PUTTING THE DORMANT COMMERCE CLAUSE BACK TO SLEEP: ADAPTING THE DOCTRINE TO SUPPORT STATE RENEWABLE PORTFOLIO STANDARDS

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State renewable portfolio standards (RPSs) and renewable energy standards (RESs) are among the most effective devices for renewable energy development, but plaintiffs have begun to challenge the constitutionality of specific provisions of these statutes by claiming they discriminate against interstate commerce in violation of the dormant Commerce Clause. Recently, a coal interest group has brought a much broader challenge, arguing that Colorado's RES excessively burdens interstate commerce because it purportedly discriminates against out-of-state nonrenewable energy providers. Should this attack succeed, the constitutionality of state RPSs and RESs across the nation will fall into doubt. At the forefront of these concerns is the ambitious California RPS, which mandates that utilities obtain 33% of energy from renewable sources. Other dormant Commerce Clause challenges to California environmental regulations, including the Rocky Mountain Farmers v. Goldstene litigation concerning the California Low Carbon Fuel Standard, may also influence how courts approach challenges to RPSs. This Article explores the implications that these cases and the Colorado litigation will have for the California RPS and other state RPSs, and analyzes the weaknesses of both the Colorado and California statutes. Finally, it offers a number of defenses that states can use to overcome these attacks.

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I. INTRODUCTION

There is widespread agreement on the value of renewable energy development: renewable energy reduces greenhouse gas emissions, decreases the country's reliance on fossil fuel reserves, and combats our dependence on the energy resources of hostile nations. Despite the importance of renewable energy development, however, the federal government has not mandated this development. Although the federal government has taken some steps to encourage renewable energy developers, including loan programs and expedited permit review for renewable energy projects, the task has largely fallen on state governments to ensure that renewable energy development actually takes place. Thus, the states have served as "laboratories" for testing various policy mechanisms in pursuit of protecting the environment. Perhaps the most popular of these policy mechanisms is the renewable portfolio standard (RPS), which requires that a certain fraction of total installed capacity or

⁵ Jacobi, *supra* note 1, at 1081; *see also* Ferrey, *supra* note 2, at 507–08. ("The leverage for these renewable power resources is fulcrumed at the state level by a host of renewable electric power subsidies and requirements. . . . These state policies drive American energy policy into the twenty-first century.").

¹ Patrick Jacobi, Note, Renewable Portfolio Standard Generator Applicability Requirements: How States Can Stop Worrying and Learn to Love the Dormant Commerce Clause, 30 Vt. L. Rev. 1079, 1080–81 (2006).

² Steven Ferrey, Sustainable Energy, Environmental Policy, and States' Rights: Discerning the Energy Future Through the Eye of the Dormant Commerce Clause, 12 N.Y.U. ENVIL. L.J. 507, 514 (2004). A transition to renewable energy also "diversifies and strengthens the U.S. energy system against attack and failure in the post-September 11 era." Id. at 508.

³ See Siobhan McIntyre & Timothy P. Duane, Water, Work, Wildlife, and Wilderness: The Collaborative Federal Public Lands Planning Framework for Utility-Scale Solar Energy Development in the Desert Southwest, 41 EnvTl. L. 1093, 1099 (2011) (discussing a Bush administration executive order that did "not explicitly mandate an increase in renewable energy development, but [did] require federal agencies to 'expedite their review of permits or take other actions as necessary to accelerate the completion of such projects" (quoting Exec. Order No. 13,212, 3 C.F.R. 769 (2002))).

⁴ Id. at 1099-1100.

⁶ See generally Robert B. McKinstry, Jr., Laboratories for Local Solutions for Global Problems: State, Local and Private Leadership in Developing Strategies to Mitigate the Causes and Effects of Climate Change, 12 Penn St. Envil. L. Rev. 15 (2004).

⁷ Although the federal government has attempted to develop an RPS, these efforts have not yet come to fruition. For discussions of the pros and cons of a national RPS, see Lincoln L. Davies, *Power Forward: The Argument for a National RPS*, 42 CONN. L. REV. 1339, 1364–75 (2010), and Jim Rossi, *The Limits of a National Renewable Portfolio Standard*, 42 CONN. L. REV.

total generation come from renewable technologies.⁸ Indeed, thirty states and the District of Columbia had adopted an RPS by 2012.⁹

Although RPSs have become a popular policy tool to encourage renewable energy development, many have questioned the validity of state renewable energy mandates under the dormant Commerce Clause. ¹⁰ Several state RPSs include in-state delivery or location requirements and incentives, while other states limit the amount of out-of-state power that a utility may use to satisfy the RPS. ¹¹ In addition, some states "carve-out" a portion of energy that a provider must obtain from in-state distributed generation. ¹² These incentives, requirements, and limitations arguably run afoul of the dormant Commerce Clause's general prohibition on discrimination against interstate commerce. ¹³

Despite the seeming vulnerability of state RPSs to a dormant Commerce Clause challenge, no party had formally challenged renewable mandates in court until 2010. This lack of enforcement could be attributed to the wide dispersion of the costs that renewable mandates place on out-of-state actors. If individual out-of-state parties are each burdened with only minor costs, they would forego suing to invalidate these mandates even if the total costs and burdens on out-of-state parties are significant when viewed as a whole. Further, companies that attack a renewable energy mandate would almost certainly risk bad publicity and difficulty getting necessary approvals from the same state regulators they would be suing.

1425, 1429–49 (2010). See also Timothy P. Duane, Greening the Grid: Implementing Climate Change Policy Through Energy Efficiency, Renewable Portfolio Standards, and Strategic Transmission System Investments, 34 VT. L. REV. 711, 754 (2010) ("RPSs... are presently under state regulators but could be supplemented by federal authority for a national RPS as outlined in H.R. 2454[.]" (quoting American Clean Energy and Security Act of 2009, H.B. 2454, 111th Cong. §§ 702–703 (2009)).

- 8 Jacobi, supra note 1, at 1081.
- ⁹ U.S. Energy Info. Admin., *Most States Have Renewable Portfolio Standards*, Today In Energy, Feb. 3, 2012, http://www.eia.gov/todayinenergy/detail.cfm?id=4850 (last visited Apr. 7, 2013); *see also* Timothy P. Duane, *Greening the Grid in California*, Nat. Resources & Env't, Fall 2010 (discussing how California's RPS regime is involved in state efforts to curb greenhouse gas emissions).
- ¹⁰ E.g., Nathan E. Endrud, Note, 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, 260–61 (2008).
- $^{11}\,$ Carolyn Elefant & Edward A. Holt, Clean Energy States Alliance, State RPS Policy Report: The Commerce Clause and Implications for State Renewable Portfolio Standard Programs 3 (2011), available at http://www.cleanenergystates.org/assets/Uploads/CEG-Commerce-Clause-paper-031111-Final.pdf.
 - ¹² *Id.*
- 13 See, e.g., id. at 5–13 (providing a general overview of common dormant Commerce Clause issues and their implications for RPS programs).
- ¹⁴ See Endrud, supra note 10, at 270 (noting that most state RPS programs have been fortunate thus far to not face many dormant Commerce Clause challenges).
- ¹⁵ Indeed, 87% of United States citizens favor legislation requiring utilities to produce more energy from wind, solar, or other renewable sources. *See* McIntyre & Duane, *supra* note 3, at 1096–97 (citing Press Release, Pew Research Center, Public Remains of Two Minds on Energy Policy (June 14, 2010), http://www.people-press.org/2010/06/14/public-remains-of-two-minds-on-energy-policy (last visited Apr. 7, 2013)). Such an "overwhelming statistical majority represents

Although the costs of litigation and the likelihood of bad publicity may have previously hindered dormant Commerce Clause challenges to renewable mandates, within the last few years plaintiffs have begun to attack these mandates. These challenges include an energy company's settled claim attacking the Massachusetts RPS¹⁶ and an organization's ongoing litigation against the Colorado renewable energy standard (RES).¹⁷ The attorneys general of Alabama, Texas, Nebraska, and North Dakota have also recently threatened to challenge California's RPS.¹⁸

This Article focuses initially on the Colorado litigation, *American Tradition Institute v. Colorado* (*ATI*), which may become the first case to result in a definitive ruling on the constitutionality of an RPS. Because of the organizational plaintiffs' interests in the case, settlement is doubtful and the case is instead "likely to end up before the Tenth Circuit." In the worst-case scenario, *ATI* could become a model that would be used in attacks on RPSs across the country. Thus, the *ATI* case threatens one of the most important tools for encouraging renewable energy development. If successful, there is no question that the attack on the Colorado RES would largely halt renewable energy development and investment in Colorado, and would likely slow development and investment across the country as entrepreneurs and industry wait to see whether the decision will find traction in other circuits.

Indeed, the outcome of the Colorado case may determine whether the state attorneys general will make good on their threatened attack against California's RPS.²² The California RPS is particularly important because of the large market it regulates and because of its ambitious goal of obtaining 33% of energy from renewable sources. Therefore, this Article also addresses the vulnerability of the California RPS in the wake of challenges to other related California statutes and regulations under the California Global

a broad base of constituent support and suggests that renewable energy development presents diverse opportunities, appealing to a wide array of stakeholders." *Id.* at 1097.

¹⁶ Complaint, TransCanada Power Mktg. Ltd. v. Bowles, No. 4:10-cv-40070-FDS (C.D. Mass. Apr. 16, 2010), *available at* http://www.ohiogreenstrategies.com/documents/transcanada.pdf. For a thorough discussion of the TransCanada litigation, see Elefant & Holt, *supra* note 11, at 19–23.

¹⁷ Am. Tradition Inst., No. 11-cv-00859-WJM-KLM, 2012 WL 2899064 (D. Colo. July 17, 2012).

¹⁸ MICHAEL N. MILLS, WILL CALIFORNIA'S 33% RENEWABLE PORTFOLIO STANDARD SURVIVE A COMMERCE CLAUSE CHALLENGE BY OTHER STATES? A RECENTLY FILED COLORADO CASE MAY PROVIDE THE ANSWER 6 (2011), available at http://www.stoel.com/files/TheOverride_CaseoftheMonth_may2011.pdf.

 $^{^{19}~}$ No. 11-cv-00859-WJM-KLM, 2012 WL 2899064 (D. Colo. July 17, 2012).

²⁰ Rudy Verner, Renewable Energy Standards Challenged, ROCKY MOUNTAIN APPELLATE BLOG (Apr. 5, 2011, 3:57 PM), http://rockymtnappellateblog.typepad.com/rocky_mountain_appellate_/2011/04/renewable-energy-standards-challenged.html (last visited Apr. 7, 2013).

 $^{^{21}~}$ $See\,\mbox{Mills}$, $supra\,\mbox{note}$ 18, at 7.

²² Id. at 6–7 ("Of particular importance to California, plaintiffs in American Tradition Institute, et al. v. Colorado raise a sweeping Commerce Clause claim.... The outcome of this case could have a profound impact on California's 33% RPS and any legal challenges mounted against it.").

Warming Solutions Act of 2006 (AB 32).²³ We conclude that the California RPS is unlikely to be vulnerable to a constitutional challenge under the dormant Commerce Clause given recent Ninth Circuit jurisprudence regarding AB 32.

The viability of the *American Tradition Institute* case highlights several problems, however, with dormant Commerce Clause doctrine as currently formulated by courts. Thus, following this introduction, Part II of this Article explores this doctrine and relevant case law. Part III discusses pending and previous challenges to state RPSs, including attacks on the Massachusetts, Minnesota, and Missouri RPSs, while Part IV focuses specifically on ATI, in which an organization representing coal interests has brought a broad challenge seeking to invalidate the Colorado RES. Part V evaluates the implications of other litigation on California's RPS, and explores the vulnerability of California's RPS to dormant Commerce Clause challenges in light of the Rocky Mountain Farmers Union v. Goldstene (Rocky Mountain Farmers)²⁴ decision at the federal district court level and the Ninth Circuit's decision in Pacific Merchant Shipping Association v. Goldstene (Pacific *Merchant*). ²⁵ In addition, it considers the important differences between California's RPS statute and other state statutes and regulations mandating renewable energy procurement. Finally, Part VI provides legislative and judicial solutions to prevent the invalidation of state RPSs under the dormant Commerce Clause.

II. THE DORMANT COMMERCE CLAUSE

Article I of the U.S. Constitution states in part that Congress shall have the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes." The negative implication of this enumerated power for the federal government is known as the dormant Commerce Clause, which impliedly restricts state regulation of interstate commerce. The purpose of the dormant Commerce Clause is "to prohibit state or municipal laws whose object is local economic protectionism." To determine whether a state or municipal law constitutes economic protectionism under the dormant Commerce Clause, courts apply one of two levels of scrutiny. Description of the commerce Clause, courts apply one of two levels of scrutiny.

 $^{^{23}\,}$ California Global Warming Solutions Act of 2006, Cal. Health & Safety Code $\S\S$ 38500–38599 (West 2006 & Supp. 2013).

²⁴ 843 F. Supp. 2d 1071 (E.D. Cal. 2011).

²⁵ 639 F.3d 1154 (9th Cir. 2011).

²⁶ U.S. CONST. art. I, § 8, cl. 3.

²⁷ See generally Rachel J. Schaefer, Note, Must the House Always Win?: A Critique of Rousso v. State, 35 SEATTLE U. L. REV. 1549, 1559–62 (2012) (explaining that the Supreme Court has long recognized the implied "limitation on the power of the states to erect barriers against interstate trade").

²⁸ C & A Carbone, Inc. v. Town of Clarkstown, N.Y., (*Carbone*) 511 U.S. 383, 390 (1994).

 $^{^{29}\,}$ Black Star Farms LLC v. Oliver, 600 F.3d 1225, 1230 (9th Cir. 2010) (citing Maine v. Taylor, 477 U.S. 131, 138 (1986)).

First, if a court determines that a statute discriminates against interstate commerce or regulates commerce beyond a state's jurisdiction, the court will use "strict scrutiny" to determine whether the statute is constitutional. Although it is theoretically possible for a statute to withstand strict scrutiny, the standard is very difficult to meet and invalidation is likely. To survive strict scrutiny, a state must show 1) that the law in question protects a legitimate state interest, and 2) that the statute is narrowly tailored to the goal of protecting that interest. In other words, the statute must be the only reasonable means to protect the interest at stake. Because of the unlikelihood of a state law surviving strict scrutiny, courts oftentimes refer to this standard as "a virtually *per se* rule of invalidity."

On the other hand, if no discrimination is present, the statute evenly regulates in-state and out-of-state entities, and it only regulates in-state commerce, then courts will apply a flexible balancing test that is more favorable to the state law.³⁵ Under this balancing test, a statute is valid so long as the burdens of the statute on interstate commerce are not excessive in proportion to the statute's in-state benefits.³⁶ A state statute may therefore be struck under this standard because it "unreasonably favor[s] local producers at the expense of competitors from other States.³⁷

In *ATI*, the plaintiffs have attacked the Colorado RES on both grounds, alleging both that the Colorado RES discriminates against interstate commerce and that the RES excessively burdens interstate commerce.³⁸ Thus, to provide a framework with which to evaluate the plaintiffs' attacks in *ATI*, this Part outlines the tests for both levels of scrutiny. Further, this Part discusses courts' treatment of subsidies for in-state businesses under the dormant Commerce Clause, with the end goal of determining whether various RPS provisions are analogous to subsidies. Finally, this Part discusses two other potentially relevant doctrines that have been cited to justify the validation or invalidation of a state law under the dormant Commerce Clause—namely, the virtual representation doctrine and the market-participant exception.

³⁰ Healy v. Beer Inst., 491 U.S. 324, 337 n.14 (1989) ("When a state statute directly regulates or discriminates against interstate commerce . . . we have generally struck down the statute without further inquiry." (quoting Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth., 476 U.S. 573, 579 (1986))).

³¹ Ferrey, *supra* note 2, at 579.

³² See Carbone, 511 U.S. at 392 (citing Maine v. Taylor, 477 U.S. 131, 138 (1986)).

³³ See id.

³⁴ See, e.g., SDDS, Inc. v. South Dakota, 47 F.3d 263, 268, 268 n.8 (8th Cir. 1995) (quoting Philadelphia v. New Jersey, 437 U.S. 617, 624 (1978)).

³⁵ Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970).

³⁶ Id.

³⁷ Shamrock Farms Co. v. Veneman, 146 F.3d 1177, 1179 (9th Cir. 1998) (quoting Fla. Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 154 (1963)).

³⁸ Amended Complaint for Injunctive and Declaratory Relief at 2, 21, Am. Tradition Inst. v. Colorado, No. 1:11-cv-00859-WJM-KLM (D. Colo. Apr. 22, 2011), available at http://www.atinstitute.org/wp-content/uploads/2011/04/ATI-RPS-Lawsuit-Amended-Complaint.pdf.

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A. Discrimination Against Out-of-State Commerce

There are three types of discrimination that may trigger strict scrutiny, either alone or in combination.³⁹ First, the language of a provision may facially discriminate against interstate commerce.⁴⁰ Second, a facially neutral provision, including subsidies for in-state businesses, may have a discriminatory effect.⁴¹ Third, a facially neutral provision may have a discriminatory purpose.⁴² As scholars have recognized, each of these three types of discrimination may be present in state RPSs.⁴³

1. Facial Discrimination

Facial discrimination occurs when a statute explicitly distinguishes between in-state and out-of-state parties and disadvantages the latter. For example, in *Wyoming v. Oklahoma*, the Supreme Court invalidated a statute that required coal-fired electric utilities in Oklahoma to burn a mixture containing at least 10% Oklahoma-mined coal. The Supreme Court determined that the statute discriminated against interstate commerce on its face because it expressly reserve[d] a segment of the Oklahoma coal market for Oklahoma-mined coal, to the exclusion of coal mined in other States. The result in *Wyoming v. Oklahoma* is particularly relevant for

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³⁹ See Nat'l Ass'n of Optometrists & Opticians LensCrafters, Inc. v. Brown, 567 F.3d 521, 525 (9th Cir. 2009) ("A statutory scheme 'can discriminate against out-of-state interests in three different ways: (a) facially, (b) purposefully, or (c) in practical effect." (quoting LensCrafters, Inc. v. Robinson, 403 F.3d 798, 802 (6th Cir. 2005) (citations omitted))); SDDS, Inc. v. South Dakota, 47 F.3d 263, 267 (8th Cir. 1995).

⁴⁰ SDDS, Inc., 47 F.3d at 267.

⁴¹ Id.

⁴² *Id.*

 $^{^{43}}$ See, e.g., Elefant & Holt, supra note 11, at 6, 8.

 $^{^{44}\} See$ Erwin Chemerinsky, Constitutional Law: Principles and Policies 412–13 (3d ed. 2006).

⁴⁵ 502 U.S. 437 (1992).

⁴⁶ *Id.* at 437.

 $^{^{47}}$ Id. at 455. The Court's decision in Wyoming v. Oklahoma relied heavily on Philadelphia v. New Jersey, 437 U.S. 617, 624 (1978). See Kirsten H. Engel, The Dormant Commerce Clause Threat to Market-Based Environmental Regulation: The Case of Electricity Deregulation, 26 ECOLOGY L.Q. 243, 272-73 n.78 (1999) (noting "[t]he Court now treats Philadelphia v. New Jersey as the flagship case referring to state regulations that discriminate against interstate commerce on their face"). Although the statute in Philadelphia v. New Jersey may be distinguishable from the percentage requirements in state RPSs (it constituted a 100% prohibition on out-of-state commerce), the Oklahoma statute overturned in Wyoming v. Oklahoma involved only a 10% allocation of the market to in-state producers (similar to an RPS that may allocate a percentage of the electricity market to renewable producers who must be in-state to meet all of the criteria for RPS eligibility). For an overview of Supreme Court cases invalidating facially discriminatory state laws, see Engel, supra, at 272-73 n.78 (citing Fort Gratiot Sanitary Landfill, Inc. v. Mich. Dep't of Natural Res., 504 U.S. 353, 361-68 (1992); Chem. Waste Mgmt., Inc. v. Hunt, 504 U.S. 334, 339-48 (1992); New Energy Co. of Ind. v. Limbach, 486 U.S. 269, 274-76, 278-80 (1988); Bacchus Imports, Ltd. v. Dias, 468 U.S. 263, 270-73 (1984); Boston Stock Exch. v. State Tax Comm'r, 429 U.S. 318, 329-32 (1977); Baldwin v. G. A. F. Seelig, Inc., 294 U.S. 511, 519-26 (1935)).

state RPSs. Arguably, the Oklahoma statute is analogous to RPS carve-out provisions that require utilities to procure a certain percentage of renewable energy from in-state sources.

2. Discriminatory Effect

Even if a statute is facially neutral, a court could also apply strict scrutiny if the state law has a discriminatory effect. However, in contrast to the relatively straightforward application of the facial discrimination test, there is less certainty regarding when strict scrutiny applies in this context. In some instances, a statute's discriminatory effect has been sufficient to invoke strict scrutiny. Nevertheless, the Supreme Court has sometimes refused to apply strict scrutiny when it recognized an overwhelming disparate impact. Hus, although a disparate impact is sometimes sufficient to establish discrimination on its own, other factors, such as the presence of discriminatory purpose of the absence of virtual representation, has be important to establish discrimination even when a disparate impact is present.

Although a larger disparate impact on out-of-staters is intuitively more likely to establish discrimination than a smaller impact, discrimination may still be present despite a small disparate impact. In *Wyoming v. Oklahoma*, after determining that the Oklahoma statute facially discriminated against out-of-state energy, the Court concluded that the statute also discriminated against interstate commerce in practical effect. Prior to the passage of the statute, Wyoming had provided "virtually 100% of the coal purchased by Oklahoma utilities," but after the statute was passed, the utilities purchased Oklahoma coal in amounts ranging from 3.4% to 7.4% of their annual needs, with a necessarily corresponding reduction in purchases of Wyoming coal. He Court rejected Oklahoma's argument that the Act sets aside only a small portion of the Oklahoma coal market, without placing an 'overall burden' on out-of-state coal producers doing business in Oklahoma." The Court explained, "[t]he volume of commerce affected measures only the

 $^{^{48}~}See$ C & A Carbone, Inc. v. Town of Clarkstown, 511 U.S. 383 (1994); Hunt v. Wash. State Apple Advertising Comm'n, 432 U.S. 333, 352–53 (1977).

 $^{^{49}}$ See generally Exxon Corp. v. Governor of Md., 437 U.S. 117 (1978) (finding no discrimination even when 95% of the statutorily disadvantaged entities were from out of state and 99% of the protected entities were from in state). Generally, we use the term "disparate impact" to refer to an effect that may or may not be sufficient to create a discriminatory effect. We use the term "discriminatory effect" to refer to an effect that constitutes discrimination and thus gives rise to strict scrutiny.

⁵⁰ See infra Part II.A.3.

 $^{^{51}}$ See infra Part II.A.5.

⁵² See Chemerinsky, supra note 44, at 436.

⁵³ See Wyoming, 502 U.S. 437, 455 (1992).

⁵⁴ See supra Part II.A.1.

 $^{^{55}}$ $\,$ See Wyoming, 502 U.S. at 455.

⁵⁶ *Id.*

⁵⁷ *Id.*

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extent of the discrimination; it is of no relevance to the determination whether a State has discriminated against interstate commerce."⁵⁸

If taken at face value, *Wyoming v. Oklahoma* poses a worst-case scenario for RPSs. Potentially, any disparate impact, however small, could constitute discrimination under this case. Still, courts can distinguish the case because the statute at issue also facially discriminated against interstate commerce, making a finding of discriminatory effect unnecessary for the Court's holding. So the analysis in *Wyoming v. Oklahoma* may not apply to a state RPS that avoids facial classifications such as in-state carve-outs.

Further, despite the language in *Wyoming v. Oklahoma* stating that the extent of disparate impact is irrelevant, scholars have more recently recognized the trend in Supreme Court cases showing that a larger disparate impact is indeed more likely to constitute discrimination. ⁵⁰ If the statute excludes virtually all out-of-state participants from an in-state market, the statute is more likely to be discriminatory. ⁶⁰ Thus, the percentage of disparate impact, though not determinative, is likely still a factor in ascertaining the presence of discrimination. An RPS with only a small disparate impact on out-of-state commerce should not be considered discriminatory without additional factors showing discrimination.

