REMOVING UNCONSTITUTIONAL BARRIERS TO OUT-OF-STATE AND FOREIGN COMPETITION FROM STATE RENEWABLE PORTFOLIO STANDARDS: WHY THE DORMANT COMMERCE CLAUSE PROVIDES IMPORTANT PROTECTION FOR CONSUMERS AND ENVIRONMENTALISTS

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Synopsis: Over the last several decades nearly two-thirds of states in the United States have enacted "renewable portfolio standards" (RPS) obligating utilities to meet at least a portion of their energy needs with renewable resources. There is unanimity among the various commentators who have addressed the subject that the "buy local" preferences found in three-quarters of state RPS laws are almost certainly unconstitutional under the dormant Commerce Clause. But nearly all of these commentators focus on the dormant Commerce Clause as an impediment to state efforts to promote renewable resources—some even urging legislators to "disguise" or "recast" RPS legislation so the in-state preferences might escape detection. This, the author argues, is misguided advice that is antithetical to the interests of consumers who pay the inflated costs imposed by protectionist legislation. And it is not in the interests of environmentalists who hope to see states make progress in reducing carbon emissions—the core goal of RPS legislation. Dormant Commerce Clause prohibitions on protectionist legislation are not only settled law, but they make for sound economic policy endorsed by economists across the entire philosophical spectrum. The author urges states to see the dormant Commerce Clause as a consumer safeguard to be embraced, not as an impediment to be circumvented. This will be difficult, given the centuries-long history of protectionist state legislation and the temptations of legislators to boast that they are saving local businesses and jobs. But the threat of litigation to enforce constitutional limitations against in-state preferences may provide states the additional impetus to curb their protectionist instincts.

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I. INTRODUCTION

Frustrated by federal inaction on national legislation to address climate change, by 2012, twenty-nine states and the District of Columbia had enacted "renewable portfolio standards" (RPS), obligating utilities to meet at least a portion of their energy needs with renewable resources.[1] But in the vast majority of these states−75%−resources developed within the state are given various forms of preference over out-of-state resources.[2] Some are outright bars on out-of-state resources, some discount the credit such resources receive for meeting a state's RPS goals (or offer credit multipliers to in-state resources), and still others place limits on the amount of out-of-state resources that can qualify as renewable.[3] Authors who have addressed this subject in recent years agree these types of restrictions are almost certainly unconstitutional under the dormant Commerce Clause.[4]

1. Steven Ferrey, *Threading the Constitutional Needle with Care: The Commerce Clause Threat to the New Infrastructure of Renewable Power*, 7 TEX. J. OIL GAS & ENERGY L. 59, 61-62 (2012). EPA's latest figures say that, as of March 2013, thirty-seven states and the District of Columbia have now adopted renewable portfolio standards (RPS), *Renewable Portfolio Standards*, EPA, http://www.epa.gov/agstar/tools/funding/renewable.html (last visited Jan. 16, 2015), although the larger number appears to include states that have adopted renewable portfolio goals as well as mandates. Kse Focus, *States Debate Large-Scale Hydro Power and Renewable Portfolio Standards*, CONGRESS.ORG (Aug. 7, 2013), http://congress.org/2013/08/07/states-debate-large-scale-hydro-power-and-renewable-portfolio-standards/. One of these states–Ohio–has recently extended the target date for meeting RPS goals, but also eliminated in-state preferences. *See, e.g.*, *Renewable Energy Standards Put on Hold in Ohio*, RENEWABLE ENERGY WORLD (May 29, 2014), http://www.renewableenergyworld.com/rea/news/print/article/2014/05/ohio-freezes-standards-for-renewable-energy-in-landmark-vote.

2. Ferrey, *supra* note 1, at 72.

3. *Id.* Funded by the U.S. Department of Energy, North Carolina State University maintains a comprehensive list of renewable resource programs. *Database of State Incentives for Renewables & Efficiency*, DSIRE, http://www.dsireusa.org/ (last visited Jan. 23, 2015).

4. Ferrey, *supra* note 1 *passim*; Trevor D. Stiles, *Renewable Resources and the Dormant Commerce Clause*, 4 ENVTL. & ENERGY L. & POL'Y J. 34 (2009); CAROLYN ELEFANT & EDWARD A. HOLT, THE COMMERCE CLAUSE AND IMPLICATIONS FOR STATE RENEWABLE PORTFOLIO STANDARD PROGRAMS, CLEAN ENERGY STATES ALLIANCE STATE RPS POLICY REPORT (2011) [hereinafter ELEFANT & HOLT]; Patrick R. Jacobi, *Renewable Portfolio Standard Generator Applicability Requirements: How States Can Stop Worrying and Learn to Love the Dormant Commerce Clause*, 30 VT. L. REV. 1079 (2006); Nathan E. Endrud, *State Renewable Portfolio Standards: Their Continued Validity and Relevance in Light of the Dormant Commerce Clause, the Supremacy Clause, and Possible Federal Legislation*, 45 HARV. J. ON LEGIS. 259 (2008); Daniel K. Lee & Timothy P. Duane, *Putting the Dormant Commerce Clause Back to Sleep: Adapting the Doctrine to Support State Renewable Portfolio Standards*, 43 ENVTL. L. 295 (2013); Stephen C. Braverman, *State Renewable Portfolio Standards and the Commerce Clause*, 25-SPG NAT. RES. & ENV'T 15 (2011); NANCY RADER & SCOTT HEMPLING, NAT'L ASS'N OF REGULATORY UTIL. COMM'RS, THE RENEWABLES PORTFOLIO STANDARD: A PRACTICAL GUIDE, A–2–A–3 (2001) [hereinafter RADER & HEMPLING], *available at* http://www.scotthemplinglaw.com/files/pdf/ppr_renewables_portfolio_standard_0201_0.pdf; Kirsten H. Engel, *The Dormant Commerce Clause Threat to Market-Based Environmental Regulation: The Case of Electricity Deregulation*, 26 ECOLOGY L.Q. 243, 288–94 (1999). *See also* Kate Konschnik & Ari Peskoe, *Minimizing Constitutional Risk: Crafting State Energy Policies that Can Withstand Constitutional Scrutiny*, HARV. LAW

The prevalence of these unconstitutional in-state preferences has prompted a number of articles over the last few years, nearly all of them focusing on the dormant Commerce Clause as an impediment to state efforts to promote renewable resources. The very title of Suffolk University Law School Professor Steven Ferrey's recent article describes the Commerce Clause as a "Threat to the New Infrastructure of Renewable Power."[5] Other authors have described the dormant Commerce Clause as an obstacle to be skirted—by subterfuge, if necessary. Indeed, various commentators have recommended that states consider "disguising" or "recasting" state-specific or regional protectionist legislation to avoid detection.[6] One has recommended that states pursue limited "pseudo-protectionist" measures.[7] Still another commentator has even recommended that in-state restrictions be phased in gradually, despite the fact that such measures "will not cure constitutional infirmities," on the theory that if the measures are only a little bit protectionist "they may significantly reduce litigation risk."[8] If these steps recommended by other authors prove unavailing, another article suggests the solution is to convince the courts to change the constitutional standard in cases of discriminatory legislation from strict scrutiny to the "more lenient test" of "intermediate scrutiny."[9] Nothing in the recent literature, however—even the article whose misleading title purports to urge states to "Learn to Love the Dormant Commerce Clause"[10]—proclaims the virtues of the clause. They contain no discussion about the Commerce Clause's value as a bulwark against protectionist measures masquerading as environmental legislation, nor do they tackle the problem that well-meaning environmental groups have conflated "local" with "environmental" to the detriment of consumer *and* environmental interests.

The dormant Commerce Clause is not an obstacle to the development of renewable energy; it is an asset in the consumer's toolkit. Drawing that distinction is the objective of this Article. Antitrust laws, which bar private parties from placing unreasonable restraints on trade in interstate commerce, have been described as the nation's "Magna Carta of free enterprise," as important to economic liberty as the Constitution's first ten amendments are to personal

SCH.: ENVTL. LAW PROGRAM POLICY INITIATIVE (Nov. 17, 2014). The several authors who have looked at the various state RPS standards have focused their attention on explicit in-state preferences that take the form of quotas or de facto surcharges. They do not, as far as this author can surmise, recognize state bans on inclusion of new large scale hydroelectric resources as renewable energy as in-state preferences. But, as discussed in Section III, *infra*, these restrictions are de facto restrictions on the import of Canadian hydropower since the only new sources of large scale hydroelectric power are located in Canada.

5. Ferrey, *supra* note 1.

6. Lee & Duane, *supra* note 4, at 354 ("re-casting location-based eligibility requirements in a facially neutral manner"); Jacobi, *supra* note 4, at 1116 ("states should employ regional limitations disguised as eligibility requirements"). Masking an indefensible position in this way, D.C. Circuit Judge Silberman said in a similar vein, "reminds us of the lawyer's song in the musical, 'Chicago,'—'[g]ive them the old razzle dazzle.'" Nat'l Ass'n of Regulatory Util. Comm'rs v. U.S. Dep't of Energy, 736 F.3d 517, 519 (D.C. Cir. 2013). The authors' suggestion to hide the ball brings to mind another Judge Silberman quote–"it runs afoul of the court's chutzpah doctrine." Caribbean Shippers Ass'n, Inc. v. Surface Transp. Bd., 145 F.3d 1362, 1365 n. 3 (D.C. Cir. 1998).

7. Stiles, *supra* note 4, at 36.

8. ELEFANT & HOLT, *supra* note 4, at 4.

9. Lee & Duane, *supra* note 4, at 355.

10. Jacobi, *supra* note 4. Far from suggesting that states embrace or love the dormant Commerce Clause, Jacobi instead tells states there is "a strong argument" that they should simply "disguise" regional limitations in their RPS standards. *Id.* at 1107-08.

liberty.[11] The Commerce Clause—which bars states from erecting barriers to interstate trade—has been described in similar terms.[12] Indeed, as an agreement among the states to permit the free flow of commerce, one might say it was the nation's first North American Free Trade Agreement (NAFTA).

II. COMMERCE CLAUSE TREATMENT OF STATE LEGISLATION THAT DISCRIMINATES AGAINST INTERSTATE AND FOREIGN COMMERCE

A. Discrimination Against Interstate Commerce

The Commerce Clause vests Congress with the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."[13] While states are not expressly barred from regulating interstate commerce, the Commerce Clause has been read to give this power exclusively to the federal government and, by negative implication, to deny states "the power unjustifiably to discriminate against or burden the interstate flow of articles of commerce."[14] "The modern law of what has come to be called the dormant Commerce Clause is driven by concern about 'economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors.'"[15] State laws and regulations,[16] as well as local ordinances, may violate the dormant Commerce Clause in one of three ways: if they discriminate against out-of-state or foreign commerce,[17] if they regulate commerce extraterritorially[18] or, even if neutral in intent or effect, they place an excessive burden on interstate commerce.[19]

11. United States v. Topco Assocs., 405 U.S. 596, 610 (1972):

> Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms. And the freedom guaranteed each and every business, no matter how small, is the freedom to compete—to assert with vigor, imagination, devotion, and ingenuity whatever economic muscle it can muster.

