹⁶⁷ See generally *Barber v. Hawai'i*, 42 F.3d 1185 (9th Cir. 1994) (discussing federal preemption challenges to Hawaii’s anchoring and mooring regulations).

¹⁶⁸ *Id.* at 1188.

¹⁶⁹ *Id.* at 1188-89.

¹⁷⁰ *Id.* at 1194.

¹⁷¹ See *id.*

¹⁷² *Id.* at 1195.

commerce.¹⁷³ As the regulations further did not target vessels in interstate commerce, they had only indirect economic effects.¹⁷⁴ The varying mooring and anchoring fees in small boat harbors did not discriminate against nonresidents or vessels engaged in interstate commerce.¹⁷⁵ Finally, the court applied the *Pike* balancing test and found in favor of the state.¹⁷⁶ *Barber* illustrates the Ninth Circuit's willingness to uphold a maritime law arguably burdening interstate commerce because it promotes a legitimate public interest.¹⁷⁷

These cases support a trend in dormant Commerce Clause jurisprudence in which federal courts are reluctant to closely examine legislations' effect on interstate commerce where the regulations advance significant policy goals.¹⁷⁸ In analyzing the regulations' purpose and effect on interstate commerce, the court's analysis may steer legislation into the dormant Commerce Clause's second tier.¹⁷⁹ There, decisions generally uphold statutes upon application of the *Pike* balancing test.¹⁸⁰

Recent case law suggested a restriction of this practice. In 2002, the Ninth Circuit examined an Arizona statute governing the state's annual hunting permit allocation system in *Conservation Force, Inc. v. Manning*.¹⁸¹ The statute mandated a 10% cap on nonresidential hunting.¹⁸² The Arizona Department of Game and Fish designed the statute to protect the state's elk and deer herds.¹⁸³ The court did not

¹⁷³ *Id.* at 1194.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* at 1195.

¹⁷⁶ *Id.*

¹⁷⁷ *See id.* at 1199 (upholding the regulation).

¹⁷⁸ *See* Allen, *Federalism*, *supra* note 149, at 90 (noting the reluctance to scrutinize state legislation, especially with regard to regulations' impact on uniformity); *see also* Steven F. Friedell, *Searching for a Compass: Federal and State Law Making Authority in Admiralty*, 57 LA. L. REV. 825, 845 (1997) ("The protection of maritime commerce through uniform national laws is not what it used to be.").

¹⁷⁹ *See, e.g., Barber*, 42 F.3d at 1194-95 (analyzing the purpose and effects of Hawaii's anchoring and mooring regulations).

¹⁸⁰ *See* sources cited *supra* note 151.

¹⁸¹ *Conservation Force, Inc. v. Manning*, 301 F.3d 985, 989-91 (9th Cir. 2002) (discussing ARIZ. ADMIN. CODE § R12-4-114 (1991)). *See generally* Dale Bish, Note, *The Unfounded Fears of Environmental Balkanization: The Ninth Circuit's Dangerous Expansion of the Commerce Clause*, 37 UC DAVIS L. REV. 605, 606-08 (2003) (examining *Conservation Force* and arguing that the Ninth Circuit's analysis "misapplied Commerce Clause precepts" and resultantly "adopted an analysis that [stood] contrary to public policy").

¹⁸² *Conservation Force*, 301 F.3d at 989.

¹⁸³ *Id.*

begin by categorizing the statute within the dormant Commerce Clause tiers, but first grappled with whether the doctrine applied at all.¹⁸⁴ The district court had concluded the Commerce Clause did not apply to the statute because hunting was recreation and unrelated to interstate commerce.¹⁸⁵ The Ninth Circuit disagreed, stating that hunting substantially affects the flow of people and goods in commercial markets, and the dormant Commerce Clause applied.¹⁸⁶ The Ninth Circuit then applied the two-tiered approach.¹⁸⁷ Arizona had considerable legitimate interests in enforcing the hunting cap.¹⁸⁸ However, the cap substantially affected and discriminated against interstate commerce.¹⁸⁹ Thus, the statute fell within the first category of regulations burdening interstate commerce;¹⁹⁰ the court remanded the case for a final decision.¹⁹¹ In deciding that recreational hunting is commerce, *Conservation Force* expanded the scope of the Commerce Clause and restricted state legislation in the area of wildlife protection.¹⁹²

Pacific Merchant II counteracts *Conservation Force*, returning to the earlier Ninth Circuit trend visible in *Barber* and *Evergreen Waste Services*. Not only does *Pacific Merchant II* return to the earlier trend, but it also reinvigorates and expands on it. Further, it does so in a manner that illustrates the interaction between environmental policy concerns and business and commercial regulations.

