

CONSTITUTIONAL ISSUES THAT CAN ARISE IN THE DESIGN AND IMPLEMENTATION OF MULTISTATE RENEWABLE ENERGY PROGRAMS

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INTRODUCTION

Multistate efforts to encourage, market, and transmit and distribute renewable energy could raise a number of constitutional issues, depending on how exactly those efforts – and the resulting institutions – are structured. State-run renewable energy programs will raise different constitutional issues than multistate delegations of authority to private or semi-private entities. State-based or regional renewable energy requirements (“portfolio standards”) and marketing will raise different constitutional issues than state or regional attempts to regulate or limit transmission of electricity across state lines. A new multistate entity intended to plan for, coordinate, or regulate renewable energy will almost certainly enjoy a different constitutional status than the constituent states themselves do. Regional-level regulation achieved through an actual multistate *agreement* will trigger different constitutional concerns than coordinated but still entirely state-based actions.

This Article seeks to provide a broad overview of the various constitutional issues that different kinds of multistate renewable energy programs could create. For each issue discussed, it will indicate what kinds of institutional structures and/or renewable energy goals are most likely to cause that kind of constitutional problem (or, at least, subject the states to that kind of constitutional challenge). Moreover, to the extent possible, the Article provides an overview of how the federal courts, especially the U.S. Supreme Court, have handled such challenges in the past.

I. INTERSTATE COMPACT CLAUSE

A. Overview of the Interstate Compact Clause

The U.S. Constitution’s Interstate Compact Clause provides that:

*No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.*¹

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¹ U.S. CONST., art. I, § 10, cl.3.

The Interstate Compact Clause thus operates as an explicit restriction on state authority, and states entering into any kind of agreement regarding renewable energy would thus have to consider whether Congress's approval is necessary under this clause. Multistate agreements deemed interstate compacts for purposes of this clause are invalid (unconstitutional) without such approval.

1. Issue #1: Is There an Interstate Compact?

The U.S. Supreme Court's first – but still guiding – statement about the applicability of the Interstate Compact Clause derives from the 1893 case of *Virginia v. Tennessee*.² In this case, Virginia sought to void an 1802-1803 agreement with Tennessee regarding the border between the two states on the grounds that the agreement was an interstate compact that Congress had not approved.³ The Court held: (1) that the agreement *did* require Congress's approval to be legal; and (2) that Congress had indeed approved the compact, albeit implicitly.

The Supreme Court acknowledged that “[t]here are matters upon which different states may agree that can in no respect concern the United States.”⁴ It cited as examples one state's purchase of a building in another state; a short-term agreement to transport materials in a canal; the draining of a shared waterway to prevent disease; and joint measures to fight “cholera, plague, or other causes of sickness and death”⁵

As such, the purposes of the Interstate Compact Clause help to determine whether any particular multistate agreement will require Congress's approval. According to the Supreme Court, “it is evident that the prohibition is directed to the formation of any combination tending to the increase of political power in the states, which may encroach upon or interfere with the just supremacy of the United States.”⁶ In other words, Congress's approval acts as a check on multistate agreements that might otherwise infringe upon the rights of the federal government,⁷ or change the relative power of the states.⁸

Under these principles, Virginia and Tennessee did not need Congress's approval to select parties to run and designate the border between them.⁹ Even the intrastate approval of that boundary by each state's legislature did not trigger the Interstate Compact Clause.¹⁰ However, when the two states contracted with each other to mutually

² 148 U.S. 503 (1893).

³ *Id.* at 516-17.

⁴ *Id.* at 518.

⁵ *Id.*

⁶ *Id.* at 519.

⁷ *Id.* at 519-20.

⁸ *Id.* at 520. *See also* *Cuyler v. Adams*, 449 U.S. 433, 440 (1981) (“Where an agreement is not ‘directed to the formation of any combination tending to the increase of political power in the States, which may encroach upon or interfere with the just supremacy of the United States,’ it does not fall within the scope of the Clause and will not be invalidated for lack of congressional consent.”).

⁹ *Id.*

¹⁰ *Id.*

recognize the boundary as correct, Congress's approval was required.¹¹ Specifically, "[t]he compact or agreement will then be within the prohibition of the constitution, or without it, according as the establishment of the boundary line may lead or not to the increase of political power or influence of the states affected, and thus encroach or not upon the full and free exercise of federal authority."¹² Thus, under *Virginia v. Tennessee*, coordinated multistate action triggers the Interstate Compact Clause when: (1) two or more states enter into an agreement; (2) to engage in coordinated legal behavior; (3) that could affect the federal government's legitimate interests and authority.

In contrast, in 2002, the Fourth Circuit concluded that the Master Settlement Agreement (MSA) in the state tobacco litigation, which involved 46 states and most of the major tobacco manufacturers, was *not* an interstate compact requiring Congress's approval.¹³ While most of the MSA governed vertical releases of liability and payments between each state and the tobacco companies, the agreement also created a single administrative body for all 46 participating states. Thus, "[t]o the extent that the States agree on the creation of this single administrative body and its functioning, there is a horizontal aspect to the Master Settlement Agreement that establishes a compact among the states, implicating the Compact Clause."¹⁴

Nevertheless, the MSA did not encroach on federal power and hence did not require Congress's approval. While "the Master Settlement Agreement may result in an increase in bargaining power of the States vis-a-vis the tobacco manufacturers," "this increase in power does not interfere with federal supremacy because the Master Settlement Agreement 'does not purport to authorize the member States to exercise any powers they could not exercise in its absence.'"¹⁵ "In addition, the Master Settlement Agreement does not derogate from the power of the federal government to regulate tobacco," especially because the MSA anticipated – and expressly subordinated itself to – any future federal statutes regulating tobacco, as well as making its terms subject to consistency with the federal Bankruptcy Code.¹⁶

2. Issue #2: If So, Did Congress Give Its Consent, and How?

Multistate agreements that require congressional consent will be deemed unconstitutional when such consent is absent. Thus, for example, "[t]he regulation of the disposal of low-level radioactive waste is a legitimate federal activity, and Congress has not waived or delegated its authority over the subject."¹⁷ Although Congress gave permission in the Low-Level Radioactive Waste Policy Act for states to enter into interstate compacts to deal with regional disposal of such waste, the State of Washington's agreement with Oregon, Idaho, Montana, and Utah was ineffective because

¹¹ *Id.* at 521.

¹² *Id.* at 520.

¹³ *Star Scientific, Inc. v. Beales*, 278 F.3d 339, 360 (4th Cir. 2002).

¹⁴ *Id.*

¹⁵ *Id.* (quoting *United States Steel Corp. v. Multistate Tax Comm'n*, 434 U.S. 452, 473 (1978)).

¹⁶ *Id.*

¹⁷ *Washington State Building & Construction Trades Council, ALF-CIO v. Spellman*, 684 F.2d 627, 630 (9th Cir. 1982).

Congress had not approved the agreement, and, as a result, Washington laws regulating such waste were unconstitutional.¹⁸

If Congress's consent to a multistate agreement is required, Congress can give it many ways. Congressional consent can precede the multistate agreement or be given afterward, as a form of congressional ratification. In addition, Congress's consent to a multistate agreement need not be explicit. In *Virginia v. Tennessee*, for example, Congress's consent was implied because of Congress's acquiescence to the two states' agreed-upon boundary.¹⁹

When Congress grants explicitly *ex post* consent to an interstate compact, Congress can impose conditions upon that compact. "The States who are parties to the compact by accepting it and acting under it assume the conditions that Congress under the Constitution attached."²⁰

3. Issue #3: What Is the Legal Status of the Compact?

Once Congress consents to a multistate compact "when the subject matter of that agreement is an appropriate subject for congressional legislation," the compact becomes federal law binding on all parties, including the courts.²¹ For example, when the District of Columbia, Maryland, and Virginia entered into an interstate compact to create the Washington Metropolitan Area Transit Authority (WMATA), and Congress enacted the compact for the District of Columbia, the compact became federal law.²² Thus, as the U.S. Supreme Court has clarified, "[t]he construction of a compact sanctioned by Congress under Art. I, § 10, cl. 3, of the Constitution presents a federal question," and "the meaning of a compact is a question on which this Court has the final say."²³ However, because the compact qualifies as a federal statute, the Supreme Court cannot *amend* the compact; instead, all such amendments must also go through Congress.

B. Application of the Interstate Compact Clause to Multistate Agreements Regarding Renewable Energy

1. Any Actual Agreement Among the States, Especially with Regard to Interstate Sale or Transmission of Electricity, Is Likely to Trigger the Interstate Compact Clause

¹⁸ *Id.* at 630, 632.

¹⁹ *Virginia v. Tennessee*, 148 U.S. at 521-22.

²⁰ *Petty v. Tennessee-Missouri Bridge Commission*, 359 U.S. 275, 281-82 (1959).

²¹ *Cuyler v. Adams*, 449 U.S. 433, 439, 440 (1981); *see also Doe v. Pennsylvania Board of Probation & Parole*, 513 F.3d 95, 103 (3rd Cir. 2008) (noting that an interstate compact becomes federal law when: (1) it falls within the scope of the Compact Clause; (2) Congress has consented to the compact; and (3) the compact's subject matter would be appropriate for federal legislation).

²² *Washington Metropolitan Area Transit Auth. v. One Parcel of Land in Montgomery County, Maryland*, 706 F.2d 1312, 1316-18 (4th Cir. 1983).

²³ *Petty v. Tennessee-Missouri Bridge Commission*, 359 U.S. 275, 278 (1959). *See also generally New Jersey v. New York*, 523 U.S. 767 (1998) (construing a boundary compact between New Jersey and New York to determine which state had jurisdiction over filled portions of Ellis Island).

Given the pervasive regulatory authority of the federal government in energy matters and Congress's repeated announcements that there is a national interest in energy and electricity, a multistate *agreement* regarding renewable energy is likely to trigger the Interstate Compact Clause, particularly if that agreement deals with interstate matters and/or electricity transmission. Conversely, coordinated single-state-based plans and laws to, for example, encourage production of renewable energy, in the absence of any contract-like multistate agreement or multistate regulation of transmission, interstate rates, or access to the grid itself, could avoid triggering the Interstate Compact Clause.

Most multistate cooperative agreements involving electricity have proceeded as interstate compacts. For example, when Washington, Oregon, Montana and Idaho sought to create a regional conservation and electricity usage plan, they entered an interstate compact, which Congress approved, creating the Pacific Northwest Electric Power and Conservation Planning Council.²⁴ The U.S. Court of Appeals upheld this compact even against challenges that the Council and its plan were *too* federal in nature, strongly suggesting that the Council was impacting federal authority regarding electricity and hence that the compact had been necessary.²⁵

Even earlier, the U.S. Court of Appeals for the Third Circuit indicated that states intrude on federal power when they enter agreements to cooperate regarding interstate rates and transmission of electricity. In this 1941 decision, the Safe Harbor Water Power Corp. operated a hydroelectric power plant that sold energy to both Consolidated Gas Electric Light and Power, in Baltimore, Maryland, and the Pennsylvania Water and Power Company in Holtwood, Pennsylvania. The greater part of the electricity from the plant entered interstate commerce, but the states were setting wholesale electric rates.

The Third Circuit acknowledged that under Section 20 of the Federal Power Act, the states could set up regulatory commissions to regulate electric power.²⁶ However, it also noted that “[t]he transmission of power from state to state may be such a matter of national concern as to require regulation sole by a federal agency, while on the other hand consumption of that power in the state to which it has been transmitted may be purely a matter of local interest.”²⁷ Thus, while each state has a proper province regarding the regulation of electricity, it was obvious that Maryland and Pennsylvania were in an agreement to cooperate regarding hydroelectricity crossing their borders, and hence “the power generated by Safe Harbor and used in Pennsylvania and Maryland must be treated as an integrated whole.”²⁸ As a result, Maryland and Pennsylvania had effectively created an interstate compact requiring Congress's approval – although the court also concluded that Congress had given permission for such agreements in Section 20 of the Act.²⁹

²⁴ See 16 U.S.C. §§ 839-839b.