12. Bruce F. Broll, *The Economic Liberty Rationale in the Dormant Commerce Clause*, 49 S.D. L. REV. 824 (2003-2004). The analogy to the importance of the Bill of Rights in protecting individual liberties draws at least some support from federal legislation giving individuals the right to sue states under the Fourteenth Amendment for civil rights violations. The Civil Rights Act of 1871, codified at 42 U.S.C. § 1983, treats state violations of the Bill of Rights and of the dormant Commerce Clause as civil rights violations and creates private causes of action for both. *See, e.g.*, Zinermon v. Burch, 494 U.S. 113, 125 (1990); Daniels v. Williams, 474 U.S. 327, 331 (1986); Dennis v. Higgins, 498 U.S. 439, 447 (1991).

13. U.S. CONST. art. I, § 8, cl. 3.

14. Or. Waste Sys., Inc. v. Or. Dep't of Envtl. Quality, 511 U.S. 93, 98 (citing Wyoming v. Oklahoma, 502 U.S. 437, 454 (1992)). *See also* Endrud, *supra* note 4, at 265.

15. Dep't of Revenue of Ky. v. Davis, 553 U.S. 328, 337-38 (2008) (quoting New Energy Co. of Ind. v. Limbach, 486 U.S. 269, 273 (1988)).

16. Regulations adopted by administrative agencies under state law have the effect of law and, accordingly, are subject to invalidation as unconstitutional. *See, e.g.*, Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth., 476 U.S. 573 (1986). As Nathan Endrud observed in his 2008 note, an ostensibly neutral state statute that gives the administrative agency—already so predisposed—discretion to favor in-state interests will not likely survive a dormant Commerce Clause challenge. Endrud, *supra* note 4, at 275-78.

17. *Brown-Forman Distillers Corp.*, 476 U.S. at 579; Alliance for Clean Coal v. Miller, 44 F.3d 591, 595 (7th Cir. 1995).

18. Healy v. Beer Inst., 491 U.S. 324, 336 (1989).

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

Although the standard is quite clear (and presumably the easiest for states to obey), instances of outright discrimination are the most common—probably because politicians are inevitably drawn to tout their efforts to promote local businesses and jobs.[20] Hundreds of state statutes and local ordinances have been invalidated on this ground since the Supreme Court's decision nearly two hundred years ago in *Gibbons v. Ogden*.[21]

Cases falling into the second category are less common.[22] There are, however, three recent federal cases in which state laws in California, Colorado, and Minnesota, aimed at encouraging the use of renewable resources, have been challenged on the grounds that they have the effect of controlling commerce outside their boundaries.[23]

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20. It is certainly possible that some legislators who voted for RPS laws knew they contained unconstitutional in-state preferences, but hoped those features of the laws would be overturned and that the renewable portfolio standards themselves would survive.

21. 22 U.S. 1, 229 (1824). Although the author has not attempted to quantify precisely the number of times state and local laws have been found to discriminate against out-of-state interests in violation of the dormant Commerce Clause, the Supreme Court has noted that "cases of this kind are legion." W. Lynn Creamery, Inc. v. Healy, 512 U.S. 186, 194 (1994)

22. The Supreme Court has defined extraterritorial regulations relatively narrowly, stating that they must *apply to* or "*control[]* commerce occurring *wholly outside* the boundaries of a State." *Healy*, 491 U.S. at 336 (emphasis added). While there have been a number of litigated cases in which a claim of extraterritorial regulation has been made, Pharm. Research & Mfrs. of Am. v. Walsh, 538 U.S. 644 (2003) appears to be the only extraterritoriality case decided by the Supreme Court in the last quarter century. "In the modern era, the Supreme Court has rarely held that statutes violate the extraterritoriality doctrine." Rocky Mountain Farmers Union v. Corey, 730 F.3d 1070, 1101 (9th Cir. 2013). *See also* Konschnik & Peskoe, *supra* note 4, at 28-29.

23. The Minnesota case, North Dakota v. Heydinger, 15 F. Supp. 3d 891 (D. Minn. Apr. 18, 2014), *appeal pending*, North Dakota v. Heydinger, No. 14-2156 (8th Cir. 2014), involved Minnesota's Next Generation Energy Act, which aimed to reduce carbon dioxide (CO_2) emissions by barring: (1) the construction of new large power plants that emit CO_2; (2) the import of power from out-of-state new large power plants that emit CO_2; and (3) the purchase of power supplies under long-term contracts that would "increase statewide power sector carbon dioxide emissions." *Id.* at 897-98 (citing Minn. Stat. § 216H.03, subd. 3). The plaintiffs in the *Heydinger* case include the State of North Dakota, several rural electric utility cooperatives, and a joint action agency with operations in Minnesota and neighboring states. The rural cooperatives and the joint action agency were concerned that, given the way the transmission grid operates and the way electricity flows, when one of their non-Minnesota generating units injects electricity into the grid to satisfy its obligations to a non-Minnesota member, it cannot ensure that none of the electricity generated would be consumed in Minnesota. North Dakota was similarly concerned that utilities within its borders could not ensure that power generated from new North Dakota power plants would not be consumed in Minnesota in violation of Minnesota's new law. *Id.* at 916.

That law, the plaintiffs complained, is unconstitutional in two respects. First, while they could seek exemptions from the Minnesota Public Utility Commission, that amounted to giving Minnesota the right to regulate transactions between parties located outside the state. Second, they argued that absent a "compelling state interest," it was also unconstitutional for a state to favor in-state businesses over others, and because of the way the Minnesota statute worked, Minnesota utilities were, in fact, getting favorable treatment. The district court agreed with the plaintiffs on the first point. Because there was no way to trace the actual flow of electrons between seller and buyer, it said, sellers in the region could not risk entering into sales arrangements with non-Minnesota buyers without obtaining permission from Minnesota. *Id.* Having found the statute unconstitutional on the basis of its extraterritorial impact, the court declined to address the discrimination claim. *Id.* at 911-18.
In contrast to the *Heydinger* decision, the Colorado federal district court in Energy & Envtl. Legal Inst. v. Epel, No. 11-cv-00859-WJM-BNB, 2014 WL 1874977 (D. Colo. May 9, 2014), rejected arguments that Colorado's Renewable Energy Standard statute, which requires local utilities to acquire a specific portion of their energy supply portfolio from renewable resources (what the court labeled the "Renewables Quota"), had the effect of regulating beyond Colorado's borders. Out-of-state utilities, it ruled, could generate electricity using any resources they chose to acquire. *Id.* at *9-10 (The plaintiff in that case did not allege that Colorado's Renewables Quota favored in-state over out-of-state renewables. This might be explained by the plaintiff's self-described mission to "promote[] coal energy" and its skepticism over whether global warming is a manmade phenomenon.

Cases in which the state has acted neutrally, but has nonetheless burdened interstate commerce unreasonably, are also far less common than cases of discriminatory state legislation. This is probably because the burden is on the complainant to establish disproportionate impact[24] and because the outcome is self-evidently far less certain than in cases of virtual *per se* unconstitutionality.

The focus of this article is on the pernicious impact of renewable resource legislation falling into the first category. "[D]iscrimination," in contravention of the dormant Commerce Clause, "simply means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter."[25] The discrimination may be evident on the face of the statute, but may also exist where that is the statute's purpose or effect.[26] To be sure, there is a difference between laws that are facially discriminatory and those that are discriminatory in purpose or effect. The former have been subject to a "virtually *per se* rule of invalidity,"[27] necessitating no further inquiry into their effect.[28] The latter require proof of discriminatory impact or purpose. But whether the law in question is facially discriminatory or simply discriminatory in effect or intent, the standard is the same: the state must demonstrate a compelling state interest justifying its policy and must show that there is no alternative available that is less burdensome to interstate commerce.[29]

Id. at *5. During the litigation, Colorado also amended its RPS law in 2013 (SB13-252) to strike references to "in Colorado").

In a third recent case, Rocky Mountain Farmers Union v. Corey, 730 F.3d 1070 (9th Cir. 2013), the Ninth Circuit reversed the lower court's determination that California's low carbon fuel standard (LCFS), which measured the "carbon intensity" of ethanol sold in the state, in part by taking into account the carbon consumed in delivering the fuel to California, effectively imposed California's rules on other jurisdictions. The Supreme Court has since denied certiorari in that case, Rocky Mountain Farmers Union v. Corey, 134 S. Ct. 2875 (2014), and, although the case has been remanded to determine whether the LCFS rules discriminate against out-of-state fuel suppliers, the Ninth Circuit's ruling dismissing the extraterritoriality claims was on the merits. *Rocky Mountain Farmers Union*, 730 F.3d at 1078.

24. *Pike*, 397 U.S. at 142 (requiring plaintiffs in such cases to demonstrate that the local benefits of the statute, ordinance, or regulation in question are outweighed by the "clearly excessive" burden placed on interstate commerce).

25. Or. Waste Sys. Inc. v. Dep't of Envtl. Quality, 511 U.S. 93, 99, 114 S. Ct. 1345, 128 L.Ed.2d 13 (1994).

26. *Rocky Mountain Farmers Union*, 730 F.3d at 1087, *cert. denied*, 134 S. Ct. 2875 (2014).

27. *Or. Waste Sys., Inc.*, 511 U.S. at 100.

28. A state law is "invalid without further inquiry when it 'directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests.'" Reynoldsville Casket Co. v. Hyde, 514 U.S. 749, 762-63 (1995) (quoting *Brown-Forman Distillers Corp.*, 476 U.S. at 579).

29. *Or. Waste Sys., Inc.*, 511 U.S. at 101. *See also Rocky Mountain Farmers Union*, 730 F.3d at 1108 (Murguia, J., concurring and dissenting in part). There, the Ninth Circuit reversed a lower court ruling granting summary judgment on plaintiff ethanol producers' claim that California's low carbon fuel standard was facially discriminatory toward out-of-state ethanol producers. But it left for trial whether the regulations were discriminatory in purpose and effect, noting that the regulations would face the compelling state interest test if discrimination was found. *Id.* at 1107-08. Maine v. Taylor, 477 U.S. 131 (1986) is often cited as the rare example of a compelling state interest claim passing muster. There, the Court upheld a Maine law banning the importation of out-of-state baitfish because they contained parasites foreign to Maine baitfish and would pose a risk to aquatic life that could not be avoided except by imposing the ban. *Id.* at 148.