Environmental policy concerns often intertwine with commercial law and economic policy.¹⁹³ *Pacific Merchant II* showcases this overlap

¹⁸⁴ *Id.* at 992-95.

¹⁸⁵ *Id.* at 992.

¹⁸⁶ *Id.* at 994-95.

¹⁸⁷ *See id.* at 995-99 (discussing background law, the state's legitimate interests, and narrow tailoring to determine the validity of Arizona's nonresident cap).

¹⁸⁸ *Id.* at 997 (stating that these interests include preserving the Arizona game population and maintaining recreational hunting opportunities for state residents).

¹⁸⁹ *Id.* at 1000.

¹⁹⁰ Commentators argue the Ninth Circuit was wrong to hold that the Arizona nonresidential hunting cap substantially burdened interstate commerce. *See, e.g.,* John Schreiner, *The Irony of the Ninth Circuit's Expanded (Ab)use of the Commerce Clause*, 33 W. ST. U. L. REV. 13, 28 (2006) (arguing the *Conservation Force* court's misinterpretation of prior cases on the same issue); Bish, *supra* note 181, at 628 (arguing that hunting is a "noncommercial, wholly intrastate activity").

¹⁹¹ *Conservation Force*, 301 F.3d at 1000.

¹⁹² *See* Bish, *supra* note 181, at 626-27.

¹⁹³ *See, e.g.,* Bernie Hawkins et al., *Disclosing Environmental Liabilities: Recent Developments in Legal and Accounting Standards*, 18 BUS. L. TODAY 61 (2009), available at <http://apps.americanbar.org/buslaw/blt/2009-07-08/hawkins.shtml> (discussing the manner in which changing attitudes toward environmental stewardship affects

while promoting significant health and environmental concerns over economic concerns. It gives the judiciary a tool with which to uphold contentious laws.¹⁹⁴ The expansion of the long-used judicial practice will likely impact future dormant Commerce Clause analyses where commercial considerations conflict with environmental and human health considerations.

Pacific Merchant II has already added to another dormant Commerce Clause discussion.¹⁹⁵ Various parties challenged California's Low Carbon Fuel Standard, part of the state's Global Warming Solutions Act, arguing that it violated the dormant Commerce Clause.¹⁹⁶ The district court found the California regulation to discriminate against out-of-state commercial interests, and the Ninth Circuit granted the government's appeal.¹⁹⁷ The Ninth Circuit has not yet ruled on the case, but both sides recognize *Pacific Merchant II*'s potential impact in their briefs.¹⁹⁸ The Ninth Circuit may reevaluate the district court's categorization based on *Pacific Merchant II*'s dormant Commerce Clause analysis.

While the decision will likely influence future Ninth Circuit analyses, other federal circuits may decline to follow the Ninth

business law in the realm of environmental liabilities).

¹⁹⁴ Cf. Michael Burger, "It's Not Easy Being Green": Local Initiatives, Preemption Problems, and the Market Participant Exception, 78 U. CIN. L. REV. 835 (2010) (suggesting that the dormant Commerce Clause's market participant exception may serve as a tool to promote local climate change and sustainability initiatives); Coenen, *Where United Haulers Might Take Us*, *supra* note 154 (explaining the development of the state self-promotion exception, a new tool with which local governments may avoid the full dormant Commerce Clause analysis); Kylie M. Dummett, Case Note, *Carbone v. United Haulers: Local Environmental Regulation Gains Headway While the United States Supreme Court "Trashes" Judicial Precedence*, 12 GREAT PLAINS NAT. RESOURCES J. 185, 191 (2008) (discussing the potential effects of the state self-promotion exception on environmental regulations).

¹⁹⁵ See Appellants' Opening Brief at 104, *Rocky Mountain Farmers Union v. Goldstene*, Nos. 12-15131, 12-15135 (9th Cir. Jan. 20, 2012), 2012 WL 2338857, at *104; Brief of the Afpm Plaintiffs-Appellees at 55 n.15, *Rocky Mountain Farmers Union v. Goldstene*, Nos. 12-15131, 12-15135 (9th Cir. Jan. 20, 2012), 2012 WL 3342552, at *55 n.15.

¹⁹⁶ See *Rocky Mountain Farmers Union v. Goldstene*, 843 F. Supp. 2d 1071, 1078 (E.D. Cal. 2011). The Global Warming Solutions Act contains ambitious greenhouse gas emissions reduction goals to be achieved by the year 2020. *Assembly Bill 32: Global Warming Solutions Act*, CAL. ENVTL. PROT. AGENCY AIR RES. BD., <http://www.arb.ca.gov/cc/ab32/ab32.htm> (last visited July 15, 2013). Signed by Governor Schwarzenegger in 2006, the legislation directed CARB to "begin developing discrete early actions to reduce greenhouse gases while also preparing a scoping plan to identify how best to reach the 2020 limit." *Id.*

¹⁹⁷ Appellants' Opening Brief, *supra* note 195, at 1-3.