3. Discriminatory Effects of Subsidies and Taxes

Subsidies for in-state businesses may also constitute discrimination when made at the direct expense of out-of-state businesses. In *West Lynn Creamery v. Healy*, ⁶¹ the Court invalidated a subsidy for in-state dairy farmers funded through a tax on both the out-of-state and in-state milk industry. ⁶² Instead of flowing into the state's general funds, the proceeds of the tax went directly into a special fund from which the in-state farmers received subsidies. ⁶³ As the Court explained:

A pure subsidy funded out of general revenue ordinarily imposes no burden on interstate commerce, but merely assists local business. The pricing order in this case, however, is funded principally from taxes on the sale of milk produced in other States. By so funding the subsidy, respondent not only assists local farmers, but burdens interstate commerce. The pricing order thus

⁵⁸ *Id.* Although this language on discriminatory effect is arguably dicta, other courts have also indicated that a small disparate impact does not prevent a determination of discriminatory effect. *See, e.g.*, Bacchus Imports, Ltd. v. Dias, 468 U.S. 263, 269 (1984).

⁵⁹ See, e.g., CHEMERINSKY, supra note 44, at 436.

 $^{^{60}}$ $\it Id.$ On the other hand, discrimination is probably not present when a state law excludes a single group of out-of-staters but allows other out-of-staters in a related industry or in the same supply chain to compete as equals with the in-staters. $\it Id.$

⁶¹ See West Lynn Creamery, Inc. v. Healy, 512 U.S. 186 (1994).

⁶² Id. at 194.

⁶³ Id. at 190.

violates the cardinal principle that a State may not "benefit in-state economic interests by burdening out-of-state competitors." 64

The Court noted that both the tax and the subsidy would have been constitutional standing alone, but the discriminatory effect of the combined tax and subsidy violated the Commerce Clause. 65

The Seventh Circuit has applied the reasoning in *West Lynn Creamery* to the energy context.⁶⁶ In *Alliance for Clean Coal v. Miller*, the Seventh Circuit determined that the Illinois Coal Act discriminated against "cleaner" (low-sulfur) coal from western states, and thus violated the dormant Commerce Clause.⁶⁷ The Act required generating units to use in-state coal in conjunction with scrubbing technology that would reduce pollutants in the high-sulfur coal for compliance with the Clean Air Act.⁶⁸ Further, the Illinois Coal Act allowed the units to pass on the costs to consumers with the explicit goal of enabling the units "to continue to burn Illinois coal."

The state argued that it had "merely agreed to subsidize the cost of using Illinois coal by requiring its own citizens to bear the cost of pollution control devices," and that the Act "merely 'encourages' the local coal industry and does not in fact discriminate." But the court reasoned that "Illinois rate-payers . . . footing the bill does not cure the discriminatory impact on western coal producers." The court analogized the subsidy to that in *West Lynn*: "the Illinois Coal Act, like the . . . order in *West Lynn*, has the same effect as a 'tariff or customs duty—neutralizing the advantage possessed by lower cost out of state producers." Even though the Act did not compel use of Illinois coal or forbid use of out-of-state coal, by encouraging use of Illinois coal, it "discriminate[d] against western coal by making it a less viable compliance option for Illinois generating plants." Thus, the court held the Act invalid based on its discriminatory effect.

The *Alliance for Clean Coal* case is arguably distinguishable from many facially neutral RPSs because the Illinois Coal Act contained numerous provisions that explicitly encouraged in-state energy generation.⁷⁶ Still, the

⁶⁴ Id. at 199 (quoting Limbach, 486 U.S. 269, 273-74 (1988)).

⁶⁵ See id. at 196, 198–99.

⁶⁶ See Alliance for Clean Coal v. Miller, 44 F.3d 591, 5996 (7th Cir. 1995); see also Everett Britt & Raul Carrillo, Renewable Energy Requirements and the Commerce Clause, 19 NAT. RESOURCES & ENV., Spring 2005, at 61, 62 (summarizing the decision in Alliance for Clean Coal v. Miller, 44 F.3d 591 (7th Cir. 1995), and noting the decision's instructive value for states with RPS programs).

⁶⁷ Alliance for Clean Coal, 44 F.3d at 596.

⁶⁸ See id. at 595-96.

⁶⁹ *Id*

⁷⁰ *Id.* at 596 (internal quotation marks omitted).

⁷¹ Id.

⁷² *Id.* (alteration in original) (quoting *W. Lynn Creamery*, 512 U.S. 186, 203 (1994)).

⁷³ *Id.* at 595 (quoting *W. Lynn Creamery*, 512 U.S. at 194).

⁷⁴ Id

⁷⁵ *Id.* at 596–97.

 $^{^{76}}$ Language in the statute indicated a discriminatory purpose by recognizing "the need to use coal mined in Illinois' and 'the need to maintain and preserve as a valuable State resource

Seventh Circuit's analysis of *West Lynn* could be used against RPSs that provide greater compliance credit for in-state renewable energy. By providing higher compliance credit as a means to encourage in-state energy generation, the RPS makes out-of-state energy "a less viable option," which was sufficient to establish a discriminatory effect in *Alliance for Clean Coal*.

4. Discriminatory Purpose

Like discriminatory effect, discriminatory purpose is sometimes sufficient on its own to establish discrimination and invoke strict scrutiny, but it is more likely to constitute discrimination when combined with other factors. A discriminatory purpose is present when the state acts with the goal either of either disadvantaging out-of-state business or benefiting instate industry. As the Supreme Court has recognized, these two motivations are practically identical.

To ascertain whether a state had a discriminatory purpose in passing a law, courts have looked to a broad array of sources including statutory declarations of purpose, legislative history (including statements of legislators and other decision makers), and events leading up to the

the mining of coal in Illinois." See id. at 595 (citing 220 ILCS 5/8-402.1(a)). The Act also required a state commission to consider the state's interest in promoting in-state coal mining when approving Illinois electric utilities' plans for compliance with the Clean Air Act. Id. Finally, the Act required the state commission's approval before a utility could decrease its use of Illinois coal by 10% or more. Id. Thus, even though the court ultimately based its conclusion on the Act's practical effect, see id. at 596, the Act's numerous in-state classifications and preferences could lead a court to distinguish the Act from an RPS that merely mandates a certain percentage of renewable energy.

- ⁷⁷ See, e.g., Bacchus Imports, Ltd. v. Dias, 468 U.S. 263, 270 (1984) ("A finding that state legislation constitutes 'economic protectionism' may be made on the basis of either discriminatory purpose, or discriminatory effect." (citing *Hunt*, 432 U.S. 333, 352–53 (1977); Philadelphia v. New Jersey, 437 U.S. 617, 624 (1978))).
- 78 See Chemerinsky, supra note 44, at 436. For example, a discriminatory purpose is likely to constitute discrimination when combined with a disparate impact. Id.
 - ⁷⁹ Bacchus Imports, 468 U.S. at 273 (1984).
 - 80 Id. The Court explained:

Virtually every discriminatory statute... can be viewed as conferring a benefit on one party and a detriment on the other, in either an absolute or relative sense. The determination of constitutionality does not depend upon whether one focuses upon the benefited or the burdened party. A discrimination claim, by its nature, requires a comparison of the two classifications, and it could always be said that there was no intent to impose a burden on one party, but rather the intent was to confer a benefit on the other. Consequently, it is irrelevant to the Commerce Clause inquiry that the motivation of the legislature was the desire to aid the makers of the locally produced beverage rather than to harm out-of-state producers.

Id.

- ⁸¹ See Philadelphia v. New Jersey, 437 U.S. 617, 625 (1978). The *Philadelphia v. New Jersey* Court ultimately did not conclude whether a discriminatory purpose was present because it decided that the statute at issue was facially discriminatory. *Id.* at 626.
 - 82 *Bacchus Imports*, 468 U.S. 263 at 273.

legislation's passage. ⁸³ For example, in *Waste Management Holdings v. Gilmore*, the Fourth Circuit found a discriminatory purpose based on the legislative history of a Virginia statute and the governor's statements. ⁸⁴ The state legislature had voted to cap the amount of municipal solid waste that Virginia landfills could accept. ⁸⁵ Although the court did not find facial discrimination or a discriminatory effect, ⁸⁶ the court concluded that a discriminatory intent was present. ⁸⁷ It delineated a four-factor test to determine whether such an intent existed:

(1) [E]vidence of a "consistent pattern" of actions by the decisionmaking body disparately impacting members of a particular class of persons; (2) historical background of the decision, which may take into account any history of discrimination by the decisionmaking body or the jurisdiction it represents; (3) the specific sequence of events leading up to the particular decision being challenged, including any significant departures from normal procedures; and (4) contemporary statements by decisionmakers on the record or in minutes of their meetings.⁸⁸

The fourth factor weighed particularly heavily in favor of finding a discriminatory intent. Prior to proposing the legislation, the governor had stated in a press release that "the home state of Washington, Jefferson, and Madison has no intention o[f] becoming New York's dumping grounds. In another press release, a senator stated that the "caps are the only effective way of limiting the amount of waste that is being imported to Virginia, and preserving our current landfill capacity for future generations of Virginians." Because a discriminatory purpose was present, the court applied strict scrutiny to the statute.

5. Defeating Discrimination Through Virtual Representation

One factor that can decrease the likelihood of discrimination is virtual representation. 93 Virtual representation occurs when a law burdens out-of-state businesses and some in-state businesses. Because the burdened in-state businesses could effectively represent the interests of the burdened out-of-state businesses in the state legislative process, judicial protection of interstate commerce is unnecessary. The Supreme Court has shown some ambivalence on the validity of this argument, however. In *C & A Carbone v.*

 $^{^{83}}$ Waste Mgmt. Holdings, Inc. v. Gilmore, 252 F.3d 316, 336 (4th Cir. 2001), $\it cert.$ $\it denied,$ Murphy v. Waste Mgmt. Holdings, 535 U.S. 904 (2002).

⁸⁴ Id. at 335.

⁸⁵ *Id.* at 323.

⁸⁶ *Id.* at 345.

³⁷ *Id.* at 340.

⁸⁸ Id. at 336 (quoting Sylvia Dev. Corp. v. Calvert Cnty., 48 F.3d 810, 819 (4th Cir. 1995)).

⁸⁹ See id. at 327.

⁹⁰ *Id.* (alteration in original).

 $^{^{91}}$ Id. at 337 (emphasis omitted).

⁹² *Id.* at 341–43.

⁹³ See CHEMERINSKY, supra note 44, at 436.

Town of Clarkstown, N.Y. (Carbone),⁹⁴ the Supreme Court stated that an "ordinance is no less discriminatory because in-state or in-town processors are also covered by the prohibition." But more recently in *United Haulers Ass'n v. Oneida-Herkimer Solid Waste Managment Authority* (Oneida), ⁹⁶ the Court used the argument of virtual representation to justify upholding a flow control ordinance. ⁹⁷ There the Court stated that "the most palpable harm imposed by the ordinances—more expensive trash removal—is likely to fall upon the very people who voted for the laws." The Court then framed dormant Commerce Clause jurisprudence in terms of protecting parties not effectively represented in the legislative process:

Our dormant Commerce Clause cases often find discrimination when a State shifts the costs of regulation to other States, because when "the burden of state regulation falls on interests outside the state, it is unlikely to be alleviated by the operation of those political restraints normally exerted when interests within the state are affected."

But when the burdened out-of-state party was effectively represented by an in-state party, there was "no reason to step in and hand local businesses a victory they could not obtain through the political process."¹⁰⁰

B. Strict Scrutiny and Deferential Pike Balancing

If a court determines that a statute discriminates against out-of-state parties in one of the three ways described above or through a combination of them, the court will apply strict scrutiny. ¹⁰¹ To survive strict scrutiny, a state must justify its statute by showing that the law promotes a "legitimate local purpose" and that any nondiscriminatory alternatives are inadequate to protect the local interest. ¹⁰² States rarely meet this level of scrutiny. ¹⁰³

Indeed, in *Wyoming v. Oklahoma*, once the Court determined discrimination was present, it summarily invalidated the discriminatory statute. ¹⁰⁴ The Court acknowledged that a state has a "presumably legitimate interest" in diversifying the sources of energy on which it relies. ¹⁰⁵ Still, it

^{94 511} U.S. 383 (1994).

 $^{^{95}}$ $\it Id.$ at 391; $\it see$ $\it also$ Fort Gratiot Sanitary Landfill, Inc., v. Mich. Dep't of Natural Res., 504 U.S. 353, 361 (1992).

 $^{^{96}\;\;550}$ U.S. $330\;(2007).$

⁹⁷ *Id.* at 345.

⁹⁸ *Id.*

⁹⁹ Id. (quoting S. Pac. Co. v. Arizona ex rel. Sullivan, 325 U.S. 761, 767–68 n.2 (1945)).

¹⁰⁰ Id.

¹⁰¹ See, e.g., Wyoming, 502 U.S. 437, 456 (1992).

¹⁰² E.g., Hughes v. Oklahoma, 441 U.S. 322, 336–37 (1979); see Wyoming, 502 U.S. at 456.

¹⁰³ Chemerinsky, *supra* note 44, at 445.

¹⁰⁴ See Wyoming, 502 U.S. at 456.

¹⁰⁵ *Id.* ("[S]ustaining the Oklahoma coal-mining industry lessens the State's reliance on a single source of coal delivered over a single rail line.").

concluded that the state could not achieve that goal by "the illegitimate means of isolating the State from the national economy." 106

In at least one instance, however, the Court determined that a discriminatory statute survived strict scrutiny.¹⁰⁷ In *Maine v. Taylor*; the state banned importation of out-of-state fish species to prevent the spread of parasites to fish inside the state.¹⁰⁸ Because there was no satisfactory method of inspecting imported fish, the Court determined that the state could not have protected its legitimate interest in preserving its fish in a less discriminatory manner.¹⁰⁹

Even if a state law does not discriminate, and therefore does not fall under strict scrutiny, it may nevertheless be invalid under the *Pike v. Bruce Church* balancing test if "the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits." Some deference to state standards is warranted under this test. 111 Thus, a state need not show that its legislation was the least-restrictive means it could have used to obtain the local benefits. 112 However, "the extent of the burden that will be tolerated" will still "depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities." 113

As scholars note, the Court has continually broadened the concept of discrimination over the years, which has allowed it to apply strict scrutiny more liberally to state regulation while diminishing the application of the *Pike* test. Indeed, "[d]uring the later Rehnquist Court, the nondiscrimination tier almost disappeared. This is perhaps the result of the loosely defined purpose and effect tests, the which give lower courts near free reign to decide what amount of disparate impact or discriminatory legislative history is sufficient to implicate strict scrutiny. Further, the Court's failure to specify when effect and purpose are individually sufficient to establish discrimination, or only sufficient in combination, has effectively converted the dormant Commerce Clause into a multifactor test under which effect, purpose, language, and virtual representation are all to be considered with uncertain weight.

The Court has defined discrimination at its broadest level as "differential treatment of in-state and out-of-state economic interests that

¹⁰⁶ Id. at 457 (quoting Philadelphia v. New Jersey, 437 U.S. 617, 627 (1978)).

¹⁰⁷ Maine v. Taylor, 477 U.S. 131 (1986).

¹⁰⁸ Id. at 141.

¹⁰⁹ Id. at 141, 151,

¹¹⁰ Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970) (citation omitted).

 $^{^{111}\,}$ Engel, supra note 47, at 289 (citing Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 473 (1981)).

 $^{^{112}}$ See Ferrey, supra note 2, at 582.

¹¹³ *Pike*, 397 U.S. at 142.

¹¹⁴ David S. Day, *The "Mature" Rehnquist Court and the Dormant Commerce Clause Doctrine: The Expanded Discrimination Tier*, 52 S.D. L. Rev. 1, 47 (2007).

 $^{^{115}}$ *Id.* at 51.

¹¹⁶ See id.

benefits the former and burdens the latter." ¹¹⁷ By describing discrimination in terms of "differential treatment," "burdens," and "benefits," the Court has pushed the language of the discrimination test closer and closer to the excessive-burden test in *Pike*. ¹¹⁸ Although the discrimination tier has not completely swallowed the *Pike* test, the Court has recently "decid[ed] almost all cases as a matter of discrimination." ¹¹⁹ In fact, avoidance of the *Pike* test is likely the reason for the Court's expansion of the discrimination tier. ¹²⁰ Judges prefer the discrimination test because they are reluctant to weigh policy and thereby usurp the role of the legislature. ¹²¹ Because of the discrimination test's increasingly broad application, state standards with legitimate goals that are not enacted for pretextual purposes—standards such as RPSs—are still at risk of being struck down under the dormant Commerce Clause and subjected to the "virtually per se" rule of invalidity. ¹²²

C. The Extraterritoriality Principle: Regulation of Out-of-State Commerce

Even if no discrimination against out-of-staters is present, a state law may nevertheless be invalid under the extraterritoriality principle if it reaches beyond the state's jurisdiction. ¹²³ Under this principle, a state law "that has the 'practical effect' of regulating commerce occurring wholly outside that State's borders is invalid under the Commerce Clause" even if the out-of-state commerce has effects inside the state. ¹²⁵ The statute must effectively "*control* conduct beyond the boundaries of the State" to violate the dormant Commerce Clause. For example, the Seventh Circuit invalidated a Wisconsin recycling statute that required communities to implement "effective recycling programs" before using in-state landfills. ¹²⁷ Because the statute applied to out-of-state as well as in-state communities, the Seventh Circuit determined that this scheme "essentially *controls* the conduct of those engaged in commerce occurring wholly outside the State." ¹²⁸

In applying the extraterritoriality principle, courts focus on the following rationale: to protect against multiple states applying inconsistent

 $^{^{117}}$ United Haulers Ass'n, 550 U.S. 330, 338 (2007) (quoting Or. Waste Sys., Inc. v. Dep't of Envtl. Quality of Or., 511 U.S. 93, 99 (1994)).

^{118 397} U.S. at 142 (1970).

¹¹⁹ Day, *supra* note 114, at 51.

¹²⁰ See id. at 51.

¹²¹ See id. at 2 n.23.

 $^{^{122}}$ See Day, supra note 114, at 1 (quoting Or. Waste Sys., Inc., 511 U.S. at 100–01). As a result, "the doctrine's upper tier will be utilized more often. Since the upper tier utilizes a strict scrutiny standard, the broader reach of the discrimination tier is 'bad news' for the States. Under a strict scrutiny test, the State will rarely win — even when they pursue legitimate ends in a non-pretextual manner." Id. at 47.

¹²³ See Healy v. Beer Inst., 491 U.S. 324, 337, 337 n.14 (1989).

¹²⁴ Id. at 332.

¹²⁵ Edgar v. MITE Corp., 457 U.S. 624, 642–43 (1982).

 $^{^{126}\,\,}$ Healy v. Beer Inst., 491 U.S. at 336 (emphasis added).

¹²⁷ Nat'l Solid Wastes Mgmt. Ass'n v. Meyer, 63 F.3d 652, 654 (7th Cir. 1995).

¹²⁸ Id. at 658 (emphasis added).

mandates to a party's conduct.¹²⁹ Thus, courts determining a statute's practical effect should consider not only its actual consequences, but also its potential interaction with the legitimate regulatory regimes of other states.¹³⁰ Further, a court should anticipate future legislation in other states and consider the effect if many or every state adopted similar statutes.¹³¹

A recent case from the Eastern District of California demonstrates the uncertainty surrounding the application of the extraterritoriality principle and its rationale. In *Rocky Mountain Farmers Union v. Goldstene*, the court considered California's Low Carbon Fuel Standard (LCFS). The LCFS gave incentives for fuel providers to sell fuels with fewer greenhouse gas emissions. Because it factored in emissions during the transportation of the fuels, the LCFS had potentially damaging effects on the corn-ethanol industry, which was located almost entirely outside California.

Although the LCFS "[o]stensibly . . . regulates only fuel-providers in California," the regulations penalized conduct outside of California. Thus, the court concluded that the "practical effect' of the regulation would be to control . . . conduct . . . occurring wholly outside of California." Under this analysis, state RPS provisions are especially vulnerable to the argument that an RPS gives incentives and disincentives for out-of-state businesses to produce certain types of energy, which "controls" conduct outside the state's borders. $^{\tiny 138}$

D. The Market-Participant Exception and Discrimination Favoring State-Owned Entities

The Court has recognized two exceptions to the dormant Commerce Clause that could arguably be extended to defend RPSs. First, the market-participant exception permits a state to discriminate against interstate commerce when the state is selling or purchasing goods or services in the same way that a private entity would. ¹³⁹ In other words, if the state "has entered into the market itself," it may discriminate without running afoul of

¹²⁹ See Healy v. Beer Inst., 491 U.S. at 336–37.

¹³⁰ *Id.* at 336.

¹³¹ Id. at 337.

¹³² Rocky Mountain Farmers II, 843 F. Supp. 2d 1071, 1085–94 (E.D. Cal. 2011).

¹³³ Id. at 1078.

¹³⁴ *Id.*

¹³⁵ Id.

¹³⁶ *Id.* at 1091.

¹³⁷ Id.

¹³⁸ We discuss *Rocky Mountain Farmers* and its appeal pending before the Ninth Circuit in Part V. When this Article was completed, *Rocky Mountain Farmers* was in an unusual procedural status before the Ninth Circuit: a panel heard oral argument in the case just a few days before one of the panel members, Senior Judge Betty Fletcher, passed away in October 2012. It was unclear in December 2012 if a newly appointed panel member might want to hear new oral argument in the case and, therefore, when the Ninth Circuit might issue a decision in the case.

¹³⁹ See, e.g., Hughes v. Alexandria Scrap Corp., 426 U.S. 794, 806 (1976).

the dormant Commerce Clause. Ho But this exception does not apply when "the State interfere[s] with the natural functioning of the interstate market either through prohibition or through burdensome regulation." Accordingly, in *Alliance for Clean Coal v. Miller*, the Seventh Circuit determined that when Illinois regulated the in-state coal market by subsidizing in-state industry, Illinois was not a "market participant." Illinois was "not acting as a purchaser of either coal or electricity but as a regulator of utilities." Although the market-participant exception therefore does not protect states in their role as market regulators, courts have not yet addressed whether states are exempt from the dormant Commerce Clause when they act as neither market participants nor regulators, but as market makers. A state that creates a market for renewable energy credits with an RPS occupies this uncharted territory.

Second, the state may regulate in favor of a state-owned entity without receiving strict scrutiny. ¹⁴⁴ For example, a state may require all waste to be sent to a publicly owned processing facility. ¹⁴⁵ This exemption has two rationales: first, "[l]aws favoring local government . . . may be directed toward any number of legitimate goals" besides economic protectionism; second, "treating public and private entities the same under the dormant Commerce Clause would lead to . . . unbounded interference by the courts with state and local government."

But the Court has not extended this rule to exempt discrimination favoring *privately* owned entities that perform a state function or use state property. In *Carbone*, the Supreme Court determined that the dormant Commerce Clause was violated when an ordinance required all waste to be deposited with a single waste processing company. Even though the company's station was "built and operated under a contract with the municipality" and would "revert to municipal ownership," the Court nevertheless determined that the state "may not employ discriminatory

¹⁴⁰ Id.

¹⁴¹ *Id.*

¹⁴² 44 F.3d 591, 596 (7th Cir. 1995); see also New Energy Co. of Ind. v. Limbach, 486 U.S. 269, 277 (1988) ("[T]he tax credit scheme [for the use of Ohio-produced ethanol] has the purpose and effect of subsidizing a particular industry That does not transform it into a form of state participation in the free market."); Michael Burger, "It's Not Easy Being Green": Local Initiatives, Preemption Problems, and the Market Participant Exception, 78 U. CIN. L. REV. 835, 879 (2010) (proposing a new expansion of the market participant exception in light of the exigencies of climate change).

¹⁴³ Alliance for Clean Coal, 44 F.3d at 596.

 $^{^{144}~}See$ United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth., 550 U.S. 330, 334 (2007).

¹⁴⁵ *Id.* at 343.

¹⁴⁶ Id

¹⁴⁷ See Carbone, 511 U.S. 383 (1994) (determining that the state was not acting as a private market participant when it had effectively granted a monopoly to one private entity). The entanglement rationale is, however, an accepted part of other constitutional doctrines including the state action requirement of the Fourteenth Amendment.