The near bar against discriminatory legislation means that states cannot favor use of in-state resources,[30] or hoard their use for local consumption.[31] "[E]ven if environmental preservation were the central purpose" of a state law or regulation, it "would not be sufficient to uphold a discriminatory regulation."[32] A "regulation is not facially discriminatory simply because it affects in-state and out-of-state interests unequally;" but "there must be 'some reason, apart from their origin, to treat them differently.'"[33] By the same token, the absence of an express preference or burden will not save a statute either. "Discriminatory state statutes cannot escape commerce clause scrutiny merely by avoiding explicit reference to in-state interests."[34] A state law need not "be drafted explicitly along state lines in order to demonstrate its discriminatory design."[35] Regional, rather than explicit in-state preferences, likewise will not escape condemnation under the Commerce Clause.[36] Nor will the fact that some in-state interests may not enjoy the preference make a statute that discriminates against out-of-state competitors constitutionally kosher.[37]

B. Discrimination Against Foreign Commerce[38]

Although most of the cases invalidating discriminatory state legislation under the Commerce Clause have involved legislation that disadvantages out-of-state interests, the Commerce Clause also serves to prevent states from erecting barriers to foreign commerce. "Power to regulate *foreign commerce*," after all, "is given in the same words, and in the same breath, as it were, with that over the commerce of the States and with the Indian tribes."[39] Just as the power to regulate interstate commerce resides exclusively with the federal government, the power to regulate commerce with other nations is also solely federal.[40]

The impact of the Commerce Clause on state laws affecting foreign commerce, in fact, is somewhat broader than in the case of state laws affecting interstate commerce. "Like the Import-Export Clause, the Foreign Commerce

30. Wyoming v. Oklahoma, 502 U.S. 437, 454–56 (1992); Alliance for Clean Coal v. Miller, 44 F.3d 591 (7th Cir. 1995).

31. New England Power Co. v. New Hampshire, 455 U.S. 331, 339 (1982).

32. *W. Lynn Creamery*, 512 U.S. at 204 n.20.

33. *Rocky Mountain Farmers Union*, 730 F.3d at 1089 (quoting Philadelphia v. New Jersey, 437 U.S. 617 (1978)).

34. Kentucky Power Co. v. Huelsmann, 352 F. Supp. 2d 77, 785 (E.D. Ky. 2005) (state law did not refer explicitly to "Kentucky customers" but by favoring "retail customers" the state was disfavoring out-of-state customers, since the only retail electric customers covered by the preference were in Kentucky).

35. Amerada Hess Corp. v. N.J. Dep't of Treasury, 490 U.S. 66, 76 (1989).

36. Ne. Bancorp, Inc. v. Bd. of Governors of the Fed. Reserve Sys., 472 U.S. 159, 174 (1985) ("There can be little dispute that the dormant Commerce Clause would prohibit a group of States from establishing a system of regional banking by excluding bank holding companies from outside the region if Congress had remained completely silent on the subject.") (citing Lewis v. BT Investment Managers, Inc., 447 U.S. 27, 39-44 (1980)).

37. Dean Milk Co. v. City of Madison, 340 U.S. 349, 354 n.4 (1951); Fort Gratiot Sanitary Landfill, Inc. v. Mich. Dep't of Natural Resources, 504 U.S. 353, 361 (1992).

38. Section II.B. and the portion of Section III, *infra*, discussing "*Restrictions on the eligibility of large-scale hydro for RPS credit*,*"* are drawn directly from the author's recent article, *When is Renewable Not Renewable? The Constitutionality of State Laws Denying New Large Canadian Hydroelectric Projects Treatment as Renewable Resources*, 5 HARV. BUS. L. REV. ONLINE 76, 77-84 (2015).

39. *Gibbons*, 22 U.S. at 228 (Johnson, J., concurring).

40. *Id.* at 228-29; *see also* Japan Line, Ltd. v. Cnty. of L.A., 441 U.S. 434 (1979).

Clause recognizes that discriminatory treatment of foreign commerce may create problems, such as the potential for international retaliation, that concern the Nation as a whole."[41] This means, of course, that a state cannot protect in-state interests by granting them preferential treatment over foreign competitors.[42] But it also means that "a State's preference for *domestic* commerce over foreign commerce is inconsistent with the Commerce Clause even if the State's own economy is not a direct beneficiary of the discrimination."[43]

III. THE WAYS THAT STATES DISCRIMINATE AGAINST OUT-OF-STATE AND FOREIGN SELLERS OF RENEWABLE RESOURCES

Professor Ferrey's exhaustive 2012 survey of state laws and regulations addressing renewable energy production recounts several ways in which state laws establishing RPS discriminate against out-of-state interests.[44] Some states discount the credit such resources receive for meeting a state's RPS goals (or offer credit multipliers to in-state resources).[45] By his count, about a quarter of the states with RPS take this approach.[46] Still others—the majority—have adopted outright bars on out-of-state (or out-of-region) resources or limit their eligibility.[47] Although he does not characterize them as such, the numerical limits on out-of-state renewable resources he summarizes are quotas, the economic significance of which is discussed, *infra*.

A comprehensive compendium of the restrictions referenced above is beyond the scope of this Article, but a few examples are helpful to illustrate how the restrictions work.

Multipliers and preferences. Arizona is one example of a state that gives preference, in the form of greater credit, to in-state renewable resources. Using what has previously been described as multipliers, Arizona allows in-state renewables to qualify for up to two times the number of renewable energy credits

41. Kraft Gen. Foods, Inc. v. Iowa Dept. of Revenue & Fin., 505 U.S. 71, 79 (1992). This is consistent with University of Chicago Law Professor Richard Epstein's observation that "there was clear, if regrettable, evidence that protectionism against foreign competition was one reason why Congress was given (and given first) power over foreign commerce." RICHARD EPSTEIN, HOW PROGRESSIVES REWROTE THE CONSTITUTION 23 (Cato Inst. 2006). In other words, if anyone was going to discriminate against foreign competition, it would be the federal government, not the states.

42. *Japan Line, Ltd.*, 441 U.S. at 434.

43. *Kraft Gen. Foods, Inc.*, 505 U.S. at 79 (emphasis added).

44. Ferrey, *supra* note 1.

45. *Id.* at 60.

46. *Id.* at 72.

47. *Id.* at 75-79. Ferrey calculates that 38% of states with RPS have adopted regional preferences, another 17% have adopted in-state preferences, and 14% have adopted in-state labor preferences, manufacture component preferences, or both. *Id.* Ferrey includes Minnesota among the seven states that have no regional or in-state RPS preference legislation. *Id.* at 79-80. *But see* Endrud, *supra* note 4, at 274-79 (observing that while Minnesota's RPS statute provides that the state's RPS program "shall not give more or less credit to energy based on the state where the energy was generated," the statute elsewhere inconsistently gives the state public utility commission the obligation to take into account local ownership of the facilities and the discretion to approve utility resource plans on that basis). Endrud, accordingly, would place Minnesota's RPS laws into the protectionist category, quoting the Supreme Court's admonition in *Brown-Forman Distillers*, that "[t]he protections afforded by the Commerce Clause cannot be made to depend on the good grace of a state agency." *Id.* at 277 (quoting *Brown-Forman Distillers Corp.*, 476 U.S. at 582 n.5).

as out-of-state resources.[48] Delaware similarly allows triple the credit for in-state solar facilities or fuel cells that use renewable energy and a one and one-half multiplier for certain in-state wind resources.[49] The multiplier is not an outright restriction on the amount of out-of-state renewable resources that can be utilized to satisfy a retail supplier's RPS obligation, but an out-of-state seller would have to discount its price substantially to make the purchase economic.

Quotas on out-of-state renewables. Until recently, Ohio law specified that at least half of the resources purchased or built by retail power suppliers to satisfy RPS must be homegrown.[50] North Carolina law similarly states that no more than 25% of renewable energy credits can be awarded to out-of-state resources.[51] In California, only 25% of tradable renewable energy credits can be associated with out-of state resources.[52] What this means is simple: some out-of-state renewable resources will be credited toward meeting a retail supplier's RPS obligation. But once the limit is reached, any out-of-state renewable resources acquired by the supplier will be treated as if they were conventional fossil-fueled resources.

Outright bars on the use of out-of-state resources to meet RPS. In Michigan, out-of-state wind power cannot be used to meet RPS standards at all.[53] Although

48. ARIZ. ADMIN. CODE § 14-2-1806(G) (2009).

49. DEL. CODE ANN. tit. 26 § 356 (2009). Delaware's law is the subject of a complaint now pending in federal district court in Delaware. *John A. Nichols & FuelCell Energy, Inc. v. Markell*, No. 1:12-cv-00777-CJB (D. Del. June 10, 2012).

50. OHIO REV. CODE ANN. § 4928.64 (West 2013). As part of legislation signed by Governor Kasich in 2014, Ohio extended by two years the deadline for reaching the state's renewable energy targets, but also "tosse[d] out the requirement that utilities obtain half of their renewable energy from in-state sources." *Renewable Energy Standards Put on Hold in Ohio*, RENEWABLE ENERGY WORLD (May 29, 2014), http://www.renewableenergyworld.com/rea/news/print/article/2014/05/ohio-freezes-standards-for-renewable-energy-in-landmark-vote. Although Colorado has likewise eliminated in-state preferences (*see infra* note 23), these legislative changes do not appear to be part of a trend. On the other hand, the National Conference of State Legislatures reports that in 2013, thirty bills were introduced in seventeen states challenging the RPS concept itself. These bills would have reduced or eliminated state RPS standards. None, however, became law. Mark Niquette, *Ohio Ready to Halt Its Renewable Portfolio Standard*, BLOOMBERG NEWS (May 21, 2014), http://www.renewableenergyworld.com/rea/news/article/2014/05/ohio-ready-to-halt-its-renewable-portfolio-standard. These efforts to dismantle RPS laws have been promoted by Americans for Prosperity and the American Legislative Exchange Council. *Id.* Their significance to the dormant Commerce Clause issues posed by this article are discussed *infra*.

51. N.C. GEN. STAT. § 62-133.8(b)(2)(e) (2009).

52. Ferrey, *supra* note 1, at 75 n.144; *Pacific Gas & Electric Co*., 137 F.E.R.C. ¶ 61,193 at P 6 n.18 (2011) ("California Senate Bill 2 (IX), signed on April 12, 2011, requires that California utilities procure 33 percent of their electricity from renewables by 2020, with at least 75 percent of deliveries from power purchase agreements executed after June 2010 from resources located in, directly connected to, or delivering in real-time to California.").

