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How to Avoid Constitutional Challenges to State Based Climate Change Initiatives: A Case Study of Rocky Mountain Farmers Union v. Corey and New York State Programs

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COMMENT

How to Avoid Constitutional Challenges to State Based Climate Change Initiatives: A Case Study of *Rocky Mountain Farmers Union v. Corey* and New York State Programs

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I. INTRODUCTION

In the absence of coordinated national efforts, States have taken it upon themselves to reduce harmful carbon emissions and combat climate change using various programs and methods.[1] The President has made recommendations regarding national action to reduce emissions, however, there has been no legislative or all-encompassing national standards set. Through the President's Climate Action Plan (hereinafter "President's Plan"), the President requires the Environmental Protection Agency (EPA) to create rules pertaining to carbon emissions under the Clean Air Act (CAA) § 111(d), which the agency has recently

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1. *See, e.g.,* CONN. GEN. STAT. § 16-245a (2013) (establishing Connecticut's RPS program); MASS. GEN. LAWS ANN. ch. 25A, § 11F (West 2012) (establishing Massachusetts's RPS program); 6 N.Y. COMP. CODES R. & REGS. tit. 6, § 242-1.1 (2008) (establishing the Regional Greenhouse Gas Initiative in New York State); OR. REV. STAT. § 36.469A (2007) (establishing Oregon's RPS program); Order Regarding Retail Renewable Portfolio Standard, In the Matter of a Renewable Energy Portfolio Standard, Case 03-E-0188 (N.Y. P.S.C. 2004), *available at* www.dps.state.ny.us/03e0188.htm (establishing New York State's RPS).

proposed.[2] As states continue to take individual action, concerns have arisen regarding the possibility of constitutional violations.[3] In 2006, due to a lack of national action on climate change, California became a first mover by enacting the Low Carbon Fuel Standard (LCFS) in order to reduce emissions from the transportation sector and limit California's exposure to the negative effects of climate change.[4] It quickly became the target of legal challenges under the Commerce Clause.

Rocky Mountain Farmers Union, representatives of the in-state and out-of-state corn ethanol industry, and American Fuels, representatives of petrochemical refineries and manufacturers, brought constitutional challenges against the California Air Resources Board for enacting the LCFS.[5] The parties alleged the LCFS violates the dormant Commerce Clause and Supremacy Clause of the Constitution and is preempted by section 211(o) of the CAA, which is part of the Renewable Fuel Standard ("RFS"), as well as the Energy Independence and Securities Act.[6] *Rocky Mountain Farmers Union v. Corey* (hereinafter "Rocky Mtn. v. Corey") reached the Ninth Circuit Court of Appeals in 2013, and the Supreme Court denied a petition for certiorari in July 2014.[7] Although certiorari was denied, the outcome of the case has had a major impact on how other states can argue the constitutional validity of state enacted emissions reduction programs, and is

2. Executive Office of the President, *The President's Climate Action Plan*, June 2013, *available at* http://www.whitehouse.gov/sites/default/files/image/president27sclimateactionplan.pdf [hereinafter *President's Climate Action Plan*]; JANE A. LEGGETT, CONG. RESEARCH SERV., PRESIDENT OBAMA'S CLIMATE ACTION PLAN (May 28, 2014); Carbon Pollution Standards for Modified and Reconstructed Stationary Sources: Electric Utility Generating Units, 79 Fed. Reg. 34,960 (proposed June 18, 2014) (to be codified at 40 C.F.R. pt. 60).

3. *See, e.g.*, Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist., 498 F.3d 1031 (9th Cir. 2007); North Dakota v. Heydinger, 11-CV-3232 (SRN/SER), 2014 WL 1612331, at *13 (D. Minn. 2014); Rocky Mountain Farmers Union v. Corey, 730 F.3d 1070, 1077 (9th Cir. 2013).