¹⁴⁸ *Carbone*, 511 U.S. at 383.

regulation to give that project an advantage over rival businesses." ¹⁴⁹ The dissent argued that the waste processing station should have been exempt from the dormant Commerce Clause because it was "essentially a municipal facility" performing a traditional municipal function. ¹⁵⁰ Accordingly, "[r]easons other than economic protectionism . . . more likely . . . explain the design and effect of an ordinance that favors a public facility." ¹⁵¹

Although the *Carbone* Court rejected an exemption for private entities closely associated with the state due to state contracts or usage of state property, the Court did not address entities that are pervasively regulated and effectively controlled by the state. State regulation and state agencies largely dictate electric utilities' rates and distribution. ¹⁵² Indeed, the public's interest in fair rates and efficient, reliable, distribution of energy has led states to restrict utilities' discretion and scrutinize their decisions in state commissions. ¹⁵³ Thus, the rule in *Carbone* may not extend to state RPSs because they apply to entities that are effectively state-controlled. Courts should therefore consider whether a limited entanglement rationale, already accepted in other constitutional jurisprudence, ¹⁵⁴ should also apply in dormant Commerce Clause cases.

III. LITIGATING THE CONSTITUTIONALITY OF STATE RPSS

To provide a context for the challenges to the Colorado RES and California RPS, this Part gives an overview of past and pending RPS litigation in other states. The litigation described in this Part centers on three potential weaknesses in state RPSs: 1) carve out provisions requiring the use of renewable energy generated in-state; 2) the chilling effect that RPSs have on interstate commerce in nonrenewable energy such as coal; and 3) bundling requirements for renewable energy credits (RECs). First, Section A describes TransCanada's settled claim that challenged in-state carve-outs in the Massachusetts RPS. Section B discusses a pending challenge to a provision in Minnesota's RPS, which prevents use of nonrenewable energy in some instances. Finally, Section C explores a state court challenge to Missouri regulations that require bundled RECs for compliance with the state's RES.

¹⁴⁹ Id. at 394, 419.

¹⁵⁰ Id. at 419 (Souter, J., dissenting).

¹⁵¹ *Id.* at 421 (Souter, J., dissenting).

¹⁵² See REGULATORY ASSISTANCE PROJECT, ELECTRICITY REGULATION IN THE U.S.: A GUIDE 50 (2011), available at http://www.raponline.org/document/download/id/645.

¹⁵³ See id. at 50, 104.

 $^{^{154}\,}$ Specifically, courts apply an entanglement rationale under the state action doctrine of the Fourteenth Amendment. See, e.g., Huff v. Notre Dame High Sch. of West Haven, 456 F. Supp. 1145, 1147 (D. Conn. 1978) ("The 'state entanglement' theory provides that 'state action' is present when the state is entangled with the operations of a private enterprise.").

A. In-State Carve-Outs and the Massachusetts RPS: TransCanada v. Bowles

The only dormant Commerce Clause challenge to an RPS that has been resolved to date is *TransCanada Power Mktg. Ltd. v. Bowles*, involving the Massachusetts RPS.¹⁵⁵ Under the Massachusetts RPS and implementing regulations, distribution companies were required to "enter into cost-effective long-term contracts to facilitate the financing of renewable energy generation *within the jurisdictional boundaries of the Commonwealth.*" Accordingly, when the implementing agency issued a request for proposals, it required that the generation facility for a proposed project "be located *within the jurisdictional boundaries of the Commonwealth.*" be located *within the jurisdictional boundaries of the Commonwealth.*"

TransCanada sought to fulfill the required long-term contracts with out-of-state. 158 renewable energy generated Specifically, cheaper TransCanada had invested in and sought to import into Massachusetts energy from the Kibby Wind Power Project in Maine. 159 To protect this investment, TransCanada sued, alleging that the Massachusetts RPS, its implementing regulations, and the request for proposals each facially discriminated against out-of-state producers and were unconstitutional. 160 According to TransCanada, the alleged discrimination not only harmed the company by undermining its investments, but also harmed the citizens of Massachusetts by increasing the overall price for renewable energy.161

Additionally, TransCanada challenged the constitutionality of a carve-out provision in the Massachusetts RPS requiring use of in-state solar energy. The carve-out required each retail supplier to "provide a portion of the required minimum percentage of kilowatt-hours sales from new on-site renewable energy generating sources *located in the Commonwealth*." Implementing regulations further specified that "[t]he Solar Carve-out Renewable Generation Unit must be used on-site, located in the Commonwealth of Massachusetts, and be interconnected with the electric grid." TransCanada alleged that the carve-out, like the long-term contracts requirement, facially discriminated against out-of-state renewable energy.

¹⁵⁵ Anne Havemann, Comment, Surviving the Commerce Clause: How Maryland Can Square Its Renewable Energy Laws with the Federal Constitution, 71 Mp. L. Rev. 848, 858 (2012).

 $^{^{156}}$ Complaint at 6, 7, TransCanada Power Mktg. Ltd. v. Bowles, No. 4:10-cv-40070-FDS (D. Mass. Apr. 16, 2010) (citing An Act Relative to Green Communities, ch. 169, \$ 83, 2008 Mass. Acts 308, 365; 220 Mass. Code Regs. \$ 17.01 (2010)), available at http://www.ohiogreenstrategies.com/documents/transcanada.pdf.

¹⁵⁷ *Id.* (quoting Mass. Dep't of Energy Resources, Request for Proposals for Long-Term Contracts for Renewable Energy Projects (Jan. 15, 2010)).

¹⁵⁸ Id. at 8 (citing An Act Relative to Green Communities, § 83, 2008 Mass. Acts at 365).

¹⁵⁹ *Id.* at 5.

¹⁶⁰ Id. at 8 (citing An Act Relative to Green Communities, § 83, 2008 Mass. Acts at 365).

¹⁶¹ *Id.*

¹⁶² *Id.* at 9, 11–12.

¹⁶³ Id. at 11-12 (quoting An Act Relative to Green Communities, sec. 32, § 11F(g), 2008 Mass. Acts at 334).

¹⁶⁴ *Id.* at 13 (quoting 225 MASS. CODE REGS. § 14.05(4)(a) (2010)).

¹⁶⁵ *Id.* at 15.

For relief, TransCanada sought a declaration that the regulations and statutes were unconstitutional, an injunction preventing their enforcement, and damages for any harm caused by enforcement. 166

Just three months after TransCanada's filing, Massachusetts issued emergency rules dropping the in-state requirement for long-term renewable energy contracts. Further, the jurisdictional agency, Massachusetts Department of Public Utilities, removed the locational requirement. Finally, in a settlement, Massachusetts agreed that electricity supply contracts signed before 2010 would be grandfathered in and not subjected to the in-state requirements of the solar carve-out. After the settlement, the parties put the case on hold. To

Although *TransCanada* did not result in a decision on the constitutionality of in-state renewable energy procurement requirements, Massachusetts's willingness to rapidly appease the plaintiffs in that case shows the vulnerability of two types of RPS provisions: in-state contracting requirements and in-state carve-outs. Many renewable mandates, including Colorado's RES, contain similar carve-outs for in-state or distributed generation.¹⁷¹

B. Prohibiting Nonrenewable Energy: The Minnesota RPS and North Dakota v. Swanson

Like most RPSs, the Minnesota RPS requires utilities to procure a percentage of their load from renewable energy resources. ¹⁷² But it also actively discourages the use of nonrenewable energy. ¹⁷³ Under the Minnesota RPS, electricity suppliers may not "import or commit to import from outside

¹⁶⁶ Id. at 24-27.

¹⁶⁷ ELEFANT & HOLT, *supra* note 11, at 20 (citing Mass. Dep't of Pub. Utils., Order Adopting Emergency Regulations at 1, D.P.U. No. 10-58 (June 9, 2010)).

¹⁶⁸ *Id.* at 20–21.

 $^{^{169}}$ Partial Settlement Agreement, TransCanada Power Mktg. Ltd. v. Bowles, No. 4:10-cv-40070, $available\ at\ http://www.mass.gov/eea/docs/doer/renewables/solar/settlement-agreement.pdf.$

¹⁷⁰ ELEFANT & HOLT, supra note 11, at 3–4.

¹⁷¹ See, e.g., Colo. Rev. Stat. § 40-2-124(1)(c)(I) (2012).

¹⁷² See MINN. STAT. 216C.05, subdiv. 2(2) (2010).

¹⁷³ *Id.* § 216H.03, subdiv. 3. California adopted similar restrictions under SB 1368, which led to regulations that prohibit in-state utilities from building facilities or purchasing power from facilities that emit more than 1,100 pounds of carbon dioxide per BTU of energy produced. *See* CAL. PUB. UTIL. CODE § 8341(a) (West 2012); CAL. CODE REGS. tit. 20, § 2902(a) (2013). That standard is based on the emissions of a state-of-the-art combined cycle, natural gas-fired power plant and effectively prohibits the purchase of power from any coal-fired power plant. Press Release, Cal. Energy Comm'n, New Regulations Restrict Purchase of Electricity from Power Plants that Exceed Greenhouse Gas Emission Limits (May 23, 2007), *available at* http://www.energy.ca.gov/releases/2007_releases/2007-05-23_sb1368_regulations.html; *Testimony of Thomas F. Farrell II, Chairman, President & CEO – Dominion, Before the H. Comm. on Energy and Commerce Subcomm. on Energy and Power*, 112th Cong. 1–2 (July 16, 2012), *available at* http://energycommerce.house.gov/sites/republicans.energycommerce.house.gov/files/Hearings/EP/20120716/HHRG-112-IF03-WState-FarrellT-20120716.pdf (explaining that EPA carbon standard of 1,100 pounds of carbon per BTU would prevent construction of new coal plants).

the state power from a new large energy facility that would contribute to statewide power sector carbon dioxide emissions." Further, suppliers may not "enter into a new long-term power purchase agreement that would increase statewide power sector carbon dioxide emissions." In turn, "statewide power sector carbon dioxide emissions" are defined to include "all emissions of carbon dioxide from the generation of electricity imported from outside the state and consumed in Minnesota." The statute also grandfathers in certain categories of facilities, effectively shielding a number of in-state projects from the prohibition.

In *North Dakota v. Swanson*, the State of North Dakota and coal companies attack the statute's restrictions on importation and power contracts, alleging that they violate the dormant Commerce Clause both by discriminating against out-of-state parties and by excessively burdening interstate commerce. Thus, the complaint does not directly challenge the core RPS requirement of renewable energy procurement, but instead focuses on the restrictions concerning use of more carbon-intensive energy. However, because the plaintiffs argue that these restrictions are not severable from the rest of the statute, the lawsuit still threatens the validity of the other provisions of the Minnesota RPS. The statute of the statute of the statute of the Minnesota RPS.

Further, if successful, the plaintiffs' argument that the restriction excessively burdens interstate commerce could have ramifications for other dormant Commerce Clause challenges. Minnesota's restriction on nonrenewable energy use¹⁸⁰ is functionally similar to the main RPS mechanism of mandating renewable energy procurement. Mandating the use of some renewable energy effectively prohibits the use of some nonrenewable energy. Thus, if restricting nonrenewable energy use burdens interstate commerce, then requiring renewable energy use might also burden interstate commerce. If the *Swanson* plaintiffs succeed in arguing that the restriction excessively burdens interstate commerce, other courts might be willing to extend the argument to invalidate the main RPS mechanism of mandating renewable energy procurement.

 $^{^{174}\,}$ Minn. Stat. \S 216H.03, subdiv. 3(2) (2010). The prohibition applies not just to suppliers, but to any "person." *Id.*

 $^{^{175}}$ Id. at § 216H.03, subdiv. 3(3). This prohibition also applies to any "person." Id.

¹⁷⁶ Id. at § 216H.03, subdiv. 3(2).

 $^{^{177}\,}$ Complaint at 20–22, North Dakota v. Swanson, No. 0:11-cv-03232, 2011 WL 5223597 (D. Minn. Nov. 2, 2011); see Minn. Stat. \S 216H.03, subdiv. 5–6.

¹⁷⁸ Complaint, North Dakota v. Swanson, *supra* note 177, at 3–6. The revelation of ATI's ties to coal interests also creates a tenuous link between the Minnesota litigation and the Colorado litigation. ATI has not alleged, however, that requiring renewable energy effectively restricts interstate commerce of coal energy, which is an analogous argument to North Dakota's argument that Minnesota may not restrict imports of coal energy.

¹⁷⁹ *Id.* at 29.

¹⁸⁰ Although the Minnesota RPS does not specifically restrict nonrenewable energy per se (but instead focuses on restricting energy with a heavy carbon offprint), the provision largely affects nonrenewable energies such as coal. *See id.* at 25 ("[A]s a result of the chilling effects of the implementation of the NGEA [the Next Generation Energy Act, which imposes the restrictions on import of energy], less coal will be mined in North Dakota and other states, to the detriment of North American Coal....").

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2013] ADAPTING THE DORMANT COMMERCE CLAUSE

C. REC Bundling Requirements and the Missouri RES

In 2011, state court plaintiffs challenged Missouri regulations that only allowed utilities to use "bundled" RECs¹⁸¹ in compliance with the state's RES.¹⁸² In other words, the regulations only counted RECs for RES compliance if they were sold together with energy that was eventually used in Missouri. Although the Missouri RES statute was silent on the bundling issue, ¹⁸³ the agency implementing the RES determined in its rulemaking order that the bundling requirement was "necessary to develop an in-state renewable energy industry."

The plaintiffs alleged that the bundling requirement violated the dormant Commerce Clause because it "discriminat[ed] against interstate commerce for a protectionist purpose." But the trial court avoided the constitutional issue and instead determined that the agency had no authority to impose a bundling requirement when the statutory RES did not include the requirement. According to the trial court, the bundling requirement "defeats the central purpose of the legislation, that is, to facilitate a broad market within which RECs can be traded independently of the energy with

 $^{^{181}}$ The Missouri RES defines RECs as "tradeable certificate[s] of proof that one megawatthour of electricity has been generated from renewable energy sources." Mo. Rev. Stat. $\S~393.1025(4)~(2012).$

¹⁸² Missouri ex rel. Mo. Energy Dev. Ass'n v. Pub. Serv. Comm'n of Mo., Nos. 10AC-CC00512, 10AC-CC00511, 10AC-CC00513, 10AC-CC00528, 10AC-CC00536, Doc. No. SL01DOCS\3510904.2 (Mo. Dist. Ct. June 29, 2011), available at http://www.realestatedevelopmentlawupdate.com/ files/2011/08/Cole-County-Conc-of-Law-on-RPS-challenge-6-29-2011.pdf (last visited Apr. 7 2013). Missouri's RES provisions are contained at Mo. Rev. Stat. § 393.1030 (2012). "Bundling" is when RECs are sold together with the renewable energy that they are associated with. See generally Ida Martinac, Considering Environmental Justice in the Decision to Unbundle Renewable Energy Certificates, 35 GOLDEN GATE U. L. REV. 491, 491 n.1 (2005) ("'[B]undling" simply means that the Renewable Energy Credit, or the renewable attribute of the underlying energy, travels with the energy, i.e., it does not get separated or 'unbundled' and then separately traded."). In contrast, "unbundled," or transferable RECs (TRECs), have the advantage of being severable from the underlying renewable energy, allowing out-of-state generators to sell the TRECs in a market even if there is inadequate transmission capacity to transport the electricity to serve the market. The "stripped" TRECs can be transported without significant cost, then, while the electricity itself can then be marketed for its power value alone ("stripped" of its TRECs) wherever the transmission system has capacity to transfer it from the generator to possible customers.

¹⁸³ See Mo. REV. STAT. § 393.1030(1) (2012) (providing that "[a] utility may comply with the [renewable energy] standard in whole or in part by purchasing RECs" but not mentioning a bundling requirement).

¹⁸⁴ Missouri ex rel. Mo. Energy Dev. Ass'n, at 7.

¹⁸⁵ Id. at 8. Although the Missouri agency argued that the issue is moot because it took additional administrative actions to remove the bundling requirement, the court nevertheless proceeded to address the legality of the bundling requirement because the subsequent administrative actions were not a part of the official record. Id. at 12.

¹⁸⁶ *Id.* Specifically, the Missouri state court relied on language in Mo. REV. STAT. § 393.1030.1, which specified that "[a] utility may comply with the [renewable energy] standard in whole or in part by purchasing RECs." *Id.* The court noted that a bundling condition was not part of the statute, and thus the agency unlawfully purported to limit the scope of the statute. *Id.*

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which they are associated."¹⁸⁷ The court further explained that the bundling requirement was "unreasonable in that it drives up the cost of compliance with the renewable energy mandate and, consequently, will actually stifle the development of renewable energy resources thus frustrating the purpose of the law."¹⁸⁸

Although the trial court did not reach the constitutional issue, the court's conclusion that the bundling requirement was unreasonable could potentially be used to show a dormant Commerce Clause violation under the *Pike* balancing test. If the court was correct that bundling requirements drive up the cost of compliance and stifle renewable energy development, then a bundling requirement would likely impose excessive burdens on interstate commerce because the benefits would be slim. The argument is particularly relevant after the California Public Utilities Commission's similar decision not to allow unbundled RECs for certain compliance categories under the California RPS. ¹⁸⁹

D. Conclusion

Although the Minnesota litigation has not yet concluded, the results of the Massachusetts and Missouri litigation show that many constitutional defects in RPSs and implementing regulations can be cured quickly without hindering an RPS's central goal of mandating renewable energy procurement. Indeed, the state regulators in those cases quickly withdrew the offending provisions to appease the plaintiffs or moot the case seemingly without harming the states' renewable energy programs. But these challenges concerned accessory mechanisms, such as bundling requirements and carve-outs, which states can remove while still preserving the general RPS scheme. In contrast, the *ATI* case described below includes a broad challenge to the Colorado RES and its central mandate for utilities to procure renewable energy. Therefore the *ATI* case poses a much greater threat to renewable energy development than other litigation.

IV. A BROAD AND ROBUST ATTACK ON THE COLORADO RES

In November 2004, after the Colorado legislature failed to enact a renewable energy standard for the third time, Colorado citizens passed an RES by popular referendum. ¹⁹⁰ Seven years later, the American Tradition

¹⁸⁷ Id. at 12.

 $^{^{188}}$ $\it Id.$ During litigation, the Missouri Public Service Commission withdrew the portion of its regulations requiring REC bundling. Missouri $\it ex~rel.$ Mo. Energy Dev. Ass'n v. Pub. Serv. Comm'n, No. WD 74896, 2012 WL 5846429, at ¶ 24 (Mo. Ct. App. Nov. 20, 2012). Accordingly, on appeal, the Missouri Court of Appeals also avoided the constitutional issue by determining that it was moot. $\it Id.$

¹⁸⁹ See infra Part V.

¹⁹⁰ Jacobi, *supra* note 1, at 1079. Other states have passed their renewable standards by initiative since the passage of the Colorado RES. For example, Washington State followed suit in 2006 when it passed Initiative 937, becoming just the second state to do so. Database of State Incentives for Renewables & Efficiency, *Washington Incentives/Policies for Renewables Energy*,

Institute (ATI), representing electric utilities and a coal company, ¹⁹¹ filed suit to invalidate the RES, ¹⁹² alleging that the statute violates the dormant Commerce Clause. ¹⁹³

Because the Colorado RES is similar to several other state RPSs, the *American Tradition Institute* case could create a blueprint for how to broadly hinder renewable energy development across the nation. Like many other RPS statutes, the Colorado RES contains carve-outs for distributed generation and multipliers (additional compliance credits) for RECs associated with in-state renewable energy. ¹⁹⁴ The plaintiffs in *ATI* challenge both types of provisions. ¹⁹⁵ More broadly, they argue that the general mandate for utilities to obtain renewable energy violates the dormant Commerce Clause. ¹⁹⁶ The plaintiffs assert facial discrimination, ¹⁹⁷ discriminatory effects, ¹⁹⁸ discriminatory purpose, ¹⁹⁹ excessive burdens on interstate commerce, ²⁰⁰ and extraterritorial regulation. ²⁰¹

A. Facial Discrimination and Discriminatory Effect

The plaintiffs allege that two of the Colorado RES provisions facially discriminate against interstate commerce and have a discriminatory effect. Specifically, they argue that the RES's distributed generation (DG)²⁰³ "set-aside" and compliance credit multipliers discriminate against out-of-state energy generators. ²⁰⁴ Indeed, the plaintiffs may prevail on these claims due to the facial preferences for in-state energy in these provisions. But even if they are successful, these attacks on the DG and multiplier provisions would not completely undermine the core RES mechanism, which does not rely on instate preferences for its effectiveness.

http://www.dsireusa.org/incentives/incentive.cfm?Incentive_Code=WA15R&RE=1&EE=1 (last vicited Apr. 7, 2013)

- ¹⁹¹ Am. Tradition Inst. v. Colorado, 876 F.Supp.2d 1222, 1227 (D. Colo. 2012).
- ¹⁹² *Id.* at 1227–28.
- 193 *Id.*
- 194 COLO. REV. STAT. § 40-2-124(c)(IV), (e) (2012).
- 195 Amended Complaint, *supra* note 38, at 6.
- ¹⁹⁶ *Id.* at 16.
- 197 Id. at 19.
- ¹⁹⁸ *Id.* at 4.
- ¹⁹⁹ *Id.* at 17.
- 200 Id. at 21.
- ²⁰¹ *Id.* at 20.
- ²⁰² *Id.* at 16, 36.

²⁰³ Distributed generation refers to energy generated at the location of the energy's use. Oftentimes, energy not used on site can be sold back to utilities. *See generally* Virginia Tech, Distributed Generation Education Module: Introduction to Distributed Generation, http://www.dg.history.vt.edu/ch1/introduction.html (last visited Apr. 7, 2013).

²⁰⁴ Amended Complaint, *supra* note 38, at 18–19.

1. Distributed Generation Requirements

The *ATI* plaintiffs have challenged the Colorado DG set-aside as facially discriminatory. This attack has broad relevance in other jurisdictions because "[m]any state RPS programs include DG or customersited set-asides." Still, "the eligibility designs vary significantly, ranging from in-state interconnection, a showing of displacement of power (to account for behind-the-meter generation) or in-state location." In Colorado, the DG set-aside requires:

[E]ach qualifying retail utility to generate, or cause to be generated, electricity from eligible energy resources in the following minimum amounts:

. . . .

- (C) Twelve percent of its retail electricity sales in Colorado for the years 2011 through 2014, with distributed generation equaling at least one percent of its retail electricity sales in 2011 and 2012 and one and one-fourth percent of its retail electricity sales in 2013 and 2014;
- (D) Twenty percent of its retail electricity sales in Colorado for the years 2015 through 2019, *with distributed generation equaling at least one and three-fourths percent* of its retail electricity sales in 2015 and 2016 and two percent of its retail electricity sales in 2017, 2018, and 2019; and
- (E) Thirty percent of its retail electricity sales in Colorado for the years 2020 and thereafter, *with distributed generation equaling at least three percent* of its retail electricity sales.²⁰⁸

At first, these distributed generation requirements appear facially neutral toward the location of the DG siting. However, "distributed generation" is defined as "[r]etail distributed generation; and . . . [w]holesale distributed generation." In turn, "retail distributed generation" is defined as "a renewable energy resource that is located *on the site of a customer's facilities* and is interconnected on the customer's side of the utility meter." Because the customers of a Colorado utility will generally be Colorado residents, this definition will usually require that the distributed generation come from an in-state site. Therefore, the provision has at least some disparate impact on out-of-state sellers. Further, if all customers are

 $^{^{205}}$ *Id.* at 18.

 $^{^{206}\,\,}$ Elepant & Holt, supra note 11, at 12.

 $^{^{07}}$ Id.

²⁰⁸ COLO. REV. STAT. § 40-2-124(1)(c)(I) (2012) (emphasis added).

²⁰⁹ *Id.* § 40-2-124(1)(a)(II).

 $^{^{210} \ \}textit{Id.} \ \S \ 40\text{-}2\text{-}124(1)(a)(V) \ (emphasis \ added).$

²¹¹ See ELEFANT & HOLT, supra note 11, at 12. Elefant and Holt note that "functional eligibility requirements such as in-state deliverability or power displacement may accomplish nearly the same results as location requirements," and that "[a]s a practical matter, the majority of DG or solar projects that are capable of meeting RPS functionality requirements will also be located in-state." *Id.* This analysis suggests that distributed generation requirements would always discriminate in practical effect by functionally excluding out-of-state energy. However, Elefant and Holt primarily focus on the *Pike* balancing test:

Colorado residents, then requiring DG to be located "on the site of a customer's facilities" may effectively be an in-state classification that constitutes facial discrimination.