53. Ill. Commerce Comm'n v. FERC, 721 F.3d 764, 776 (7th Cir. 2013). "A Michigan statute, Mich. Comp. L. 460.1029(1), forbids Michigan utilities to count renewable energy generated outside the state toward satisfying the requirement in the state's 'Clean, Renewable, and Efficient Energy Act' of 2008 that they obtain at least 10 percent of their electrical power needs from renewable sources by 2015." *Id.* at 775. Writing for the three-member panel in that case, Judge Posner found the statute unconstitutional: "Michigan cannot, without violating the commerce clause of Article I of the Constitution, discriminate against out-of-state renewable energy." *Id.* at 776. The case involved Michigan's objection to a FERC decision upholding the allocation to Michigan utilities of costs associated with transmission facilities that would allow the transmission of wind-based power to, *inter alia*, Michigan utility customers of the transmission provider. While the case did not involve a direct challenge to Michigan's clean energy legislation, the discussion of the legality of that legislation may not have been dicta, since it was arguably necessary to the disposition of the case. Michigan had maintained that it was arbitrary and capricious to allocate to Michigan consumers the costs of transmission facilities from which

Massachusetts agreed to suspend the restrictions after being sued,[54] it similarly retains on the books two bans on the use of out-of-state renewable resources, barring their use to meet requirements for long-term contracts[55] and requiring that retail electric suppliers purchase renewable energy credits for solar resources solely from solar generators located in Massachusetts.[56] Under provisions of this type, no out-of-state resource, regardless of its environmental characteristics, would qualify for RPS credit.

Restrictions on the eligibility of large-scale hydro for RPS credit. Many of the state laws adopting RPS include provisions declaring that large-scale hydroelectric facilities, both new and existing, are not to be considered renewable resources.[57] Where states are already hydro-rich, restrictions on counting existing large-scale hydroelectric facilities as renewable resources would serve the obvious purpose of promoting the development of new renewable resources.[58] This may or may not be good policy,[59] but it is not fashioned to exclude out-of-state or foreign competitors. Consider Washington, for example. It accounts for more than a quarter of all the hydroelectric power production in the United States[60] and, not surprisingly, well over half of the electricity its residents and businesses use

its residents would receive no benefits. And it based the "no benefits" argument on the Michigan law. The court rejected that argument on the grounds that the statute was unconstitutional. Where interpretation of a law is necessary to disposition of a case, the court's determination is not considered dicta. Brand X Internet Servs. v. FCC, 345 F.3d 1120, 1129-30 (9th Cir. 2003), *rev'd on other grounds*, 545 U.S. 967 (2005). At a minimum, it might become the law of the circuit. *See, e.g.*, Miranda B. v. Kitzhaber, 328 F.3d 1181, 1186 (9th Cir.2003) (per curiam) ("As we have noted before, 'where a panel confronts an issue germane to the eventual resolution of the case, and resolves it after reasoned consideration in a published opinion, that ruling becomes the law of the circuit, regardless of whether doing so is necessary in some strict logical sense.'").

54. TransCanada Power Mktg., Ltd. v. Bowles, No. 40070-FDS (D. Mass. 2010) [hereinafter TransCanada Complaint]; Partial Settlement Agreement, Transcanada Power Mktg., Ltd. v. Bowles, No. 40070-FDS (D. Mass. 2010), *available at* http://www.mass.gov/eea/docs/doer/renewables/solar/settlement-agreement.pdf. TransCanada, which owned a wind project located in Maine, brought the suit. As part of the settlement, the state public utility commission ordered that operation of the restrictive provisions be suspended. Order Adopting Emergency Regulations, Decision No. 10–58 (Mass. Dep't of Pub. Utils. June 9, 2010) [hereinafter TransCanada Complaint Settlement], *available at* http://web1.env.state.ma.us/DPU/FileRoomAPI/api/Attachments/Get/?path=10-58%2f6910dpuord.pdf.

55. TransCanada Complaint, *supra* note 54, at P 18 (citing section 83 of Massachusetts' 2008 Green Communities Act, MASS. ST. 2008, c. 169 § 83).

56. *Id.* at PP 34-46 (citing MASS. ST. 2008, c. 169 § 32 and 225 C.M.R. 14.05(4) (c)-(h)).

57. *See generally* Focus, *supra,* n. 1. *See also* David C. Coen & Robert J. Thormeyer, *Should Large Hydroelectric Plants be Treated as Renewable Resources?*, 32 ENERGY L.J. 541, 543 (2011) ("Oregon, Washington, and Missouri do not include hydropower at all in their RPS, and other states, such as New Hampshire, California, and North Carolina, only make new hydropower projects eligible for inclusion in their renewable programs," but exclude large-scale hydro projects.).

58. Mary G. Powell, *Treatment of Large Hydropower as a Renewable Resource*, 32 ENERGY L.J. 553, 558 (2011).

59. State policies excluding existing large-scale hydroelectric facilities from their definition of eligible renewable resources may also result in exclusion of additional hydroelectric output resulting from expansion of existing facilities. The impact, falling on in-state and out-of-state suppliers alike, may well be neutral in Commerce Clause terms, but the policy benefits are questionable. Expansion of existing hydroelectric projects is likely to be more economic than development of other sources of renewable energy. Coen & Thormeyer, *supra* note 57, at 543. If the goal is reduced carbon emissions, the exclusion becomes a costly choice for consumers.

60. *State Profile and Energy Estimates—Washington, 2014*, U.S. ENERGY INFO. ADMIN., http://www.eia.gov/state/?sid=WA (last visited Jan. 22, 2015).

comes from hydroelectric facilities.[61] If existing hydroelectric facilities counted toward a renewable portfolio goal of, say, 30%, there would be no impetus to develop any new renewable energy sources. And, since the states that have chosen to adopt these restrictions already have their own existing hydroelectric facilities,[62] the purpose of the exclusion would be neutral from a Commerce Clause perspective. This is so, even though, in the conventional sense, hydroelectric facilities are quintessential examples of renewable energy sources.[63]

The picture is completely different where the exclusion extends, as it does in several states, to new large-scale hydroelectric projects.[64] A restriction can be discriminatory even if it is not express.[65] In the case of large-scale hydroelectric facilities, there are no sites left in the United States where they can be developed.[66] There are, however, potential sites in British Columbia, Manitoba, and Québec,[67]

61. *Id.* Oregon similarly relies on hydroelectric energy for 70% of its energy needs. *State Profile and Energy Estimates—Oregon, 2014*, U.S. ENERGY INFO. ADMIN., http://www.eia.gov/state/?sid=OR (last visited Jan. 22, 2015).

62. States excluding existing hydroelectric facilities from the definition of renewable resources include the New England states (Maine, Massachusetts, Rhode Island, New Hampshire, Vermont, and Connecticut), Oregon, Washington, and California. VAL STORI, ENVIRONMENTAL RULES FOR HYDROPOWER IN STATE RENEWABLE PORTFOLIO STANDARDS (2013), *available at* http://www.cesa.org/assets/2013-Files/RPS/Environmental-Rules-for-Hydropower-in-State-RPS-April-2013-final-v2.pdf. There are existing hydroelectric projects in all of these states.

63. Coen & Thormeyer, *supra* note 57, *passim*; Powell, *supra* note 58.

64. Coen & Thormeyer, *supra* note 57. Large-scale hydroelectric projects are considered to be those thirty megawatts or larger. *See, e.g.*, ELECTRIC POWER RESEARCH INSTITUTE (EPRI), ASSESSMENT OF WATERPOWER POTENTIAL AND DEVELOPMENT NEEDS 2-1 (2007), http://www.epri.com/abstracts/Pages/ProductAbstract.aspx?ProductId=000000000001014762&Mode=download.

65. "The commerce clause forbids discrimination, whether forthright or ingenious. In each case it is our duty to determine whether the statute under attack, whatever its name may be, will in its practical operation work discrimination against interstate commerce." Best & Co. v. Maxwell, 311 U.S. 454, 455-56 (1940).

66. Lea Kosnik, *The Potential of Water Power in the Fight Against Global Warming in the U.S.*, ENERGY POLICY (2008) at n.1, *available at* http://www.umsl.edu/~kosnikl/Saved%20Emissions.pdf ("We do not consider any potential coming from the construction of new large (i.e., traditional) hydropower dams."); PEW CENTER ON GLOBAL CLIMATE CHANGE, HYDROPOWER 5 (2009), *available at* www.circleofblue.org/.../wp.../Hydropower10-09_FINAL_cleanPDF.pdf ("The best sites for large hydropower generation in the United States have already been developed."); *What is Hydroelectric Power and How is it Used?*, USGS, http://www.usgs.gov/faq/node/3248 (last visited Jan. 22, 2015) ("New large-scale hydroelectric facilities will be few and far between in the future as most of the prime locations to place large dams suitable for hydroelectric-power production have already been used."); *Hydropower*, CTR. FOR CLIMATE & ENERGY SOLUTIONS, http://www.c2es.org/print/technology/factsheet/hydropower (last visited Jan. 22, 2015) ("[T]he construction of new large hydropower dams is not considered a practical option for increasing hydropower generation due to the environmental impacts and unavailability of proper sites to develop for large-scale hydropower generation.").