²⁵ Seattle Master Builders Ass'n v. Pacific Northwest Power & Conservation Planning Council, 786 F.2d 1359, 1363-66 (9th Cir. 1986).

²⁶ Safe Harbor Water Power Corp. v. Federal Power Comm'n, 124 F.2d 800, 805 (3rd Cir. 1941).

²⁷ *Id.* at 806-07.

²⁸ *Id.* at 807-08.

²⁹ *Id.* at 808.

2. A Potential Model to Avoid Triggering the Interstate Compact Clause: The Regional Greenhouse Gas Initiative

The Regional Greenhouse Gas Initiative (RGGI) is an example of a multistate coordinated enterprise currently operating without an interstate compact. It could provide an interesting test case for the Interstate Compact Clause should the Initiative ever be challenged on those grounds. However, the ten states involved appear to have designed the RGGI expressly triggering the Clause.

The ten states implementing the RGGI are Connecticut, Delaware, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Rhode Island, and Vermont. In December 2005, they entered into a Memorandum of Understanding outlining the goals and requirements of the Initiative.

Nevertheless, legally the RGGI operates almost entirely through individual state efforts. For example, each state participating in the Initiative has enacted an individual carbon dioxide budget trading program pursuant to its own state's laws and regulations, although based on the RGGI Model Rule. Enactment of a state program that substantially complies with the Model Rule is a requirement for each state's emitters to participate in the interstate trading of allowances, but

The RGGI Model Rule does not supplant any state regulatory or legislative efforts, but instead facilitates them by including the types of provisions necessary to implement RGGI. The RGGI Model Rule does so in a way that preserves state sovereignty and provides certainty and consistency to the regulated community and to the public.³⁰

Similarly, although there is a regional "cap" on carbon dioxide emissions designed to reduce those emissions from the power sector by 10 percent by 2018, each state's individual program establishes its respective share of the regional cap as a matter of state law.³¹

Nevertheless, as part of its state program and laws, each state allows the affected sources to meet the state cap and their individual emissions requirements by buying allowances issued by *any* of the states participating in the Initiative. The allowances are auctioned quarterly through a regional auction platform.³²

3. Existing Compacts May Also Impact New Multistate Agreements Regarding Renewable Energy

³⁰ Regional Greenhouse Gas Initiative, *Overview of RGGI CO₂ Budget Trading Program* 1 n.2 (Oct. 2007), available at http://rggi.org/docs/program_summary_10_07.pdf. The RGGI Model Rule is available at <http://www.rrgi.org/modelrule.htm>.

³¹ Regional Greenhouse Gas Initiative, *The Regional Greenhouse Gas Initiative Is . . .*, at 2 (April 2009 update), available at http://www.rrgi.org/docs/RGGI_Executive%20Summary_4.22.09.pdf.

³² Regional Greenhouse Gas Initiative, *CO₂ Auctions*, <http://www.rrgi.org/co2-auctions> (as visited July 28, 2009).

Finally, it is worth noting that existing interstate compacts may effectively require interstate cooperation and agreement regarding new renewable energy measures. For example, in March 2008, the U.S. Supreme Court interpreted a 1905 interstate compact between New Jersey and Delaware regarding the states' jurisdiction over activities in the Delaware River. The litigation arose when Delaware refused to grant permission to allow construction of a liquefied natural gas terminal along the New Jersey shore when the constructed facility would extend about 2000 feet into Delaware's territory. The Supreme Court concluded that the compact did not give New Jersey exclusive jurisdiction over the facility and upheld Delaware in refusing to grant permission for the facility.³³

Other existing compacts may be more directly relevant to the implementation of new multistate renewable energy agreements and arrangements. In 2007, for example, the U.S. Court of Appeals for the Ninth Circuit determined that the Bonneville Power Administration, a federal power marketing agency for the hydroelectric power generate by the dams on the Columbia River in Oregon and Washington, was arbitrary and capricious when it tried to transfer the functions of a fish passage center without showing how the transfer was consistent with the fish and wildlife program established through an interstate compact.³⁴

II. INTERSTATE COMMERCE CLAUSE/DORMANT COMMERCE CLAUSE

A. Congress's Authority to Regulate under the Interstate Commerce Clause

The Commerce Clause of the U.S. Constitution gives Congress the power “[t]o regulate Commerce . . . among the several States”³⁵ Two facets of the Interstate Commerce Clause are potentially relevant to any multistate agreement on alternative energy: the straightforward grant of power to Congress, particularly if Congress has enacted potentially conflicting legislation; and the so-called “dormant Commerce Clause,” which limits states' authority to interfere with national and interstate commerce.

Congress is a legislative body of limited powers, and it can legislate only to the extent that the Constitution allows. While Congress's authority under the Interstate Commerce Clause has traditionally been viewed as very broad, it is not unlimited. Commerce Clause jurisprudence attempts to balance the states' “reasonable exercise of [their] police powers over local affairs” and “matters of local concern” with the federal government's authority to oversee matters of “national interest.”³⁶ From the states' perspective, the constitutional balance of the Interstate Commerce Clause is the Tenth Amendment, which provides that “[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or

³³ New Jersey v. Delaware, --- U.S. ---, 128 S. Ct. 1410, 1427 (2008).

³⁴ Northwest Env'tl. Defense Ctr. v. Bonneville Power Admin., 477 F.3d 668, 688-90 (9th Cir. 2007).

³⁵ U.S. CONST., art. I, § 8 cl. 3.

³⁶ Great Atl. & Pac. Tea Co. v. Cottrell, 424 U.S. 366, 370-71 (1976).

to the people.”³⁷ In 1992, the U.S. Supreme Court noted that the Commerce Clause and Tenth Amendment “are mirror images of each other. If a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States; if a power is an attribute of state sovereignty reserved by the Tenth Amendment, it is necessarily a power the Constitution has not conferred on Congress.”³⁸

The Supreme Court’s view of Congress’s Commerce Clause authority has changed over the course of time. “Until 1937, Congress’ Commerce Clause authority was limited to regulating activities that *directly* affected interstate commerce.”³⁹ In 1937, however, the Court decided *National Labor Relations Board v. Jones & Laughlin Steel Corp.*,⁴⁰ upholding the National Labor Relations Act of 1935 and announcing that Congress’s “constitutional authority to protect interstate commerce from burdens and obstructions . . . is plenary and may be exerted to protect interstate commerce, not matter what the source of the dangers that threatened it.”⁴¹

From 1937 until 1995, Congress’s Commerce Clause authority seemed boundless.⁴² However, in 1995, the U.S. Supreme Court decided in *United States v. Lopez*, invalidating the Gun Free School Zones Act of 1990⁴³ on the grounds that it exceeded Congress’s Commerce Clause authority.⁴⁴

The *Lopez* Court “identified three broad categories of activity that Congress may regulate under its commerce power.”⁴⁵ “First, Congress may regulate the use of the channels of interstate commerce.”⁴⁶ “Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons and things in interstate commerce, even though the threat may come only from intrastate activities.”⁴⁷ “Finally, Congress’ commerce authority includes the power to regulate those activities that have a substantial relation to interstate commerce.”⁴⁸

B. The Interstate Commerce Clause and Congress’s Authority Over Energy

Congress’s authority to regulate energy matters pursuant to the Interstate Commerce Clause has survived challenges in the U.S. Supreme Court. For example, when litigants challenges Titles I and II and Section 210 of the Public Utility Regulatory Policies Act of 1978 (PURPA) as violating Congress’s Commerce Clause authority, the Supreme Court upheld the statute across the board, concluding that it did not

³⁷ U.S. CONST., amend X.

³⁸ *New York v. United States*, 505 U.S. 144, 156 (1992).

³⁹ ROBIN KUNDIS CRAIG, *THE CLEAN WATER ACT AND THE CONSTITUTION: LEGAL STRUCTURE AND THE PUBLIC’S RIGHT TO A CLEAN AND HEALTHY ENVIRONMENT* 95 (2004).

⁴⁰ 301 U.S. 1 (1937)

⁴¹ *Id.* at 36-37 (quoting *Second Employers Liability Cases*, 223 U.S. 1, 51 (1912)).

⁴² *See* CRAIG, *supra* note 39, at 95-97 (detailing the broadening cases).

⁴³ 18 U.S.C. § 992(q)(1)(A) (Supp. II 1990)

⁴⁴ *United States v. Lopez*, 514 U.S. 549, 557 (1995).

⁴⁵ *Id.* at 558.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.* at 558-59.

impermissibly intrude upon state regulatory authority or commandeer the states' regulatory mechanisms.⁴⁹ The Court found that the challenged provisions feel well within Congress's Commerce Clause authority, even with respect to regulation of intrastate activities, and "federal regulation of intrastate power transmission may be proper because of the interstate nature of the generation and supply of electric power."⁵⁰

Although these challenges pre-dated the Supreme Court's decision in *Lopez*, it is difficult to imagine that Congress could violate the Commerce Clause in regulating energy even under the *Lopez* constrictions. Clearly, regulation of the interstate aspects of energy are within Congress's purview. Moreover, in its 2005 "medical marijuana" case, *Gonzalez v. Raich*,⁵¹ the Supreme Court upheld Congress's authority, exercised pursuant to the federal Controlled Substances Act,⁵² to criminalize the in-state use of marijuana grown in-state for medical purposes, even when California law legalized such use. Relying heavily on *Wickard v. Filburn*⁵³ and *Perez v. United States*,⁵⁴ the Court determined that:

Our case law firmly establishes Congress' power to regulate purely local activities that are part of an economic "class of activities" that have a substantial effect on interstate commerce. As we stated in *Wickard*, "even if appellee's activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce." We have never required Congress to legislate with scientific exactitude. When Congress decides that the "'total incidence'" of a practice poses a threat to a national market, it may regulate the entire class. In this vein, we have reiterated that when "a general regulatory statute bears a substantial relation to commerce, the *de minimis* character of individual instances arising under that statute is of no consequence."⁵⁵

Given *Gonzalez v. Raich* and the clear connections to interstate commerce of energy production and regulation, successful Commerce Clause challenges to Congress's energy statutes – existing or future – are unlikely.

C. The General Parameters of the Dormant Commerce Clause

Of more likely direct relevance to a multistate agreement on alternative energy is the dormant Commerce Clause. According to the U.S. Supreme Court, the Interstate Commerce Clause "has long been understood . . . to provide 'protection from state

⁴⁹ Federal Energy Regulatory Comm'n v. Mississippi, 456 U.S. 741, 749-50, 753-57 (1982).

⁵⁰ *Id.* at 755 (citing Federal Power Comm'n v. Florida Power & Light Co., 404 U.S. 453 (1972)).

⁵¹ 545 U.S. 1 (2005).

⁵² 21 U.S.C. § 801 *et seq.*

⁵³ 317 U.S. 111, 125, 128-29 (1942).

⁵⁴ 402 U.S. 146, 151, 154-55 (1971).

⁵⁵ *Gonzalez v. Raich*, 545 U.S. at 17 (quoting *Wickard v. Filburn*, 317 U.S. at 125; *Perez*, 402 U.S. at 154-55; *Lopez*, 514 U.S. at 558 (quoting *Maryland v. Wirtz*, 392 U.S. 183, 196 n. 27 (1968))).

legislation inimical to the national commerce [even] where Congress has not acted.”⁵⁶ Thus, for example, if a multistate agreement prevented users in the party states from purchasing electricity generated outside the party states, or prohibited generators outside the party states from selling electricity to users within the party states, the multistate agreement would be vulnerable to dormant Commerce Clause challenges.