¹⁹⁸ See *id.* at 104; Brief of the Afpm Plaintiffs-Appellees, *supra* note 195, at 55 n.15.

Circuit's lead if faced with a similar case. Coastal states, especially states circling the Gulf of Mexico, exhibit a sensitive relationship between commercial interests and environmental regulations.¹⁹⁹ The Gulf states, including Texas, Louisiana, and Florida, also contain the nation's largest ports and control a substantial amount of the country's imports and exports.²⁰⁰ Environmental regulations in the Gulf of Mexico, subject to Fifth and Eleventh Circuit review, may provide a useful comparison in the future.

States circling the Gulf of Mexico lag behind California, and other environmentally progressive states, in enacting legislation advancing environmental and human health concerns.²⁰¹ No Gulf states have enacted vessel fuel regulations analogous to California's VFR.²⁰² Though the EPA encourages fuel switching to comply with international standards,²⁰³ international standards are not as stringent as the VFR.²⁰⁴

¹⁹⁹ See John Alton Duff & William C. Harrison, *The Law, Policy, and Politics of Gillnet Restrictions in State Waters of the Gulf of Mexico*, 9 ST. THOMAS L. REV. 389, 402-03 (1997) (illustrating this sensitive relationship by discussing efforts by conservation groups and state legislatures to adopt gillnet fishing bans in the Gulf states).

²⁰⁰ See *Ports — Crucial Coastal Infrastructure*, *supra* note 4 (listing Southern Louisiana as the largest U.S. port and Houston, Texas, as the second; Florida controls numerous smaller ports).

²⁰¹ See, e.g., Kristen M. Fletcher, "If You Can't Beat 'Em, Eat 'Em." *Legal Methods to Control Aquatic Nuisance Species in the Gulf of Mexico*, 5 OCEAN & COASTAL L.J. 245, 246-47 (2000) (explaining that Gulf states have been slow to enact protective legislation against aquatic nuisance species for a variety of reasons, including lack of an immediate crisis as seen with invasive species in the Great Lakes).

²⁰² But see generally ENVTL. PROT. AGENCY, U.S.-MEXICO DEMONSTRATION OF FUEL SWITCHING ON OCEAN GOING VESSELS IN THE GULF OF MEXICO 5 (2010), available at <http://www.epa.gov/international/air/fuelswitchreport.pdf> (demonstrating that, though Texas had no VFR, the Port of Houston participated in a pilot program to examine the benefits of low-sulfur fuel); Press Release, Port of Houston Authority, Port of Houston Authority Wins First Place Gulf Guardian Award for Fuel-Switching Project (Aug. 5, 2011), available at <http://globenewswire.com/news-release/2011/08/05/453295/228755/en/Port-of-Houston-Authority-Wins-First-Place-Gulf-Guardian-Award-for-Fuel-Switching-Project.html> (noting the Port of Houston Authority's demonstrated commitment to "environmental stewardship" and air quality planning).

²⁰³ See generally ENVTL. PROT. AGENCY, *supra* note 202, at 3, 5, 7 (discussing the high amount of pollution from ships in the Gulf of Mexico, especially at the Port of Houston, and encouraging the use of low-sulfur fuel — as would ultimately be required under the International Convention for the Prevention of Pollution from Ships — by sponsoring a "fuel switch demonstration").

²⁰⁴ Annex VI of the International Convention for the Prevention of Pollution from Ships ("MARPOL") requires reduced fuel sulfur for ocean-going vessels operating within 200 nautical miles of the United States coastline, including the Gulf coastline. See *id.* at 3, 5 (requiring fuel sulfur content to reduce to 1% in 2010 and 0.1% in 2015); see also *Pac. Merch. Shipping Ass'n v. Goldstene (Pacific Merchant II)*, 639 F.3d

The Fifth and Eleventh Circuits have not had the opportunity to rule on regulations analogous to California's VFR, but nothing indicates that either Circuit would come to the same opinion as the Ninth Circuit if forced to decide.²⁰⁵ The Gulf ports contain extensive foreign and international commercial interests;²⁰⁶ these commercial interests might tip the dormant Commerce Clause balancing test against environmental regulations. Opposing decisions could create a circuit split only reconcilable by the Supreme Court. Until then, the scope of *Pacific Merchant II*'s positive impact on states' environmental regulations and negative affect on business and commercial interests will remain ambiguous.