67. Canada is a major exporter of electricity to the United States, most of it from hydroelectric facilities. Charlotte Helston, *Large Hydro*, ENERGYBC, http://www.energybc.ca/profiles/largehydro.html (last visited Jan. 22, 2015) ("60% of electricity produced in Canada is drawn from hydro. Only a portion of that hydroelectricity is used in Canada; the rest is exported for profit."). While many of the best sites for large-scale hydroelectric projects in Canada have already been developed, there remains the potential for additional large-scale project development, particularly in Québec and British Columbia. Hydro-Québec, for example, broke ground in 2009 on the Romaine project, a 1,550 megawatt (MW) hydroelectric project on the Romaine river. HYDRO-QUÉBEC, STRATEGIC PLAN 2009–2013 20 (2009) [hereinafter HYDRO-QUÉBEC STRATEGIC PLAN], http://issuu.com/hydroquebec/docs/plan-strategique-2009-2013-en?e=1151578/ 4175386. The project is part of a larger plan to develop up to 4,500 MW of new large scale hydroelectric facilities. *Id.* at 22. In British Columbia, plans have been underway for several years to develop the Site C Clean Energy Project, a 1,100 MW

the three Canadian provinces with the largest hydroelectric output.[68] The de facto effect of the restrictions, then, is to limit competition from Canadian entities to supply renewable energy. This should be enough of a reason on Commerce Clause grounds to strike down the restrictions as state interference with federal regulation of foreign trade.[69]

Were proof of a discriminatory or protectionist motive needed, however, there seems ample evidence to support that conclusion, too. Renewable energy advocates in New England, for example, have successfully argued that defining large hydroelectric facilities as renewable resources "would slow down the development of renewable energy projects in the region."[70] This, in fact, was official government policy in Vermont for over a quarter century. "Vermont policy-makers reached a consensus that if large hydropower were deemed renewable, it would hinder the development of smaller renewable energy projects."[71] New Hampshire's protectionist intent is quite explicit. The text of its RPS states as its "[p]urpose" that "[r]enewable energy generation technologies can provide fuel diversity to the state and New England generation supply through use of *local* renewable fuels and resources that serve to displace and thereby lower regional dependence on fossil fuels."[72]

To be sure, there are unquestionable environmental concerns associated with the construction and operation of large-scale hydroelectric facilities. "Damming rivers," notes former Vermont Public Service Board Member David Coen (an advocate for treating large hydroelectric projects as renewable resources), "forever alters a region's geologic landscape, and a hydroelectricity facility's turbines often kill the fish that get caught in the plant."[73] And, he adds "roughly 600 dams have been removed in the last 50 years" because of "safety issues and concerns over their long-term impact on the environment and recreation."[74] It is highly doubtful, however, that environmental concerns about large-scale hydroelectric projects in Canada could justify denying their eligibility as renewable resources.

For one thing, a good environmental motive will not save discriminatory legislation. As noted earlier, "even if environmental preservation were the central

hydroelectric facility on the Peace River in the northeastern portion of the province. *About Site C*, SITE C CLEAN ENERGY PROJECT, https://www.sitecproject.com/about-site-c (last visited Jan. 22, 2015). There is also some potential for large hydro project development in Manitoba. Tim Anderson, *Manitoba's hydro power has states looking north to Canada*, THE COUNCIL OF STATE GOVERNMENTS–MIDWEST (Nov. 2011), http://www.csgmidwest.org/policyresearch/11hydro.aspx.

68. Helston, *supra* note 67.

69. *Japan Line, Ltd.*, 441 U.S. at 448-49.

70. Powell, *supra* note 58, at 556.

71. *Id.* Vermont has since amended its laws to allow the inclusion of new large-scale hydroelectric facilities as a renewable resource for RPS purposes, becoming, in 2010 the first state in the nation to do so. *Id.* at 553. Wisconsin followed suit about a year later, although its legislation does not take effect until the end of 2015. 2011 Wisconsin Act 34, WIS. STAT. § 196.378 (2011).

72. N.H. REV. STAT. ANN. § 362-F:1 (2007) (emphasis added). There is both some protectionist consistency and some irony in New Hampshire's position. Years earlier, the Supreme Court struck down the State's legislation seeking to limit the export of energy from its own valuable large hydroelectric facilities as violative of the Commerce Clause. *New England Power Co.*, 455 U.S. at 339.

73. Coen & Thormeyer, *supra* note 57, at 544.

74. *Id.*

purpose" of a state law or regulation, it "would not be sufficient to uphold a discriminatory regulation."[75]

In any event, restrictions like multipliers or exclusions from RPS eligibility are economic, not environmental. Canadian hydropower producers are not banned from exporting; their products are simply not credited toward meeting the buyer's renewable portfolio obligations. Indeed, Canadian suppliers continue to sell large amounts of hydroelectric power to U.S. buyers.[76] Several New England states have considered proposed legislation to ease restrictions on the eligibility of large hydro facilities to satisfy renewable energy targets.[77] But, the environmental groups that have opposed these initiatives have, no doubt unintentionally, articulated their concerns in economic, not environmental terms.

When, for example, New Hampshire was considering legislation to allow large hydro to qualify as a renewable resource, the Conservation Law Foundation New Hampshire (the Foundation) described the legislation as simply a way to allow Hydro-Québec to take business away from homegrown renewables. As one reporter recounted the statement of the Foundation's director:

> Tom Irwin, VP and Director of the Conservation Law Foundation New Hampshire, writes in his blog that HB 302 is "clearly intended to tilt the playing field in favor of the Northern Pass.["] He said that "HB 302 will greatly undermine one of the core purposes of New Hampshire's RPS law: the stimulation of investment in renewable energy technologies in New England and, in particular, in New Hampshire."[78]

Mr. Irwin's objections, in other words, were not that removing the limitations would damage the environment, but that they would force New Hampshire's mom-and-pop renewable energy producers to compete with the Hydro-Québec behemoth. That may articulate a populist theme, but it is not an environmental one.

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75. *W. Lynn Creamery*, 512 U.S. at 204 n.20. States excluding new large hydroelectric projects from the definition of renewable resources may argue that their statutes do not single out Canadian energy sources in purpose or effect. The reason to advance such an argument is obvious. Statutes that are discriminatory are subject to strict scrutiny under the dormant Commerce Clause, while statutes alleged to burden interstate commerce come under the more lenient *Pike* balancing test. In the author's view, however, convincing a court that the restrictions on new large hydro facilities do not single out Canadian sellers is a pretty tough sell; they are the only entities selling power from facilities of this type.

76. It bears emphasis that when we are talking about Canadian hydroelectric facilities, we are not talking about ecological disasters like the Three Gorges Dam in China and limited environmental review. Mara Hvistendahl, *China's Three Gorges Dam: An Environmental Catastrophe?*, SCIENTIFIC AM. (Mar. 8, 2008), http://www.scientificamerican.com/article/chinas-three-gorges-dam-disaster/. As Hydro-Québec points out in its recent Strategic Plan, the Romaine Project now under way is subject to strict environmental review and was preceded by a required a 2,500-page environmental impact statement. HYDRO-QUÉBEC STRATEGIC PLAN, *supra* note 67, at 21.

77. Jennifer Runyon, *Small States Grapple with Big Canadian Hydropower*, RENEWABLE ENERGY WORLD (Mar. 7, 2011), http://www.renewableenergyworld.com/rea/blog/post/print/2011/03/small-states-grapple-with-big-canadian-hydropower.

78. *Id.* The reaction of Jake Brown, spokesman for the Vermont Natural Resources Council, to similar legislation in Vermont was not much different from Mr. Irwin's:

> So Vermont would be in many ways a domino falling and in our view a standards being dropped which is very unlike Vermont, Vermont is a place that has high standards and is proud of its high standards and what we're doing here is really just slicing off a little piece of our reputation and giving it to Hydro Quebec. [sic].

Bob Kinzel, *Lawmakers Pass Bill Making Hydro-Québec 'Renewable'*, VT. PUB. RADIO (May 7, 2010, 5:49 PM), http://www.vpr.net/news_detail/87979/.

A year later, the Foundation wrote a letter to Connecticut environmental regulators voicing similar objections to proposals in that state to allow large hydro projects to qualify as renewable resources:

> Large-scale hydropower merits no special financial incentives. RPS policies, as every state in New England with a RPS has affirmed, are intended to facilitate the development of utility-scale renewable technologies that currently require financial incentives to achieve economic viability. Large-scale hydropower has been deployed in Canada without such incentives from New England ratepayers for many decades and has no such need for incentives. RPS recognition of large-scale hydropower will merely serve to funnel ratepayer funds to foreign Canadian utilities for a resource that is already economically viable.[79]

The Foundation's argument that RPS legislation is intended to subsidize the use of renewable resources is quite distinct from the author's understanding that the primary, albeit not exclusive goal of RPS, is to reduce carbon emissions through the development of clean energy.[80] That goal is premised on the notion that carbon emission reductions can be ensured by requiring utilities to include a substantial percentage of non-carbon-emitting "clean" generating resources in their supply portfolios. This may well have the *effect* of subsidizing renewable energy sources. But that is not inevitable. On the contrary, "[t]he cost of providing electricity from wind and solar power plants has plummeted over the last five years, so much so that in some markets renewable generation is now cheaper than coal or natural gas."[81] Accepting the Foundation's rationale for state adoption of RPS, however, would lead to the conclusion that *no* renewable resource—wind, solar, or hydro—should qualify to meet RPS targets if the seller is able to compete without subsidies. Would the Foundation or other environmental organizations favor that outcome? Not likely. It would allow utilities to meet their energy needs with any combination of resources, whether they reduced carbon emissions or not. The Foundation's explanation for opposing

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79. Letter from N. Jonathan Peress, Dir., Clean Energy and Climate Program, Conservation Law Foundation, to Debra Morrell, Conn. Dep't of Energy and Envtl. Protection, Bureau of Energy and Tech. Policy (Dec. 21, 2012) (regarding 2012 Comprehensive Energy Strategy for Connecticut). The Sierra Club made a similar economic argument in opposing Maine legislation that would have permitted power from new large Canadian hydroelectric projects to qualify as renewable resources. "If allowed to qualify for the RPS," Sierra Club's Maine Director testified, "imported, large-scale hydro from Canada would flood and crash the renewable energy credits (REC) market, which would cripple the market for wind, solar and other *home-grown*, clean power industries and their positive and growing economic impact." Testimony of Glen Brand, Testimony on L.D. 646 Before the Energy, Utilities, and Technology Committee of the Maine Legislature (Jan. 15, 2014) (emphasis added). The Sierra Club's critique of a 2011 Wisconsin bill that will allow large hydro to qualify as a renewable resource was similar: The bill, it said, was "outsourcing clean energy jobs to Canada." *Sierra Club−John Muir Chapter 2012 Legislative Scorecard* at 4, SIERRA CLUB, *available at* http://www.sierraclub.org/sites/www.sierraclub.org/files/sce/wisconsin-john-muir-chapter/newsletters/SCJMC_2012_LegScorecard.pdf.

80. Carbon emission reduction, of course, is not the only goal of RPS legislation. As discussed in this article, the "buy local" provisions of RPS laws are aimed at promoting local business and economic development. They can also foster the development of new technologies. RPS laws further serve to promote supply diversity by limiting reliance on any one source of energy.