In 2008, the Supreme Court emphasized that “[t]he modern law of what has come to be called the dormant Commerce Clause is driven by concern about ‘economic protectionism – that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors.’”⁵⁷ With this principle as the touchstone, dormant Commerce Clause challenges are evaluated in two steps. First, if state legislation facially discriminates against interstate commerce, it is virtually *per se* invalid.⁵⁸ The federal courts will uphold such a law “only if it ‘advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives.’”⁵⁹

Second, if a state law appears to regulate even-handedly but indirectly affects interstate commerce, it is evaluated under the *Pike* balancing test. Under this test:

Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course 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.⁶⁰

State laws are almost always constitutional under *Pike* balancing.

D. The Dormant Commerce Clause and State Multistate Regulation of Renewable Energy

At one point, the U.S. Supreme Court followed a fairly mechanical rule regarding state regulation of electricity with respect to the dormant Commerce Clause: state

⁵⁶ Barclays Bank PLC v. Franchise Tax Board of California, 512 U.S. 298, 310 (1994) (quoting Southern Pacific Co. v. Arizona ex rel. Sullivan, 325 U.S. 761, 769 (1945)).

⁵⁷ Department of Revenue of Kentucky v. Davis, --- U.S. ---, 128 S. Ct. 1801, 1807 (2008) (quoting New Energy Co. of Indiana v. Limbach, 486 U.S. 269, 273-74 (1988)).

⁵⁸ Department of Revenue of Kentucky v. Davis, 128 S. Ct. 1801, 1808-09 (2008) (citing Oregon Waste Systems, Inc. v. Department of Environmental Quality of Oregon, 511 U.S. 93, 99 (1994)); Wyoming v. Oklahoma, 502 U.S. 437, 454-55 (1992); Brown-Forman Distillers Corp. v. New York State Liquor Authority, 476 U.S. 573, 579 (1986); Philadelphia v. New Jersey, 437 U.S. 617, 624 (1978).

⁵⁹ Department of Revenue of Kentucky v. Davis, 128 S. Ct. 1801, 1808-09 (2008) (quoting Oregon Waste Systems, Inc. v. Department of Environmental Quality of Oregon, 511 U.S. 93, 100 (1994)).

⁶⁰ Pike, 397 U.S. 137, 142 (1970); see also Department of Revenue of Kentucky v. Davis, 128 S. Ct. 1801, 1808-09 (2008) (reciting this same test).

regulation of wholesale sales of electricity was constitutional as an indirect regulation of interstate commerce, while state regulation of retail sales was unconstitutional as direct regulation of interstate commerce.⁶¹ By the 1980s and 1990s, however, the Court had rejected *Attleboro*'s mechanical test in favor of a more nuanced balancing approach, as in other dormant Commerce Clause cases.⁶²

A number of dormant Commerce Clause cases have involved energy production, and they systematically conclude that states cannot create legal requirements or preferences based on the source of the fuel or energy. In *Wyoming v. Oklahoma*, for example, the U.S. Supreme Court struck down an Oklahoma statute that required Oklahoma coal-fired electric power plants producing power for sale in Oklahoma to burn a mixture of coal containing at least 10 percent Oklahoma-mined coal.⁶³ Moreover, the "savings clause" of the Federal Power Act did not prevent the conclusion that the Oklahoma statute was unconstitutional.⁶⁴ Similarly, the U.S. District Court for the Northern District of Illinois concluded that a Clean Air Act compliance plan that favored Illinois coal violated the dormant Commerce Clause.⁶⁵

Nor can states "hoard" state-created energy within their borders. Thus, in 1982, the U.S. Supreme Court concluded that New Hampshire could not constitutionally restrict interstate transportation of hydroelectric power generated in New Hampshire.⁶⁶

In contrast, the courts generally uphold other kinds of state regulation related to energy in the face of dormant Commerce Clause challenges. For example (and perhaps questionably), the Virginia Supreme Court recently concluded that a state statute that allowed electric utilities to apply for approval of a rate adjustment from customers to cover the costs of a coal-fired generation facility that "utilized Virginia coal" did *not* violate the dormant Commerce Clause because the statute did not require utilities to use Virginia coal but rather allowed them to be compensated for the costs of doing so.⁶⁷ Similarly, the U.S. Supreme Court held in 1989 that the Kansas Corporation Commission's regulations governing the timing of natural gas production from the Kansas-Hugoton field were not aimed at economic protectionism but rather sought to more productively run more gas out of the field in the face of common pool management problems. As a result, the regulations did not facially discriminate against interstate commerce and were clearly constitutional under the *Pike* balancing test.⁶⁸ Nor did the Arkansas Public Service Commission's assertion "of regulatory jurisdiction over the wholesale rates charged by the Arkansas Electric Cooperative Corporation (AECC) to its

⁶¹ *Public Utilities Comm'n of Rhode Island v. Attleboro Steam & Electric Co.*, 273 U.S. 83, 86-90 (1927).

⁶² *Arkansas Electric Cooperative Corp. v. Arkansas Public Service Comm'n*, 461 U.S. 375, 391-92 (1983); *Quill Corp. v. North Dakota by & through Heitkamp*, 504 U.S. 298, 316-18 (1992).

⁶³ *Wyoming v. Oklahoma*, 502 U.S. 437, 454-56 (1992).

⁶⁴ *Id.* at 457-58 (citing 16 U.S.C. § 824(b)(1)).

⁶⁵ *Alliance for Clean Coal v. Craig*, 840 F. Supp. 554, 560 (N.D. Ill. 1993).

⁶⁶ *New England Power Co. v. New Hampshire*, 455 U.S. 331, 339 (1982).

⁶⁷ *Appalachian Voices v. State Corp. Comm'n*, 675 S.E.2d 458, 462-63 (Va. 2009).

⁶⁸ *Northwest Central Pipeline Corp. v. State Corporation Comm'n of Kansas*, 489 U.S. 493, 505, 523-26 (1989).

member retail distributors” who all were located within Arkansas violate the dormant Commerce Clause, again because there was no economic protectionism involved and the burden of the regulation on interstate commerce was not clearly excessive under the *Pike* test.⁶⁹

E. Potentially Relevant Exceptions to the Dormant Commerce Clause for Multistate Agreements Regarding Renewable Energy

Three exceptions to the application of the dormant Commerce Clause are potential relevant to multistate agreements regarding alternative energy. First, the dormant Commerce Clause applies only to state and local regulation of commerce, not to non-governmental actions. As is discussed *infra* in connection with the Eleventh Amendment, the governmental status of entities created by interstate compact is often unclear, and it is possible (although unusual) for a multistate agreement to create an entity that is entirely non-governmental in nature.

Second, the U.S. Supreme Court has recognized a market participant exception for governments. If the state or local government is participating freely in the marketplace rather than acting as a regulator, its actions do not violate the dormant Commerce Clause.⁷⁰ Thus, if a multistate agreement fashioned the states as market participants buying and selling alternative energy, each state’s activity would be free of dormant Commerce Clause restrictions. It is less certain, however, whether a multistate entity participating in the market for the entire region governed by the agreement would enjoy the same benefit. Thus, for example, the dormant Commerce Clause status of the RGGI’s allowance auction platform – which cannot sell carbon dioxide allowances to entities outside RGGI-qualified states – could be of interest to states seeking to enter multistate agreements involving, for example, trading of renewable energy credits.

Third, in its 2007 *United Haulers* decision, the Supreme Court determined that facilities operated by public authorities do not facially discriminate against interstate commerce even if they impose requirements that restrict interstate commerce.⁷¹ In 2008, it concluded that this reasoning applied to state-issued municipal bonds, as well.⁷² *United Haulers* thus suggests that state-owned alternative energy facilities could receive some dormant Commerce Clause protections. Again, however, it is unclear whether the *United Haulers* logic would extend to facilities owned by a multistate entity created by multistate agreement, particular in light of the fact that the *United Haulers* Court emphasized the government’s accountability to voters as one reason for not subjecting it to the same dormant Commerce Clause scrutiny when the government owns the facilities in question.

⁶⁹ Arkansas Electric Cooperative Corp. v. Arkansas Public Service Comm’n, 461 U.S. 375, 391-95 (1983).

⁷⁰ Department of Revenue of Kentucky v. Davis, 128 S. Ct. 1801, 1809 (2008).

⁷¹ United Haulers Ass’n, Inc. v. Oneida-Herkimer Solid Waste Management Auth., 550 U.S. 330, 342-45 (2007).

⁷² Department of Revenue of Kentucky v. Davis, 128 S. Ct. 1801, 1810-11 (2008).

F. Interstate Compacts and the Dormant Commerce Clause

The dormant Commerce Clause is a restriction on *state* regulatory authority; Congress may discriminate against interstate commerce all it wants. Thus, the creation of a multistate agency through a congressionally approved interstate compact could arguably insulate a multistate renewable energy program from dormant Commerce Clause restrictions.

However, as will be discussed in Part V, *infra*, multistate agencies do not necessarily entirely lose their status as state entities, and hence dormant Commerce Clause restrictions could still apply. Moreover, there is no federal case law finding that an interstate compact had eliminated dormant Commerce Clause restrictions. This issue would likely turn on what exactly Congress approved in the compact at issue and how thoroughly it “federalized” the resulting program through federal statute.

III. SUPREMACY CLAUSE/ FEDERAL PREEMPTION

A. Supremacy Clause Basics

The Supremacy Clause of the U.S. Constitution states that “[t]he Constitution and the laws of the United States which shall be made in pursuance thereof . . . shall be the Supreme Law of the Land; . . . any Thing in the Constitution or Laws of any State to the contrary notwithstanding.”⁷³ Pursuant to the Supremacy Clause, therefore, federal laws (including, in some cases, federal agency regulations) will trump, or preempt, any state constitutional, statutory, or regulatory provisions that conflict with federal law or work as obstacles to federal objectives.

Nevertheless, the U.S. Supreme Court does not presume that federal preemption exists when state and federal laws govern related subjects – indeed, just the opposite. As the Court emphasized in 1978, under principles of federalism, “when a State’s exercise of its police power is challenged under the Supremacy Clause, ‘we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clean and manifest purposes of Congress.’”⁷⁴ As a result, Congress’s intent in the allegedly preempting federal legislation can be critical.

The Supreme Court nevertheless has identified a number of different kinds of federal preemption. First, and often most clearly, Congress can *explicitly* preempt certain kinds of state laws in a federal statute. Even so, the *scope* of that express preemption will be a matter of statutory interpretation, and federal courts tend to read express preemption provisions narrowly, to leave as much room as possible for state law to operate.⁷⁵

⁷³ U.S. CONST., art. VI, cl. 2.

⁷⁴ *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 157 (1978) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947); *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977)).

⁷⁵ *Sprietsma v. Mercury Marine*, 123 S. Ct. 518, 526-27 (2002); *CSX Transportation, Inc. v. Easterwood*, 507 U.S. 658, 664 (1993); *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 518 (1992).