The DG definitions also contain a more explicit in-state classification. "[W]holesale distributed generation," is defined as a "renewable energy resource *in Colorado* with a nameplate rating of thirty megawatts or less and that does not qualify as retail distributed generation." Thus, the statute likely facially discriminates against out-of-state energy by limiting the definition of wholesale DG to in-state energy. 213

Counterintuitively, a discriminatory effect may actually be more difficult to establish here than facial discrimination. The extent of the alleged discriminatory effect depends on whether the court views the DG requirement in isolation or in the context of the RES as a whole. If the court views the amount of DG required in isolation, there is nearly a 100% discriminatory impact on out-of-state energy producers because practically all DG must be obtained from inside the state. But if the court views the distributed generation requirement in light of the entire scheme, there is at most a 3% discriminatory impact on out-of-state producers because only 3% of a utility's energy must come from DG even in the final and most rigorous year of the RES implementation scheme.

2. In-State Multipliers

The plaintiffs also allege that the Colorado RES discriminates against out-of-state energy through compliance-credit multipliers that give preference to in-state energy. Like the attack on DG requirements, this argument has broad relevance because many states also use multipliers for RPS and RES compliance credits associated with renewable energy produced in the state. These multipliers incentivize the use of in-state renewable energy to meet the mandate. The state of the state of

The Colorado RES contains several multipliers that could implicate the dormant Commerce Clause. First, "[e]ach kilowatt-hour of electricity generated from eligible energy resources *in Colorado*, other than retail

[B]ecause deliverability requirements for DG or solar set-asides mean that the provisions disproportionately benefit in-state projects, it might be argued that even neutral functional eligibility requirements impermissibly burden commerce by foreclosing opportunities for out-of-state generation. Since functional requirements are neutral, the *Pike* balancing test would apply to evaluate these particular Commerce Clause issues. *Id.*

²¹² COLO. REV. STAT. § 40-2-124(1)(a)(VI) (2012) (emphasis added).

²¹³ See Elefant & Holt, supra note 11, at 12 ("Location-based eligibility requirements for DG or solar set-asides may raise Commerce Clause concerns...").

²¹⁴ COLO. REV. STAT. § 40-2-124(1)(c)(I) (2012).

 $^{^{215}}$ See Amended Complaint, supra note 38, at 19.

²¹⁶ See Elefant & Holt, supra note 11, at 10 (noting that "enhanced RPS compliance credit" is a "common RPS design element"). Some states, such as Washington, also provide extra renewable energy credits for use of equipment manufactured in-state or use of an in-state labor force. Database of State Incentive for Renewables & Efficiency, supra note 190.

²¹⁷ See Elefant & Holt, supra note 11, at 3, 11.

distributed generation, shall be counted as one and one-quarter kilowatthours for the purposes of compliance with this standard."²¹⁸ Second, "[e]ach kilowatt-hour of electricity generated from eligible energy resources at a community-based project shall be counted as one and one-half kilowatthours. For purposes of this subparagraph . . . 'community-based project' means a project *located in Colorado*."²¹⁹ Finally, the RES contains a multiplier for "renewable energy resources that interconnect[] to electric transmission or distribution facilities owned by a cooperative electric association or municipally owned utility."²²⁰ Energy credits obtained from these sources "may be counted for the life of the project as two kilowatthours for compliance."²²¹ However, this benefit applies "only to the aggregate first one hundred megawatts of nameplate capacity of projects statewide."²²²

The plaintiffs have alleged that all three of these multipliers are facially discriminatory. On the one hand, the in-state multipliers do appear to be facially discriminatory because of the location-based classification. On the other hand, multipliers are a less intrusive mechanism of economic protectionism than the in-state location requirements of the Massachusetts RPS at issue in *TransCanada*. Multipliers merely incentivize in-state generation with additional compliance credit—they do not require it. Nevertheless, the Colorado RES still facially differentiates between out-of-state and in-state renewable energy and disadvantages the use of out-of-state renewables. As the Supreme Court has stated, discrimination is present in "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter."

Despite the apparent discrimination of in-state multipliers, Colorado may be able to justify the multipliers as subsidies. Under the rule of *West Lynn Creamery*, a subsidy is "generally constitutional, unless the subsidy is partnered with a tax in such a manner that the scheme as a whole

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²¹⁸ COLO. REV. STAT. § 40-2-124(1)(c)(III) (2012) (emphasis added).

²¹⁹ *Id.* § 40-2-124(1)(c)(VI) (emphasis added). The Colorado RES also contains a multiplier for energy credits obtained by production of solar energy: "each kilowatt-hour of renewable electricity generated from solar electric generation technologies shall be counted as three kilowatt-hours." *Id.* § 40-2-124(1)(c)(VII)(A). This multiplier "applies only to solar electric technologies that begin producing electricity prior to July 1, 2015." *Id.* § 40-2-124(1)(c)(VII)(B). Because this multiplier does not include a location-based classification, it probably does not invoke the "virtually per se rule of invalidity" for discrimination against interstate commerce. *See* ELEFANT & HOLT, *supra* note 11, at 5–7.

 $^{^{220}\,}$ Colo. Rev. Stat. § 40-2-124(1)(c)(IX) (2012).

²²¹ *Id.*

²²² Id.

²²³ Amended Complaint, *supra* note 38, at 19.

²²⁴ ELEFANT & HOLT, *supra* note 11, at 11 ("[M]ultipliers (i.e., enhanced compliance credits) for certain types of renewables do not raise Commerce Clause concerns so long as eligibility is not limited to in-state projects."). Although the Colorado programs that favor one renewable source over another are facially neutral, the state's interest in increasing diversity of supply by offering added incentives to spur development of certain types of renewables is compelling.

²²⁵ United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth., 550 U.S. 330, 338 (2007) (quoting Or. Waste Sys., Inc. v. Dep't of Envtl. Quality of Or., 511 U.S. 93, 99 (1994)).

discriminates against interstate commerce."²²⁶ Granted, multipliers do not directly provide a monetary benefit to in-state renewable energy producers as a subsidy would. Still, multipliers could be said to subsidize utilities that use renewable energy produced in the state by allowing the utility to buy fewer RECs or purchase less renewable energy. The question will hinge on the flexibility of the subsidy concept. A court that is willing to view dormant Commerce Clause precedent creatively may well find that in-state multipliers function as subsidies.

If these multipliers are effectively subsidies, the question becomes whether they are directly funded by out-of-staters, which would likely constitute discrimination under *West Lynn*. In that case, the state subsidy was funded by a tax on the regulated industry, including out-of-state businesses. The in-state benefit therefore came at the direct expense of the out-of-state industry. But here, the Colorado energy consumers, not the out-of-state businesses, pay for the functional subsidy by purchasing the in-state renewable energy. The multipliers merely establish a preference for distributing the functional subsidy to in-state businesses. There is no prohibition on directing a subsidy toward in-state businesses when it does not directly burden out-of-state businesses. Because the burden of the multiplier-subsidy in the Colorado RES falls on the consumer rather than out-of-state producers, the multiplier should not be considered discrimination under *West Lynn*.

B. Discriminatory Purpose

The plaintiffs in *ATI* also challenge the Colorado RES by alleging a discriminatory purpose. Specifically, the plaintiffs point to the broad declaration of legislative intent in the ballot initiative, which reads as follows:

SECTION 1. Legislative declaration of intent:

Energy is critically important to Colorado's welfare and development, and its use has a profound impact on the economy and environment. Growth of the state's population and economic base will continue to create a need for new energy resources, and Colorado's renewable energy resources are currently underutilized.

Therefore, in order to save consumers and businesses money, attract new businesses and jobs, promote development of rural economies, minimize water use for electricity generation, diversify Colorado's energy resources, reduce the impact of volatile fuel prices, and improve the natural environment of the

²²⁶ Ferrey, *supra* note 2, at 590 (citing W. Lynn Creamery, Inc. v. Healy, 512 U.S. 186, 199 (1994); *Limbach*, 486 U.S. 269, 278 (1988)). *West Lynn Creamery* stands for the proposition that a subsidy "ordinarily imposes no burden on interstate commerce, but merely assists local business," 512 U.S. at 199; while *Limbach* discusses whether state renewable trust fund schemes constitute an impermissible "subsidy." 486 U.S. at 277–80.

state, it is in the best interests of the citizens of Colorado to develop and utilize renewable energy resources to the maximum practicable extent. ²²⁷

At first, this language appears fairly innocuous—it does not say specifically that Colorado sought to encourage in-state economic growth. Still, the statute can logically be read to imply an intent to benefit in-state interests. "[D]evelopment of rural economies" likely refers to rural economies inside Colorado, while the declaration that "Colorado's renewable energy resources are currently underutilized" implies an intent to develop Colorado's underutilized renewable resources. Reading these two provisions together, the plaintiffs allege that "[t]he purpose of requiring retail utilities to generate . . . electricity from renewable sources in order to fully utilize Colorado's renewable energy resources is facially discriminatory to electricity generators operating outside of Colorado."

The broad, ambiguous declarations in the Colorado RES probably do not evince a discriminatory intent on their own. In contexts outside the dormant Commerce Clause, the Supreme Court has cautioned against judicial attempts to discern the intent of legislatures because of the multiplicity of different purposes behind the passage of a statute.²²⁹ In deciding an equal protection claim, the Court stated that "it is extremely difficult for a court to ascertain the motivation, or collection of different motivations, that lie behind a legislative enactment."

On the one hand, this rationale does not apply in the *ATI* case because the intent was agreed upon and codified.²³¹ There is no risk in misconstruing the purpose of the statute because the statute itself states the purpose. On the other hand, because the Colorado RES was passed by popular initiative, it is even more difficult to divine the true purpose of the statute because a court would have to look to the entire voting population of Colorado to determine what the intent was. Moreover, the statutory purpose section does not state that it provides an exhaustive list of purposes. Voters may very well have had other legitimate purposes in passing the legislation.

²²⁷ Amended Complaint, *supra* note 38, at 16–17 (citing Colorado's voter initiative, Amendment 37). Much of this original text was later codified by statute:

Energy is critically important to Colorado's welfare and development and its use has a profound impact on the economy and environment. In order to diversify Colorado's energy resources, attract new businesses and jobs, promote development of rural economies, minimize water use for electric generation, reduce the impact of volatile fuel prices, and improve the natural environment of the state, the general assembly finds it in the best interests of the citizens of Colorado to develop and utilize solar energy resources in increasing amounts.

COLO. REV. STAT. § 40-2-123(3)(a)(I) (2012).

²²⁸ Amended Complaint, *supra* note 38, at 17. The plaintiffs allege that the declaration evinces several other discriminatory purposes such as "to promote development of rural economies engaged in interstate commerce from within Colorado." *Id.*

²²⁹ Palmer v. Thompson, 403 U.S. 217, 224 (1971) (citing Fletcher v. Peck, 6 Cranch 87, 130 (1810); United States v. O'Brien, 391 U.S. 367, 383 (1968)).

 $^{^{230}}$ Ia

²³¹ Colo. Rev. Stat. § 40-2-123 (3)(a)(I) (2012).

Further, the Court has explained that "there is an element of futility" in striking a statute based solely on discriminatory purpose: "If the law is struck down for this reason, rather than because of its facial content or effect, it would presumably be valid as soon as the legislature or relevant governing body re-passed it for different reasons." Thus, even if the *ATI* plaintiffs succeed in invalidating the statute based on a discriminatory purpose, this is unlikely to have far reaching consequences on state RPSs because states can easily repass the legislation without any statutory purpose sections that may violate the dormant Commerce Clause.

C. Extraterritoriality

The plaintiffs allege that the Colorado RES is invalid because it "has the practical effect of extraterritorial control of commerce occurring entirely outside the boundaries of Colorado." First, the plaintiffs attack the RES's tradable REC scheme. This section of the RES provides that "[t]he commission shall not restrict the qualifying retail utility's ownership of renewable energy credits if the qualifying retail utility . . . uses definitions of eligible energy resources that are limited to those identified in paragraph (a) of this subsection (1)." Section (1)(a) defines the eligible types of renewable energy, including "solar, wind, geothermal, biomass, new hydroelectricity with a nameplate rating of ten megawatts or less, and hydroelectricity in existence on January 1, 2005, with a nameplate rating of thirty megawatts or less." As the plaintiffs point out, these definitions may conflict with other state REC definitions and mandates, which effectively hinders interstate commerce by preventing interstate REC trading.

The main problem with the plaintiffs' argument is that the wording of the Colorado statute does not necessarily use this definition. Rather, the provision is phrased in the negative—the commission must not restrict the utility if the utility meets the requirements. Thus, by its plain language, the statute does not necessarily penalize out-of-state interests for failure to adopt Colorado's definition of renewable energy. Further, this definition may not actually create conflicts with other RPS statutes because it encompasses most types of renewable energy that other state definitions might incorporate. The rationale of the extraterritoriality principle is to avoid conflicts between regulations from different states. Because interstate regulatory conflicts are unlikely to occur due to the Colorado RES, the court should not invalidate the RES under the extraterritoriality principle.

Nevertheless, the court may find that *Rocky Mountain Farmers* supports invalidating the RES.²³⁸ In that case, the Eastern District of

²³² Palmer, 403 U.S. at 225.

²³³ Amended Complaint, *supra* note 38, at 20.

²³⁴ Id.

²³⁵ Colo. Rev. Stat. § 40-2-124(1)(d) (2012).

²³⁶ Id. § 40-2-124(1)(a)(IV).

²³⁷ Amended Complaint, *supra* note 38, at 20.

²³⁸ Rocky Mountain Farmers II, 843 F. Supp. 2d 1071, 1085–86 (E.D. Cal. 2011).

California struck a California fuel standard under the extraterritoriality principle based on the incentives it placed on out-of-state businesses.²³⁹ The definition of REC in the Colorado RES arguably incentivizes using the listed types of energy because it guarantees that restrictions will not apply.

D. Burdens on Interstate Commerce

The main thrust of the ATI plaintiffs' arguments is that the Colorado RES places excessive burdens on interstate commerce. At the core of this argument is the plaintiffs' contention that wind energy—one of the types of renewable energy permitted to satisfy the Colorado RES—is inherently unreliable. The plaintiffs argue that reliance on wind energy ultimately causes more pollution than nonrenewable resources due to the need for shaping wind energy. Essentially, utilities must rely on nonrenewable sources to provide a fluctuating amount of energy that makes up for what wind resources fail to provide when wind is less constant. This inconsistent use of nonrenewable energy, plaintiffs claim, creates more pollution and is more expensive than a steady, constant use of nonrenewable energy from out-of-state suppliers.

Whether the plaintiffs' contentions will succeed ultimately hinges on a fact-specific inquiry into the exact costs and benefits of renewable energy. Still, as discussed in the preceding Part, the *Pike* balancing test for excessive burdens on interstate commerce grants the state considerable deference. Indeed, the state need only offer "putative" local benefits—the court need not scrutinize each stated benefit to determine the exact ratio of costs to benefits. Thus, the plaintiffs' chance of succeeding on this claim is slim considering the straightforward argument that Colorado can make regarding the wide array of potential benefits of renewable energy. The plaintiffs fail to address several potential benefits from renewable energy, including the political independence that renewable energy allows. Further, the court's lack of institutional competence to make complicated policy decisions and

²³⁹ *Id.*

 $^{^{240}}$ Amended Complaint, supra note 38, at 20–35. Indeed, the plaintiffs use 15 pages to describe the burdens on interstate commerce and the lack of benefits to local interests.

²⁴¹ *Id.* at 8.

²⁴² *Id.* at 29.

²⁴³ *Id.*

²⁴⁴ Id. at 8, 16, 30.

 $^{^{245}}$ See Timothy P. Duane & Kiran H. Griffith, Legal, Technical, and Economic Challenges in Integrating Renewable Power Generation into the Electricity Grid, SAN DIEGO J. CLIMATE & ENERGY L. (forthcoming 2013) (manuscript at 32–50) (on file with authors), for a discussion of the difficulty of estimating these costs, as well as benefits and examples of studies that have found negative costs for such integration.

²⁴⁶ James D. Fox, State Benefits Under the Pike Balancing Test of the Dormant Commerce Clause: Putative or Actual?, 1 Ave Maria L. Rev. 175, 177 (2003).

²⁴⁷ Eric Moll, *Importance of Renewable Resources of Energy*, NAT'L GEOGRAPHIC: GREEN GUIDE, http://greenliving.nationalgeographic.com/importance-renewable-resources-energy-2146.html (last visited Apr. 7, 2013).

to engage in nuanced fact-finding will likely militate against a determination that the Colorado RES fails the *Pike* balancing test.²⁴⁸

The plaintiffs' assault on wind energy may be more of a publicity counterattack than a serious doctrinal argument. The *Pike* balancing test, though unfavorable to the plaintiffs doctrinally, gives them an opportunity to make arguments that are more intuitive to laymen than discrimination-based arguments. While legally potent, discrimination-based arguments may have less weight in public opinion because the public might not prioritize eliminating economic protectionism. The *Pike* balancing test thus allows the plaintiffs to attempt to "demystify" renewable energy in general by emphasizing the putative burdens of wind energy.²⁴⁹ Although the broad approval of renewable energy makes this a difficult goal, the focus on wind energy may be more effective. Of renewable energies, wind energy has the least popular appeal due to the alleged burdens it places on local communities in the siting process.²⁵⁰ For example, the shadow flicker and noise of wind turbines lead to nuisance actions, while the blades may harm birds, which engenders resistance from some wildlife organizations.²⁵¹

E. The Market-Participant Exception and Virtual Representation

As currently formulated, the market-participant exception would likely be of little use in defending against a dormant Commerce Clause challenge to state RPSs. As discussed above, the market-participant exception only applies when the state is selling or buying goods in the market, not when the state is regulating a private party in the market. Under an RES, the state does not purchase renewable energy; rather, a private utility does. Further, although a state may discriminate in favor of state-owned entities, it is irrelevant that a state is heavily involved in regulating the private party in whose favor the state discriminates, or that the private party is in effect performing a traditional government function. Thus, the state cannot claim immunity under the market-participant exception simply based on heavy

 $^{^{248}\,}$ In this case, however, the Colorado statute was adopted by the voters directly. Jacobi, $supra\, {\rm note}\, 1,$ at 1079.

²⁴⁹ Indeed, in a series of videos, the plaintiffs focus almost exclusively on the costs of wind energy. *See, e.g.*, Video Blog: American Tradition Institute, *American Tradition Institute Colorado Lawsuit, Part 1 – Pollution Issues*, YouTube (Aug. 4, 2011), http://www.youtube.com/watch?v=F21i4TxDOUk (last visited Apr. 7, 2013).

 $^{^{250}}$ See John Forbush, Gov't Ctr. of Albany Law School, Siting Backyard Wind Power Facilities Under the Zoning Laws of New York State 5 (2011), available at http://www.albanylaw.edu/glc/about/expertise/renewable/Pages/White-Papers.aspx.

²⁵¹ See Tom Zeller Jr., For Those Near, the Miserable Hum of Clean Energy, N.Y. TIMES, Oct. 5, 2010, http://www.nytimes.com/2010/10/06/business/energy-environment/06noise.html (last visited Apr. 7, 2013); see also MASS. DEP'T. ENVTL. PROT., WIND TURBINE HEALTH IMPACT STUDY: REPORT OF INDEPENDENT EXPERT PANEL, at ES-7 (2012), available at www.mass.gov/dep/energy/wind/turbine_impact_study.pdf (defining shadow flicker as "the passage of the blades of a rotating wind turbine between the sun and the observer").

 $^{^{252}\,\,}$ Reeves, Inc. v. Stake, 447 U.S. 429, 447 (1980).

²⁵³ Carbone, 511 U.S. 383, 394 (1994).

involvement in the activities of the utility companies that purchase the renewable energy.

Although the market-participant exception does not apply, the virtual representation rationale may favor upholding renewable energy mandates because the burden of requiring renewable energy generation will largely fall on in-state consumers who may pay more for the energy. Any higher costs for renewable energy burden in-state consumers, thus providing a check on rampant economic protectionism. Still, virtual representation has been treated as a supplemental argument that merely supports a conclusion decided under the discrimination or *Pike* tests. Virtual representation does not suffice by itself to protect a statute from invalidation. Indeed, when the Supreme Court mentioned virtual representation in *United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Management Authority*, it was not necessary to the Court's holding. The Court merely stated that "it bears mentioning" that the interests of the burdened out-of-state interests were virtually represented in-state. Thus, virtual representation can hardly be considered a safety net for RPSs.

F. Standing, ATI's Membership, and Incentives Not to Settle

The Colorado case survived a motion to dismiss based on lack of standing. To show it had standing, ATI revealed that its membership included a coal company and utilities. Because the court only resolved the standing claims at the pleading level, more information may yet arise concerning the membership of ATI. The fact that coal interests support ATI further indicates that the Colorado case is likely to establish a blueprint for other challenges and have larger effects on other state RPSs than previous cases. Unlike TransCanada, ATI is unlikely to be interested in settling the

 $^{^{254}}$ At the same time, the *Oneida* case, where the Court applied the virtual representation rationale, is distinguishable because it concerned the market participant exception, which probably does not apply here. United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth., 550 U.S. 330, 345, 362–63 (2007).

²⁵⁵ *Id.* at 345.

²⁵⁶ *Id.*

²⁵⁷ The virtual representation argument also highlights the democratic problems of the dormant Commerce Clause. On the one hand, the doctrine allows the Court to facilitate democracy by redirecting political efforts whenever it strikes down laws passed by legislatures or by popular referenda. See Robert R.M. Verchick, The Commerce Clause, Environmental Justice, and the Interstate Garbage Wars, 70 S. CAL. L. REV. 1239, 1251 (1997). On the other hand, under dormant Commerce Clause analyses, democratic concerns seem to take a back seat and rarely play a role in the outcome of a case. See, e.g., Russell Korobkin, The Local Politics of Acid Rain: Public Versus Private Decisionmaking and the Dormant Commerce Clause in a New Era of Environmental Law, 75 B.U. L. REV. 689, 748–51 (1995).

 $^{^{258}}$ Am. Tradition Inst. v. Colorado, 876 F. Supp. 2d 1222, 1235 (D. Colo. 2012). The court not only permitted the plaintiffs to bring their claims for declaratory and injunctive relief, but also dismissed several defendants in the process, including the State of Colorado.

²⁵⁹ See id. at 1231–32.

case or merely invalidating any facially discriminatory provisions that are accessory to the main RES mandate.

Although Colorado can reduce some of its legal vulnerability by following Massachusetts' lead in issuing rules that eliminate in-state designations, 260 this solution would still not address ATI's *Pike*-based claim, which alleges that Colorado's entire RES places an undue burden on interstate commerce.261 Unlike its attacks on Colorado's multiplier and carve-out provisions, ATI's Pike-based argument challenges the core component of an RPS—the requirement that utilities obtain a certain amount of energy from renewable sources. In *TransCanada*, invalidating the overall renewable mandate would have harmed the plaintiffs, who produced renewable energy and thus benefited from the general incentives of state RPSs, though to a lesser extent than in-state producers.²⁶² Accordingly, TransCanada did not assert a *Pike*-based claim to retain the incentives for utilities to purchase its renewable energy. 263 TransCanada instead advanced a discrimination-based attack on the exclusion of out-ofstate renewable energy under accessory provisions.²⁶⁴ But unlike TransCanada, ATI and its members would benefit from the wholesale elimination of RESs and RPSs. ATI therefore seeks to bring down the entire Colorado RES under the *Pike* test. Without the overall renewable mandate, other RES provisions become meaningless. Colorado thus faces a much more harmful potential outcome than Massachusetts ever did.

The Colorado litigation is the first example of a challenge alleging that the main renewable mandate of an RES or RPS violates the dormant Commerce Clause. Thus, this is the first case that risks more than states' ability to use RPSs to serve local economic goals—an adverse outcome in the *ATI* litigation would completely invalidate the state RPS tool and puts all renewable energy development at risk. Without a federal RPS, ²⁶⁵ invalidation of state RPSs leaves very little to encourage renewable energy development besides tax incentives. ²⁶⁶ These incentives are less effective than state RPSs because RPSs *require* renewable energy development.

²⁶⁰ See Elefant & Holt, supra note 11, at 20 (citing Mass. Dep't of Pub. Utils., Order Adopting Emergency Regulations at 5, D.P.U. No. 10-58 (June 9, 2010)).

²⁶¹ Am. Tradition Inst. v. Colorado, 2012 WL 2899064, at * 1–2.