81. Diane Cardwell, *Solar and Wind Energy Start to Win on Price vs. Conventional Fuels*, N.Y. TIMES (Nov. 23, 2014), http://www.nytimes.com/2014/11/24/business/energy-environment/solar-and-wind-energy-start-to-win-on-price-vs-conventional-fuels.html?action=click&contentCollection=Middle%20East&module=MostEmailed&version=Full&region=Marginalia&src=me&pgtype=article&_r=0.

the inclusion of large hydro in RPS makes its "buy American" renewables objective transparent. Even accepting an environmental impetus for the restriction, under the Commerce Clause, the judgment whether to limit foreign imports based on environmental (or any other) considerations would reside exclusively with the federal government, not the states. And while the federal government's silence would not create space for state-imposed restrictions on foreign trade, here, the federal government has spoken loudly against trade restrictions through ratification of both NAFTA and its companion treaty, the North American Agreement on Environmental Cooperation (NAAEC). The latter obligates each of the signatory states—Canada, Mexico, and the United States—to adhere to responsible environmental policies.[82]

IV. WHY RESTRICTIONS ON THE USE OF OUT-OF-STATE AND FOREIGN-PRODUCED RENEWABLE RESOURCES ARE BAD FOR CONSUMERS AND ENVIRONMENTALISTS: THE ECONOMIC CASE FOR THE DORMANT COMMERCE CLAUSE DOCTRINE

Scholars have long debated the origins and purpose of the Commerce Clause.[83] But there is little doubt about how the courts have viewed its purpose. Almost since the founding of the Republic, the courts have embraced the Clause as the embodiment of a national sentiment against protectionist legislation by the states. "Preservation of local industry by protecting it from the rigors of interstate

82. *North American Agreement on Environmental Cooperation*, CTR. FOR ENVTL. COOPERATION, http://www.cec.org/Page.asp?PageID=1226&SiteNodeID=567 (last visited Jan. 22, 2015). The restrictions might also put state policies at odds with the federal government's commitments under the General Agreement on Tariffs and Trade (GATT) administered by the World Trade Organization (WTO). The GATT requires the participating countries to "refrain[] from imposing quantitative restrictions such as quotas and embargoes on imports and exports." JEANNE J. GRIMMET, CONGRESSIONAL RESEARCH SERV., WORLD TRADE ORGANIZATION DECISIONS AND THEIR EFFECT IN U.S. LAW 1 (2011). The Uruguay Round Agreement Act (URAA), 19 U.S.C. §§ 3501, 3511-56, 3571-72, 3581-3592, 3601-24, "prohibits private remedies based on alleged violations of WTO agreements," but does allow the federal government "to bring domestic legal challenges to the state law," although suits by the United States against state laws are "expected to be a rarity." *Id.* at 1, 3-4.

83. *Compare* Calvin H. Johnson, *The Panda's Thumb: The Modest and Mercantilist Original Meaning of the Commerce Clause*, 13 WM. & MARY BILL RTS. J. 1 (2004), *available at* http://www.constitution.org/lrev/cjohnson/pandas_thumb.pdf, *and* RICHARD A. EPSTEIN, HOW PROGRESSIVES REWROTE THE CONSTITUTION 23 (Cato Inst. 2006), *with* Robert H. Bork & Daniel E. Troy, *Locating the Boundaries: The Scope of Congress's Power to Regulate Commerce*, 25:3 HARV. J.L. & PUB. POL'Y 850 (2002), http://www.constitution.org/lrev/bork-troy.htm. Interestingly, originalists Epstein, Bork, Scalia, and Thomas all reach quite different conclusions about the original intent of the Framers. Bork concludes that the state actions that "threaten the free flow of goods and service in interstate commerce" were "the problem that led to creation of the federal Constitution." Bork & Troy, at 850. "[T]he Clause," he states, "was crafted, among other reasons, to vest the federal government with the ability to protect commerce between the States from the discriminatory interference of self-interested States." Bork & Troy, at 851. By contrast, University of Chicago Professor Epstein posits that there is "little or no historical evidence from the original debates as to the intended meaning of the Commerce Clause insofar as it applies to commerce among the several states." EPSTEIN, at 23. Justices Scalia and Thomas stake out yet a third originalist interpretation: the concept of a dormant Commerce Clause is inconsistent with the Tenth Amendment, which reserves exclusively to the states those powers not delegated to the Federal government. *See, e.g.*, Tyler Pipe Indus. v. Wash. State Dep't of Revenue, 483 U.S. 232, 259-65 (1987) (Scalia, J., concurring in part and dissenting in part) (arguing that Framers did not intend "negative" or "dormant" component of Commerce Clause); Itel Containers Int'l Corp. v. Huddleston, 507 U.S. 60 (1993) (Scalia, J., concurring in part and concurring in the judgment) (concurring in enforcement of dormant Commerce Clause on stare decisis grounds); United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth., 550 U.S. 330 (2007) (Thomas, J., concurring) ("[t]he negative Commerce Clause has no basis in the Constitution and has proved unworkable in practice").

competition," the Supreme Court has said, "is the hallmark of economic protectionism that the Commerce Clause prohibits."[84] While concluding that the preventing discrimination between the states was not a significant motivating factor in the drafting of the Commerce Clause,[85] University of Texas Law Professor Calvin Johnson observes that this is, nonetheless, now almost universally seen as of central concern to the Framers:

> It has been said that creation of a common market allowing free trade within the states was *the* purpose or at least a primary cause of the Constitution. In 1824, Justice William Johnson argued that "[i]f there was any one object riding over every other in the adoption of the constitution, it was to keep the commercial intercourse among the States free from all invidious and partial restraints." To this day it is commonly echoed that the major purpose of the Constitution was to prevent protectionist economic policies among the states and to establish a common market with free trade across state borders.[86]

Whether that view is accurate or not, the free trade policy it has nourished is, coincidentally, sound economics that has been a boon to American consumer welfare and economic stability.[87]

The economic case for free trade has been based on the concept of "comparative advantage," the proposition that all nations would be better off if they specialized in those services or products in which they were relatively most efficient.[88] It is a concept that has received virtually universal endorsement by economists of all philosophical stripes.[89] There is also at least an implicit

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84. *W. Lynn Creamery*, 512 U.S. at 205.

85. Johnson, *supra* note 82, at 3 (internal citations omitted) ("It is often now stated that the major purpose of the Constitution was to prevent protectionist economic policies among the states and to establish a common market with free trade across state borders. Barriers on interstate commerce, however, were not a notable issue in the original debates.").

86. *Id.* at 42.

87. As Professor Johnson put it:

> That the power to regulate commerce was once a mercantilist clause, regulating commerce by restricting it, should not bother us very much. We are no longer mercantilists. That the power to regulate commerce was once a small and very different power does not mean that the modern Commerce Clause is illegitimate. Evolution for survival is not an illegitimate process.

Id. at 4.

88. The principle, often attributed to British economist David Ricardo, means that countries (or states) can benefit from free trade even if one country (state) is better at manufacturing everything than its neighbor. Paul Krugman, *Ricardo's Difficult Idea*, http://web.mit.edu/krugman/www/ricardo.htm (last visited Jan. 23, 2015) [hereinafter Krugman, *Ricardo's Difficult Idea*]. Princeton economics professor Alan Blinder illustrates the principle with this commonsense example:

> Some lawyers are better typists than their secretaries. Should such a lawyer fire his secretary and do his own typing? Not likely. Though the lawyer may be better than the secretary at both arguing cases and typing, he will fare better by concentrating his energies on the practice of law and leaving the typing to a secretary. Such specialization not only makes the economy more efficient but also gives both lawyer and secretary productive work to do.

Alan S. Blinder, *Free Trade*, THE CONCISE ENCYCLOPEDIA OF ECONOMICS (2d ed. 2007). The author's undergraduate economics professor, Mordechai Kreinin, offered a similar example. Suppose that a doctor was "absolutely more efficient" than any nurse "in the performance of both medical and paramedical duties." Should the doctor perform both? Plainly not. "[I]t pays the doctor to concentrate on the former and hire a nurse to do the latter." Mordechai Kreinin, INTERNATIONAL ECONOMICS 246 (6th ed. 1991).

89. Paul A. Samuelson & William D. Nordhaus, ECONOMICS 686 (15th ed. 1995) ("[T]he theory of comparative advantage is one of the deepest truths in all of economics."); Paul R. Krugman, *Is Free Trade Passé?*, 1 J. ECON. PERSPECTIVES 131 (1987) ("If there were an Economist's Creed, it would surely contain the

endorsement of comparative advantage in those Supreme Court cases characterizing the dormant Commerce Clause as a guarantor of free trade.[90] There is surely some element of comparative advantage in the context of competition to supply renewable resources. Solar power, for example, can be produced in California and Oregon. But California, with its large, sunny desert regions, probably has a comparative advantage in its development, making it logical for Oregon to concentrate on something else at which it is comparatively more efficient if solar power is available more cheaply from other states.

While endorsing free trade and opposition to protectionist barriers on comparative advantage principles,[91] Princeton economist and Nobel laureate Paul Krugman offers yet another reason to resist the imposition of trade barriers. Where nations enjoy no clear-cut comparative advantage in producing a particular good or service, and each can produce the same product or service, trade barriers can nonetheless limit competition to the detriment of consumer welfare.[92] His point was well summarized in a 2008 article in *The Economist*:

> Mr. Krugman's model showed that when trade barriers fall, firms gain access to bigger markets, allowing them to expand production and reap economies of scale. But openness also exposes them to competition from rival foreign firms, paring their margins. Some firms may go out of business. But between the domestic survivors and the foreign entrants, consumers still have more goods to choose from. Thus the gains from trade arise not from specialisation, but from scale economies, fiercer competition and the cornucopia of choice that globalisation provides.[93]

This principle applies with full force in the context of trade barriers in the sale of renewable energy by both domestic and foreign suppliers. Wind developers, for example, may find it advantageous to invest in projects in both Oregon and California. The advantage a developer might have in one location—say higher wind velocity and greater frequency of windy conditions at some sites in Oregon—would be negated by a multiplier that renders the purchase by California retail suppliers uneconomic compared to California wind projects. Consumers interested in purchasing renewable energy in such a case are disadvantaged. They are deprived of the value of a carbon-free wind resource and must instead purchase a more expensive, local one. This is not an academic point.

Take the case of a transmission project that Pacific Gas and Electric Company (PG&E) undertook so it could transmit renewable energy from Canada

affirmations 'I understand the Principle of Comparative Advantage' and 'I advocate Free Trade.'") [hereinafter Krugman, *Free Trade*]; Blinder, *supra* note 88 ("For more than two centuries economists have steadfastly promoted free trade among nations as the best trade policy."); Milton Friedman, *How Quotas Boomerang*, S.F. CHRONICLE (Apr. 19, 1985), *available at* http://0055d26.netsolhost.com/friedman/pdfs/sfc/SFC.04.19.1985.pdf; Greg Mankiw, *Outsourcing Redux*, GREG MANKIW'S BLOG (May 6, 2006), http://gregmankiw.blogspot.com/2006/05/outsourcing-redux.html.