Second, the federal courts can find that Congress *implicitly* preempted certain kinds of state laws in a federal statutory scheme. While several kinds of implicitly preemption exist, the preemption analysis always focuses on Congress's overall purpose in enacting the federal statute. For example, one kind of implicit preemption arises when Congress evinces an intent to "occupy the field" with respect to a particular kind of regulation, leaving no room for state action. For example, in energy law, the Supreme Court has concluded that the Natural Gas Act of 1938⁷⁶ constitutes a "comprehensive scheme" of federal regulation that gives the Federal Energy Regulatory Commission "exclusive jurisdiction over the transportation and sale of natural gas in interstate commerce for resale," occupying this particular field, especially given that Congress gave FERC authority to regulate almost every aspect of natural gas transportation and sale.⁷⁷

The federal courts will also imply congressional intent to preempt state law if "the Act of Congress [] touches a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject."⁷⁸ The Supreme Court, for example, has found dominant federal interests in cases involving fraud on federal agencies⁷⁹ and navigation of ships at sea.⁸⁰

Finally, federal courts will find that Congress has implicitly preempted state law when "the object sought to be obtained by the federal law and the character of the obligations imposed by it . . . reveal" Congress's intent to preempt state law.⁸¹ For example, the Supreme Court has held that the Medical Device Amendments to the federal Food, Drug, and Cosmetic Act⁸² preempt state-law fraud claims in part because "[t]he federal statutory scheme amply empowers the FDA [Food & Drug Administration] to punish and deter fraud . . . and . . . this authority is used by the Administration to achieve a somewhat delicate balance of statutory objectives," which state tort claims could skew.⁸³

The third common type of preemption is conflict preemption. "Even if Congress has not completely foreclosed state legislation in a particular area, a state statute is void to the extent that it actually conflicts with a federal statute."⁸⁴ Conflict preemption is absolute, and "neither an express pre-emption provision nor a savings clause 'bar[s] the ordinary working of conflict pre-emption principles."⁸⁵ "Conflict preemption is the

⁷⁶ 15 U.S.C. §§ 717-717w.

⁷⁷ *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 300-04 (1988).

⁷⁸ *Rice v. Santa Fe Corp.*, 331 U.S. 218, 230 (1947) (citing *Hines v. Davidowitz*, 312 U.S. 52, 62-63 (1941)); *see also* *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 157 (1978) (citing the same principle).

⁷⁹ *Buckman Co. v. Plaintiffs' Legal Comm'n*, 531 U.S. 341, 347-48 (2001).

⁸⁰ *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 160-68 (1978).

⁸¹ *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) (citations omitted).

⁸² 21 U.S.C. §§ 360c *et seq.*

⁸³ *Buckman Co. v. Plaintiffs' Legal Comm'n*, 531 U.S. 341, 348 (2001).

⁸⁴ *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 158 (1978).

⁸⁵ *Buckman Co. v. Plaintiffs' Legal Comm'n*, 531 U.S. 341, 352 (2001) (quoting *Geier v. American Honda Motor Co.*, 529 U.S. 861, 869 (2000)).

irreducible minimum of the Supremacy Clause's import: state law cannot directly conflict with federal."⁸⁶

B. Preemption and Classic Federal Energy Regulation

Given the number of federal statutes governing energy issues and the continued use of cooperative federalism in energy regulatory programs, preemption issues have arisen in a number of contexts. For example, in 1983 the U.S. Supreme Court determined that neither the Federal Power Act nor the Rural Electrification Act preempted the Arkansas Public Service Commission's assertion of "regulatory jurisdiction over the wholesale rates charged by the Arkansas Electric Cooperative Cooperation (AECC) to its member distributors, all of whom were located within the State."⁸⁷ As for the Federal Power Act, the AECC was a rural power cooperative and the Federal Power Commission had "determined in 1967 that it did not have jurisdiction under the Federal Power Act over the wholesale rates charged by rural power cooperatives."⁸⁸ As a result, the Rural Electrification Administration had the exclusive regulatory authority among federal agencies. However, it was a lending agency, not a public utility regulatory body, according to the Court.⁸⁹ As a result, neither statute preempted the state's regulation of the AECC's wholesale rates.⁹⁰

Similarly, in 1989, the Court determined that despite the Natural Gas Act's broad preemptive force, it did not preempt the Kansas Corporation Commission's regulations governing the timing of natural gas production from the Kansas-Hugoton field.⁹¹ The Court characterized the state laws as an attempt to regulate a common-pool resource to which many people had rights and to create an incentive to run more gas out of the field.⁹² As such, the law regulated producers and was aimed primarily at the production of natural gas, not at the marketing of natural gas in interstate commerce.⁹³ The Natural Gas Act does not occupy the field with respect to natural gas production,⁹⁴ and the Kansas regulation did not conflict with any of the Act's provisions.⁹⁵

In contrast, the Natural Gas Act *did* preempt the Michigan Public Service Commission's requirement that public utilities seeking to transport natural gas in Michigan get the Commission's prior approval before doing so.⁹⁶ This state regulation was preempted because the Act "confers upon FERC exclusive jurisdiction over the

⁸⁶ CAIG, *supra* note 39, at 43.

⁸⁷ Arkansas Electric Cooperative Corp. v. Arkansas Public Service Comm'n, 461 U.S. 375, 377 (1983).

⁸⁸ *Id.* at 383.

⁸⁹ *Id.* at 386.

⁹⁰ *Id.* at 389.

⁹¹ Northwest Central Pipeline Corp. v. State Corporation Comm'n of Kansas, 489 U.S. 493, 508-10 (1989).

⁹² *Id.* at 497-98, 505.

⁹³ *Id.* at 508-10.

⁹⁴ *Id.* at 510.

⁹⁵ *Id.* at 516-18.

⁹⁶ Schneidewind v. ANR Pipeline Co., 485 U.S. 293, 296-97 (1988).

transportation and sale of natural gas in interstate commerce for resale.”⁹⁷ Similarly, in 1979 the Court held the New Mexico Electrical Energy Tax Act invalid under the Supremacy Clause because the federal Tax Reform Act of 1976 prohibited the states from imposing a tax on the generation or transmission of electricity which discriminates against out-of-state consumers.⁹⁸

C. Preemption and State Promotion of Alternative Energy

Federal preemption issues have already been relevant to states’ attempts to promote use of renewable energy. For example, in 2002 the California Court of Appeals concluded that the Public Utility Regulatory Policies Act of 1978 (PURPA) preempted the California Public Utilities Commission’s adoption of a floor for the transmission loss factor for PURPA Qualifying Facilities that relied on renewable resources for their fuel sources.⁹⁹ According to the court, the Commission’s order usurped FERC’s exclusive authority under PURPA.¹⁰⁰ Similarly, in 2004, the California Court of Appeals concluded that the Federal Power Act preempted an order from the California Public Utilities Commission that required utilities to pay the up-front costs of the system upgrades necessary to connect new sources of renewable energy to the electricity distribution system.¹⁰¹ The court concluded that federal law controlled because FERC’s jurisdiction includes control over interconnections to the distribution system, including the terms of such interconnections.¹⁰²

Even more recently, with respect to state-created renewable energy credits (RECs), federal and state courts have been wrestling with the issue of whether Section 210(e) of PURPA¹⁰³ preempts the states’ creation and assignment of RECs in transactions governed by existing contracts. Section 210 of PURPA requires electric utilities to purchase electricity from qualifying cogenerators or “small power production facilities.”¹⁰⁴ Section 210(e) then exempts qualifying facilities from certain federal and state utility regulation, including the regulation of utility rates.¹⁰⁵ Courts have indicated that if a state agency modifies a power purchasing contract involving a qualifying facility, that modification would constitute a regulation of rates that violates PURPA.¹⁰⁶

When states began enacting renewable energy portfolio requirements and creating RECs, questions arose over which party in an existing contract was entitled to the RECS – the renewable energy producer or the renewable energy distributor. As state agencies

⁹⁷ *Id.* at 300-01.

⁹⁸ *Arizona Public Service Co. v. Snead*, 441 U.S. 141, 149-50 (1979).

⁹⁹ *Southern California Edison Co. v. Public Utilities Commission*, 101 Cal. App. 4th 384, 396-99 (2002).

¹⁰⁰ *Id.* at 398-99.

¹⁰¹ *Southern California Edison Co. v. Public Utilities Comm’n*, 121 Cal. App. 4th 1303, 1310-13 (2004).

¹⁰² *Id.* at 1312-13.

¹⁰³ 16 U.S.C. § 824a-3(e).

¹⁰⁴ 16 U.S.C. § 824a-3(a).

¹⁰⁵ 16 U.S.C. § 824a-3(e).

¹⁰⁶ *E.g.*, *Freehold Cogeneration Assocs., LP v. Board of Regulatory Commissions of the State of New Jersey*, 44 F.3d 1178, 1192 (3rd Cir. 1995).

and state courts decided that property rights issue, they then faced arguments that the assignment of the RECs modified existing contracts in violation of PURPA and hence that those state decisions – or the entire retroactive application of RECs – were preempted.

In October 2003, FERC concluded that PURPA did not preempt the creation or assignment of RECs. According to the agency:

What is relevant here is that RECs are created by the States. They exist outside the confines of PURPA. PURPA thus does not address the ownership of RECs. And the contracts for sales of [qualifying facility] capacity and energy, entered into pursuant to PURPA, likewise do not control the ownership of the RECs (absent an express provision in the contract). States, in creating RECs, have the power to determine who owns the REC in the initial instance, and how they may be sold or traded; it is not an issue controlled by PURPA.¹⁰⁷

The U.S. Court of Appeals for the District of Columbia Circuit later held that it lacked jurisdiction to review this declaratory order from FERC.¹⁰⁸

In the mean time, REC/PURPA issues continue to play out in the federal and state courts. For example, Connecticut enacted laws in 2002 that require electricity suppliers to use electricity from renewable sources. Wheelabrator Lisbon is a renewable energy producer for purposes of the Connecticut law, and in 1991 it had entered into a long-term contract with Connecticut Light & Power Co. for the energy that Wheelabrator produced. As a result of the 2002 Connecticut renewable energy laws, “[t]he energy conveyed in [Wheelabrator’s 1991] Agreement possessed certain renewable energy attributes that, since the signing of the Agreement, have become independently tradeable commodities known as ‘renewable energy credits’ (RECs).”¹⁰⁹ In 2004, the Connecticut Department of Public Utility Control (DPUC) assigned the RECs created under the Agreement to Connecticut Light & Power.¹¹⁰ When Wheelabrator challenged DPUC’s decision as violating PURPA, both the federal district court and the U.S. Court of Appeals for the Second Circuit upheld DPUC’s assignment, concluding – relying on FERC’s 2003 declaratory ruling – that the 2004 DPUC decision did not modify Wheelabrator’s Agreement or regulate rates.¹¹¹ As a result, PURPA did not preempt the DPUC’s decision.¹¹² Several other courts have reached the same conclusion.¹¹³

¹⁰⁷ American Ref-Fuel Co., Covanta Energy Group, Monterey Power Corp., & Wheelabrator Technologies, Inc., 105 FERC 61004, 2003 WL 22255784, at 61007 ¶ 23 (Oct. 1, 2003).

¹⁰⁸ Xcel Energy Services, Inc. v. FERC, 407 F.3d 1242, 1243-44 (D.C. Cir. 2005).

¹⁰⁹ Wheelabrator Lisbon, Inc. v. Connecticut Dept. of Public Utility Control, 531 F.3d 183, 186 (2d Cir. 2008).

¹¹⁰ *Id.*

¹¹¹ *Id.* at 189.

¹¹² *Id.*

¹¹³ *Arippa v. Pennsylvania Public Utility Comm’n*, 966 A.2d 1204, 1208-11 (Pa. Cmwlth 2009) (upholding the Pennsylvania Public Utility Commission in giving alternative energy credits to the electric distribution companies and holding that PURPA does not preempt the state’s assignment of RECs); In re

D. Potential Sources of Federal Preemption in the Future

As the above discussion indicates, federal preemption arguments can take many forms and rely on several sources of federal law, such as tax statutes, as well as the existing federal energy statutes. States pursuing multistate arrangements regarding renewable energy should consider the possibility that proposed and future federal legislation to preempt all or part of such multistate programs.