²⁶² Id. at * 1; see supra Part III.A.

²⁶³ Complaint, *supra* note 156, at 5.

²⁶⁴ *Id.* at 1.

²⁶⁵ See supra note 7 and accompanying text.

²⁶⁶ Two of the most powerful of these federal tax incentives—the Production Tax Credit (PTC) and Investment Tax Credit (ITC)—were renewed on January 2, 2013 when President Obama signed the American Taxpayer Relief Act into law. American Taxpayer Relief Act of 2012, § 407, Pub. L. No. 112-240, 126 Stat. 2313 (2013). Although this provides some short-term reassurance to renewable energy project developers, the PTC and TIC have, at best, received inconsistent and undependable support from Congress over the years. See, e.g., Union Concerned Scientists, Production Tax Credit for Renewable http://www.ucsusa.org/clean_energy/smart-energy-solutions/increase-renewables/productiontax-credit-for.html (last visited Apr. 7, 2013) (arguing that the "on-again/off-again" cycle of congressional support for tax credits has plagued the wind industry).

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V. CHALLENGING CALIFORNIA'S RPS AND AB 32 IMPLEMENTATION

Perhaps learning from the *TransCanada* litigation, California has strived to protect its renewable standards from constitutional invalidation by removing location classifications from its RPS. Initially, California largely prevented use of renewable energy credits generated out-of-state to meet its RPS. This changed in 2006 when California amended its RPS to allow energy suppliers to use renewable energy that was generated out-of-state. In 2010, California passed legislation specifying that 25% of a supplier's RPS obligations could be met using unbundled RECs. California created three categories of energy resources that could be used to satisfy the RPS. Category 1 includes energy that either has its first point of interconnection with a California balancing authority or uses a dynamic transfer from

[H]ave a first point of interconnection with a California balancing authority, have a first point of interconnection with distribution facilities used to serve end users within a California balancing authority area, or are scheduled from the eligible renewable energy resource into a California balancing authority without substituting electricity from another source. The use of another source to provide real-time ancillary services required to maintain an hourly or subhourly import schedule into a California balancing authority shall be permitted, but only the fraction of the schedule actually generated by the eligible renewable energy resource shall count toward this portfolio content category.

 $^{^{267}}$ Steven Ferrey, Follow the Money! Article I and Article VI Constitutional Barriers to Renewable Energy in the U.S. Future, 17 VA. J.L. & TECH. 89, 107 (2012).

 $^{^{268}}$ Id. at 104 (citing California's S.B. 107, ch. 464, § 3 (2006), available at http://www.leginfo.ca.gov/pub/05-6/bill/sen/sb_01010150/sb_107_bill_20060926_chaptered.html); see CAL. Pub. Res. Code § 25741(a) (2007).

²⁶⁹ Ferrey, *supra* note 267, at 107–08; *see* California Renewable Energy Resources Act, S.B. X1-2, 1st Ext. Sess. (Ca. 2011).

²⁷⁰ CAL. PUB. UTIL. CODE § 399.16(b) (Supp. 2013).

²⁷¹ In other words, the project must connect directly into the states' grid. Steve Ernst, *California Clean Energy Rules May Impede Imports from Rest of West*, HIGH COUNTRY NEWS, May 28, 2012, http://www.hcn.org/issues/44.9/the-fading-arizona-town-of-gila-bend-bets-big-on-solar/california-clean-energy-rules-may-impede-imports-from-rest-of-west (last visited Apr. 7, 2013). Specifically, the statute provides that this subcategory of renewable energy project must:

CAL. PUB. UTIL. CODE § 399.16(b)(1)(A) (Supp. 2013).

 $^{^{272}}$ A dynamic transfer is "electronically transferring generation from the balancing authority area in which it physically resides to another balancing authority area in real-time. Such transfers allow generation to be located and controlled in a geographic location that is outside of the receiving balancing authority area." W. Governor's Ass'n, Meeting Renewable Energy TARGETS IN THE WEST AT LEAST COST: THE INTEGRATION CHALLENGE 5 (Lisa Swartz ed., Regulatory Assistance Project, 2012). "In essence, it gives on balancing authority (BA) that is consuming the power (e.g., [the California Independent System Operator]) control over operation of the generating plant even though the latter is in a different BA (e.g., [Bonneville Power Administration])." Duane & Griffith, supra note 245, at 35. This shifts the responsibility for managing the variability of generating output to the consuming BA, but it also requires the source BA to keep transmission open "for maximum dynamic flow that could occur within the scheduling period." W. GOVERNOR'S ASS'N, supra. Moreover, dynamic transfers also increase power and voltage fluctuations, which "are more difficult to manage as more dynamic transfers have large and frequent ramps [i.e., dramatic changes in output, either up or down] within the scheduling period." Id. "These concerns—over control, the opportunity costs of potentially unused transmission capacity, and power or voltage fluctuations—have limited the use of dynamic transfers." Duane & Griffith, supra note 245, at 35.

another balancing authority.²⁷³ Because dynamic transfers are uncommon, complicated processes, most out-of-state renewable energy projects are unlikely to qualify for this first category.²⁷⁴ This is problematic because Category 1 comprises a large portion of the energy eligible to satisfy California's RPS—utilities must obtain 50% of their RPS compliance from this category by 2013 and 75% by 2017.²⁷⁵ Category 2 is for firmed and shaped energy.²⁷⁶ By 2016, utilities must obtain between 15% and 25% of their RPS compliance from renewable energy in this category.²⁷⁷ Finally, under Category 3, other renewable energy products, including unbundled RECs, may comprise no more than 10% of RPS compliance after 2016.²⁷⁸

In a recent decision, the California Public Utility Commission (CPUC) determined that unbundled or transferable RECs (TRECs) would not qualify for meeting Category 1 (from which 75% of RPS compliance must be obtained by 2017); instead, only energy that was bundled together with its associated renewable energy would qualify.²⁷⁹ Thus, just as with the Missouri case,²⁸⁰ California prohibits TRECs from being used to meet the largest required category for RPS compliance.²⁸¹ Utilities must instead meet this energy category by providing credits associated with renewable energy that is actually used inside California. The CPUC decision also provided that RECs associated with distributed generation would be characterized as unbundled, and therefore ineligible for Category 1 status, if the energy is

²⁷³ CAL. PUB. UTIL. CODE § 399.16(b)(1)(B) (Supp. 2013).

²⁷⁴ For example, the Bonneville Power Administration (BPA) has imposed significant restrictions on dynamic transfers from the BPA Balancing Authority Area (BA) to the California Independent System Operator (CAISO) over the three high-voltage transmission lines between the Pacific Northwest and California, which limits the ability of many renewable generators in the BPA BA from qualifying under Tier 1 of the California RPS. *See* Duane & Griffith, *supra* note 245, at 15–31 (discussing the resultant conflict between BPA and wind generators in the Pacific Northwest who want to transmit their power to the lucrative California RPS market).

²⁷⁵ CAL. PUB. UTIL. CODE § 399.16(c)(1) (Supp. 2013).

²⁷⁶ Firmed and shaped energy refers to renewable energy that, due to its intermittent flow, is coupled with other more controllable types of energy for anticipatable or constant transmission. See, e.g., Geoffrey Craig, CPUC Approves RPS 'Bucket' Decision, ENERGY TRADER, Dec. 16, 2011, 2011 WLNR 26863478. For example, because the amount of solar and wind energy generated from a project could vary based on the amount of sun or wind on that day, a generator may couple the energy with hydropower or nonrenewable energy such as natural gas to provide a more controlled flow of energy.

²⁷⁷ CAL. PUB. UTIL. CODE § 399.16(c) (Supp. 2013).

²⁷⁸ *Id.* § 399.16(b)(3), (c)(2).

²⁷⁹ Pub. Utils. Comm'n of California, Decision Implementing Portfolio Content Categories for the Renewables Portfolio Standard Program, D.11-12-052, R.11-05-005 31–36 at 46 (Dec. 15, 2011), available at http://docs.cpuc.ca.gov/word_pdf/final_decision/156060.pdf [hereinafter Decision Implementing Portfolio Content Categories]; see also Steven F. Greenwald & Vidhya Prabhakaran, Davis Wright Tremaine, CPUC Issues Final Decision on Renewables Portfolio Standard Content Categories of SB 2X (Dec. 23, 2011), http://www.jdsupra.com/legalnews/cpuc-issues-final-decision-on-renewables-36318/ (last visited Apr. 7, 2013).

²⁸⁰ See supra Part III.C.

²⁸¹ Greenwald & Prabhakaran, *supra* note 279.

consumed on the site and not sold along with the renewable energy credit. Thus, because distributed generation RECs (which are typically generated in-state) are considered unbundled, they will be competing for Category 3 compliance with other out-of-state unbundled RECs.

A. Cowlitz County's Claim Before the California Public Utilities Commission

Public Utility District No. 1 of Cowlitz County, Washington (Cowlitz County) recently challenged the constitutionality of the California three-category RPS structure and the CPUC rules implementing it. ²⁸³ Cowlitz County is both a preference wholesale customer of the Bonneville Power Administration and a project developer that has spearheaded several wind projects to export energy to meet California's RPS. The County claims it was harmed when it lost a contract with Pacific Gas & Electric to provide wind energy to California. ²⁸⁴ Cowlitz County alleged that this harm was caused by the uncertainty inherent in the California RPS and exacerbated by the CPUC's failure to provide standards for out-of-state generators to qualify for Category 1 compliance. ²⁸⁵

First, Cowlitz County attacked the overall RPS structure directly because of its differential treatment of in-state and out-of-state projects:

Since the vast majority of out-of-state facilities will be unable to connect directly to the California grid and the protocols and procedures for dynamic transfers of intermittent renewable resources are still under development, few out-of-state transactions are likely to be able to qualify for Category 1. Most instate facilities will be connected directly to the California grid, however, and will easily qualify for Category 1. ²⁸⁶

Although Cowlitz County acknowledged that neither the legislation nor the decision used state-based criteria in defining the categories, the County claimed that the legislation and decision had the practical effect of imposing "very different burdens to the disadvantage of out-of-state generators and to the benefit of in-state generators."

The County also argued that the CPUC had discriminated against interstate commerce in its decision because the CPUC's failure to clarify how out-of-state projects could comply with the rules exacerbated the larger

²⁸² However, for excess DG that is sold to the utility and not consumed on site, the REC would be bundled with the sold energy and therefore eligible for Category 1 compliance. Decision Implementing Portfolio Content Categories, *supra* note 279, at 34–35.

²⁸³ Application of Public Utility District No. 1 of Cowlitz County For Rehearing of Decision 11-12-052, CPUC Doc. No. R.11-05-005, at 1 (Jan. 20, 2012), available at https://www.pge.com/regulation/RenewablePortfolioStdsOIR-IV/Pleadings/Cowlitz/2012/RenewablePortfolioStdsOIR-IV_Plea_Cowlitz_20120120_226891.pdf.

²⁸⁴ *Id.* at 3–5.

²⁸⁵ *Id.* at 3–4.

²⁸⁶ *Id.* at 10.

²⁸⁷ Id.

burdens on out-of-state renewable energy projects.²⁸⁸ Although the CPUC had specified how in-state transactions could qualify for Category 1 treatment, it failed to specify standards for out-of-state renewable energy projects to qualify for Category 1 RPS compliance.²⁸⁹ The County contended that this failure created additional uncertainty in the ability of out-of-state energy to meet Category 1 compliance, and therefore constituted discrimination against out-of-state commerce.²⁹⁰ Specifically, Cowlitz County argued that there is "no clear understanding" regarding how an out-of-state generator could be scheduled "into a California balancing authority without substituting electricity from another source" or complete a "dynamic transfer," which were the only statutory options for generators to qualify for Category 1 if they could not connect directly to California's grid.²⁹¹ Indeed, the CPUC admitted that "the techniques and protocols for dynamic transfer are evolving." Finally, Cowlitz County argued that additional requirements for Category 2 compliance, such as the bundling requirement for firmed and shaped energy, further reduced the ability of out-of-state energy to qualify for California RPS compliance.²⁹³

Although Cowlitz County references the bundling requirement for Category 2 compliance, Cowlitz interestingly does not refer to the bundling requirement for Category 1 compliance. Still, the bundling requirement could, in and of itself, constitute a dormant Commerce Clause violation because it prohibits the use of RECs associated with energy sold out-of-state. This prohibition could constitute discrimination against interstate commerce on its own. The requirement that the energy associated with the REC must also be sold in the state is arguably facial discrimination. Although the RPS does not mention whether the energy is sold in the state, the terms "bundled" and "unbundled" have this same effect. California cannot avoid facial discrimination simply by using synonyms for in-state requirements. Indeed, the Supreme Court has stated that discrimination is forbidden "whether forthright or ingenious."294 And even if the requirement of bundling is not facially discriminatory, it nevertheless causes a discriminatory effect, which can on its own violate the dormant Commerce Clause.

Still, California could make at least two arguments in support of its RPS. First, the state could argue that its RPS does not prohibit interstate commerce because an energy producer can still comply by keeping RECs bundled with the energy and making sure the energy is used in California. Second, California could point out that some unbundled RECs are accepted for compliance purposes under Category 3.²⁹⁵ Thus, the state's RPS arguably

 $^{^{288}}$ *Id.* at 11.

²⁸⁹ *Id.*

²⁹⁰ Id. at 1.

²⁹¹ *Id.* at 10–12 (quoting CAL. PUB. UTIL. CODE § 399.16(b)(1)(A) (Supp. 2013)).

²⁹² *Id.* at 14 (internal quotation marks omitted).

²⁹³ *Id.* at 16–17.

 $^{^{294}\,}$ W. Lynn Creamery, Inc. v. Healy, 512 U.S. 186, 201 (1994) (quoting Best & Co. v. Maxwell, 311 U.S. 454, 455 (1940)).

 $^{^{295}\,}$ Cal. Pub. Util. Code $\$ 399.16(b)(3) (Supp. 2013).

does not cause a 100% discriminatory effect because out-of-state renewable energy producers can avoid the prohibition by simply bundling the RECs and the energy and can still compete for Category 3 compliance.

However, the first argument—that discrimination is not present because out-of-state generators can meet the requirement by bundling—relies heavily on the assumption that bundling is possible for out-of-state generators. Bundling requires that the energy be used in the state.²⁹⁶ For a generator that is out-of-state but extremely close to the border, it can guarantee that its energy will be used in the state by connecting directly into the California grid from transmission lines that do not lead to another state's grid.²⁹⁷ However, for generators that are more than one state away and must transmit energy through several other state grids, it is difficult to guarantee that this energy ultimately connects to California's grid. Thus, a bundling requirement may effectively prevent interstate commerce if it is too difficult to prove that the energy and the REC are still bundled; in other words, it is too difficult to prove that the energy was used in the state.²⁹⁸

The second argument ignores that the only category for which unbundled credits would be permitted will comprise no more than 10% of RPS compliance. Although some court precedent indicates that less than a 100% discriminatory effect must be accompanied with evidence of discriminatory purpose for a dormant Commerce Clause violation to be present, ²⁵⁹ California's RPS places this absolutist language under great strain and shows the absurdity of such a test. Surely, a 99.9% discriminatory effect would also lead to a dormant Commerce Clause violation. Such line drawing is not administrable. A 90% discriminatory effect may be permissible in some instances when it is due to noninstitutional factors. However, California's RPS specifies the exact percentages of bundled and unbundled RECs necessary for compliance—percentages that can be more easily met by instate, as opposed to out-of-state, providers. Further, considering that out-of-

²⁹⁶ Tom Mounteer, *To Bundle or Not to Bundle*, 40 ENVTL. L. REP. 10,119, 10,119 (2010).

²⁹⁷ This may prove to be quite expensive, however, if there is not already sufficient transmission capacity available. For instance, southern California has been labeled a "Critical Congestion Area" by the Department of Energy, due to "the area's persistent transmission congestion problems." U.S. DEPT. OF ENERGY, NATIONAL ELECTRIC TRANSMISSION CONGESTION STUDY 73 – 77 (2009), available at http://energy.gov/sites/prod/files/Congestion_Study_2009.pdf.

²⁹⁸ This problem has generally been overcome with the use of an E-tag system, however, where each party in a sequence of transactions "tags" the renewable power with the REC attributes to assure that the delivered power is "bundled" with the RECs. See, e.g., CAL. ENERGY COMM'N, JOINT COMMISSION REPORT: TRACKING SYSTEM OPERATIONAL DETERMINATION 22–25 (2008), available at http://www.energy.ca.gov/2008publications/CEC-300-2008-001/CEC-300-2008-001-CMF.PDF (examining California's WREGIS system and NERC E-tag system for tracking and verifying RECs). This assures that the same REC attributes can only be sold once and cannot be double-counted. *Id.* at iv.

²⁹⁹ See SDDS, Inc. v. State of S.D., 47 F.3d 263, 271 (8th Cir. 1995) ("The fact that only 90% rather than 100% of the costs of excluding the waste fall on out-of-staters does not eliminate the discriminatory effect. This fact merely reduces the scope of the discrimination." (citing Fort Gratiot Sanitary Landfill, Inc. v. Mich. Dept. of Natural Res., 504 U.S. 353 (1992); Waste Sys. Corp. v. Cnty. of Martin, Minn., 985 F.2d 1381, 1387 n.11 (8th Cir. 1993))); see also Wyoming v. Oklahoma, 502 U.S. 437, 455 (1992).

state providers would be supplying the vast majority of unbundled RECs, a 90% ban on such RECs would also carry considerable weight when analyzing the violation under the *Pike* balancing test for excessive burdens on interstate commerce.

On the other hand, a state surely need not award compliance credit for energy used in another state. An attempt to do so might, in effect, constitute an attempt to regulate out-of-state commerce by placing incentives and, arguably, even limitations on the actions of utilities in other states. Thus, it would be absurd to require that California accept unbundled credits because it would effectively require the state to regulate the use of renewable energy in other states. California's bundling requirement, therefore, actually prevents it from making the rule overbroad and affecting actors outside of California. Moreover, given California's dominance in western electricity markets due to its size and population, unbundled credits could actually create strong incentives for generators in other states. Since compliance with California's TREC system would be much more beneficial or economical, this would disincentivize generators from complying with other states' REC tracking systems. Thus, requiring California to accept unbundled RECs could in turn limit the effectiveness of other states' RPSs.

Further, a REC is in the end merely an attribute of the energy—an identifier recognizing that the energy is from a renewable source. The abstraction of the REC from the energy itself is thus superficial and recognized only by some RPSs. Requiring that a state accept unbundled RECs effectively requires states to treat the renewable attribute separately. It thus requires the state to accept a specific policy mechanism that relies on a legal fiction: the concept that renewable attributes are separable from the energy itself. Such a strange result seems far beyond the bounds of the dormant Commerce Clause; judicial overreaching indeed will have stretched to a new level if the dormant Commerce Clause is construed to *require* that states isolate specific attributes of products in interstate commerce and sell them separately from the products themselves.

In sum, the distinction between the REC and the energy itself is already artificial. RECs are merely an "attribute" of the energy—not an inherent part of it—and requiring a state to treat the renewable part of the energy as separate from the energy effectively requires the state to ignore the reality of the product.³⁰¹ Although the REC is a recognized unit with monetary value that can be traded, a REC is also merely an attribute—an identifier to indicate that the energy from which the REC was "stripped" was from a renewable source.

³⁰⁰ See, e.g., Healy v. Beer Inst., Inc., 491 U.S. 324, 336–37 (1989) (noting that the Commerce Clause forbids states from controlling conduct beyond its own boundaries).

³⁰¹ Unlike most pollutants, however, greenhouse gas (GHG) emissions that are emitted out-of-state have the same effect upon climate change as GHG emissions from within the state. Therefore, the unbundled RECs will generally yield a comparable level of GHG reductions whether they are located in-state or out-of-state (all other aspects of the generation mix and dispatch system being equal, which of course they are not throughout the western grid).

Yet another conceptual way to look at the situation addresses whether there really is an interstate market for RECs that can be restricted in violation of the dormant Commerce Clause. Certainly, there is such a market for the energy itself. Although states can attempt to create an interstate market for RECs by defining RECs similarly and accepting each other's definitions, that market is nonetheless voluntary. Because of these different state REC definitions, the question remains whether RECs are ultimately traded in one interstate market, several regional markets, or in individual, isolated, state markets. It is likely the latter.

If the market is itself defined by the state, and not otherwise in existence, then it is hard to say that the state restricts interstate commerce when there was no interstate commerce to begin with. A more proper characterization is that the state has created the potential for interstate commerce in making a market for the renewable attribute, but it is another thing to say that the state has a duty to realize that potential and create the interstate market when all it has done is create an intrastate market. A court's invalidation of such a market under the dormant Commerce Clause would effectively require a state to create an interstate market if it is to create any market at all.

B. There Is No Discriminatory Purpose Evident in the California RPS

Challengers to the Massachusetts³⁰² and Colorado³⁰³ RPS statutes claimed that they were both facially discriminatory and discriminatory in their respective purposes. In contrast, the California legislature adopted purposes in the relevant RPS legislation that are far less susceptible to a discriminatory purpose challenge.

The current legislation was adopted in 2011 with the passage of California Senate Bill X1-2 (SB X1-2),³⁰⁴ which made some changes to the declared legislative purpose of California's Renewable Portfolio Standards Program. Even prior to SB X1-2, however, the declared purpose of the statute read as follows:

(b) Increasing California's reliance on renewable energy resources may promote stable electricity prices, protect public health, improve environmental quality, stimulate sustainable economic development, create new employment opportunities, and reduce reliance on imported fuels.

³⁰² See supra Part III.A.

³⁰³ See supra Part IV.

 $^{^{304}}$ California Renewable Energy Resources Act, S.B. X1-2, 1st Ext. Sess. (Ca. 2011) (amending scattered sections of the CAL FISH & GAME, PUB. RES., and PUB. UTIL. CODES). The "X1" indicates that S.B. X1-2 was adopted during "Extraordinary Session 1." The bill is also inconsistently cited as S.B. 2, S.B. 2 (x1), or S.B. 2 (1x).

(c) The development of renewable energy resources may ameliorate air quality problems throughout the state and improve public health by reducing the burning of fossil fuels and the associated environmental impacts. 305

These statements do not appear to evince a discriminatory purpose. Although the legislature sought to "create new employment opportunities," the legislature did not limit its intent to create these opportunities inside California. Such an intent could arguably be inferred, however. But it is unlikely that a court would have leaned on such a slender reed to support invalidating the California RPS. And although the next sentence provides that the RPS's goal is to "ameliorate air quality problems throughout the state," this does not constitute the type of "protectionist rhetoric" that courts look for in ascertaining a discriminatory purpose. This language merely indicates that the state seeks to benefit its citizens' public health, not that it seeks to discriminate against other states. Every piece of state legislation seeks to benefit in-state interests to some extent. Thus, without some indication that the legislature sought to benefit in-state interests at the expense of other states, a court should not apply strict scrutiny based on discriminatory purpose.

Despite the innocuous language in the original RPS legislation (which remained the same after the 2006 amendments), the state changed the legislative purpose in 2011 with SB X1-2. The legislature declared that achieving the RPS was intended "to provide unique benefits to California, including all of the following, each of which independently justifies the program:

- (1) Displacing fossil fuel consumption within the state.
- (2) Adding new electrical generating facilities in the transmission network within the Western Electricity Coordinating Council service area.
- (3) Reducing air pollution in the state.
- (4) Meeting the state's climate change goals by reducing emissions of greenhouse gases associated with electrical generation.

³⁰⁵ See S.B. 1078, ch. 516, sec. 3, art., 16 § 399.11(b), (c) (Cal. 2002); S.B. 107, ch. 464, sec. 13, § 399.11(b), (c) (Cal. 2006). Subsections (a) and (d) merely declare the legislature's intent to implement the RPS program and its intent that the RPS complement existing renewable energy programs.

³⁰⁶ S.B. 1078, § 399.11; S.B. 107, § 399.11.

 $^{^{307}\;}$ S.B. 1078, § 399.11; S.B. 107, § 399.11.