90. *See, e.g.*, Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564, 575 (1997) (State laws discriminating against out of state commerce "would destroy the barrier against protectionism the Constitution provides."); *Healy*, 512 U.S. at 193 (A tariff on out-of-state goods "violates the principle of the unitary national market by handicapping out-of-state competitors, thus artificially encouraging in-state production even when the same goods could be produced at lower cost in other States."); Hunt v. Wash. State Apple Adver. Comm'n, 432 U.S. 333, 351 (1977) (Striking down state law because it "has the effect of stripping away from the Washington apple industry the competitive and economic advantages it has earned.").

91. Krugman, *Ricardo's Difficult Idea*, *supra* note 88.

92. Krugman, *Free Trade*, *supra* note 89.

93. *Bold Strokes: A Strong Economic Stylist Wins the Nobel*, THE ECONOMIST (Oct. 16, 2008), http://www.economist.com/node/12429411/print.

and neighboring states back to California.[94] Several years later, after the project was underway, PG&E chose to cancel it, asking the Federal Energy Regulatory Commission (FERC) to allow it to recover the eight million dollars in development costs it had incurred on grounds that the cancellation was necessitated by reasons beyond its control.[95] Among the reasons it cited and that the FERC found persuasive was that a 2011 California state law had made uneconomic the purchase of the out-of-state renewable resources the utility planned to acquire.[96] The law, SB 2, provides that three-quarters of the renewable resources California utilities procure to satisfy California's renewable portfolio target "must come from resources located in, directly connected to, or delivering in real-time to California."[97] This was certainly a lose-lose proposition for PG&E's customers. They not only lost access to potentially less expensive renewable resources than those the company ultimately needed to purchase to satisfy California law, but were also forced to pay for expenses the company incurred in a failed transmission project that would never be used to deliver service.[98]

In fact, the California example illustrates yet a third competitive harm—that quotas and outright bans on the use of out-of-state or foreign renewable resources are far worse for consumers than multipliers.

Here, again, there is near unanimity among economists on this point.[99] In fact, it has even become an *Encyclopedia Britannica* entry.[100] A numerical multiplier—essentially a tax on the out-of-state producer—still enables the producer to compete for market share, although it must shave its profit margins to do so.[101] Competition will nonetheless be restricted because some lower-priced competitors, hampered by the tax, will be forced out of the market. To the extent that some remain in the market, however, the in-state producers will not capture all of the benefit.

This is not true in the case of either a ban or a quota on imports. They both shift all of the economic rents to producers. In the case of quotas, out-of-state producers will simply raise their rates to the in-state level since, with a cap on their market share potential, they will have no reason to discount their prices below the in-state market price.[102] And in the case of outright bans, the in-state producers

94. *Pacific Gas & Elec. Co.*, 137 F.E.R.C. ¶ 61,193 at P 2 (2011).

95. *Id.* at P 5.

96. *Id.* at P 22.

97. *Id.*

98. *Id.* at P 23.

99. *See, e.g.*, Friedman, *supra* note 89; CAMPBELL R. MCCONNELL, STANLEY L. BRUE, & SEAN M. FLYNN, INTERNATIONAL TRADE, CH. 23, ECONOMICS: PRINCIPLES, PROBLEMS, AND POLICIES (19th ed.) (Jan. 13, 2011), https://www.inkling.com/read/microeconomics-campbell-mcconnell-19th/chapter-23/learning-objective-4-analyze.

100. *Quota*, ENCYCLOPEDIA BRITANNICA, http://www.britannica.com/EBchecked/topic/487650/quota (last visited Jan. 23, 2015) ("Quotas are more effective in restricting trade than tariffs" because the manufacturers cannot offset them by lowering their price or by securing subsidies).

101. That the out-of-state producer might be able to reduce its prices and still participate in the market, however, would not make the restriction constitutional. *W. Lynn Creamery*, 512 U.S. at 195 (citing New Energy Co. of Ind. v. Limbach, 486 U.S. 269, 275 (1988)) ("[O]ut-of-staters' ability to remain competitive by lowering their prices would not immunize a discriminatory measure.").

102. As Milton Friedman explained it:

will reap the benefits in the form of higher prices when they are already getting an indirect subsidy from the existence of an RPS standard. But in both cases, the consumer foots the entire bill for the discrimination. That concern is evident in the decisions of several New England legislatures, mentioned earlier, to reexamine—and in Vermont's case to reverse—the ban on importation of power from large-scale hydroelectric projects in Canada.

Whether the restrictions take the form of multipliers, quotas, or bans related to the use of renewable energy produced out-of-state or in foreign countries, it is not only consumer interests that suffer. Because more is spent to achieve renewable resource goals than necessary, there is less money to spend to achieve renewable energy goals themselves.

The immediate impact of in-state preferences, that consumers are forced to forgo cheaper, equally renewable sources of supply, is not the only harm protectionism causes. Competition promotes allocative efficiency, ensuring that resources go to their highest-valued uses and that consumers have access to the lowest-priced alternatives.[103] But competition also promotes innovation, what economists call "x efficiency"[104] or "dynamic efficiency."[105] That is, competition not only allows consumers to shop for the cheapest mousetrap, but prods competitors to build a better one.

In the context of renewable portfolio standards, this means that protectionist barriers dampen incentives for technological innovation that might foster breakthroughs in the cost of electric storage, wind generation, photovoltaic cells, etc. These cost breakthroughs would make it easier for states to reach their renewable portfolio goals, maybe even to expand them.

And, if the states' goals in enacting RPS laws are to displace fossil-fueled generation—whether as an environmental measure or out of a desire to promote reliability or fuel price stability through supply diversity—they will be better off without in-state preferences. Fossil-fueled generators, after all, compete regionally. If preferences for in-state suppliers are removed, renewable energy producers will be better situated to compete against their fossil-fueled counterparts.[106]

> Under a tariff, the government adds a charge to imported goods and pockets the proceeds. Under a quota, only a specified amount of imports is allowed into the country. Like a tariff, a quota raises the U.S. price above the level that would prevail under free trade. But the difference goes not to the U.S. Treasury but to the foreign producers. In effect, we permit them to impose a tax on domestic consumers and to pocket the proceeds.

Id.

103. *Allocative Efficiency*, ECONOMICSHELP, http://www.economicshelp.org/blog/glossary/allocative-efficiency/ (last visited Jan. 23, 2015).

104. Harvey Leibenstein, *Allocative Efficiency vs. "X-Efficiency*,*"* 56 THE AM. ECON. REV. 392, 412-13 (1966).

105. *Dynamic Efficiency*, ECONOMICSHELP, http://www.economicshelp.org/microessays/costs/dynamic-efficiency/ (last visited Feb. 4, 2015); *Efficiency*, ECONOMICSONLINE, http://www.economicsonline.co.uk/Business_economics/Efficiency.html (last visited Feb. 4, 2015).

106. Some state goals, like promotion of local industry, plainly will not be advanced by removal of RPS in-state preferences. But, as noted in Section V, *infra*, there are other means of advancing these goals without adopting legislation that violates the Commerce Clause.

V. CONCLUSION

"I think it safe to say," wrote Justice Scalia over twenty years ago, "that the federal courts have never been plagued by a shortage of [dormant Commerce Clause] suits brought by private parties, and that the nontextual elements of the Commerce Clause have not gone unenforced for lack of willing litigants."[107] Yet this has not been true in the case of state renewable energy legislation. As Nathan Endrud commented in his 2008 article, although many state statutes adopting RPS for utilities would fail Commerce Clause review, most seemed to have escaped that fate because of the "fortunate circumstance," for them, of "lack of enforcement."[108]

Endrud's observation about the lack of enforcement raises two questions: (1) why is it that we do not see more lawsuits, and (2) are we worse off as a nation—both environmentally and economically—as a result of the lack of enforcement?

There is no clear cut answer to the first question. There have been several suits challenging RPS laws in Massachusetts, New York, Missouri, Delaware, and Colorado.[109] But there are many more states with RPS laws as restrictive as those of the states that have been sued. For the renewable energy companies disadvantaged by these laws, the answer may simply be that, as relative industry newcomers, they cannot afford the cost of litigating the issue.

The other industry participants disadvantaged by preferences for in-state renewables are the utilities that must purchase renewable resources at costs inflated by diminished competition. Some can simply pass on these costs to their ratepayers. This seems to be the path of least resistance chosen by PG&E in the case discussed earlier. In the author's experience, and based on conversations with would-be litigants, the answer lies in their relationships with regulators and state legislators. Privately-owned utilities are regulated by state commissions that

107. *Wyoming*, 502 U.S. at 461-62 (Scalia, J., dissenting).

108. Endrud, *supra* note 4, at 270:

> Realistically then, there are only two plausible escapes from the Court's current dormant Commerce Clause doctrine for state RPS programs with economically protectionist measures. The first is a lack of enforcement, which seems to be the fortunate circumstance enjoyed by several states thus far. The second is congressional authorization that expressly allows states to implement such protectionist measures, which Congress could give under its express Commerce Clause power. Barring such circumstances, state RPS programs will be scrutinized under the Court's current dormant Commerce Clause doctrine.

109. Ferrey, *supra*, note 1, and cases cited therein. In one case, Town of Barnstable v. Berwick, 17 F. Supp. 3d 113 (D. Mass. May 2, 2014), the court sustained Massachusetts' objection that the plaintiffs' suit was barred on sovereign immunity grounds by the Eleventh Amendment. While acknowledging that state officials (in this case, commissioners on the State's Department of Public Utilities) could be sued in their official capacity "where the complaining party seeks *prospective* equitable relief from a continuing violation of federal law," the court ruled that sovereign immunity would apply where retroactive or monetary relief was sought, as it was in the case before it. *Id.* at 121, 123 (citing Green v. Mansour, 474 U.S. 64, 68 (1985)). State officials, of course, have been sued by private parties for enforcing state laws that violate the dormant Commerce Clause many times. Those suits are not barred by the Eleventh Amendment. *See, e.g.*, Ex Parte Young, 209 U.S. 123, 159-60 (1908) (suit against state official acting unconstitutionally "does not affect the State in its sovereign or governmental capacity" because the state officer committing an unconstitutional act is considered to be "stripped of his official or representative character"). Sovereign immunity is also inapplicable to suits by the federal government against states (United States v. Mississippi, 380 U.S. 128, 140 (1965)); by states against other states (Blatchford v. Native Village of Noatak, 501 U.S. 775, 781-82 (1991)); and by private parties against municipalities (Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 280 (1977)).

will, by their nature as state agencies, be supportive of state RPS policies. Utilities that choose to challenge state RPS laws will inevitably need to seek authority from the regulators to raise rates, obtain operating certificates, and the like. Their fear, well-founded or not, is that their regulators will have long memories and can find ways to make life uncomfortable for utilities that bring constitutional challenges to state laws. Municipal utilities are typically not subject to regulation by state utility commissions, but they too may feel that suing the state may raise the ire of state legislatures that have at least some control over their purse strings.[110]

There is, to be sure, a third class of industry participants adversely affected by RPS standards—fossil fuel producers, fossil-fueled generators, and some large industrial consumers. But their objections are not to in-state preferences. They object to preferences for renewable resources in general, which they argue will increase costs to consumers.[111] And, as noted earlier, advocacy groups aligned with them have not been passive. They have directed most of their efforts at state-level lobbying for repeal of state RPS laws.[112] Their efforts—apparently well-funded[113]—might better be directed at eliminating the in-state preferences that are the subject of this article, not at killing RPS.