Since the 104th Congress began in 1995, over 1350 bills introduced into Congress have addressed “renewable energy” or “alternative capacity” in a wide variety of contexts. For example, just in July 2009, the New Alternative Transportation to Give Americans Solutions Act was introduced into the Senate to amend the Internal Revenue Code to provide tax incentives for renewable energy,¹¹⁴ while the House of Representatives saw the Water Protection and Reinvestment Act of 2009, which would provide funding to, among other things, promote the use of alternative energy in connection with water supply.¹¹⁵

The new laws that are likely to be most directly relevant to multistate renewable energy programs and agreements, however, are laws to establish national energy plans, to combat climate change, or both. For example, the House is currently entertaining the American Clean Energy and Security Act,¹¹⁶ which, if enacted anything like it has been proposed, would contain a number of relevant provisions. For example, the bill would amend Title VI of the PURPA to add a new Section 610, governing combined efficiency and renewable electricity standards. As proposed, this new section would define “renewable energy resource” to be:

- (A) Wind energy.
- (B) Solar energy.
- (C) Geothermal energy.
- (D) Renewable biomass.
- (E) Biogas derived exclusively from renewable biomass.
- (F) Biofuels derived exclusively from renewable biomass.
- (G) Qualified hydropower.

Ownership of Renewable Energy Certificates, 913 A.2d 825, 831 (N.J. Super. 2007) (same result in New Jersey)

¹¹⁴ S. 1408, 111th Cong., 1st Sess. (introduced July 8, 2009).

¹¹⁵ H.R. 3203, 111th Cong., 1st Sess. (July 14, 2009).

¹¹⁶ H.R. 2454, 111th Cong., 1st Sess. (July 7, 2009).

(H) Marine and hydrokinetic renewable energy, as that term is defined in section 632 of the Energy Independence and Security Act of 2007 (42 U.S.C. 17211).¹¹⁷

Moreover, the new provisions would allow FERC to regulate Federal Renewable Electricity Credits, requiring FERC to “issue to each generator of renewable electricity, 1 Federal renewable electricity credit for each megawatt hour of renewable electricity generated by such generator after December 31, 2011.”¹¹⁸ The existence of FRECs, apparently issued to generators, could thus preempt or otherwise affect state-issued RECs already in existence, as the bill recognizes and addresses as follows:

(A) Except as provided in subparagraph (B), where renewable electricity is generated with the support of payments from a retail electric supplier pursuant to a State renewable electricity program (whether through State alternative compliance payments or through payments to a State renewable electricity procurement fund or entity), the Commission shall issue Federal renewable electricity credits to such retail electric supplier for the proportion of the relevant renewable electricity generation that is attributable to the retail electric supplier’s payments, as determined pursuant to regulations issued by the Commission. For any remaining portion of the relevant renewable electricity generation, the Commission shall issue Federal renewable electricity credits to the generator, as provided in paragraph (1), except that in no event shall more than 1 Federal renewable electricity credit be issued for the same megawatt hour of electricity. In determining how Federal renewable electricity credits will be apportioned among retail electric suppliers and generators in such circumstances, the Commission shall consider information and guidance furnished by the relevant State or States.

(B) In the case of a central procurement State that pursuant to subsection (a) has assumed responsibility for compliance with the requirements of subsection (b), the Commission shall issue directly to the State Federal renewable electricity credits for any renewable electricity for which the State, pursuant to a mandate described in subsection (a)(7), has centrally procured credits or certificates issued based on generation of such renewable electricity.¹¹⁹

The bill also explicitly amends Section 210 of PURPA to clarify state authority regarding RECs in light of the Section 210(e) litigation. The bill would add a new Section 210(o):

(o) Clarification of State Authority to Adopt Renewable Energy Incentives. Notwithstanding any other provision of this Act or the Federal

¹¹⁷ *Id.* § 101(a) (establishing § 610(a)(17)).

¹¹⁸ *Id.* (establishing § 610(e)(1)).

¹¹⁹ *Id.* (establishing § 610(e)(2)).

Power Act, a State legislature or regulatory authority may set the rates for a sale of electric energy by a facility generating electric energy from renewable energy sources pursuant to a State-approved production incentive program under which the facility voluntarily sells electric energy. For purposes of this subsection, “State-approved production incentive program” means a requirement imposed pursuant to State law, or by a State regulatory authority acting within its authority under State law, that an electric utility purchase renewable energy (as defined in section 609 of this Act) at a specified rate.¹²⁰

Several other provisions would also be of interest to states should this bill become law. Section 132, for example, would provide support to state renewable energy and energy efficiency programs, while Section 299D would create loans for states and Indian tribes to carry out renewable energy sources activities. Section 700 would create supplemental agriculture and renewable energy incentives programs.

Given these provisions, the House of Representatives’ proposed American Clean Energy and Security Act would largely *preserve* – rather than preempt – state authority over programs to encourage the use of renewable energy, and it is probable that Congress is likely to preserve some form of cooperative federalism or state authority in whatever climate change legislation it enacts. Nevertheless, it is possible that Congress will choose to preempt certain kinds of state regulation in this general field, and it is likely that state renewable energy programs and requirements will need to be reconciled, at least at the detail level, with specific aspects of any carbon dioxide cap-and-trade system, dependent on how Congress finally constructs that cap-and-trade system.

E. Interstate Compacts and Federal Preemption

In light of continuing congressional activity with respect to renewable energy, it is worth noting that interstate compacts do affect the application of the Supremacy Clause and federal preemption. Specifically, the Interstate Compact Clause and the Supremacy Clause can interact in three ways.

First, if Congress has already preempted state law in a given area, multistate agreements to regulate in that area *require* an interstate compact approved by Congress.¹²¹ Second, a congressionally approved interstate compact can help to convince a court that Congress has *not* preempted state laws and regulations enacted pursuant to the compact.¹²² Thus, the interstate compact can blunt the operation of the Supremacy Clause. Third, if Congress adopts detailed provisions of the compact as federal statute, the compact can itself preempt state law. Thus, because Congress not only approved the

¹²⁰ *Id.* § 102.

¹²¹ *See* People of State of New York by Abrams v. Trans World Airlines, Inc., 728 F. Supp. 162, 182-83 (S.D.N.Y. 1989) (holding that no interstate compact was required in part because Congress had consciously not preempted state law in the area of airline advertising).

¹²² *Waterfront Commission of New York Harbor v. Construction & Marine Equipment Co., Inc.*, 928 F. Supp. 1388, 1401 (D.N.J. 1996).

1987 Tahoe Regional Planning Authority's management plan but wrote it into federal law, that plan "preempts state laws and state constitutions."¹²³

IV. FIFTH/FOURTEENTH AMENDMENT TAKINGS

A. The U.S. Constitution's Prohibition on Takings of Private Property Without Compensation

The Fifth Amendment to the U.S. Constitution provides that the United States shall not take "private property . . . for public use, without just compensation."¹²⁴ This prohibition on uncompensated takings applies to states and municipalities through the Fourteenth Amendment's Due Process Clause.¹²⁵

For most of the United States' history, the Takings Clause was most relevant to physical takings of real property, such as through eminent domain for public projects. The U.S. Supreme Court has affirmed that *any* physical occupation of private property as a result of government action requires compensation,¹²⁶ although it has also construed the "public uses" for which such property may be taken quite broadly, to allow condemnation for almost any "public purpose."¹²⁷ Thus, for example, the promotion of competition in natural gas markets is a legitimate public purpose justifying condemnation of property for a pipeline.¹²⁸

In 1922, the U.S. Supreme Court recognized that unconstitutional takings could arise from governmental regulation – so-called "regulatory takings."¹²⁹ The regulatory takings analysis, the Court has emphasized, is "designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."¹³⁰

The Supreme Court evaluates regulatory takings under two standards. In the 1992 case of *Lucas v. South Carolina Coastal Council*,¹³¹ the Court established a *per se* regulatory takings claim "when the owner of real property has been called upon to sacrifice *all* economically beneficial use in the name of the common good, that is, to leave his property economically idle" ¹³² In these circumstances, "[w]here the State seeks to sustain regulation that deprives land of all economically beneficial use, we think

¹²³ *Stephans v. Tahoe Regional Planning Agency*, 697 F. Supp. 1149, 1152 (D. Nev. 1988).

¹²⁴ U.S. CONST., amend V.

¹²⁵ *Dolan v. City of Tigard*, 512 U.S. 374, 383-84 (1994); *Keystone Bituminous Coal v. DeBenedictis*, 480 U.S. 470, 481 n. 10 (1987); *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 122 (1978).

¹²⁶ *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 421 (1982).

¹²⁷ *Kelo v. City of New London, Connecticut*, 545 U.S. 469, 477-81 (2005); *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 245 (1984).

¹²⁸ *Midcast Interstate Transmission, Inc. v. FERC*, 198 F.3d 960, 973 (D.C. Cir. 2000).

¹²⁹ *Pennsylvania Coal v. Mahon*, 260 U.S. 393, 412-16 (1922).

¹³⁰ *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

¹³¹ 505 U.S. 1003 (1992).

¹³² *Id.* at 1019 (emphasis added).

it may resist compensation only if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with."¹³³

In 2002, however, the Supreme Court clarified that *Lucas*-type *per se* regulatory takings are a very narrow category of regulatory takings. Specifically, "*Lucas* carved out a narrow exception to the rules governing regulatory takings for the 'extraordinary circumstance' of a permanent deprivation of all beneficial use"¹³⁴ For all other regulatory takings, including temporary takings, the balancing test from *Penn Central Transportation Co. v. New York City* controls.¹³⁵ This factor-based test looks at: (1) "[t]he economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations"; and (2) "the character of the governmental action."¹³⁶

B. Takings Claims and Classic Energy Regulation

Since the 19th century, the U.S. Supreme Court has considered the ramifications of the Takings Clause in connection with state and federal rate setting for utilities. As the Court summarized in 1989, "The guiding principle has been that the Constitution protects utilities from being limited to a charge for their property serving the public which is so 'unjust' as to be confiscatory. If the rate does not afford sufficient compensation, the State has taken the use of the utility property without paying just compensation for it."¹³⁷ Originally, the federal courts judged the constitutionality of the rate order according to the "fair value" rule, which "required rates to be set according to the actual present value of the assets employed in the public service."¹³⁸ However, in 1944, the Court held that the fair value rule was not the only constitutionally acceptable method for fixing utility rates,¹³⁹ and state and federal rate setters have since moved toward "prudential investment" or "historical cost" rules.¹⁴⁰ Regardless of the rule used, "whether a particular rate is 'unjust' or 'unreasonable' will depend to some extent on what is a fair rate of return given the risks under a particular rate-setting system, and on the amount of capital upon which the investors are entitled to earn that return."¹⁴¹ Moreover, the courts do not assess the constitutionality of the rate set on a piecemeal basis, but rather judge the overall net effect of the rate order.¹⁴²

¹³³ *Id.* at 1027.

¹³⁴ *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 325 n.19 (2002).

¹³⁵ *Id.* at 321 (referencing *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978)).

¹³⁶ *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124-25 (1978).

¹³⁷ *Duquense Light Co. v. Baraschi*, 488 U.S. 299, 307-08 (1989) (citing *Covington & Lexington Turnpike Road Co. v. Sanford*, 164 U.S. 578, 597 (1896); *Federal Power Comm'n v. Natural Gas Pipeline Co.*, 315 U.S. 575, 585 (1942); *Federal Power Comm'n v. Texaco, Inc.*, 417 U.S. 380, 391-92 (1974)).

¹³⁸ *Id.* at 308 (citing *Smythe v. Ames*, 169 U.S. 466, 547 (1898)).