B. States Will Increase Regulations Concerning Maritime Activity and Commercial Regulations Generally

States will likely regulate maritime economic activity traditionally outside of their reach and increase the scope of commercial regulations generally to meet environmental policy goals. In *Pacific Merchant II*, the VFR regulated maritime economic activity traditionally outside of California's reach. The Ninth Circuit categorized potentially economic and commercial concerns as noncommercial.²⁰⁷ It called attention to the environmental and human health impacts of inaction.²⁰⁸

Other states will likely follow suit and begin regulating maritime economic activity traditionally outside of their reach. Ballast water

1154, 1161 (9th Cir. 2011), *cert. denied*, 133 S. Ct. 22 (2012) (noting that MARPOL regulations would require "vessels to meet the same 0.1% sulfur limit established by the Vessel Fuel Rules beginning in 2015"). CARB recognized these similarities during the decisionmaking process and noted that the VFR regulations were more stringent and would "achieve significantly more emission reductions in the 2009-2015 timeframe." CARB, INITIAL STATEMENT 2008, *supra* note 8, at ES-23 to ES-24.

²⁰⁵ See *supra* text accompanying note 199. Past dormant Commerce Clause challenges to environmental regulations do not provide clear guidance on this issue. See generally Duff & Harrison, *supra* note 199, at 399-416 (discussing gillnet fishing bans in Texas, Florida, Alabama, Louisiana, and Mississippi, and explaining that while the federal court upheld Texas's bans, preemption challenges in Louisiana were more successful). Further, the Eastern District of Louisiana recently declined to extend *Pacific Merchant II* to regulations involving offshore oil rigs; this may suggest that Fifth Circuit courts may look unfavorably on the ruling. See *In re Oil Spill by Oil Rig DEEPWATER HORIZON in Gulf of Mexico*, on April 20, 2010, MDL No. 2179, 2011 WL 5520295, at *7 (E.D. La. Nov. 14, 2011).

²⁰⁶ See *Ports — Crucial Coastal Infrastructure*, *supra* note 4 (calling ports the "essential driver of the U.S. economy").

²⁰⁷ See *Pacific Merchant II*, 639 F.3d at 1179-80.

²⁰⁸ See *id.*

regulation on the Great Lakes provides an analogy.²⁰⁹ There, Michigan's Ballast Water Statute withstood dormant Commerce Clause scrutiny.²¹⁰ Soon after, Minnesota followed Michigan in adopting a ballast water permitting policy.²¹¹

The Sixth Circuit upheld Michigan's ballast water permitting regulations in *Fednav II*.²¹² Vessels regularly discharge water from their ballast tanks when calling at port, a practice which brought aquatic nuisance species into Michigan's harbors.²¹³ These nonindigenous species are financially burdensome and can carry diseases.²¹⁴ Michigan's statute countered these adverse effects by requiring that ocean-going vessels visiting Michigan ports purchase a Ballast Water Control General Permit.²¹⁵

In 2008, shipping companies, nonprofit shipping associations, and other plaintiffs challenged Michigan's Ballast Water Statute in federal court.²¹⁶ The plaintiffs argued that the Commerce Clause and federal laws, including the National Invasive Species Act, preempted Michigan's statute.²¹⁷ In *Fednav I*, the district court applied the *Pike* balancing test and found that the benefits to Michigan far outweighed the burdens on interstate commerce.²¹⁸ The Sixth Circuit similarly found no dormant Commerce Clause preemption in *Fednav II*.²¹⁹

²⁰⁹ Ballast water is water taken into ships' tanks to "control or maintain trim, draft, stability, or stresses on the vessel." SARAH LESAGE, AQUATIC INVASIVE SPECIES ADVISORY COUNCIL, REGULATION OF BALLAST WATER DISCHARGE 2 (2006), available at http://www.michigan.gov/documents/deq/wrd-ais-april6-ballastwater_383132_7.pdf; see Matthew R. First et al., *Stratification of Living Organisms in Ballast Tanks: How Do Organism Concentrations Vary as Ballast Water is Discharged?*, 47 ENVTL. SCI. & TECH. 4442, 4442 (2013). Ships load ocean water into their ballast tanks at a "source port," where they discharge their cargo, and discharge ballast water at the "destination port," where they load cargo. See LESAGE, *supra*, at 2. The ballast water often contains invasive species. See First, *supra*, at 4442.

²¹⁰ *Fednav, Ltd. v. Chester (Fednav II)*, 547 F.3d 607, 625 (6th Cir. 2008).

²¹¹ See Stephanie Showalter, *Minnesota Requires Permit for Ballast Water Discharge in Lake Superior*, 7:4 THE SANDBAR 4, 4 (2009), available at <http://nsglc.olemiss.edu/SandBar/pdfs/sandbar7.4.pdf>.

²¹² *Fednav II*, 547 F.3d at 625.

²¹³ See *id.* at 610.

²¹⁴ See *id.* at 610-11.

²¹⁵ *Id.* at 613.

²¹⁶ *Id.* at 610.