³⁰⁸ See, e.g., S.D. Farm Bureau, Inc. v. Hazeltine, 340 F.3d 583, 594 (8th Cir. 2003) (quoting SDDS, Inc. v. South Dakota, 47 F.3d 263, 268 (8th Cir. 1995)). In *Hazeltine*, the Eighth Circuit found a discriminatory purpose when the legislature reports had emphasized that without the passage of certain legislation, "[d]esperately needed profits will be skimmed out of local economies and into the pockets of distant corporations." *Id.* Consistent with *Hazeltine*, courts have mainly found discriminatory purpose when the state seeks to foster economic development, not public health benefits, in the state. See, e.g., Bacchus Imports, Ltd. v. Dias, 468 U.S. 263, 270–71 (1984) (finding a discriminatory purpose because "the exemption of 'fruit wine manufactured in the State from products grown in the State' was intended 'to help' in stimulating 'the local fruit wine industry'").

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- (5) Promoting stable retail rates for electric service.
- (6) Meeting the state's need for a diversified and balanced energy generation portfolio.
- (7) Assistance with meeting the state's resource adequacy requirements.
- (8) Contributing to the safe and reliable operation of the electrical grid, including providing predictable electrical supply, voltage support, lower line losses, and congestion relief.
- (9) Implementing the state's transmission and land use planning activities related to development of eligible renewable energy resources.

Although the new language seems more susceptible to challenge because it seeks to provide "unique" benefits to California, ³¹⁰ it is still likely insufficient to show a discriminatory purpose because there is no discussion of accomplishing these benefits at the expense of other states. Importantly, SB X1-2 appears to have removed the language in the RPS statute discussing creation of jobs. ³¹¹

Even though the new language fails to show a discriminatory purpose, the legislature was keenly aware of the danger of indicating a purpose focused on in-state economic benefits, and expressly sought to disclaim any questionable intent by declaring several findings showing out-of-state benefits. In the same section of the statute, the legislature declared that "[t]his electricity may be generated anywhere in the interconnected grid that includes many states, and areas of both Canada and Mexico." Moreover, it expressly required that "generating resources located outside of California, but . . . able to supply that electricity to California end-use customers . . . be treated identically to generating resources located within the state, *without discrimination*."

Finally, in a statement that seemed to be directly aimed at undermining dormant Commerce Clause challenges, the legislature declared a number of factual findings regarding the current inclusion of out-of-state generation in its RPS scheme:

California electrical corporations have already executed, and the commission has approved, power purchase agreements with eligible renewable energy resources located outside of California that will supply electricity to California end-use customers. These resources will fully count toward meeting the renewables portfolio standard procurement requirements. In addition, there are nearly 7,000 megawatts of additional proposed renewable energy resources located outside of California that are awaiting interconnection approval from the Independent System Operator. All of these resources, if procured, will

 $^{^{309}}$ S.B. X1-2, ch. 1, sec. 13, § 399.11(b) (Cal. 2011) (codified at CAL. Pub. Util. Code § 399.11(b)).

³¹⁰ *Id.*

³¹¹ Compare id., with S.B. 107, ch. 464, sec. 13, § 399.11(b) (Cal. 2006).

 $^{^{312}~}$ S.B. X1-2, sec. 13, § 399.11(e)(1) (codified at Cal. Pub. Util. Code § 399.11(b) (2013)).

 $^{^{313}}$ $\,$ Id. \S 399.11(e)(2) (emphasis added).

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count as eligible renewable energy resources that satisfy the portfolio content requirements of paragraph (1) of subdivision (c) of Section 399.16. 314

This language, which expressly recognizes the out-of-state benefits of the RPS, is probably more than sufficient to prevent a finding of discriminatory purpose. However, the declared even-handedness of the legislation depends on the actual function of section 399.16(c)(1), which Cowlitz County has argued is discriminatory due to insufficient guidelines on how out-of-state generators can qualify for (c)(1) compliance, which will comprise 75% of California's required renewable generation after 2016. Cowlitz is arguing, in other words, that the absence of guidelines for out-of-state generators discriminates in favor of in-state producers.

C. Rocky Mountain Farmers: Challenging the Low Carbon Fuel Standard

There has not yet been any litigation in court directly against the California RPS statute or regulations, but pending Ninth Circuit cases involving other California environmental regulations may reveal how a potential RPS challenge would play out in the courts. Two court challenges to regulations adopted by the California Air Resources Board (CARB) to implement the California Global Warming Solutions Act of 2006 (AB 32) have recently reached the Ninth Circuit. In *Rocky Mountain Farmers*, the Eastern District of California determined that California's regulations implementing a Low Carbon Fuel Standard both discriminated against interstate commerce and impermissibly regulated extraterritorially in violation of the dormant Commerce Clause. 318

1. The LCFS and the District Court's Reasoning

In 2006, California passed the AB 32, which set goals to reduce greenhouse gas (GHG) emissions in California to 1990 levels by 2020. The Act gave CARB the responsibility of developing regulations to achieve these goals. CARB's implementing regulations focused on the lifecycle carbon

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³¹⁴ *Id.* § 399.11(e)(3).

³¹⁵ *Id.* at sec. 22, § 399.16(c)(1) (codified at CAL. PUB. UTIL. CODE § 399.16(c)(1)).

³¹⁶ See Notice of Ex Parte Communications of Southern California Edison Company (U 338-E), at 1–2, part of CPUC Rulemaking 11-05-005 (Dec. 16, 2011). This claim raises an interesting question of law regarding what the "text" is that might be deemed facially discriminatory: the statute, the regulations, or the absence of either? The Rocky Mountain Farmers case presents a similar issue regarding a single Low Carbon Fuel Standard Table adopted through the regulations implementing the statute. Although the method used to develop the Table may not be facially discriminatory, do the labels on the Table make it so? See Rocky Mountain Farmers II, 843 F. Supp. 2d 1071, 1081–82 (E.D. Cal. 2011).

³¹⁷ Ass'n of Irritated Residents v. Cal. Air Resources Board, 206 Cal. App. 4th 1487 (2012); *Rocky Mountain Farmers II*, 843 F. Supp. 2d at 1079.

³¹⁸ Rocky Mountain Farmers II, 843 F. Supp. 2d at 1078–79.

 $^{^{319}}$ *Id.* at 1079.

³²⁰ Id.

intensity of specific fuels. ³²¹ Specifically, CARB developed a Low Carbon Fuel Standard (LCFS) Table assigning specific carbon intensities to fuels based on the amount of GHGs that would be directly or indirectly emitted over its entire lifecycle from production, delivery, distribution, to the ultimate use by the consumer. ³²² The program was designed to curb GHG emissions by requiring regulated parties to meet annual standards aimed at lowering the carbon intensity of transportation fuels. The Table assigned "more favorable carbon intensity values to California corn-derived ethanol than to Midwest corn-derived ethanol."

Midwest ethanol producers sued to enjoin CARB officials from enforcing the LCFS, alleging that the policy: 1) constituted discrimination of interstate commerce, 2) amounted to extraterritorial regulation of interstate commerce, and 3) placed excessive burdens on interstate commerce under the *Pike* balancing test.³²⁴ The district court agreed.³²⁵

Before discussing whether discrimination was present, the court determined that Congress had not expressly delegated the ability to discriminate against interstate commerce to California under the Clean Air Act. "As the only state to have adopted emissions standards prior to March 30, 1966, California enjoys special consideration under the Clean Air Act." In fact, the Clean Air Act authorizes California to regulate "all fuels and fuel additives for the purposes of motor vehicle emissions control" even though other states' air quality regulations are preempted. The defendants argued that this exemption from preemption showed that "Congress directly authorized California to regulate a significant aspect of interstate commerce"; that "Congress was keenly aware that allowing, and in fact, encouraging California to set stricter emission standards would affect interstate commerce"; and that "Congress explicitly granted California the authority to regulate fuels knowing full well that it would have effects on

 $^{^{321}}$ Id. at 1080–81.

³²² *Id.* at 1081.

³²³ *Id.* The rationale underlying CARB's lifecycle analysis is that some methods of ethanol production and/or transport result in higher lifecycle carbon emissions than do other methods. Therefore, each gallon of ethanol has an amount of "carbon intensity" that results in different levels of greenhouse gas reductions. Those methods that employ high levels of fossil fuels (e.g., for production or transport) actually result in more greenhouse gas emissions than those methods that employ lower levels of lifecycle fossil fuels (or lower carbon-intensity fuels, such as natural gas, rather than coal-fired electricity). Generally, the result was that ethanol produced in California (which relies less on coal than ethanol produced in the Midwest) and therefore not transported significant distances (i.e., from the Midwest to California) had lower carbon intensities in the Table. According to Jocelyn Thompson, of the law firm Alston & Bird, the net result is approximately a 10% disadvantage for Midwest ethanol compared to California ethanol in terms of carbon intensity. Jocelyn Thompson, Partner, Alston & Bird, California State Bar Environmental Law Conference (Oct. 26, 2012).

³²⁴ Rocky Mountain Farmers II, 843 F. Supp. 2d at 1078.

³²⁵ *Id.* at 1078–79.

³²⁶ Rocky Mountain Farmers Union v. Goldstene (*Rocky Mountain Farmers I*), 843 F. Supp. 2d 1042, 1047 (E.D. Cal. 2011).

³²⁷ Id. at 1050.

³²⁸ *Id.* at 1069.

interstate commerce."³²⁹ Nevertheless, the court determined that "Congress must do more than simply authorize a State to regulate in an area" in order to exempt it from the dormant Commerce Clause.³³⁰ As the Supreme Court had stated, "A federal statute that merely exempts state law from the preemptive effect of another federal provision does not authorize a violation of the Commerce Clause."³³¹ Thus, the defendants had failed to meet their burden of demonstrating that Congress had a clear and unambiguous intent to remove federal constitutional constraints.³³²

Having determined that California was not exempt from the dormant Commerce Clause, the court concluded that strict scrutiny applied because the statute was discriminatory. The LCFS facially discriminated against interstate commerce, the court reasoned, by assigning less-favorable carbon intensity values to corn ethanol produced in the Midwest than the values assigned to California fuels.³³³ The court emphasized that "the ethanol varieties made in the Midwest and California are physically and chemically identical."³³⁴ However, "the carbon intensities of these two otherwise-identical products are different according to lifecycle analysis" because of "the transportation, the different farming methods used, and the different types of electricity provided to and used by the plants."³³⁵ Nevertheless, the differential treatment was impermissible because it was "based on transportation and out-of-state electricity—both factors that discriminate based on location."³³⁶

Additionally, the court determined that the LCFS was subject to strict scrutiny because it controls extraterritorial conduct. The dormant Commerce Clause invalidates state statutes that "directly control[] commerce occurring wholly outside the boundaries of a State." Courts do not only look to the plain language of the statute; "[t]he critical inquiry is whether the practical effect of the regulation is to control conduct beyond the boundaries of the State." To determine if the practical effect is to control extraterritorial commerce, court consider "how the challenged statute may interact with the legitimate regulatory regimes of other States and what effect would arise if not [just] one, but many or every, State adopted similar legislation."

According to the district court, the LCFS "regulate[s], among other things, deforestation in South America, how Midwest farmers use their

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329 Id.
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³³⁰ Id

 $^{^{331}\,}$ Id. at 1069–70 (quoting New England Power Co. v. New Hampshire, 455 U.S. 331, 341 (1982)).

³³² Id. at 1069.

³³³ Rocky Mountain Farmers II, 843 F. Supp. 2d 1071, 1088–89 (E.D. Cal. 2011).

³³⁴ *Id.* at 1088.

³³⁵ Id.

³³⁶ *Id.* at 1089.

³³⁷ Id. at 1090.

³³⁸ Id. (citing Healy v. Beer Inst. Inc., 491 U.S. 324, 336 (1989)).

³³⁹ Id. (citing Healy, 491 U.S. at 336).

³⁴⁰ *Id.* (citing *Healy*, 491 U.S. at 336).

land, and how ethanol plants in the Midwest produce animal nutrients."³⁴¹ The defendants argued that out-of-state effects were indirect rather than direct because the regulation merely created market forces and because the LCFS did not require reduction of carbon intensity or changes in production or distribution. ³⁴² Still, the court focused on the lifecycle analysis required to determine carbon intensity. California was "attempting to . . . reduce . . . emissions from the entire pathway," including farming practices and land use. ³⁴³ This gave an incentive for producers to adopt production methods that resulted in lower emissions. ³⁴⁴ Thus, the LCFS impermissibly attempted to control conduct outside the state. ³⁴⁵ The defendants could not take the "legal and political responsibility" of commerce occurring outside of California, even if the products of that commerce ultimately are sold in California."

The court bolstered its conclusion on extraterritoriality by determining that the statute potentially would conflict with legitimate regulatory regimes that other states might enact. "Generally . . . the Commerce Clause protects against inconsistent legislation arising from the projection of one state regulatory regime into the jurisdiction of another State." According to the court, ethanol producers "would be hard-pressed to satisfy the requirements of 50 different LCFS regulations which may [require] 50 different levels of reductions over 50 different time periods."

Finally, the court determined that strict scrutiny applied because the LCFS "impermissibly regulates the channels of interstate commerce" by requiring approval of changes in the fuel's transportation method, including "rail with truck or ship transport," with CARB before giving credits to the producer. The regulation "'forc[es] a merchant to seek regulatory approval in one State before undertaking a transaction in another,' causing the LCFS to 'directly regulate[] interstate commerce."

Having determined that strict scrutiny applied, the court proceeded to invalidate the LCFS. Although the court determined that the LCFS served a legitimate local purpose, it also concluded that the defendants failed to establish that it could not be served through other nondiscriminatory means, such as an LCFS without the discriminatory components or a tax on fossil

³⁴¹ *Id.* at 1090–91.

³⁴² *Id.* at 1091.

³⁴³ In

³⁴⁴ *Id.* Based on the government's Petroleum Administration for Defense Districts (PADDs), only 0.8% of all ethanol in the United States is produced on the West Coast or in Alaska or Hawaii—while 94% is produced in the Midwest. Jocelyn Thompson, Partner, Alston & Bird, California State Bar Environmental Law Conference (Oct. 26, 2012) (citing 75 Fed. Reg. 14670, 14745 fig.IV.B.1-2 (Mar. 26, 2010)).

³⁴⁵ Rocky Mountain Farmers II, 843 F. Supp. 2d at 1091.

 $^{^{346}}$ *Id.* at 1092.

³⁴⁷ Id.

³⁴⁹ *Id.* at 1092–93.

³⁵⁰ Id. at 1092.

 $^{^{351}}$ $\emph{Id.}$ (quoting Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth., 476 U.S. 573, 582 (1986)).

fuels.³⁵² The defendants argued that the tax was not politically feasible and therefore was not an acceptable alternative. The court rejected this argument in a separate opinion, stating that the fact "[t]hat the tax would be difficult to pass does not establish that it is an unreasonable alternative to the LCFS." Because California failed to establish that less discriminatory means were not available, the LCFS could not survive strict scrutiny and it was invalid under the dormant Commerce Clause.

2. The Court Misapplied the Extraterritoriality Principle and Failed to Recognize Congress's Intent Under the Clean Air Act Exemption

At least one scholar has argued that the court misapplied the extraterritoriality principle by "incorrectly equat[ing] control with influence" as shown by a comparison of two Supreme Court cases discussing the extraterritoriality principle. ³⁵⁴ In *Healy v. Beer Institute*, ³⁵⁵ a case that *Rocky* Mountain Farmers cites, the Supreme Court invalidated a Connecticut law prohibiting a company from changing its alcohol prices in other states.³⁵⁶ To the Healy court, "[c]ontrol . . . meant one state effectively dictated a product's price in the other states."357 In contrast, in Pharmaceutical Research & Manufacturers of America v. Walsh (Pharmaceutical Research), 358 the Supreme Court determined that a Maine statute did not impermissibly regulate outside a state's borders.³⁵⁹ The Maine statute in that case "prevented pharmaceutical companies from selling their products in the state unless they agreed to participate in a rebate program or their drugs were approved through a process known as a 'prior authorization." The Supreme Court determined that the statute "does not regulate the price of any out-of-state transaction, either by its express terms or by its inevitable effect. Maine does not insist that manufacturers sell their drugs to a wholesaler for a certain price." Thus, post-Pharmaceutical Research "it is clear that Healy was meant to apply to laws that dictated or effectively dictated prices of transactions in other states."362

The comparison between *Healy* and *Pharmaceutical Research* shows that the LCFS does not violate the extraterritoriality principle by controlling transactions outside the state as the statute in *Healy* did. The LCFS has "the practical effect of incentivizing different behavior, but it places no controls

³⁵² *Id.* at 1093–94.

³⁵³ Rocky Mountain Farmers Union v. Goldstene (*Rocky Mountain Farmers III*), Nos. CV-F-09-2234-LJO-DLB, CV-F-10-163-LJO-DLB, 2011 WL 6936368, at *16 (E.D. Cal. Dec. 29, 2011).

³⁵⁴ Robert L. Molinelli, *Renewable Energy Development: Surviving the Dormant Commerce Clause*, Renewable, Alternative, and Distributed Energy Resources Committee Newsletter (ABA Section of Env't, Energy, and Res.), Sept. 2012, at 5.

³⁵⁵ 491 U.S. 324 (1989).

³⁵⁶ Molinelli, *supra* note 354, at 5 (citing *Healy*, 491 U.S. at 326).

³⁵⁷ Id.

^{358 538} U.S. 644 (2003).

³⁵⁹ See Molinelli, supra note 354, at 5–6 (citing Pharmaceutical Research, 538 U.S. at 669).

³⁶⁰ Id. (citing Pharmaceutical Research, 538 U.S. at 669).

Pharmaceutical Research, 538 U.S. at 669.

³⁶² Molinelli, *supra* note 354, at 6.

on extraterritorial sales. It merely offers advantages to producers that comply with certain production standards."363 However, a fine line exists between strong incentives and actual control. As the Rocky Mountain court recognized, courts should look not to the language of a statute, but to the practical effect of the statute on out-of-state commerce in order to determine whether it is permissible under the extraterritoriality principle.³⁶⁴ Regardless, the California LCFS cannot be said to constitute "control" of outof-state transactions by any stretch of the word. For one, the court made no findings that it would no longer be profitable to produce ethanol except under California's specifications. Certainly, an ethanol producer may become somewhat less competitive in the California market if it adopts land use practices that fail to mitigate carbon emissions. But the fact that a regulation reduces a producer's competitive advantage does not mean that it controls the producer's conduct. Such market effects are "indirect," whereas the dormant Commerce Clause requires "direct" control over out-of-state commerce before a law is unconstitutional. Because an ethanol producer still has meaningful choice in adopting California's specifications, the LCFS cannot be said to constitute extraterritorial control.

Further, the court erred in determining that the LCFS regulated commerce "wholly outside" the state's borders. Although the court recognized that a number of transactions outside the state's borders would be affected—such as those concerning land use—these transactions cannot be said to be "wholly outside" the state's borders because they are, in the end, a part of the larger chain of commerce providing ethanol products inside California.³⁶⁵ Regulating practices affecting the production of a product to be sold inside a state cannot be said to violate the dormant Commerce Clause. A state's power to control production practices is assumed under its power to control the type of product that is marketed within the state.³⁶⁶ For example, the state in which a food product is sold must have the ability to restrict or regulate the production of the food or else it would have little ability to protect the health of its citizens. A state should not be forced to accept beef that is produced out-of-state with the use of harmful chemicals or feeding practices simply because this would influence out-of-state transactions.³⁶⁷ Rather, the fact that the beef is ultimately sold in

³⁶³ Id

³⁶⁴ See Rocky Mountain Farmers II, 843 F. Supp. 2d 1071, 1085–92 (E.D. Cal. 2011).

³⁶⁵ Molinelli, *supra* note 355, at 5.

³⁶⁶ See, e.g., Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 470–74 (1981) (upholding a state statute banning retail sale of milk in plastic nonreturnable, nonrefillable containers because the incidental burden imposed on interstate commerce was not clearly excessive in relation to the putative local benefits).

³⁶⁷ Unless, of course, Congress has preempted state regulation by occupying the field under the Supremacy Clause. *See, e.g.*, Nat'l Meat Ass'n v. Harris, 132 S. Ct. 965, 975 (2012) (holding that the Federal Meat Inspection Act preempts a California law regulating the handling and treatment of nonambulatory pigs in slaughterhouses). For an extensive analysis of preemption doctrine in the context of California's special exemptions under the Clean Air Act, see Green Mountain Chrysler Plymouth Dodge Jeep v. Crombie (*Green Mountain*), 508 F. Supp. 2d 295, 354–55 (D. Vt. 2007).

the state should be enough to render the extraterritoriality rule inapplicable. When the product is sold in the state, it is the in-state transaction that the state is regulating, even when regulation of the in-state transaction affects production practices occurring "wholly outside" the state. One way to make this completely clear is for the reviewing court to adopt a test under which "incidental" transactions occurring outside a state may be regulated by the state when the "primary" transaction occurs in the state.

Even if the Rocky Mountain Farmers court had been correct in interpreting the breadth of the extraterritoriality principle, it still should have recognized an express delegation from Congress—through the Clean Air Act³⁶⁸—sufficient to immunize California's LCFS from dormant Commerce Clause scrutiny. Although the court correctly determined that Congress's exemption from preemption does not automatically constitute a waiver of the dormant Commerce Clause requirements, 369 it failed to go beyond and consider Congress's specific intent in enacting the Clean Air Act exemption. Through this enactment, Congress recognized California's leadership in the area of regulating emissions.³⁷⁰ Indeed, Congress permitted other states to adopt California standards instead of national standards.³⁷¹ At one point, the EPA in fact sought to require other states to adopt certain clean air provisions that California had adopted. 372 It is true that Congress did not specifically state that this provision would operate to exempt California from dormant Commerce Clause scrutiny, but in practical effect, the provision would be meaningless without just such an exemption. Any regulation of motor vehicle emissions in the state would necessarily affect interstate commerce both because of the ability of cars to travel interstate and because most cars sold in California are produced out-of-state. Thus, recognizing an express delegation in this instance is necessary to give effect to Congress's intent in adopting exemption under the Clean Air Act. 373

³⁶⁸ 42 U.S.C. § 7543(b), (e) (2006).

³⁶⁹ "To authorize a Commerce Clause violation, Congress must do more than simply authorize a State to regulate in an area, it must 'affirmatively contemplate otherwise invalid state legislation' and clearly express its intent to 'remove federal constitutional constraints.'" Rocky Mountain Farmers Union v. Goldstene, 719 F. Supp. 2d 1170, 1195 (E.D. Cal. 2010) (quoting South-Central Timber Dev., Inc. v. Wunnicke, 467 U.S. 82, 91 (1984); Sporhase v. Nebraska ex rel. Douglas, 458 U.S. 941, 960 (1982)).

³⁷⁰ See Green Mountain, 508 F. Supp. 2d at 344, 394.

³⁷¹ *Id.* at 344 n.52, 355, 394.

³⁷² In 2009, EPA initiated rulemaking to effectively adopt California's motor vehicle standards as federal standards. *See* Proposed Rulemaking to Establish Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards, 74 Fed. Reg. 49,454 (Sept. 28, 2009).

³⁷³ There may be another basis on which the court should have upheld the LCFS. The Supreme Court has recognized that a state could regulate the transportation of a substance if its "very movement... into or through [the state] endangers health." Philadelphia v. New Jersey, 437 U.S. 617, 629 (1978). The Court rejected application of the quarantine exception in *Philadelphia v. New Jersey* because "[t]he harms caused by waste are said to arise after its disposal in landfill sites, and at that point, as New Jersey concedes, there is no basis to distinguish out-of-state waste from domestic waste. If one is inherently harmful, so is the other." *Id.* The regulation of carbon intensity, however, fits the quarantine exception more appropriately because it is the movement and transportation of the fuel that causes additional

3. Implications for State RPSs

The *Rocky Mountain Farmers* decision poses a number of challenges for states seeking to defend their RPSs from constitutional attacks. First, the *Rocky Mountain Farmers* court's broad interpretation of the extraterritoriality principle could harm RPSs. Second, the court's focus on the regulation of the channels of interstate commerce could invalidate California's specified dynamic transfer requirement for Category 1 RPS compliance. Third, by rejecting the differential treatment of identical products, the court's decision also implicates RPSs that treat identical energy products differently based on the production methods.

a. Extraterritoriality Concerns

Although the California RPS is less likely to constitute facial discrimination because it does not ostensibly classify products based on origin, like *Rocky Mountain Farmers*, it may be subject to attack based on the extraterritoriality principle. However, the application of *Rocky Mountain Farmers* could be limited to the specific factual circumstances when a state seeks to give incentives to producers, none of whom are within the state. As one author has pointed out, "California did not produce ethanol. Therefore, the law, which favored ethanol produced a certain way, had the effect of regulating out-of-state ethanol producers." If *Rocky Mountain Farmers* can be limited in this way, then it would not affect state RPSs because an "RPS affects energy generators with plants inside—as well as outside—[the state's] borders." However, the *Rocky Mountain Farmers* court did not explicitly base its reasoning on the lack of a California ethanol industry.