¹³⁹ *Federal Power Comm'n v. Hope Natural Gas Co.*, 320 U.S. 591, 605 (1944).

¹⁴⁰ *Duquense Light Co. v. Baraschi*, 488 U.S. 299, 309 (1989).

¹⁴¹ *Id.* at 310.

¹⁴² *Id.* at 314.

Constitutional takings claims can also arise in a variety of energy contexts besides ratemaking. As is true of takings claims generally, most of these arguments are not successful. Thus, for example, when FERC issued orders that required all transmission facilities to adopt standard agreements for interconnecting with generators larger than 20 megawatts to avoid discrimination, the U.S. Court of Appeals for the District of Columbia Circuit denied the plaintiffs' takings claims based on the loss of landowners' good will because "the Order explicitly requires that any uses of eminent domain by transmission providers be at the expense of the benefiting generators."¹⁴³ While the court acknowledged that the use of eminent domain for unaffiliated generators might indeed undermine that good will, the same sort of undermining was also likely when eminent domain was used for interconnection to affiliated generators, and hence no taking had occurred simply because of FERC's efforts to avoid discrimination.¹⁴⁴

The Energy Policy Act has generated a number of recent takings claims – again, largely unsuccessful. For example, the Act curtails the ability of claimants to perfect or obtain patents to mining claims on federal lands. However, when the owner of 229 shale oil mining claims sued for an unconstitutional taking of his property rights, the U.S. Court of Appeals for the Federal Circuit concluded that no taking had occurred because there is no property "right" to a federal patent – just the opportunity to participate in a highly conditional claim process.¹⁴⁵

The Energy Policy Act also imposed an assessment on domestic nuclear power utilities to help pay for the decontamination and decommissioning of the United States' uranium enrichment facilities. Various federal courts have concluded that this assessment is constitutional and not a taking, either because the assessment is not large or disproportionate enough to qualify as a regulatory taking under the *Penn Central* balancing test¹⁴⁶ or under a more general rule that there can be no takings claim when the government imposes an obligation to pay money.¹⁴⁷

C. Takings Claims and State Promotion of Alternative Energy

States' programs to promote use of renewable energy, especially in conjunction with the creation of renewable energy credits (RECs) that qualify as valuable property rights, have begun to raise takings claims. For example, when the Connecticut Department of Public Utility Control (DPUC) assigned RECs to power distributors in existing contracts rather than the renewable energy producers, the producers repeatedly sued, claiming that the DPUC's decision constituted an unconstitutional taking of private property. In 2007, the Connecticut Supreme Court disagreed, concluding that there was

¹⁴³ National Ass'n of Regulatory Utility Commissioners v. FERC, 475 F.3d 1277, 1283-84 (D.C. Cir. 2007).

¹⁴⁴ *Id.*

¹⁴⁵ Grover v. United States, 73 Fed. Appx. 401, 404-05 (Fed. Cir. 2003).

¹⁴⁶ Carolina Power & Light Co. v. United States, 48 Fed. Cl. 35, 46-50 (2000)

¹⁴⁷ Commonwealth Edison Co. v. United States, 271 F.3d 1327, 1338-40 (Fed. Cir. 2001); Yankee Atomic Electric Co. v. United States, 112 F.3d 1569, 1580 (Fed. Cir. 1997).

no unconstitutional taking under the Connecticut Constitution because the RECs were new property that had never belonged to the power producers.¹⁴⁸

Thus, new programs regarding renewable energy that create new forms of property rights are unlikely to run afoul of the Taking Clause. However, new programs that destroy existing property rights, or that result in unjust rates, could.

D. Interstate Compacts and State Constitutional Takings

Most state constitutions also include takings prohibitions, often interpreted along the same lines as the U.S. Constitution. If, in approving an interstate compact, Congress codifies a specific interstate program or plan into federal law, those federal statutes can preempt state constitutional takings claims.¹⁴⁹

V. ELEVENTH AMENDMENT SOVEREIGN IMMUNITY

A. Eleventh Amendment Basics

The Eleventh Amendment to the U.S. Constitution provides that:

The Judicial power of the United States shall not extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.¹⁵⁰

Thus, as a general matter, the states, as sovereigns, enjoy Eleventh Amendment sovereign immunity from lawsuits by citizens in the federal courts.¹⁵¹ This immunity does not apply to suits against states by the federal government; however, Congress's authority to waive states' sovereign immunity from citizen-brought suits in federal courts is limited, and generally confined to federal statutes based in Congress's authorities pursuant to the post-Civil War amendments to the Constitution, especially Section 5 of the Fourteenth Amendment.¹⁵²

A state's Eleventh Amendment immunity extends to all "arms of the state," such as state agencies. However, it does not extend to municipalities. In case of doubt regarding an entity's Eleventh Amendment status, the federal courts have devised a multi-factor test for deciding whether an entity is entitled to immunity. Relevant factors

¹⁴⁸ *Wheelabrator Lison, Inc. v. Department of Public Utility Control*, 931 A.2d 159, 176-77 (Conn. 2007); *Minnesota Methane, LLC v. Department of Public Utility Control*, 931 A.2d 177, 184 (Conn. 2007).

¹⁴⁹ *Stephans v. Tahoe Regional Planning Agency*, 697 F. Supp. 1149, 1152 (D. Nev. 1988).

¹⁵⁰ U.S. CONST., Amend XI.

¹⁵¹ *Hess v. Port Authority Trans-Hudson Corp.*, 513 U.S. 30, 39 (1994) ("The Eleventh Amendment largely shields States from suit in federal court without their consent, leaving parties with claims against a State to present them, if the State permits, in the State's own tribunals.").

¹⁵² *United States v. Georgia*, 546 U.S. 151, 158 (2006); *Tennessee v. Lane*, 541 U.S. 509, 530-35 (2004).

include: the nature of the entity's duties and functions (land use is municipal; transportation is more debatable); how the entity's directors and/or governing board are appointed; the level of state control over the entity's actions; how the entity is described in the relevant implementing legislation; the state's financial responsibility for the entity and its actions; and the state's legal responsibility for the entity and its actions.¹⁵³ If these "indicators of immunity point in different directions, the Eleventh Amendment's twin reasons for being remain our prime guide": (1) whether suit in federal court will threaten a state's dignity; and (2) whether suit in federal court will threaten the state's purse.¹⁵⁴ Of these two factors, the latter is more important.¹⁵⁵

B. The Eleventh Amendment Status of Multistate Entities

Regulatory entities created through multistate agreements – including interstate compacts – tend *not* to be entitled to Eleventh Amendment immunity, and hence can usually be sued in federal court. States entering a multistate agreement regarding renewable energy may thus want to consider the potential for federal court litigation if they seek to create a new multistate regulatory body.

As a general matter, the question of whether a state has waived its Eleventh Amendment immunity through a multistate agreement is a question of the state's intent.¹⁵⁶ However, if the multistate agreement is also an interstate compact approved by Congress, the "federalization" of the states' agreement results in different standards applying when courts assess the states' intent. As the Supreme Court has explained:

where the waiver is, as here, claimed to arise from a compact between several States, the Court is called on to interpret not unilateral state action but the terms of a consensual agreement, the meaning of which, because made by different States acting under the Constitution and with congressional approval, is a question of federal law. In making that interpretation we must treat the compact as a living interstate agreement which performs high functions in our federalism, including the operation of vast interstate enterprises.¹⁵⁷

Thus, when Tennessee and Missouri specified in an interstate compact that the Tennessee-Missouri Bridge Commission could sue and be sued, the Supreme Court determined that, under federal law, the "sue-and-be-sued" clause effectively waived the Commission's asserted Eleventh Amendment immunity – even though the law in both states would have concluded otherwise.¹⁵⁸

¹⁵³ Hess v. Port Authority Trans-Hudson Corp., 513 U.S. 30, 44-46 (1994).

¹⁵⁴ *Id.* at 47.

¹⁵⁵ *Id.* at 48.

¹⁵⁶ Petty v. Tennessee-Missouri Bridge Commission, 359 U.S. 275, 278 (1959).

¹⁵⁷ Petty v. Tennessee-Missouri Bridge Commission, 359 U.S. 275, 279 (1959).

¹⁵⁸ *Id.* at 280-81.

In 1994, the Supreme Court again emphasized that interstate-compact-created “[b]istate entities occupy a significantly different position in our federal system than do the States themselves. The States, as separate sovereigns, are the constituent elements of the Union. Bistate entities, in contrast, typically are creations of three discrete sovereigns: two States and the Federal Government.”¹⁵⁹ As a result:

Suit in federal court is not an affront to the dignity of a Compact Clause entity, for the federal court, in relation to such an enterprise, is hardly the instrument of a distant, disconnected sovereign; rather, the federal court is ordained by one of the entity’s founders. Nor is the integrity of the compacting States compromised when the Compact Clause entity is sued in federal court. As part of the federal plan prescribed by the Constitution, the States agreed to the power sharing, coordination, and unified action that typify Compact Clause creations.¹⁶⁰

As a result, there is a presumption that agencies created through a congressionally approved interstate compact do not qualify for Eleventh Amendment sovereign immunity, although in doubtful cases courts will still apply the factor-based test for “arms of the state.”¹⁶¹

C. The Potential for Multistate Entities to Acquire Multivalent Status

One of the more perverse outcomes for multistate agencies, especially those created by interstate compact, is that they can qualify as state actors for some legal purposes while still being denied Eleventh Amendment immunity. For example, the U.S. Supreme Court determined that the Tahoe Regional Planning Agency, created through an interstate compact between California and Nevada, was enough of a state entity to act “under color of state law” for purposes of being subject to suit for constitutional “takings” pursuant to 42 U.S.C. § 1983 and 28 U.S.C. § 1343,¹⁶² but not an “arm of the state” entitled to Eleventh Amendment immunity.¹⁶³

On the statutory liability issue, the Supreme Court emphasized that:

The Compact had its genesis in the actions of the compacting States, and it remains part of the statutory law of both States. The actual implementation of TRPA, after federal approval was obtained, depended upon the appointment of governing members and executives by the two States and their subdivisions and upon mandatory financing secured, by the terms of the Compact, from the counties. . . . The federal involvement, by contrast, is limited to the appointment of one nonvoting member to the governing board. While congressional consent to the

¹⁵⁹ Hess v. Port Authority Trans-Hudson Corp., 513 U.S. 30, 40 (1994).

¹⁶⁰ *Id.* at 41-42.

¹⁶¹ *Id.* at 43-44, 44-46.

¹⁶² Lake Country Estates v. Tahoe Regional Planning Agency, 440 U.S. 391, 399-400 (1979).

¹⁶³ *Id.* at 400-02.

original Compact was required, the States may confer additional powers and duties on TRPA without further congressional action. And each State retains an absolute right to withdraw from the Compact.¹⁶⁴

In contrast, Eleventh Amendment sovereign immunity “is only available to ‘one of the states.’”¹⁶⁵ While state agencies may share such immunity “in order to protect the state treasury from liability that would have had essentially the same practical consequences as a judgment against the State itself,” lesser entities receive no such immunity.¹⁶⁶ “Unless there is good reason to believe that the States structured the new agency to enable it to enjoy the special constitutional protection of the States themselves, and that Congress concurred in that purpose,” multistate agencies receive no such immunity.¹⁶⁷

Thus, new multistate regulatory agencies or other entities can raise a series of issues regarding their exact jurisprudential status regarding the availability of federal courts for lawsuits and the applicability of various federal laws. States should consider these possibilities when creating such multistate bodies.