²¹⁷ *Id.* at 618-26.

²¹⁸ *Fednav, Ltd. v. Chester (Fednav I)*, 505 F. Supp. 2d 381, 397-99 (E.D. Mich. 2007), *aff'd*, 547 F.3d 607 (6th Cir. 2008).

²¹⁹ *Fednav II*, 547 F.3d at 624-26. *Fednav I* and *Fednav II* have slightly different dormant Commerce Clause analyses. *Fednav I* applied the *Pike* balancing test and found no dormant Commerce Clause preemption challenge. *Fednav I*, 505 F. Supp. 2d

Other Great Lakes states, particularly Minnesota, faced similar health and environmental threats from ballast water discharge.²²⁰ Explaining *Fednav I*'s dormant Commerce Clause preemption challenge, one academic advised Minnesota to follow Michigan's example and adopt similar ballast water discharge regulations.²²¹ The *Fednav I* court upheld the statute because it did not facially discriminate against out-of-state interests, and it had a minimal burden on interstate commerce.²²² Minnesota could adopt similar regulations to address the ballast water issues, and federal law likely would not preempt the regulations.²²³

In 2008, Minnesota followed this advice and became the second state to adopt a Ballast Water Discharge Program.²²⁴ As in Michigan, vessel operators wishing to discharge ballast water into Minnesota state waters must apply and receive a state permit.²²⁵ But Michigan's statute only applies to ocean-going vessels, and Minnesota's new regulations reach further.²²⁶ Minnesota requires all vessels, including those restricting travel to the Great Lakes, to obtain a permit.²²⁷ Further, Minnesota's regulations set ballast water treatment standards, which arguably set a higher compliance threshold than Michigan's technology-based standards.²²⁸

at 397-99. *Fednav II* discussed the *Pike* balancing test and affirmed the district court's ultimate dormant Commerce Clause ruling. *Fednav II*, 547 F.3d at 623-24. But it explained "there is no need to conduct the *Pike* balancing at all" because "the Commerce Clause has not been dormant here." *Id.* at 624. Despite this technicality, secondary sources discussing *Fednav I* and *II* either ignore the difference or treat *Fednav II* as generally affirming *Fednav I*'s dormant Commerce Clause analysis. See, e.g., David W. Robertson & Michael F. Sturley, *Recent Developments in Admiralty and Maritime Law at the National Level and in the Fifth and Eleventh Circuits*, 34 TUL. MAR. L.J. 443, 499 (2010) (stating simply the "Sixth Circuit held that the statute was neither federally preempted nor a violation of the dormant Commerce Clause"); Rebecca S. Robison, Comment, *Bringing the Floating Polluters to Port: Why the Minnesota Pollution Control Agency Has a Nondiscretionary Duty to Regulate Ballast Water Discharge in Lake Superior and How to Avoid Impermissible Extraterritorial Effects*, 31 HAMLINE L. REV. 773 (2008) (discussing *Fednav I* and its dormant Commerce Clause analysis without *Fednav II*).

²²⁰ See Robison, *supra* note 219, at 775.

²²¹ See *id.* at 790-91.

²²² See *id.* at 807.

²²³ See *id.* at 805-07.

²²⁴ Showalter, *supra* note 211, at 4.

²²⁵ *Id.*

²²⁶ *Id.*

²²⁷ *Id.*

²²⁸ See *id.*

As Minnesota followed Michigan's lead, coastal states may likewise follow California's example and enact far-reaching fuel rules.²²⁹ This would increase regulations affecting maritime commercial activity. This further indicates that states may regulate non-maritime commercial activity generally in the name of environmental and health goals.

The Great Lakes ballast water context, described above, may not accurately indicate *Pacific Merchant II*'s effect on maritime activity. The Michigan Ballast Water Statute fills a loophole in the federal aquatic nuisance species regulatory scheme.²³⁰ Federal laws regulating aquatic nuisance species, most prominently the National Invasive Species Act, contemplated regulations such as Michigan's.²³¹ The Act's savings clause encouraged state activity that could regulate nuisance species where federal activity fell short.²³² The VFR do not fill any similar loopholes in federal law, and states may thus face difficulties adopting similar regulations.

Pacific Merchant II upheld regulations in an area where the legislature did not contemplate state environmental regulation.²³³ The ruling indicates that federal courts — or the Ninth Circuit at a minimum — will allow for regulation in areas almost completely field preempted by federal law. The savings clause highlighted in the Sixth Circuit's dormant Commerce Clause analysis is not always necessary.²³⁴ Precisely for this reason, other states will follow suit.²³⁵

²²⁹ See Robison, *supra* note 219, at 805-07, 822-28 (discussing *Fednav I*'s dormant Commerce Clause preemption challenge and giving guidelines for other states to follow suit while avoiding preemption); cf. Duff & Harrison, *supra* note 199 (explaining that Texas's early net ban, prohibiting commercial fishing with environmentally harmful gillnets, withstood dormant Commerce Clause challenges and served "as a model for other states to enact their own gillnet restrictions").