Another potential way to limit *Rocky Mountain Farmers* is to focus on the comprehensiveness of the lifecycle analysis in that case. Because the regulation took into account the entire lifecycle of the fuel, including steps in its production that occurred wholly out-of-state, the regulation was especially susceptible to extraterritoriality concerns.³⁷⁶ An RPS, in contrast, would regulate neither land use nor intermediate steps in production of the energy. Whereas farming practices and the energy mix used to produce ethanol in the Midwest affected the carbon intensity score for Midwest

harm to the environment and thus the health of citizens by creating additional carbon emissions. Thus, although the quarantine exception to the dormant Commerce Clause usually applies to inherently harmful things such as diseased persons, animals, or foods, the rationale behind the exception could be applied in the context of carbon intensity regulations. This is because the transportation of the substance—here, the ethanol—is in itself harmful, the only way for a state to effectively prevent the harm is to regulate its transportation. The state's regulations will not appropriately address the harm unless they account for the distance of travel, and this type of regulation will necessarily reach into interstate commerce. The quarantine rationale, however, is much less likely to affect the constitutionality of state RPSs because there is no innate harm in transporting electricity across state lines.

³⁷⁴ Havemann, supra note 155, at 882.

³⁷⁵ Id

 $^{^{376}\}$ Rocky Mountain Farmers II, 843 F. Supp. 2d 1071, 1078–79 (E.D. Cal. 2011).

ethanol, the California RPS and Colorado RES merely regulate one aspect of the method of energy production (i.e., whether the production qualifies as renewable). Still, the *Rocky Mountain Farmers* court emphasized that the LCFS provided an incentive for parties to adopt certain production methods outside the state. An RPS similarly creates an incentive to use certain types of energy production methods that qualify as renewable. Energy producers outside California will have greater incentives under California's RPS to use solar and wind production methods rather than natural gas and coal production. Thus, a broad interpretation of the extraterritoriality principle in *Rocky Mountain Farmers* could pose a concern for RPSs.

In discussing the extraterritorial application of the LCFS, the court also emphasized the potential conflicts between state laws and the LCFS. The court evaluated "how the challenged statute may interact with the legitimate regulatory regimes of other States and what effect would arise if not one, but many or every, State adopted similar legislation." If this reasoning can be used to invalidate the LCFS, which did not have other analogues in other states, then it certainly can be used to invalidate an RPS. Because at least thirty states and the District of Columbia have adopted an RPS, 380 there is a greater concern for conflict between state law RPS regimes than there was with California's isolated LCFS.

There are a number of ways that state RPSs might conflict. RPSs could (and often do) use different definitions for renewable energy—some types of energy could qualify for compliance in some states but not others. Further, RPSs could define RECs differently and create different regimes for REC recording and extinguishment. Indeed, it may be impossible for a renewable energy provider to comply with all REC regimes. California's dominance in the market for renewable energy due to its ambitious RPS of 33%, and its large consumption of energy, will likely result in renewable energy developers favoring compliance with the California system over compliance with other RPSs and REC regimes. Thus, California's regulations will likely eclipse those of other states as renewable energy providers seek to comply with California's requirements and neglect other standards.

³⁷⁷ The LCFS regulation may have been less vulnerable to a facial discrimination challenge if the LCFS Table had been labeled to reflect different carbon intensity values based on lifecycle analysis (e.g., transport distance) rather than labeled explicitly as "Midwest" and "California" ethanol. The distinction between the method and the tabular results of applying the method, and whether only the latter represents facial discrimination, is unsettled. This is especially apparent when the legislation, regulation, and method are clearly not pretextual for an unconstitutional discriminatory purpose. See id. at 1081–82.

³⁷⁸ Id. at 1091.

 $^{^{379}}$ $\,$ Id. at 1092 (quoting Healy, 491 U.S. 324, 336 (1989)).

³⁸⁰ U.S. Energy Info. Admin., supra note 9.

 $^{^{381}}$ See, e.g., PJM EIS, Comparison of Renewable Portfolio Standards (RPS) Programs in PJM States 5 (2013), available at http://www.pjm-eis.com/documents.aspx.

³⁸² California Renewable Energy Resources Act, S.B. X1-2, 1st Ext. Sess. (Ca. 2011).

³⁸³ U.S. Energy Info. Admin., *State Profiles and Energy Estimates*, http://www.eia.gov/beta/state/seds/data.cfm?incfile=sep_sum/html/rank_use_gdp.html (last visited Apr. 7, 2013) (showing that California consumes 7,825.7 trillion BTUs of energy per year, making it the second most energy consumptive state in the U.S.).

On the other hand, California's RPS structure does not actually require anything unless the generator or producer wants to take advantage of the California system and sell renewable energy or RECs in California. Thus, California's system arguably does not interfere with other states' regimes

because a renewable energy provider could easily choose to ignore California's requirements and simply submit renewable energy for compliance with another RPS. Nothing in California's RPS requires a

provider in another state to meet California's REC specifications.

Nevertheless, the LCFS did not prevent an out-of-state ethanol producer from complying with other state regimes or requirements. In-state requirements on distributors created a high market demand for cleaner ethanol, thus creating an incentive for out-of-state producers to comply with California's LCFS regime—but the court determined that this incentive alone was enough to violate the dormant Commerce Clause. Specifically, the court determined that California's regulation "seeks to reach beyond its borders to interfere with those States' decisions related to their individual electricity policies."384 Although the court stated that "[e]thanol producers and suppliers would be hard-pressed to satisfy the requirements of 50 different LCFS regulations which may [require] 50 different levels of reductions in over 50 different time periods,"385 the LCFS did not actually require anything—rather, it merely created market incentives for out-of-state suppliers to produce ethanol in a certain way. Similarly, that the RPS does not actually require a producer to comply with California law may not save it from a dormant Commerce Clause violation under Rocky Mountain Farmers because these economic incentives might be enough to conflict with other states' policy decisions. It is worth noting that the Rocky Mountain Farmers court did not actually require a showing of inconsistent regulations in other states. Rather, it merely recognized a "danger that inconsistent legislation, if adopted by sister states, would cause significant problems to the ethanol market."386 Thus, under the Rocky Mountain Farmers interpretation, a state need not actually adopt legislation that conflicts with another state's law; there need only be a possibility of conflict. Such an open-ended standard creates considerable concerns for the constitutionality of RPSs because of the myriad ways that other states can regulate and incentivize renewable energy development, which in turn could create substantial potential conflicts.

b. Regulation of the Channels of Interstate Commerce

The Rocky Mountain Farmers court's emphasis on regulating the channels of interstate commerce may pose another hurdle for California's RPS. By specifying the exact mechanism—namely, dynamic transfer—by which electricity must be transmitted to the California grid to qualify for

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³⁸⁴ Rocky Mountain Farmers II, 843 F. Supp. 2d at 1093.

³⁸⁵ Id. at 1092-93.

 $^{^{386}}$ Id. at 1093 (emphasis added).

Category 1 compliance, 387 California is selecting how the electricity is transported to the state just as CARB required documentation of how fuel and feedstock were transported to California to obtain credits under the LCFS. For example, replacing "rail with truck or ship transport" was a material change in transportation that would have required CARB approval to qualify for credits under the LCFS.³⁸⁸ Arguably, the California RPS is even more restrictive because it does not just require documentation and approval—rather, it actually specifies only one method of energy transportation that can qualify for Category 1 compliance. 389 Interestingly, the Cowlitz complaint argues that California is doing just this—regulating the channels of interstate commerce by specifying an exact method for them to transfer energy so as to qualify for Category 1 compliance. 390 Cowlitz alleges that failure to specify an exact method of energy transportation is discriminatory because the resulting uncertainty burdens out-of-state producers.³⁹¹ Thus, California faces a catch-22: if it regulates the channels of interstate commerce, it will arguably violate the dormant Commerce Clause. However, if California fails to regulate the channels of interstate commerce and provide a specific method by which out-of-state producers can transmit energy to California, the resulting uncertainty creates a discriminatory effect due to the uncertainty of Category 1 compliance. Thus, California may face a dormant Commerce Clause violation one way or the other.

c. Differential Treatment of Substances of Identical Composition

The *Rocky Mountain Farmers* decision focuses heavily on the differential treatment of identical substances. The court emphasized that "the ethanol varieties made in the Midwest and California are physically and chemically identical when ultimately mixed with petroleum." The court further pointed out that the "point of the LCFS is to penalize the differences between the California and Midwest ethanol" including differences in production methods such as the "different farming methods used." Although the court did not seem to base its ultimate invalidation of the LCFS on this consideration, the court's emphasis on the identical chemical composition of the regulated products creates concerns for renewable energy regulation. An RPS can be construed as penalizing different energy production methods even though the product (the energy itself) is identical. If the *Rocky Mountain Farmers* court's decision can be interpreted to mean that identical substances must not have differential treatment despite different production practices, state RPSs will face a significant obstacle.

³⁸⁷ See supra note 271–74 and accompanying text.

 $^{^{388}}$ $\,$ $Rocky\,Mountain\,Farmers\,I\!I\!,\,843$ F. Supp. 2d at 1092.

³⁸⁹ See supra text accompanying note 281.

³⁹⁰ See supra text accompanying notes 286–90.

See supra text accompanying notes 288–91.

³⁹² Rocky Mountain Farmers II, 843 F. Supp. 2d at 1088.

³⁹³ Id.

D. The Ninth Circuit's Rationale in Pacific Merchant Supersedes Rocky Mountain Farmers

While the district court in *Rocky Mountain Farmers* was deciding that the LCFS was unconstitutional, the Ninth Circuit reached the opposite conclusion in *Pacific Merchant*.³⁹⁴ In that case, the court considered another CARB regulation requiring ocean vessels to use low-sulfur fuel while operating within twenty-four nautical miles of the coastline. The goal of CARB's "Vessel Fuel Rules" is to reduce emissions of dangerous pollutants and thereby promote public health.³⁹⁵ As discussed below, the Ninth Circuit's approach in *Pacific Merchant* provides a more favorable framework for upholding state RPS legislation.

1. The Ninth Circuit's Reasoning in Pacific Merchant

Whereas the *Rocky Mountain Farmers* court merely addressed discrimination and extraterritoriality, the *Pacific Merchant* court also addressed the constitutionality of the Vessel Fuel Rules under the *Pike* balancing test. First, the court summarily dismissed the notion that the Vessel Fuel Rules in some way discriminated against interstate commerce. The court explained that the purpose was not discriminatory because "the central purpose of the Vessel Fuel Rules is to protect the health and wellbeing of the state's residents from the harmful effects of the fuel used by ocean-going vessels." Second, the court rejected the argument that it regulated extraterritorially. The Ninth Circuit determined that the Vessel Fuel Rules "do not apply to commercial activities occurring 'wholly outside' of the territorial limits of California." Rather, they "continue to govern the fuel use of ocean-going vessels traveling to and from California's ports while they are within the state's own territorial waters."

Having determined that strict scrutiny did not apply, the court considered the regulation under the *Pike* balancing test, examining the burden of the regulation on interstate commerce. The burden was "relatively light" because the cost of compliance—roughly \$30,000 per ship call—was nominal in comparison to the large cost of any ocean voyage. 401 In contrast, the state had an exceptional interest in the health of its citizens. The pollution caused by commonly used fuels exposed 27 million Californians (80% of the state's population) to "a number of harmful effects" including "cancer and respiratory illnesses like aggravated asthma as well as [an] increase[d]...risk of heart disease." Estimates from CARB stated that the

 $^{^{394}~}$ Pac. Merch. Shipping Ass'n v. Goldstene, 639 F.3d 1154, 1181–82 (9th Cir. 2011).

³⁹⁵ *Id.* at 1158.

³⁹⁶ *Id.* at 1179.

³⁹⁷ Id.

³⁹⁸ Id.

³⁹⁹ Id.

⁴⁰⁰ Id

⁴⁰¹ *Id.* at 1159, 1179.

⁴⁰² *Id.* at 1160.

vessels' direct emissions caused "300 premature deaths across the state every single year, even after excluding cancer effects." 403

The Ninth Circuit recognized that it was "dealing with an expansive and even possibly unprecedented state regulatory scheme." Nevertheless, "the severe environmental problems confronting California... are themselves unusual and even unprecedented." Although this statement at first seems most appropriate to the weighing of federal and state interests required under general admiralty and maritime law preemption principles, ⁴⁰⁶ the court cited a dormant Commerce Clause case in discussing California's "especially powerful interest in controlling the harmful effects of air pollution." Thus, when considered in light of California's powerful interests in the health of its citizens, the burdens on interstate commerce did not give rise to a determination of unconstitutionality.

2. How the Result in Pacific Merchant Undermines the Court's Reasoning in Rocky Mountain Farmers

California's victory at the Ninth Circuit in *Pacific Merchant* shows that *Rocky Mountain Farmers* was wrongly decided. Just as the Vessel Fuel Rules only applied to the ships in California's waters in *Pacific Merchant*, the LCFS in *Rocky Mountain Farmers* only applied to fuel that was sold in California. Unlike in *Rocky Mountain Farmers*, the *Pacific Merchant* court did not even inquire into whether the state law created incentives for parties to adopt different practices outside the state.

Still, there is some dicta in *Pacific Merchant* that could be used to support invalidation of the California LCFS. In *Pacific Merchant*, the Ninth Circuit stated that it was "not currently confronted with a state attempting to regulate conduct in . . . another state . . . (such as in . . . a hypothetical California regulatory scheme requiring automobiles driving from Arizona to switch to certain kinds of fuel 24 miles from the California border)." The court thus suggested that the hypothetical would likely invoke the dormant Commerce Clause's prohibition on extraterritorial regulation. And the regulation in the hypothetical is in some ways analogous to the LCFS. Granted, the LCFS does not require switching to a certain fuel outside of the state, but it does provide incentives to do so. The fuel used over the entire distance travelled in delivering ethanol is taken into account when determining the carbon intensity under the LCFS. Thus, the industry has a strong incentive to tailor the transportation of its ethanol to decrease the carbon intensity of the LCFS. If this incentive amounts to practical control,

⁴⁰⁴ *Id.* at 1181.

⁴⁰³ *Id.*

⁴⁰⁵ *Id.* at 1181–82.

⁴⁰⁶ See Ernest A. Young, Preemption at Sea, 67 GEO. WASH. L. REV. 273, 299–300 (1999).

⁴⁰⁷ Pacific Merchant, 639 F.3d at 1180–81 (citing Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440, 445–46, 448 (1960)).

⁴⁰⁸ Pacific Merchant, 639 F.3d at 1180.

⁴⁰⁹ CAL. CODE REGS. tit. 17, § 95486(a)(1)(D) (2013).

then the hypothetical in *Pacific Merchant* might be used to support the court's invalidation of the LCFS.

3. Other Potential Implications of Pacific Merchant on RPSs

The court's emphasis on the exceptional nature of California's interests arguably injects a new consideration into dormant Commerce Clause analysis. Thus far, the Supreme Court has merely required that a local interest be "legitimate" once it determined that strict scrutiny applied, 410 and has not yet inquired into the gravity of the interest in any circumstances under the dormant Commerce Clause. The Ninth Circuit's emphasis on California's exceptional interest in the health of its citizens seems to introduce a new element in dormant Commerce Clause jurisprudence. Under the Ninth Circuit's reasoning, where a state has an exceptionally powerful interest, such as its citizens' health, this should be factored into the calculus of whether the statute is constitutional under the dormant Commerce Clause. 411 This reasoning is in some ways supported by the Supreme Court's recognition of the quarantine exception, under which a state can exclude products in interstate commerce if the very movement of the product would cause harm to the state's citizens, such as adverse health effects.412

There is also a normative rationale for the Ninth Circuit's inquiry into the seriousness of the state's interest: some state interests should take precedence over the economic concerns at play in dormant Commerce Clause jurisprudence. The state should not be precluded from protecting the health and welfare of its citizens merely to avoid a balkanization effect on interstate commerce. A doctrinalist or textualist might bluntly argue that the Constitution commands that economic concerns take precedence over other concerns, but this rejoinder is especially unconvincing in light of the precarious origins of the dormant Commerce Clause. It is not based on the affirmative text of the Constitution—it is not an explicit constitutional command, but rather, a judicially implied doctrine.⁴¹³ It is a far stretch to say that the "negative implications" of the Commerce Clause should take precedence over such legitimate concerns as the health of a state's citizens.

Instead of taking precedence over state laws that manifest an "exceptional" state interest, the effect of the dormant Commerce Clause should be limited to the extent intended by the framers. Because the

⁴¹⁰ See supra note 32 and accompanying text.

⁴¹¹ See Pacific Merchant, 639 F.3d at 1160, 1182.

⁴¹² See supra note 374 and accompanying text. The Pacific Merchant court's discussion of the exceptional quality of the state's interest may merely show that it considered California's instate benefits to be substantial under the Pike balancing test, not that it was introducing a new factor into dormant Commerce Clause jurisprudence. In other words, the Ninth Circuit may have merely used different words to address the in-state benefits of California. Still, by emphasizing that the environmental concerns were "unusual and even unprecedented," the Ninth Circuit indicated that it was the type or quality of the interest that mattered, not only the quantity of benefits accruing in the state. Pacific Merchant, 639 F.3d at 1181–82.

 $^{^{413}\;}$ See supra notes 26–28 and accompanying text.

doctrine is implied, not express, it is appropriate for some state interests to take precedence over Commerce Clause restraints. A doctrine based on a "negative implication" should not give rise to the same level of scrutiny as Equal Protection and Due Process claims, which are rooted in the express language of the Constitution. The interests of a state in promoting the health of its citizens is at stake in air quality regulations, as well as in renewable energy mandates that aim to reduce reliance on dirtier fuels and combat the dire effects of climate change. Like the Vessel Fuel Rules in *Pacific Merchant*, the LCFS and RPS similarly protect the health of Californians from an "unusual and . . . unprecedented" environmental harm, and should therefore survive a dormant Commerce Clause challenge.

Further, it is appropriate for the level of scrutiny under a given doctrine to be associated with the strength and clarity of the constitutional command from which the doctrine arose. Because the dormant Commerce Clause is negatively implied, and not firmly rooted in the text of the Constitution as the Equal Protection or Due Process Clauses, a lower level of scrutiny would be appropriate. Indeed, it is intuitive that less exacting scrutiny be applied to laws implicating economic protectionism than the scrutiny applied to laws prohibiting discrimination based on race classifications.

Intermediate scrutiny, at most, is warranted. Environmental regulations under this standard would more easily survive constitutional scrutiny because the law would not need to be "narrowly tailored" to its legitimate goals. Rather, it would be enough that it substantially advance the goal. There is little question that RPSs substantially advance a state's environmental goals by requiring production of renewable energy. We discuss the test under intermediate scrutiny and how it should be tailored to apply to dormant Commerce Clause challenges to state RPS mandates in Part VI.

VI. IMPLICATIONS AND PRESCRIPTION

If the *American Tradition Institute* litigation results in the invalidation of the Colorado RES, other state RPSs will almost surely become vulnerable. Indeed, the *American Tradition Institute* plaintiffs confirmed their plan to pursue the strategy used in the Colorado case in subsequent litigation: "If we prevail in Colorado, the likelihood is that we will then move on to another state." As we have shown, however, any success by ATI in the federal district court of Colorado is unlikely to translate into similar success against California's RPS before the Ninth Circuit. Certainly, the effects of the Colorado litigation on other state RPSs will depend largely on the grounds upon which the court decides the case, as well as the specific structure of the state RPS legislation. If the court invalidates the statute solely based on the allegedly discriminatory language in the set-aside and multiplier

⁴¹⁴ Video Blog: Am. Tradition Inst., *American Tradition Institute Colorado Lawsuit, Part 3 – Possible Outcomes*, YouTube (Aug. 12, 2011), http://www.youtube.com/watch?v=5pmZrJvDh9A (last visited Apr. 7, 2013).

⁴¹⁵ See supra Part V.D.

provisions, then states may be able to avoid invalidation simply by excising such provisions from the statute, or redrafting the language in these provisions to avoid facial discrimination. Further, if multipliers and set-aside provisions are severable from state RPSs, states will have less to lose from a dormant Commerce Clause challenge. On the other hand, if the court accepts the plaintiffs' unlikely argument that the Colorado RES excessively burdens interstate commerce, then it will make it considerably more difficult for other states to avoid invalidation of their RPSs.

Because of the plain location-based classifications in the Colorado RES, the most likely ground for invalidation is facial discrimination. Scholars have offered several plausible solutions to avoid such discrimination. For example, states may:

- Craft facially neutral RPS eligibility requirements, such as in-state delivery
 or consumption requirements that apply equally to all resources irrespective
 of location;
- Evaluate the feasibility of re-casting location-based eligibility requirements in a facially neutral manner;
- Emphasize the state's interest in legitimate, non-protectionist goals such as
 environmental protection, reliability, energy conservation and diversity of
 power supply when drafting or reauthorizing RPS legislation or regulations;
- If location-based requirements are employed, opt for in-region location eligibility requirements which are more likely to withstand constitutional challenge than in-state location requirements;
- Where location-based eligibility RPS requirements are employed, build a legislative or administrative factual record showing that the state has no other alternative to achieve legitimate goals;
- Phase in new in-state RPS requirements gradually, or limit rather than
 prohibit out-of-state eligibility, to minimize impacts on affected parties.
 While these measures will not cure constitutional infirmities, they may
 significantly reduce litigation risk.⁴¹⁷

There are several other potential solutions to this problem besides redrafting RPSs. Congress may expressly delegate to states the power to discriminate against interstate commerce in connection with a renewable energy mandate. Further, Congress could itself step in and create a federal RPS that would eliminate or reduce the need for state RPSs. Besides Congress, the judiciary and the litigants in a dormant Commerce Clause challenge certainly have the most direct power to influence the outcomes of challenges to RPSs. This Article has already discussed some of the potential

⁴¹⁶ COLO. REV. STAT. § 40-2-124(1)(c)(I)(C)-(E), (1)(c)(III), (VI)-(IX) (2012).

 $^{^{417}\,}$ Elefant & Holt, supra note 11, at 4.

⁴¹⁸ Endrud, *supra* note 10, at 270, 280 ("Congress has the power to explicitly authorize states to incorporate into their RPS programs economic restrictions that burden interstate commerce.").

⁴¹⁹ *Cf.* Davies, *supra* note 7 (arguing that a national law is necessary); Rossi, *supra* note 7 (discussing some of the problems presented by a national RPS and offering solutions).

doctrinal approaches that the judiciary or a state litigant can use to defend an RPS. 420 For example, by characterizing multipliers as subsidies, states can survive constitutional challenges by distinguishing *West Lynn Creamery*. 421 This Part delineates two other doctrinal proposals that would potentially allow RPSs as currently formulated to survive constitutional scrutiny. First, courts could apply intermediate scrutiny to facially discriminatory provisions in state RPSs. Second, courts could expand the market-participant exception to include an entanglement rationale and to exempt market creators from strict scrutiny. Finally, this Part discusses how federalism concerns justify a more lenient approach when scrutinizing state RPSs under the dormant Commerce Clause.

A. Apply Intermediate Scrutiny as the Standard of Review for State RPSs

Under many constitutional doctrines besides the dormant Commerce Clause, courts have applied three different levels of scrutiny to determine the constitutionality of statutes: strict scrutiny, intermediate scrutiny, and rational basis review. 422 To survive intermediate scrutiny, a challenged law or policy must serve "important governmental objectives and... the discriminatory means employed" must be "substantially related to the achievement of those objectives." One rationale for applying this more lenient test is that a classification that is instrumental (or useful) should not be subject to strict scrutiny because its use may be beneficial in some respects.424 Although courts might question the appropriateness of the classification, the instrumental nature of the classification should make a less exacting scrutiny more appropriate. For example, because there are real differences between persons of different genders, it may be necessary or useful for legislators to use this classification in certain situations even though the potential for gender discrimination merits heightened scrutiny. Thus, a compromise is intermediate scrutiny.