VI. OTHER POTENTIAL CONSTITUTIONAL ISSUES

A. Procedural Due Process

The Fourteenth Amendment to the U.S. Constitution states that “[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law”¹⁶⁸ Under this amendment, states – and multistate entities that qualify as government entities, such as the Tahoe Regional Planning Council – must provide minimum procedural protections to regulated entities when affecting those entities’ liberty or property interests.¹⁶⁹

Nevertheless, the requirements of the Due Process Clause are generally not onerous. As the U.S. Supreme Court has emphasized, if the due process prerequisite of a liberty or property interest is met, the fundamental due process guarantees are notice and an opportunity to be heard.¹⁷⁰

¹⁶⁴ *Id.* at 399.

¹⁶⁵ *Id.* at 400.

¹⁶⁶ *Id.* at 401.

¹⁶⁷ *Id.* See also *Hess v. Port Authority Trans-Hudson Corp.*, 513 U.S. 30, 32-33 (1994) (“[c]oncluding that . . . the Port Authority Trans-Hudson Corporation (PATH), is not cloaked with the Eleventh Amendment immunity that a State enjoys”).

¹⁶⁸ U.S. CONST., amend XIV, § 1.

¹⁶⁹ *District Attorney’s Office for the Third Judicial District v. Osborne*, --- U.S. ---, 129 S. Ct. 2308, 2319 (2009) (noting that the Due Process “Clause imposes procedural limitations on a State’s power to take away protected entitlements.”).

¹⁷⁰ *Jones v. Flowers*, 547 U.S. 220, 223 (2006); *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)); *Mullane v. Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950).

Procedural due process is already a constitutional requirement in state (and federal) energy-related proceedings, such as rate-making or licensing. Moreover, compliance with normal state or federal administrative procedural requirements virtually guarantees compliance with the rather minimal constitutional requirements.¹⁷¹ Nevertheless, the parties to any multistate agreement governing renewable energy would want to ensure that any of the resulting administrative processes – permitting, licensing, ratemaking, applications for renewable energy credits, etc. – comply with at least the minimum constitutional due process procedural requirements.

B. Substantive Due Process

The Due Process Clause of the Fourteenth Amendment also “includes a substantive component that provides some protection against economic legislation interfering with property interests.”¹⁷² However, this protection is very limited.¹⁷³ “To comport with the limited scope of substantive due process protection, economic legislation need only be rationally related to a legitimate government interest.”¹⁷⁴

For example, in the wake of the Master Settlement Agreement for the state tobacco litigation, Star Scientific, a cigarette manufacturer, challenged Virginia’s legislation implementing that agreement, which Star Scientific argued “unconstitutionally aims to effectively neutralize the economic impact of the Master Settlement Agreement on the participating manufacturers by placing equivalent financial burdens on the nonparticipating manufacturers, who are competitors of the participating manufacturers.”¹⁷⁵ The U.S. Court of Appeals for the Fourth Circuit upheld Virginia’s legislation because Virginia enacted its laws to promote public health against all cigarette use, and “the statute’s stated purpose is to ensure that Virginia will be able to recover healthcare costs from cigarette manufacturers regardless of whether the manufacturer had signed on to the Master Settlement Agreement.”¹⁷⁶

Substantive due process claims have also arisen in a variety of energy contexts. For example, the Price-Anderson Act imposed a liability cap of \$560 million for nuclear power plants’ liability in the case of a nuclear accident. The U.S. Supreme Court concluded that this cap did not violate substantive due process protections because Congress had characterized the liability limit as a starting point, the likelihood of a

¹⁷¹ See, e.g., *United Gas Public Service Co. v. Texas*, 303 U.S. 123, 138-29 (1938) (concluding that the procedures in a Texas rate-making proceeding satisfied constitutional procedural due process requirements).

¹⁷² *Star Scientific, Inc. v. Beales*, 278 F.2d 339, 348 (4th Cir. 2002) (citing *Concrete Pipe & Prods. Of California, Inc. v. Constr. Laborers Pension Trust for Southern California*, 508 U.S. 602, 636-37 (1993); *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 14-15 (1976)).

¹⁷³ *Williamson v. Lee Optical of Oklahoma*, 348 U.S. 483, 488 (1955); *Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963).

¹⁷⁴ *Star Scientific, Inc. v. Beales*, 278 F.2d 339, 348 (4th Cir. 2002) (citing *Concrete Pipe & Prods. Of California, Inc. v. Constr. Laborers Pension Trust for Southern California*, 508 U.S. 602, 637 (1993); *Duke Power Co. v. Carolina Env’tl. Study Gp.*, 438 U.S. 59, 84 (1978); *Holland v. Keenan Trucking Co.*, 102 F.3d 736, 740 (4th Cir. 1996)).

¹⁷⁵ *Id.* at 347.

¹⁷⁶ *Id.* at 349.

nuclear accident was small, and Congress would probably enact additional legislation should a nuclear accident actually occur.¹⁷⁷

Substantive due process claims have most commonly arisen when legislatures like Congress impose assessments or fees to pay for the consequences of power generation. For example, the Energy Policy Act imposed an assessment on domestic utilities to help pay for the decontamination and decommission of the United States' uranium enrichment facilities. The U.S. Court of Federal Claims upheld these provisions against a substantive due process challenge even though the assessment was retroactive, unanticipated, and unforeseeable (according to the plaintiffs), because the plaintiffs made no showing that Congress had not acted rationally, Congress considered several options for paying for the decontamination and decommissioning, there was no showing that the allocation of the assessments was arbitrary, and Congress expressly allowed the utilities to pass the costs of the assessment on to ratepayers.¹⁷⁸ "Based on the foregoing history," concluded the court, "it is clear that Congress' decision to look to those who had benefited from the government's enrichment services in the past to help pay for the cleanup of the government's enrichment facilities was not irrational."¹⁷⁹ The U.S. Court of Appeals for the Federal Circuit agreed in parallel Energy Policy Act litigation, concluding that the assessments did not violate the Due Process Clause either because of their retroactivity or because the remediation costs were disproportionate to each utility's use of enriched uranium.¹⁸⁰ Similarly, the Federal Circuit concluded that provisions in the Nuclear Waste Policy Act that imposed an assessment on nuclear power plants to pay for the disposal of nuclear waste, which costs the plants then passed on to consumers, did not violate principles of substantive due process, because "constitutional principles are not violated by requiring those benefiting from nuclear-generated power to pay for the disposal of its waste; and it must be recognized that the waste must ultimately be disposed of."¹⁸¹

This case law indicates that multistate agreements that impose fees or assessments – especially retroactive assessments – could prompt substantive due process claims against the implementing states or multistate agency.¹⁸² However, such claims are unlikely to succeed if the states or multistate agency has a rational reason for imposing the fee or assessment, the fee or assessment is related to the activity being regulated, and the fee or assessment is not disproportionately large compared to the other costs and the profits of the activities at issue.

C. Equal Protection Clause

¹⁷⁷ Duke Power Co. v. Carolina Environmental Study Group, Inc., 438 U.S. 59, 83-87 (1978).

¹⁷⁸ Carolina Power & Light Co. v. United States, 48 Fed. Cl. 35, 42-46 (2000).

¹⁷⁹ *Id.* at 45.

¹⁸⁰ Commonwealth Edison Co. v. United States, 271 U.S. 1327, 1341-47 (Fed. Cir. 2001).

¹⁸¹ Roedler v. Department of Energy, 255 F.3d 1347, 1355 (Fed. Cir. 2001).

¹⁸² See, e.g., Lake Country Estates, Inc. v. Tahoe Regional Planning Agency, 440 U.S. 391, 396, 397 (1979) (noting that the plaintiff had raised a Due Process claim in connection with its challenge to the compact-created Tahoe Regional Planning Authority's actions but not needing to address it).

The Fourteenth Amendment to the U.S. Constitution states that “[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws.”¹⁸³ Interstate agreements that favor some interests over other interests can leave themselves vulnerable to Equal Protection challenges. Equal Protection challenges could arise in connection with a multistate agreement regarding renewable energy, for example, if the resulting program substantially favored electricity from renewable sources (wind, solar) over electricity from conventional coal-, gas-, or oil-fired power plants, either at the generator level – in terms of access to the grid, price, priority of use, or other considerations – or at the consumer level.

Nevertheless, Equal Protection Clause challenges would be unlikely to succeed. According to the U.S. Supreme Court, “[i]n areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.”¹⁸⁴ In other words, the courts will uphold allegedly “discriminatory” classifications if the classification is rationally related to a legitimate state interest – so long as the classification does not involve suspect categories (race, gender) or the right involved is not a fundamental constitutional right (voting, free speech).¹⁸⁵

Thus, for example, the U.S. Court of Appeals for the Eleventh Circuit upheld Florida’s implementation of the Energy Conservation and Production Act¹⁸⁶ despite discrimination against felons and sex offenders. Specifically, the Broward County Weatherization Program, which distributed federal funds obtained pursuant to the Act to low-income families to improve the weatherization of their homes, excluded otherwise-eligible sex offenders and felons from receiving the funds. The Eleventh Circuit concluded that there was no equal protection violation because: (1) neither “felon” nor “sex offender” is a suspect class; (2) the country program thus enjoyed a strong presumption of validity under rational basis review; and (3) conservation of limited funds for distribution was a rational basis for excluding some categories of low-income individuals from receiving the weatherization funds.¹⁸⁷

D. Indian Commerce Clause

The Indian Commerce Clause is a separate provision of the Interstate Commerce Clause and provides Congress with the power “[t]o regulate Commerce . . . with the Indian Tribes.”¹⁸⁸ This Clause could become relevant to a multistate agreement on alternative energy if, for example, Tribes seek to sell electricity from renewable sources into a program operating through a multistate agreement, or if states seek to lease tribal lands for alternative energy production.

¹⁸³ U.S. CONST., amend. XIV, § 1.

¹⁸⁴ FCC v. Beach Communications, Inc., 508 U.S. 307, 313 (1993).

¹⁸⁵ Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 461 (1981); City of New Orleans v. Duke, 427 U.S. 297, 303 (1976).

¹⁸⁶ 42 U.S.C. §§ 6851-6873.

¹⁸⁷ Houston v. Williams, 547 F.3d 1357, 1364 (11th Cir. 2008).

¹⁸⁸ U.S. CONST., art. I, § 8, cl. 3.

Indian law is a complex and nuanced area of federal law. In general, however, recognized Indian tribes are sovereigns, but subordinate to the United States. Specifically, through the Indian Commerce Clause, “Congress has plenary authority to limit, modify, or eliminate the powers of local self-government which the tribes otherwise possess.”¹⁸⁹ As a result, tribes are subject to any federal law that Congress chooses to impose upon them.¹⁹⁰

However, tribes are not automatically subject to state regulation. Unfortunately, state authority to regulate on-reservation activities is one of the most complex and murky topics in federal Indian law and often depends on a particular tribe’s precise history and the exact language of any treaties it has with the United States.¹⁹¹ Nevertheless, some general rules can be discerned. First, Congress can waive a tribe’s sovereign immunity in favor of state regulation.¹⁹² Second, in the first two-thirds of the 20th century, Congress tended to allow state regulation of on-reservation activities.¹⁹³ Third, however, both Congress and the U.S. Supreme Court have more recently become more respectful of tribal sovereignty.

The Federal Power Act provides one example of the complexities of tribal issues in energy regulation. As between states and the federal government, for example, the U.S. Supreme Court established in 1955 that the Federal Power Commission, now FERC, has exclusive jurisdiction to issue licenses for hydroelectric projects on lands considered “reservations” under the Act, which includes formal tribal reservations; states cannot veto those licenses.¹⁹⁴ However, this restriction does not apply to non-reservation lands owned by a tribe. As a result, the Tuscadora Indian Nation was subject to the normal operation of Section 21 of the Act,¹⁹⁵ which allowed the Power Authority of New York, as a FERC licensee, to condemn the Nation’s non-reservation lands for a hydroelectric project.¹⁹⁶

Even on reservation lands, however, FERC does not operate with a free hand. Pursuant to Section 4(e) of the Federal Power Act, the Secretary of the Interior can condition FERC licenses for hydropower projects on reservations in order to protect the reservation and its utilization.¹⁹⁷ According to the Supreme Court, FERC *must* implement all of the Secretary’s conditions and cannot second-guess the Secretary

¹⁸⁹ Santa Clara Pueblo v. Martinez, 436 U.S. 49, 56-57 (1978) (citing United States v. Kagama, 118 U.S. 375, 379-81, 383-84 (1886)).