²³⁰ See Jason G. Howe, Case Note, *Fednav, Ltd. v. Chester: Ballast Water and the Battle to Balance State and Federal Regulatory Interests*, 15 OCEAN & COASTAL L.J. 381, 384-86 (2010) (discussing the shortcomings of the National Invasive Species Act, Clean Water Act, and Nonindigenous Aquatic Nuisance Prevention and Control Act in preventing aquatic nuisance species and explaining Michigan's attempt to fix the deficiencies).

²³¹ *Id.* at 390-91.

²³² *Id.*

²³³ See *Pac. Merch. Shipping Ass'n v. Goldstene (Pacific Merchant II)*, 639 F.3d 1154, 1179-82 (9th Cir. 2011) (failing to indicate any federal laws contemplating state regulation of vessel fuels past the Submerged Lands Act three-mile boundary), *cert. denied*, 133 S. Ct. 22 (2012).

²³⁴ But see Howe, *supra* note 230, at 389-91 (explaining the significance of the savings clause in *Fednav I* and *II*'s dormant Commerce Clause analyses).

²³⁵ Recent developments in ballast water law may complicate this analogy in the future. Public interest environmental groups push for strict ballast water discharge regulation under the Clean Water Act. See, e.g., Press Release, Natural Res. Def.

Further, states will likely increase the scope of commercial regulations outside of maritime commerce to meet environmental policy goals. Growing climate change concerns suggest that states will extend environmental regulations to include stricter greenhouse gas regulations.²³⁶ Greenhouse gases, like the air pollution addressed by California's VFR, are not local in nature and can easily permeate state territorial borders.²³⁷ They are essentially global.²³⁸ Though no national standards currently exist, the federal Environmental Protection Agency ("EPA") may eventually regulate greenhouse gas emissions — specifically, carbon dioxide — under the Clean Air Act.²³⁹ If the federal government regulates carbon dioxide as an air pollutant under the Clean Air Act, states also must take regulatory action.²⁴⁰ This process traditionally requires that the EPA first set National Ambient Air Quality Standards for the air pollutant.²⁴¹ States in turn create State Implementation Plans to achieve the federal government air quality standards.²⁴² However, states may choose to regulate beyond federal requirements given greenhouse gases' significant potential harms.²⁴³

Council, EPA Permit Too Weak to Protect Great Lakes, U.S. Waters from Ballast Water Invaders (Feb. 21, 2012), available at <http://www.nrdc.org/media/2012/120221a.asp>. See generally Eric B. Rothenberg & Robert S. Nicksin, *Latest Developments in International Maritime Environmental Regulation*, 33 TUL. MAR. L.J. 137, 153-55 (2008) (discussing earlier attempts to regulate ballast water as a pollution discharge under the Clean Water Act). Ballast water regulation under the Clean Water Act may add another dimension to future ballast water regulation preemption challenges. These proposals are outside the scope of this Note, but may provide an interesting comparison with the Marine Vessel Rules preemption challenge under the Clean Air Act, discussed *supra* text accompanying notes 26-32.

²³⁶ See Arnold W. Reitze, Jr., *Federal Control of Carbon Dioxide Emissions: What Are the Options?*, 36 B.C. ENVTL. AFF. L. REV. 1, 76 (2009).

²³⁷ See Richard A. Rinkema, Comment, *Environmental Agreements, Non-State Actors, and the Kyoto Protocol: A "Third Way" for International Climate Action?*, 24 U. PA. J. INT'L ECON. L. 729, 730 (2003).

²³⁸ *Id.*

²³⁹ DAVID HUNTER, JAMES SALZMAN, DURWOOD ZAEKE, *INTERNATIONAL ENVIRONMENTAL LAW AND POLICY* 725-26 (4th ed. 2011); Reitze, *supra* note 236, at 1 (discussing the Supreme Court's holding in *Massachusetts v. E.P.A.*, explaining that the Clean Air Act is a poor vehicle for greenhouse gas regulation, and suggesting alternative regulation methods); see *Massachusetts v. E.P.A.*, 549 U.S. 497, 528 (2007) (holding that EPA may regulate greenhouse gas emissions from new motor vehicles under the Clean Air Act if it decides that the emissions contribute to climate change).

²⁴⁰ Reitze, *supra* note 236, at 3.

²⁴¹ *Id.* (citing Clean Air Act § 109(a)(1), 42 U.S.C. 7409(a)(1) (2000)).