The intermediate level of scrutiny may similarly be the ideal compromise between traditional dormant Commerce Clause concerns of combatting economic protectionism and the modern necessity of preserving resources and avoiding catastrophic environmental problems such as climate change. In light of the modern scientific understanding of the dangers of climate change and the necessity of preserving the environment, the level of scrutiny for facially discriminatory statutes should be lowered in cases where the state's proffered legitimate interest is environmental

⁴²⁰ See supra Part V.D.

⁴²¹ See supra Part II.A.3.

⁴²² E.g., Montgomery v. Carr, 101 F.3d 1117, 1121 (6th Cir. 1996).

 $^{^{423}}$ Miss. Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982) (citation and internal quotation marks omitted).

⁴²⁴ Cf. Harris M. Miller II, Note, An Argument for the Application of Equal Protection Heightened Scrutiny to Classifications Based on Homosexuality, 57 S. CAL. L. REV. 797, 832–33 (1984) (arguing for an "instrumental rationality" approach to judicial scrutiny based on whether a law promotes stability and uniformity).

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protection. Although one might argue that states can protect themselves without discrimination against interstate commerce, states may be unwilling to issue such environmental regulation unless they are able to make sure that the economic benefits of environmental regulation accrue in-state. Indeed, without some level of differential treatment for in-state interests, states may be disinclined to issue environmental regulations that reduce effects on climate change because the environmental benefits of climate change regulations are widely dispersed across the globe. The burdens of such regulation, however, will fall on the in-state consumer and utilities that pay the extra cost to purchase renewable energy. Thus, the primary benefit for the state may be job creation and the development of in-state industry. Once that benefit is removed by a dormant Commerce Clause challenge, the state has a disincentive to encourage renewable energy production. Thus, current dormant Commerce Clause doctrine has the effect of enforcing the tragedy of the commons—each party has incentives to continue depleting natural resources to the disadvantage of all. 425

Courts should apply intermediate scrutiny for state renewable energy standards in recognition of the instrumental usefulness of renewable energy regulations. Generally, an in-state classification that triggers strict scrutiny under the dormant Commerce Clause will only be useful to encourage protectionism. However, the in-state classification is particularly instrumental in the renewable energy context, especially for encouraging distributed generation. Distributed generation—which occurs at the customer's site—is inherently in-state. 426 Development of in-state DG may also be more beneficial not only for economic reasons, but also for environmental reasons. DG is often touted as a solution to efficiency problems because at peak times it allows energy companies to avoid both generation and transmission costs due to lower net demand. 427 These efficiency benefits are not present if the DG is outside the state and outside the jurisdiction of the energy company. Thus, the in-state/out-of-state distinction may be especially appropriate and instrumental in this context, and a lower level of scrutiny may therefore be more appropriate.

Arguably, the *Pike* "burden on interstate commerce" test effectively achieves an intermediate level of scrutiny by permitting courts to consider

⁴²⁵ Garrett Hardin, *The Tragedy of the Commons*, Science, Dec. 13, 1968, at 1243, 1244. *But see* Elinor Ostrom, Governing the Commons: The Evolution of Institutions for Collective Action 6–7 (1990) (discussing the limits of Hardin's metaphor and analysis).

⁴²⁶ Some governmental classifications based on inherent differences, such as gender, may be instrumental and useful for important government purposes, and therefore subject to intermediate scrutiny rather than strict scrutiny. Distributed generation is analogous to gender differences, and therefore similarly deserving of intermediate scrutiny. DG is both useful for carrying out state economic and environmental goals, and inherently different from other forms of energy generation because it can only be produced in-state.

⁴²⁷ *Cf.* Duane, *supra* note 7 (discussing an integrated regulatory approach for encouraging energy efficiency, renewable generation, and new transmission); Duane & Griffith, *supra* note 245 (discussing the complexity of evaluating generation, transmission, and distribution system tradeoffs to determine the net benefits and costs of distributed generation compared to more centralized renewable generation).

whether the benefits of the regulation justify the burdens on interstate. commerce. Thus, the test essentially requires courts to consider whether the statute is sufficiently instrumental to avoid invalidation. But this balancing test only applies under current precedent when statutes are facially neutral. As a result, because location-based classifications do not appear facially neutral, under the current analytical framework of the dormant Commerce Clause, there will oftentimes be no judicial consideration of whether a given classification is instrumental. Even if these classifications serve a legitimate purpose and substantially further that purpose, the judiciary must engage in least-restrictive means analysis under current doctrine and reject the statute if there is any other way to further the goal without the subject regulation. But intermediate scrutiny would provide such a check by allowing the court to take into account the legitimate goals of the regulation without doing a least-restrictive means analysis.

Courts have thus far applied intermediate scrutiny "to content-neutral restrictions that place an incidental burden on speech, to disabilities attendant to illegitimacy, and to discrimination on the basis of sex." In Equal Protection Clause cases concerning sex discrimination, the Supreme Court's rationale for applying a lower level of scrutiny rather than strict scrutiny is that there are "inherent differences" between men and women that sometimes may justify legal differentiation. In the First Amendment context, courts apply intermediate instead of strict scrutiny to content-neutral regulations because these restrictions are less likely than content-based distinctions to jeopardize the free flow of ideas, as content-neutral regulations do not promote one viewpoint over another.

In both the First Amendment and Equal Protection context, for a statutory classification to survive intermediate scrutiny, it must be "substantially related to an important governmental objective." Unlike rational basis review, where a court is willing to hypothesize justifications during litigation, under intermediate scrutiny the proffered justification must be genuine. Further, the justification must not depend on overbroad generalizations. And unlike strict scrutiny, intermediate scrutiny does not require that a given law constitute the least restrictive means to accomplish

⁴²⁸ See, e.g., Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970).

⁴²⁹ *Id.* at 142.

⁴³⁰ United States v. Virginia, 518 U.S. 515, 568 (1996) (Scalia, J., dissenting) (citing Turner Broad. Sys., Inc. v. Fed. Commc'ns Comm'n, 512 U.S. 622, 662 (1994); Mills v. Habluetzel, 456 U.S. 91, 98–99 (1982); Craig v. Boren, 429 U.S. 190, 197 (1976)).

⁴³¹ United States v. Virginia, 518 U.S. at 533.

⁴³² Jamie Edwards, McGuire v. Reilly: *The First Amendment and Abortion Clinic Buffer Zones in the Wake of* Hill v. Colorado, 36 U.C. DAVIS L. REV. 787, 793 n.31 (2003) (citing Hill v. Colorado, 530 U.S. 703, 723 (2000) (noting general applicability of content-neutral regulation); *Turner Broad. Sys.*, 512 U.S. at 642 (noting that content-neutral laws "pose a less substantial risk of excising certain ideas or viewpoints from the public dialogue"); McGuire v. Reilly, 260 F.3d 36, 40–41 (1st Cir. 2001) (reviewing content-neutrality discussion in *Hill*)).

⁴³³ Clark v. Jeter, 486 U.S. 456, 461 (1988).

 $^{^{434}\,\,}$ United States v. Virginia, 518 U.S. at 533.

⁴³⁵ Id.

the government interest.⁴³⁶ A regulation will survive intermediate scrutiny so long as it "promotes" the government's interest, meaning that the interest "would be achieved less effectively absent the regulation."⁴³⁷

Several commentators have argued that strict scrutiny under the dormant Commerce Clause may already be more akin to the intermediate scrutiny of the Equal Protection Clause. 438 Others have pointed out that strict scrutiny under the dormant Commerce Clause is at least somewhat different than strict scrutiny under the Equal Protection Clause. 439 While the strict scrutiny standard of Equal Protection and Due Process jurisprudence requires a "compelling local interest and use of the least restrictive alternative,"440 Commerce Clause strict scrutiny requires a "legitimate local purpose and . . . the absence of nondiscriminatory alternatives."441 This distinction may be primarily semantic, however, as "[a]pplying strict scrutiny properly explains most Dormant Commerce Clause precedent."442 In other words, although courts have used outdated language to describe the strict scrutiny test of the dormant Commerce Clause, they have nevertheless been applying strict scrutiny much as a court would in an Equal Protection case, which indicates that applying intermediate scrutiny to allegedly discriminatory statutes would constitute more than a semantic shift from precedent. Nonetheless, such a shift would give courts more leeway to uphold statutes that further environmental goals and would otherwise be invalidated under the strict scrutiny test.

 $^{^{436}}$ $\,$ Turner Broad. Sys., 512 U.S. at 662.

⁴³⁷ Id.

⁴³⁸ Timothy J. Slattery, Note, *The Dormant Commerce Clause: Adopting a New Standard and a Return to Principle*, 17 Wm. & Mary Bill Rts. J. 1243, 1259 n.138 (2009) (citing New Energy Co. of Ind. v. Limbach, 486 U.S. 269, 278–79 (1988)); *see also* Jack L. Goldsmith & Alan O. Sykes, *The Internet and the Dormant Commerce Clause*, 110 Yale L.J. 785, 818 n.137 (2001) ("[The Supreme Court] applied intermediate scrutiny in the First Amendment context, but there is no reason to believe that the balancing test and associated level of least-restrictive-means scrutiny are any different in the dormant Commerce Clause context." (citing Greater New Orleans Broad. Ass'n v. United States, 527 U.S. 173 (1999)); Gordon Eng, *Old Whine in a New Battle: Pragmatic Approaches to Balancing the Twenty-First Amendment, the Dormant Commerce Clause, and the Direct Shipping of Wine*, 30 FORDHAM URB. L.J. 1849, 1917 (2003) (arguing for "a pragmatic analytical approach, incorporating the modern dormant Commerce Clause framework, but substituting an intermediate level of scrutiny for the conventional strict scrutiny that most courts have applied" in the context of wine shipments and in light of conflicts between the commerce clause and the Twenty-First Amendment); Jennifer L. Larsen, *Discrimination in the Dormant Commerce Clause*, 49 S.D. L. Rev. 844, 850–51 (2004).

⁴³⁹ Larsen, *supra* note 438, at 850–51.

⁴⁴⁰ *Id.* at 851 (citing Grutter v. Bollinger, 539 U.S. 306, 322–23 (2003) (stating the strict scrutiny under the Equal Protection Clause involves review of whether a statute protects "a compelling governmental interest" and whether such statute is narrowly tailored to promote that governmental interest); Reno v. Flores, 507 U.S. 292, 302 (1993) (discussing the strict scrutiny test under the substantive Due Process Clause as an "infringement [that] is narrowly tailored to serve a compelling state interest")).

⁴⁴¹ Id. (quoting Chem. Waste Mgmt., Inc. v. Hunt, 504 U.S. 334, 342-43 (2009)).

⁴⁴² Slattery, *supra* note 438, at 1261.

2013] ADAPTING THE DORMANT COMMERCE CLAUSE

B. Expanding the Market-Participant Exception

The current formulation of the market-participant exception provides that "when a state or city regulates private transactions, the Court will scrutinize strictly any discrimination against outsiders, but when a state acts as a buyer or seller of goods or services, it may discriminate against outsiders all it likes." Thus, although the Court has recognized that a state may adopt regulations that discriminate in favor of a government-owned entity, in *Carbone* the Court indicated that a state may not discriminate in favor of a private entity even if that entity is performing a government function. Permitting such regulations would have required the Court to perform the difficult task of determining what constituted a "traditional government function" and would have effectively opened the door to judicial policy-making.

The outcome in *Carbone* also suggests that the entanglement rationale of the Fourteenth Amendment would not apply under the dormant Commerce Clause. He fourteenth Amendment, a private entity's actions may be considered "state action" if the interests of the government and the private entity are sufficiently entangled. Carbone would have been the perfect case to apply the entanglement rationale to the market participant exception. In that case, the local government was heavily involved in the private entity's actions. For example, the company's waste transfer station was "built and operated under a contract with the municipality" and was scheduled to "revert entirely to municipal ownership." Regardless, the Court treated the government's regulations as discriminating in favor of a private entity despite the close relationship between the entity and the state. In a dissent, Justice Souter argued that the state should have been permitted to discriminate in favor of the private entity because it was effectively performing a municipal function.

The renewable energy context poses a similar situation where states are heavily involved with public utilities, which, although private entities, are heavily regulated ones. Extending the entanglement rationale to the dormant Commerce Clause would likely permit these public entities to be

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⁴⁴³ Kathleen M. Sullivan, *Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 46 (1992); *see also supra* Part II.D (discussing the market participant exception to the dormant Commerce Clause).

⁴⁴⁴ Carbone, 511 U.S. 383, 394–97 (1994).

⁴⁴⁵ See id. at 394–95.

⁴⁴⁶ See Burton v. Wilmington Parking Auth., 365 U.S. 715, 723 (1961).

⁴⁴⁷ Carbone, 511 U.S. at 419 (Souter, J., dissenting).

⁴⁴⁸ Id. at 394

⁴⁴⁹ Id. at 419 (Souter, J., dissenting).

⁴⁵⁰ Note that SB X1-2 applies to municipal utilities as well as investor-owned utilities, so the municipal utilities could be exempt from the dormant Commerce Clause claims under the market participant exception even if the statute and its regulations are deemed unconstitutional as applied to the state-regulated investor-owned utilities. *See* Maryellen Suhrhoff, *Solid Waste Flow Control and the Commerce Clause: Circumventing* Carbone, 7 Alb. L.J. Sci. & Tech. 185, 196 (1996) (describing the market participant exception). This would be a result that would fragment the California RPS market with effects on interstate commerce.

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considered "state actors." Thus, including an entanglement rationale within the dormant Commerce Clause would allow the state to use its regulations to express a preference for these state actors to purchase renewable energy developed inside the state. This doctrinal device would recognize that state governments, through public utilities, are effectively participating in the market by delegating a responsibility related to necessary public infrastructure to a private party. Further, this device recognizes that state regulation over public utilities rises to such a level of control that it is justified to treat public utilities as government actors when they preferentially purchase in-state renewable energy to the disadvantage of out-of-state energy.

Finally, the market-participant exception could also be expanded to permit discrimination when the state acts as a market creator. In most situations subject to dormant Commerce Clause scrutiny, the state imposes its regulations onto a preexisting market. For example, in *Philadelphia v. New Jersey*, the state sought to control an interstate market in waste disposal. In contrast, in the context of renewable energy mandates and renewable energy credit trading schemes, *the market within the state is completely created by the state itself.* Without the state regulation, there is no distinct market for RECs or renewable energy. Unlike municipal solid waste, RECs only can be considered interstate commerce insofar as the state creates a market for these credits. Thus, as the market creator, the state should also have the power to define the market it has created and should be exempt from the discrimination principle of the dormant Commerce Clause in defining aspects of the market.

C. A Broken Federalism and Regulatory Voids

When determining what standard to apply to state renewable energy regulations, courts should also take into account whether a regulatory void in federal regulation is present. If the federal government has tried, and failed, to achieve a compromise that would fill a regulatory void, then this militates in favor of permitting states to take up the unregulated area. We need a "balanced federalism," as Erin Ryan has argued, in the "interjurisdictional gray area" where both the federal and state governments have responsibility for policy and implementation. 453

Professor Ryan notes that "[t]he accelerating interdependence of modernity has revived the great dilemma of constitutional federalism—that is, how to define the boundaries of state and federal jurisdiction so as to

⁴⁵¹ Philadelphia v. New Jersey, 437 U.S. 617, 619 (1978).

⁴⁵² Scholars have also recognized that, in contractual bargaining, transaction costs can be prohibitive even when a given result is desirable and efficient for both bargaining parties. *See* Eugene Kontorovich, *The Constitution in Two Dimensions: A Transaction Cost Analysis of Constitutional Remedies*, 91 VA. L. REV. 1135, 1143 (2005).

⁴⁵³ Erin Ryan, Federalism and the Tug of War Within: Seeking Checks and Balance in the Interjurisdictional Gray Area, 66 Md. L. Rev. 503 (2007); see also Erin Ryan, Federalism and the Tug of War Within (Oxford Univ. Press, 2012).

preserve checks and balances without eviscerating effective regulatory responses to interjurisdictional problems." Ryan recognizes that federalism "remains content-neutral" and is "designed to realize a set of competing good government values that are suspended in a permanent tug of war." Still, balance is required to more effectively address "confounding interjurisdictional problems without compromising the important federalism values associated with structural checks and balances, all while continuing to promote accountability and localized diversity and innovation." Instead of a "bright-line approach," a jurisprudential standard should be adopted to "maintain a healthy balance between local and national power without catapulting any one federalism value over all competing considerations."

Specifically, Ryan's solution is to apply intermediate scrutiny when a state seeks to regulate in this interjurisdictional gray area:

The reviewing court would apply the gatekeeping inquiry to establish, in essence, what level of scrutiny to apply: something akin to rational basis review if within the regulator's own uncontroversial sphere, *intermediate scrutiny under the balancing test if within the interjurisdictional gray area*, and perhaps strict scrutiny if crossover is to the uncontroversial sphere of the other sovereign. 458

The failure of Congress to develop a strong, coherent national policy regarding renewable energy suggests that holdout costs have prevented compromise and much-needed regulation to encourage renewable energy development. Indeed, two presidential administrations have proposed renewable energy legislation including a federal RPS to no avail. Congress's failure to follow through on a federal RPS has left a gap in federal energy policy. Regardless of the reasons for that gap, however, renewable energy policy is precisely the type of interjurisdictional gray area that calls for balanced federalism and intermediate scrutiny.

Currently, this gap is filled by state regulations such as state RPSs, but dormant Commerce Clause doctrine has the potential to prevent states from filling this policy void. If any of the dormant Commerce Clause attacks

 $^{^{454}\,\,}$ Ryan, $supra\, {\rm note}\,\, 453,$ at 665.

⁴⁵⁵ *Id.* at 666.

⁴⁵⁶ *Id.* at 667.

⁴⁵⁷ Id.

⁴⁵⁸ *Id.* at 660 (emphasis added).

⁴⁵⁹ See Davies, supra note 7, at 1341 ("For more than a decade, debate over a national renewable energy requirement has been mired in congressional deadlock. More than twenty-five proposals for this so-called federal [RPS] have been introduced on Capitol Hill, but not one has passed both chambers. Words have been harsh. Opponents of the measure have called it everything from 'a new energy tax' to 'a huge wealth transfer,' from 'an unneeded subsidy' to 'a major policy blunder.' Proponents, by contrast, have been effusive on multiple fronts. In the RPS, they see the United States' energy future, a law that will 'create jobs, save consumers money,' reduce pollution, 'reduce the cost of capital,' and "increase our energy security and enhance the reliability of the electricity grid.' Both sides' positions thus staked, the result has been predictable: an 'ossified' stalemate, a 'long congressional deep freeze.'").

⁴⁶⁰ *Id.* at 1373.

described in this Article are successful, neither state nor federal regulation would be in place to encourage development of renewable energies and alternative technologies. Indeed, that is exactly what some recent plaintiffs desire: the American Tradition Institute seeks complete invalidation of the Colorado RES.

To avoid this catastrophic result and encourage renewable energy development, courts can extend Ryan's balanced federalism approach to dormant Commerce Clause cases involving state RPS policies. ⁴⁶¹ Ryan develops her approach in the context of the Tenth Amendment, but she acknowledges that the principles of balanced federalism may be extended:

[A]lthough Balanced Federalism dual sovereignty has theoretical implications for cases involving the scope of federal authority under the Commerce Clause or Section Five of the Fourteenth Amendment, such challenges would not be adjudicated under the Tenth Amendment standard; they would be resolved on the basis of the most specifically relevant constitutional doctrines. The principles of Balanced Federalism [and] dual sovereignty may yet bear on the unfolding jurisprudence in these related federalism inquiries, but not by application of the Tenth Amendment standard. 462

. . .

Indeed, the Court often turns to a balancing approach when evaluating tensions between orthogonal values, such as between protection of efficient interstate commerce and conflicting but legitimate local exercise of the police power, or between legitimate exercise of the police power and private property rights. 463

To the extent that Professor Ryan's analytical approach is only applicable in the Tenth Amendment context, we step in here to argue that dormant Commerce Clause doctrine is not sufficiently settled to justify frustrating legitimate government interests in interjurisdictional gray areas. Indeed, some scholars still disagree regarding the extent to which the scrutiny currently applied under the dormant Commerce Clause for discriminatory statutes is analogous to strict scrutiny in other contexts such as equal protection. Further, the evolving breadth of the discrimination test shows that dormant Commerce Clause doctrine is anything but settled. Thus, introducing intermediate scrutiny would not unduly disrupt a long line of firm and established precedent when the dormant Commerce Clause

 $^{^{461}\,}$ Endrud, supra note 10, at 280 ("Congress has the power to explicitly authorize states to incorporate into their RPS programs economic restrictions that burden interstate commerce.").

⁴⁶² Ryan, *supra* note 453, at 659.

⁴⁶³ *Id.* at 662 n.682 ("For example, in adjudicating dormant commerce clause challenges, the Court considers values relating to the state's obligation to protect its citizens and values relating to the nation's interest in efficient interstate commerce. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 145 (1970). Similarly, in adjudicating regulatory takings claims, the Court balances values relating to the protection of public interests and to the owner's private property rights. *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 123–25 (1978).").

⁴⁶⁴ See supra text accompanying notes 395–400.

⁴⁶⁵ See supra text accompanying notes 78–84.

doctrine is still under considerable transformation. Finally, the difficulty of defining the amount of discriminatory impact required to invoke strict scrutiny engenders enough confusion on its own regarding what level of scrutiny to apply that doctrinal certainty cannot be relied on as a rationale for maintaining the current dormant Commerce Clause scheme. Therefore, Professor Ryan's reasoning should apply equally to the dormant Commerce Clause context, making intermediate scrutiny the appropriate level of judicial review for state RPSs.

Another opportunity to balance the federal and state interests at play in an interjurisdictional gray area is when courts determine whether a delegation of Commerce Clause power to states has occurred. The Supreme Court has traditionally required "unmistakably clear" language from Congress to exempt state statutes from scrutiny under the dormant Commerce Clause. This stringent standard provides no room for consideration of the necessity of state regulation when there is a federal policy void. A more balanced approach is necessary in the interjurisdictional gray area where neither the states nor the federal government have exclusive jurisdiction. Such an interjurisdictional gray area clearly exists when a majority of states have taken it upon themselves to fill a regulatory void and Congress has, by its acquiescence or paralysis, effectively ratified these standards by failing to adopt a national RPS to occupy the field and preempt those state RPSs.

In the case of renewable energy, where a vast majority of states have stepped forward as regulators, courts should recognize that Congress, by its inaction, has effectively or constructively ceded this field to the states. Although an express delegation has not occurred, a de facto delegation has. Thus, while states should not be fully exempted from all dormant Commerce Clause scrutiny as would be the case in an express delegation, RPSs should still be exempted from strict scrutiny in recognition of Congress's regulatory acquiescence and the legitimate state interests at stake. Because of this de facto delegation, intermediate scrutiny should apply to dormant Commerce Clause attacks on state RPSs.

D. Conclusion

Much hinges on the outcome of *American Tradition Institute v. Colorado*, ⁴⁶⁷ now pending in the District of Colorado, and the Ninth Circuit's pending decision in *Rocky Mountain Farmers*. ⁴⁶⁸ Because of the unique interests of the plaintiffs and the unlikelihood of settlement, *American Tradition Institute* may be the first case to squarely face the issue of RPS constitutionality. And because of the in-state classifications found in the Colorado RES and many state RPSs, this attack could result in the first judicial invalidation of a state renewable energy mandate. Because RPSs are

⁴⁶⁶ Maine v. Taylor, 477 U.S. 131, 138-39 (1986).

⁴⁶⁷ See supra Part IV.

⁴⁶⁸ See supra Part V.C.

one of the most popular policy mechanisms by which states encourage renewable energy development, a successful attack on state RPSs could paralyze this development in the United States. Congress, states, and the judiciary should all take action to avoid this result. Courts should also rethink current dormant Commerce Clause doctrine in light of pressing concerns over climate change and our nation's dependence on dwindling nonrenewable energy resources from hostile nations. Application of intermediate scrutiny to RPS challenges would extend the principles of balanced federalism to an interjurisdictional gray area. This would ultimately support federalism values within the context of constitutional requirements under the Commerce Clause. Moreover, as in Pacific Merchants, 469 the Ninth Circuit should recognize California's legitimate health and welfare interests and overrule the Rocky Mountain Farmers District Court decision. If these steps are taken, states could continue filling the void left by Congress's inaction on RPS policies—while still providing a dormant Commerce Clause backstop to prevent pretextual regulation by the states for impermissible advantage.

469 See supra Part V.D.

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