The second question is easier to answer with an unambiguous "yes." States do not have to sacrifice either consumer protection or the welfare of local businesses and workers to promote renewable technologies. They have ample constitutional options:

States may promote renewables neutrally, that is, without favoring in-state interests. Economists are in broad agreement that the preferable way to reduce CO_2 emissions is to tax them.[114] Raising taxes is a difficult thing for legislators, and the alternative solution chosen by many legislatures is to require utilities to meet at least a portion of their customers' energy demands with renewable resources.[115] Favoring renewable generation over fossil-fueled energy sources poses no dormant Commerce Clause issue. Favoring "homegrown" renewable energy sources, however, is generally no greener than favoring renewable resources and is likely, instead, to raise the costs of renewable energy unnecessarily. To be sure, state-adopted multipliers and quotas will be a benefit to the favored in-state industries. As Princeton Economics Professor Alan Blinder reminds us, "while protectionism is sold as job saving, it probably really amounts

110. State attorneys general have also frequently been plaintiffs in dormant Commerce Clause cases. Their absence from litigation over RPS legislation is likely explained by one significant factor: with so many states enacting discriminatory RPS laws, the plaintiffs would be inviting scrutiny of their own vulnerable laws.

111. Niquette, *supra* note 50.

112. *Id.*

113. *See, e.g.*, *supra* note 47.

114. The Carbon Tax Center maintains a list of the numerous prominent economists and scientists who believe a carbon tax is the most efficient way to reduce carbon emissions. *Scientists and Economists*, CARBON TAX CENTER, www.carbontax.org/services/supporters/scientists-economists/ (last visited Jan. 23, 2015). *See also* Harvey L. Reiter, *America's Energy Future: So Who Are the Good Guys?*, PUB. UTILS. FORTNIGHTLY, VOL. 151 NO. 10 at 52, 54 (Oct. 2013) (and sources cited therein).

115. "Short of a carbon tax, some economists would argue there are other, more efficient ways to reduce the use of fossil fuels in the production of energy than through RPS," such as "[h]olding utilities to a carbon output standard." Reiter, *supra* note 114, at 54 (citing Karen Palmer & Dallas Burtraw, *Cost Effectiveness of Renewable Energy Policies*, RESOURCES FOR THE FUTURE (Jan. 2005)).

to job swapping. It protects jobs in some industries only by destroying jobs in others."[116]

States may favor particular renewable technologies. Although, as noted, several organizations have launched concerted, but so far unsuccessful, efforts to repeal or limit state RPS laws,[117] favoring renewable technologies is not unconstitutional. Neither the Public Utilities Regulatory Policies Act (PURPA), which generally requires utilities to purchase the output of a range of renewable generation sources (wind, solar, geothermal, biofuels, small hydro),[118] nor the Federal Power Act (FPA), which gives the FERC exclusive jurisdiction to regulate the rates for interstate wholesale sales of electricity,[119] preempts states from favoring renewable resources over conventional fossil fuel generation.[120] Both the FERC and several appellate courts have said that the Supremacy Clause is not an obstacle in that regard.[121] And, as long as they are not favoring in-state over out-of-state competitors, states may also favor particular renewable technologies over others without running afoul of the Commerce Clause.[122] Arguments that

116. Blinder, *supra* note 88.

117. *See also supra* note 47.

118. Am. Paper Inst., Inc. v. Am. Elec. Power Serv. Corp., 461 US 402, 404-05 (1983).

119. Fed. Power Comm'n v. S. Cal. Edison Co., 376 U.S. 205, 206-07 (1964). *See also* New England Power Co. v. New Hampshire, 455 U.S. 331, 340 (1982).

120. The Energy and Environmental Legal Institute (EELI) "describes itself as being dedicated to the advancement of rational, free-market solutions to land, energy, and environmental challenges," the promotion of "coal energy," and as a skeptic that "human activities have had [an impact] on the rise in global temperatures." Energy & Envtl. Legal Inst. v. Epel, No. 11-cv-00859-WJM-BNB, 2014 WL 1874977, at *1 (D. Colo.). The EELI has argued that state laws favoring particular renewable generation over other forms of energy create conflicts with laws in other states and place an undue burden on interstate commerce. *Id.* at *6. This is a dubious claim. "The only cases in which the Supreme Court has held that the federal need for uniformity outweighs the state's ability to devise its own regulations involve areas like foreign trade and interstate transportation." *Id.* at *7. *See also Japan Line, Ltd.*, 441 U.S. at 453; Bibb v. Navajo Freight Lines, Ltd., 359 U.S. 520, 527 (1959).

121. As the FERC noted in *S. Cal. Edison Co. & San Diego Gas & Elec. Co.*, 71 F.E.R.C. ¶ 61,269, at p. 62,080 (1995):

> [S]tates have numerous ways outside of PURPA to encourage renewable resources. As a general matter, states have broad powers under state law to direct the planning and resource decisions of utilities under their jurisdiction. States may, for example, order utilities to build renewable generators themselves, or deny certification of other types of facilities if state law so permits. They also, assuming state law permits, may order utilities to purchase renewable generation.

See also Cal. Pub. Utils. Comm'n, 132 F.E.R.C. ¶ 61,047 (2010); Conn. Dep't of Pub. Util. Control v. FERC, 569 F.3d 477, 482 (D.C. Cir. 2009) (noting that the Federal Power Act does not preempt states from selecting what type of generation should be built in the state or the types of generation utilities should purchase); PPL EnergyPlus, LLC v. Solomon, 766 F.3d 241, 255 (3d Cir. 2014).

122. To be sure, parties are free to allege that, by favoring a particular technology, states may be placing an undue burden on interstate commerce even if they are not discriminating against out-of-state competitors. As noted earlier, however, claims of this type rarely succeed. *Energy & Envt. Legal Inst.*, 2014 WL 1874977, at *3. Still, while states may have the discretion to support a particular type of renewable resource, favoring a particular renewable technology, even where reducing carbon emissions is the goal, may not be good policy. As this author wrote in questioning whether subsidies for off-shore wind projects would be the best policy, lawmakers should ask themselves:

> Will the subsidy borne by ratepayers allow wind to develop even if solar is cheaper? If so, is that a green outcome? Will the cost of the legislation make it more difficult for legislators already facing budget constraints to call on ratepayers also to subsidize energy conservation or energy efficiency programs? If these programs are market-driven they will have to compete with wind resources. Could development of other, possibly more efficient green technologies be retarded as a result? Or will the

geographically neutral renewable portfolio standards might nonetheless unduly burden interstate commerce because of their adverse effect on out-of-state fossil-fueled generators' ability to compete,[123] in this author's opinion, would be constitutional long-shots.[124]

States may even subsidize local industries, including renewable energy producers, as long as they do not fund the subsidy with taxes on out-of-state competitors. What states do with their own dollars to favor local business will not ordinarily violate the Commerce Clause. "A pure subsidy funded out of general revenue ordinarily imposes no burden on interstate commerce, but merely assists local business."[125] So, a state could, for example, determine that it wants to promote the use of rooftop solar panels and provide direct subsidies to local manufacturers, to give them a competitive jump-start. But, while the state could fund the subsidy out of general taxes, it cannot collect taxes directly from out-of-state companies to subsidize their in-state competitors. Nor can it disguise a subsidy by taxing both in-state and out-of-state competitors[126] and then redistributing the revenues collected solely to the in-state companies.[127]

States acting as customers or as vendors may constitutionally favor local residents. "Nothing in the purposes animating the Commerce Clause prohibits a State, in the absence of congressional action, from participating in the market and exercising the right to favor its own citizens over others."[128] State and local governments are large purchasers of goods and services. So, it follows that nothing, constitutionally anyway, bars them from favoring local businesses—including local developers of renewable energy projects—in their purchasing practices.[129] States and local governments also often act in a proprietary capacity. "Thus, for example, when a State chooses to manufacture and sell cement, its business methods, including those that favor its residents, are of no greater constitutional concern than those of a private business."[130] States, therefore, can develop their own renewable energy projects. Many states and several thousand municipalities, in fact, are already in the electric utility business.[131]

The temptations for states to legislate in ways that insulate local businesses from out-of-state and foreign competition are as old as the Republic. The large body of dormant Commerce Clause case law suggests that they have succumbed to these temptations time and again. Perhaps the hope that states will curb their

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> wind subsidy serve to jumpstart offshore wind, increase economies of scale, lower costs and produce jobs in the long term . . . ?

Reiter, *supra* note 114, at 55.

123. *See, e.g.*, *supra* note 24.

124. Konschnik & Peskoe, *supra* note 4, at 29 (pointing to recent Supreme Court decisions expressing doubts about the courts' ability to evaluate burdens on interstate commerce under the *Pike* balancing test and warning that the Court "would not 'rigorously scrutinize economic legislation passed under the auspices of the police power' for the purpose of judging the wisdom of such legislation." (quoting *United Haulers Ass'n*, 550 U.S. at 347)).

125. *W. Lynn Creamery*, 512 U.S. at 199.

126. *Id.*

127. *Id.* at 197.

128. Hughes v. Alexandria Scrap Corp., 426 U.S. 794, 810 (1976).

129. *Id.* at 823.

130. New Energy Co. of Ind. v. Limbach, 486 U.S. 269, 277 (1988).

131. AM. PUB. POWER ASS'N, 2014 PUBLIC POWER ANNUAL DIRECTORY & STATISTICAL REPORT 41, 47-48 (on file with author).

protectionist instincts when legislating to combat climate change is a futile one. Perhaps not, though. Converting to a low carbon energy economy may be necessary to avoid a planetary catastrophe, but that conversion probably will not come cheap. Consumers—constituents—will foot the bill. They ought to be getting the best deal. Maybe the threat of dormant Commerce Clause challenges will help ensure that they do.