²⁴² *Id.* (citing Clean Air Act § 110(a)(1), 42 U.S.C. 7410(a)(1) (2000)).

²⁴³ See, e.g., *id.* at 8-9 (discussing states' discretion under the Clean Air Act concerning permitting requirements for new pollution sources in the commercial

States may also regulate in the absence of federal requirements, before the EPA sets threshold goals.²⁴⁴ California's Global Warming Solutions Act illustrates this concept.²⁴⁵ *Rocky Mountain Farmers Union v. Goldstene* further demonstrates that far-reaching greenhouse gas regulations will likely face dormant Commerce Clause challenges.²⁴⁶ Academics suggest that state climate change regulations should ultimately withstand dormant Commerce Clause scrutiny, but will first face harsh opposition.²⁴⁷

Pacific Merchant II allows states to regulate commercial activity traditionally outside of their reach to meet environmental policy goals.²⁴⁸ Arguably, allowing such regulations will advance states' environmental policy goals while negatively impacting commercial and business interests. But academics question whether harsh regulations are the best method to combat environmental issues, especially where the environmental issues are national or global.²⁴⁹ The final section suggests cooperation among opposing interest groups to better combat air pollution, greenhouse gas emissions, and other environmental issues.

sector).

²⁴⁴ See, e.g., *id.* at 67 (explaining that California was the first state to impose greenhouse gas emissions standards on motor vehicles with A.B. 1493 in 2002).

²⁴⁵ See generally Assembly Bill 32, *supra* note 196 (detailing the Global Warming Solutions Act's specific requirements and explaining how they would decrease statewide greenhouse gas emissions).

²⁴⁶ See generally 843 F. Supp. 2d 1071, 1078-82 (E.D. Cal. 2011) (discussing the basis of Rocky Mountain Farmer's Union's challenge to California's Low Carbon Fuel Standard, CAL. CODE REGS. tit. 17, §§ 95480-95490 (2010)).

²⁴⁷ Academics propose various rationales as to why greenhouse gas regulations should withstand dormant Commerce Clause scrutiny, including reasoning similar to the *Pacific Merchant II* analysis. See, e.g., Burger, *supra* note 194 (suggesting that states avoid dormant Commerce Clause preemption by crafting climate change initiatives that conform to the "market participant" exception); Fogel, *supra* note 156 (arguing that greenhouse gas cap-and-trade programs should survive preemption challenges based on the "public-function exception"); Patricia Weisselberg, Comment, *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, 204-24 (2007) (discussing the same concerns proposed by the *Pacific Merchant II* court and concluding that California's Greenhouse Gas Emissions Performance Standard Act (SB 1368) imposes only incidental burdens on interstate commerce and does not have extensive extraterritorial effects).

²⁴⁸ See *supra* text accompanying notes 210-229, 236-247 (analogizing the California VFR to Minnesota's ballast water statute and predicting that other states will similarly follow California's lead, and then assessing the possibility of states regulating greenhouse gases).

²⁴⁹ See discussion *infra* Part III.C (suggesting that national and global environmental issues may require national and global solutions).

C. *Increased Regulations Suggest Increased Collaboration*

Pacific Merchant II's dormant Commerce Clause analysis will likely pave the way for increased business and commercial regulations.²⁵⁰ As business and commercial regulations increase, so too will animosity toward environmental regulations. Business and commercial groups affected by strict environmental regulations will likely voice their concerns regarding new environmental policies.²⁵¹ Commercial groups affected by these policies may resent and resist new, increasingly harsh environmental laws.²⁵²

Scholars present a solution: opposing interest groups should collaborate to minimize business's frustration with environmental regulations.²⁵³ Within local and regional spheres, environmental decision-makers now trend toward integrated environmental management and collaboration with outside parties.²⁵⁴ States wishing to follow California's lead and adopt similar vessel fuel rules should consider this trend. Any state wishing to adopt environmental regulations with substantial economic effects may evade strong backlash by increasing early collaboration with commercial interests.

²⁵⁰ See discussion *supra* Part III.B.

²⁵¹ See DANIEL BODANSKY, *THE ART AND CRAFT OF INTERNATIONAL ENVIRONMENTAL LAW* 132 (2010) ("To the extent that environmental regulations impose costs on business, it is clear why business actors might oppose them."); see, e.g., Brief for World Shipping Council et al. as Amici Curiae Supporting Petitioner, *supra* note 131, at 3-5 (summarizing the arguments against the VFR and urging the Supreme Court to grant certiorari and reverse the district court's opinion).

²⁵² See BODANSKY, *supra* note 251, at 132. See generally Eric Engle, *Environmental Protection as an Obstacle to Free Movement of Goods: Realist Jurisprudence in Articles 28 and 30 of the E.C. Treaty*, 27 J.L. & COM. 113, 115-16 (2008) (discussing the collision between free trade and environmental protection in the international arena).