¹⁹⁰ Federal Power Comm’n v. Tuscadora Indian Nation, 362 U.S. 99, 116 (1960).

¹⁹¹ See, e.g., Nevada v. Hicks, 533 U.S. 353, 364-65 (2001) (holding that a tribal court did not have jurisdiction over a member’s tort and § 1983 claims against the state); South Dakota v. Yankton Sioux Tribe, 522 U.S. 329, 354-56 (1998) (upholding application of South Dakota’s environmental laws to a landfill allegedly within the reservation).

¹⁹² Rice v. Rehner, 463 U.S. 713, 715-35 (1983).

¹⁹³ Organized Village of Kake v. Egan, 369 U.S. 60, 74 (1962).

¹⁹⁴ Federal Power Commission v. Oregon, 349 U.S. 435, 445-46 (1955).

¹⁹⁵ 16 U.S.C. § 814.

¹⁹⁶ Federal Power Commission v. Tuscadora Indian Nation, 362 U.S. 99, 115 (1960).

¹⁹⁷ 16 U.S.C. § 797(e).

regarding which conditions are “really” necessary.¹⁹⁸ Moreover, according to the U.S. Court of Appeals for the District of Columbia Circuit, FERC cannot impose strict time limits on the Secretary’s submission of conditions, and “so long as some portion of the project is on the reservation, the Secretary is authorized to impose any conditions that will protect the reservation, including *utilization* of the reservation in a manner consistent with its original purpose.”¹⁹⁹ Moreover, according to the U.S. Court of Appeals for the Ninth Circuit, the Federal Power Act does not preempt tribes’ treaty-based claims for damages in connection with Federal Power Commission- or (by implication) FERC-licensed projects.²⁰⁰

Thus, to the extent that a multistate program for renewable energy seeks to incorporate tribal lands and governments, it could be subject to tribal resistance and claims of tribal sovereignty or federal preemption. Moreover, long-term agreements with any tribe will almost certainly require the involvement of the federal government. For example, Congress has used its Indian Commerce Clause and federal Property Clause authorities to enact two generally relevant statutes that require federal involvement in contracts with tribes. First, “[n]o agreement or contract with an Indian tribe that encumbers Indian lands for a period of 7 or more years shall be valid unless that agreement or contract bears the approval of the Secretary of the Interior or a designee of the Secretary.”²⁰¹ Second if the agreement or contract involves tribal trust property or funds held by the United States, the United States must consent to the contract.²⁰² In either case, the involvement of tribes in a multistate program would make the interstate compact option more appealing.

E. Appointments Clause

The Appointments Clause of the U.S. Constitution provides that: GET TEXT.²⁰³ While this constitutional provision would not seem to be relevant, it has been raised when interstate energy-related entities appear to take on federal authority, prompting arguments that the members of those entities need to be appointed by the President and approved by Congress in conformance with the Clause.

For example, an interstate compact entered into by Washington, Oregon, Montana, and Idaho approved by Congress created the Pacific Northwest Electric Power and Conservation Planning Council. Through the compact, the terms of which Congress adopted as federal statute, the Council was charged with preparing a regional conservation and electricity usage plan for the Pacific Northwest region.²⁰⁴ Litigants challenging the Council and its 1983 Northwest Conservation and Electric Power Plan

¹⁹⁸ Escondido Mutual Water Co. v. La Jolla, Rincon, San Pasqual, Pauma, & Pala Bands Mission Indians, 466 U.S. 765, 775-70 (1984).

¹⁹⁹ City of Tacoma, Washintong, v. FERC, 460 F.3d 53, 64-65, 66-67 (D.C. Cir. 2006).

²⁰⁰ Skokomish Indian Tribe v. United States, 410 F.3d 506, 512 n.4 (9th Cir. 2005).

²⁰¹ 25 U.S.C. § 81(b).

²⁰² 25 U.S.C. § 85.

²⁰³ U.S. CONST., art. II, § 2, cl. 2.

²⁰⁴ 16 U.S.C. §§ 839(a), 839b(c)(2).

argued in part that the Council was a federal agency whose members are thus “federal officers” who must be appointed in conformity with the Appointments Clause.

The challengers argued that the Council was a federal agency because it influences federal actors such as the Bonneville Power Administration, not state actors. However, the U.S. Court of Appeals for the Ninth Circuit disagreed. It noted first that both the compact and the federal statutes implementing the compact specified that the Council is not a federal agency.²⁰⁵ Second, it emphasized that “[t]here is no bar against federal agencies following policies set by nonfederal agencies.”²⁰⁶ Finally, the Council members were not federal officers because “the Council members’ appointment, salaries and administrative operations are pursuant to the laws of the four individual states, within parameters set by the Act. More important, the states ultimately empower the Council members to carry out their duties.”²⁰⁷ As a result, the compact and its implementing federal statutes created an “innovative system of cooperative federalism” that did not violate the Appointments Clause.²⁰⁸

F. Free Speech Clause

The First Amendment to the U.S. Constitution states that “Congress shall make no law . . . abridging the freedom of speech . . .”²⁰⁹ This Free Speech Clause applies to the states through the Fourteenth Amendment.²¹⁰

The First Amendment would likely be most relevant to a multistate agreement regarding renewable energy in the context of advertising, especially restrictions on advertising. Such advertising is commercial speech, and the U.S. Supreme Court’s reigning test for the constitutionality of state regulation of commercial speech arose in the context of electric utilities. According to the Court in *Central Hudson Gas and Electric Corp. v. Public Service Commission of New York*,

The First Amendment, as applied to the States through the Fourteenth Amendment, protects commercial speech from unwarranted government regulation. . . . Commercial expression not only serves the economic interest of the speaker, but also assists consumers and furthers the societal interest in the fullest possible dissemination of information.²¹¹

However, commercial speech receives less constitutional protection than other forms of speech, such as political speech.²¹²

²⁰⁵ Seattle Master Builders Ass’n v. Pacific Northwest Electric Power & Conservation Planning Council, 786 F.2d 1359, 1361 (9th Cir. 1986) (citing 16 U.S.C. § 839b(a)(2)(A)(iv)).

²⁰⁶ *Id.* at 1364.

²⁰⁷ *Id.* at 1365 (citing 16 U.S.C. §§ 839b(a)(3), 839b(a)(4)).

²⁰⁸ *Id.* at 1366.

²⁰⁹ U.S. CONST., amend I.

²¹⁰ *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557, 561 (1980).

²¹¹ *Id.* at 561-62.

²¹² *Id.* at 562-63.

As a result, the Court created – and continues to use²¹³ – a four-part test for commercial speech. First, the commercial speech must be entitled to First Amendment protection; states are free to prohibit advertising that is deceptive or “commercial speech related to illegal activity.”²¹⁴ Second, if the commercial speech warrants First Amendment protection, state regulation must serve a “substantial” state interest.²¹⁵ Third, the regulation must “directly advance” that state interest.²¹⁶ Finally, the regulation must be the least restrictive means of regulating commercial speech that achieves the substantial state interest.²¹⁷ Under this test, the U.S. Supreme Court concluded that the New York Public Service Commission had violated the First Amendment when the Commission promulgated a regulation that completely banned electric utilities from advertising to promote the use of electricity, despite the fact that conservation of electricity was a national priority at the time.²¹⁸

First Amendment issues could also potentially arise if states or a multistate agency limited advertising to promoting renewable energy. While such a restriction would still fall within the commercial speech analysis, it is worth noting that in other contexts the Supreme Court prohibits viewpoint discrimination.²¹⁹

However, the First Amendment would not restrict states’ or a multistate agency’s promotion of renewable energy. As the Supreme Court emphasized last term, the Free Speech Clause limits government regulation of private speech; it “does not regulate government speech.”²²⁰

CONCLUSION

Constitutional considerations could – and in many respects should – inform the structure, function, and substantive components of any multistate renewable energy program. In addition, even where the constituent states predict that a program attribute would survive constitutional challenge, preparing those rationales in advance can better prepare the states and any resulting multistate agency against future lawsuits.

Structurally, the primary question for the states involved in a multistate renewable energy agreement or program is whether to proceed *as* states or to act through an interstate compact. The Regional Greenhouse Gas Initiative (RGGI) provides once example of a complex and coordinated multistate program operating without an interstate compact by relying almost entirely on state-specific implementation of generally shared

²¹³ Thompson v. Western States Medical Center, 535 U.S. 357, 367-68 (2002) (using the *Central Hudson* test to invalidate restrictions on drug advertising).

²¹⁴ *Central Hudson*, 447 U.S. at 563-64.

²¹⁵ *Id.* at 564.

²¹⁶ *Id.*

²¹⁷ *Id.*

²¹⁸ *Id.* at 571-72.

²¹⁹ Pleasant Grove City, Utah v. Summum, --- U.S. ---, 129 S. Ct. 1125 (2009).

²²⁰ *Id.* at 1131.

principles. Importantly, however, the RGGI has not been subject to an Interstate Compact Clause challenge, and arguments can be made that it should not survive such a challenge, on grounds that there is obviously a high level of coordination among the ten participating states and that the Supreme Court, Congress, and the federal Environmental Protection Agency have now acknowledged the federal interest in greenhouse gas regulation.

Given the pervasive federal presence in energy regulation, it may be difficult for states to both coordinate their renewable energy actions and programs *and* avoid the application of the Interstate Compact Clause. Moreover, in weighing the interstate compact option, states should consider that an interstate compact could help them to avoid other constitutional issues that could arise in the implementation of a multistate renewable energy program.

As noted, a multistate entity created through interstate compact would be unlikely to enjoy the states' Eleventh Amendment sovereign immunity from citizen suits in federal court. Conversely, congressional approval of the compact could at least partially, and arguably completely, insulate the resulting multistate program from Supremacy Clause challenges, which might be a significant benefit in light of evolving congressional work on climate change and energy policy legislation. Greater federalization of the multistate program might also eliminate dormant Commerce Clause limitations.

Finally, certain attributes of a multistate renewable energy program would make an interstate compact necessary or particularly desirable. For example, if the states desire the long-term participation of tribes in the program, or plan to lease tribal lands for renewable energy development, federal consent will likely be required regardless, making an interstate compact more attractive. In addition, Moreover, if the states enter an actual agreement regarding the sale, distribution, and transmission of renewable electricity, especially across state lines, an interstate compact will be required.

Regardless of how the states resolve this fundamental issue of legal structure, however, other constitutional requirements will govern the program's function. For example, any governmental process – intrastate or multistate – will have to observe the basic constitutional protections of procedural due process. Similarly, if the acting agencies try to regulate private advertising, they will be subject to the First Amendment's Free Speech Clause.

Constitutional considerations should also be relevant to the substance of the multistate renewable energy program. A program that creates and assigns new property rights, such as renewable energy credits, is unlikely to violate the Takings Clause, but one that changes or reassigns existing property rights – including contractual rights – certainly could. Fees and assessments, however, are unlikely to violate either the Takings Clause or substantive due process requirements. Finally, if the program seeks to establish preferential classifications based on the type of energy being used, or income, or other non-suspect status, it will probably not violate the Equal Protection Clause.