²⁵³ See, e.g., BODANSKY, *supra* note 251, at 134 (involving the business community is necessary because industry often plays "the key role" in the environmental regulation implementation process); David E. Frulla et al., *Found in the Wind: The Value of Early Consultation and Collaboration with Other Ocean Users for Successful Offshore Wind Development*, 17 ROGER WILLIAMS U. L. REV. 307, 307-08 (2012) (often missing in ocean use planning is "comprehensive inclusion in planning of all interested parties from the outset"); Bradley C. Karkkainen, *Environmental Lawyering in the Age of Collaboration*, 2002 WIS. L. REV. 555, 567-71 (2002) (discussing the transformation in environmental decision-making, from confrontational to collaborative, and its implications for lawyering); Prue Taylor, *The Business of Climate Change: What's Ethics Got to Do with It?*, 20 PAC. MCGEORGE GLOBAL BUS. & DEV. L.J. 161, 203 (2007) (calling for substantive change in businesses' attitude toward environmental regulations but conceding that "appealing to theories of business management and institutional behavior may be necessary steps" for corporations to ultimately adopt an ethic of environmental stewardship).

²⁵⁴ Karkkainen, *supra* note 253, at 555.

Collaboration is further relevant for environmental protection measures in maritime law because of its international implications.²⁵⁵ Even a sovereign nation acting alone on the international stage can substantially disrupt maritime law and the balance of international environmental regulations.²⁵⁶ Cooperative regulatory schemes ensure uniformity essential for effective international economic relations as well as effective environmental protection systems.²⁵⁷ Thus, interested parties, including government entities and multinational corporations, should cooperate to meet global goals.²⁵⁸

CONCLUSION

Pacific Merchant II upholds a state environmental regulation with significant impacts on maritime commerce.²⁵⁹ The ruling will impact the relationship between commercial law and environmental policy; it will benefit environmental policy while disadvantaging business and commercial interests.²⁶⁰ This Note scrutinized the Ninth Circuit's dormant Commerce Clause analysis to reveal the decision's significant impact on future environmental regulations.²⁶¹ The ruling suggests

²⁵⁵ See generally Emeka Duruigbo, *Reforming the International Law and Policy on Marine Oil Pollution*, 31 J. MAR. L. & COM. 65 (2000) (explaining that maritime pollution is an international issue and that international collaboration is necessary for effective oil pollution control systems); Lieutenant Commander Joan M. Malik, *United States Environmental Law Applied in the Arctic Ocean: Frustrating the Balance of the Law of the Sea, National Sovereignty, and International Collaboration Efforts*, 60 NAVAL L. REV. 41, 43-44 (2010) (discussing how the United States' federal environmental requirements (NEPA, ESA, etc.) disrupt international environmental schemes in the Arctic and arguing that the presumption against extraterritoriality should control).

²⁵⁶ See Malik, *supra* note 255, at 49.

²⁵⁷ See sources cited *supra* note 255.

²⁵⁸ See Robert F. Blomquist, *Models and Metaphors for Encouraging Responsible Private Management of Transboundary Toxic Substances Risk: Toward a Theory of International Incentive-Based Environmental Experimentation*, 18 U. PA. J. INT'L ECON. L. 507, 509 (1997) (suggesting a system of "indirect public encouragement" to promote private initiatives to mitigate environmental risks crossing national boundaries); Rinkema, *supra* note 237, at 732-33 (suggesting multinational corporations might contribute to climate change regimes through "binding, enforceable, and voluntary agreements"). See generally BODANSKY, *supra* note 251, at 11 (explaining that transboundary environmental problems and issues beyond national jurisdiction, such as whaling, pollution of the high seas, and ozone depletion, all involve "physical spillovers" and thus require international cooperation).

²⁵⁹ See discussion *supra* Part III.

²⁶⁰ See discussion *supra* Part III.

²⁶¹ See discussion *supra* Part III.A (discussing concerns voiced by the maritime shipping industry, and arguing that the expanded practice will impact future dormant Commerce Clause).

that states will increase regulation of potentially extraterritorial business and commerce based on state environmental policy concerns.²⁶² But state agencies, including California's CARB, will face growing challenges in implementation as commercial interest groups act against such regulations.²⁶³ States must find new solutions, such as collaboration with opposing interests, to advance future environmental policy goals.²⁶⁴

²⁶² See discussion *supra* Part III.B (analogizing California's VFR to Minnesota's ballast water statute, upheld by the Sixth Circuit, and predicting that other states will follow California's lead).

²⁶³ See discussion *supra* Part III.C (suggesting that harsh regulations on business and commercial groups will cause resentment).

²⁶⁴ See discussion *supra* Part III.C (suggesting increased collaboration).