4. CAL. CODE REGS. tit. 17, § 95480 (2013).

5. Rocky Mountain Farmers Union v. Goldstene, 843 F. Supp. 2d 1071, 1092 (E.D. Cal. 2011), *rev'd sub nom.* Rocky Mountain Farmers Union v. Corey, 730 F.3d 1070, 1077 (9th Cir. 2013), *reh'g en banc denied*, 740 F.3d 507 (2014), *cert. denied*, 134 U.S. 2875 (2014).

6. 42 U.S.C. § 7545 (2012); *Corey*, 730 F.3d at 1077; Michael R. Barr et al., *Recent Litigation*, 6-85 CA ENVTL. L. & LAND USE PRAC. § 85.03(4) (2014).

7. *Corey*, 730 F.3d 1070, *cert. denied*, 134 U.S. 2875.

already being referred to in cases outside the Ninth Circuit.[8] After remand, it is possible the case could come back up through the Ninth Circuit and appear before the Supreme Court.

Considering the decision in *Rocky Mtn. v. Corey* and the EPA's actions in accordance with the President's Plan, this comment will outline best practices states can use in creating climate initiatives based on the challenges California faced in *Rocky Mtn. v. Corey*. Part II of this comment will analyze the reasoning in *Rocky Mtn. v. Corey*. Although certiorari was denied in the case, Part II will analyze recent Supreme Court dormant Commerce Clause jurisprudence to determine which cases are relevant to consider when analyzing a dormant Commerce Clause challenge to state based climate initiatives. Part III will discuss the current Federal Climate Action Plan and relevant provisions of the CAA, focusing on 111(d), and what states should consider when implementing climate initiatives to avoid constitutional challenges. Part IV will highlight New York State based climate initiatives as a case study. Like California's LCFS, the Regional Greenhouse Gas Initiative ("RGGI") and New York's Renewable Portfolio Standard (hereinafter "NYS RPS") faced scrutiny as to whether the regulations violate the dormant Commerce Clause.[9] Part IV will also discuss how RGGI and the NYS RPS demonstrate how States can act locally and regionally applying best practices to create legally defensible climate initiatives.[10]

8. *Corey*, 740 F.3d at 507, *cert. denied*, 134 U.S. 2875 (denial of motion for rehearing en banc and inference that the parties will most likely file for certiorari); *see Heydinger*, 2014 WL 1612331, at *20; Carolyn Whetzel, *Ethanol Groups Seek Supreme Court Review of California's Low Carbon Fuel Standard*, BLOOMBERG BNA (Mar. 21, 2014), https://www.bna.com/ethanol-groups-seek-n17179888987/ (discussing how a petition for certiorari was filed on March 20, 2014).

9. U.S. CONST. art. I, § 8, cl. 3; *see generally* Bowman v. Chicago & N. W. Ry. Co., 125 U.S. 465, 479 (1888).

10. This comment will focus only on dormant Commerce Clause challenges, however the author recognizes there are other constitutional challenges that can be brought against a state climate initiative of which states should be aware. Some potential constitutional challenges include a federal preemption challenge under the Supremacy Clause or a challenge under the Equal Protection Clause. Theoretically, if a state complies with the dormant Commerce Clause, federal law would not apply, so preemption would no longer be an issue, and the action would be non-discriminatory avoiding an Equal Protection challenge.

II. ORIGINS OF ROCKY MOUNTAIN FARMERS UNION V. COREY

Rocky Mountain Farmers Union v. Corey focuses on the constitutionality of California's LCFS. Part II.a. discusses the history and pertinent provisions of the LCFS that were challenged in the case. Part II.b. gives an overview of the dormant Commerce Clause. Part II.c. provides an overview of *Rocky Mtn. v. Corey* and describes the reasoning the Ninth Circuit Court of Appeals used to determine the LCFS does not violate the dormant Commerce Clause. Part II.d. describes relevant Supreme Court jurisprudence to consider when defending a state-based climate initiative from a dormant Commerce Clause challenge.

A. Overview of California's Low Carbon Fuel Standard

The Global Warming Solutions Act of 2006 established ambitious climate change legislation for the state of California.[11] The act established a cap-and-trade system and included a requirement that the State's greenhouse gas emissions level must reach the emissions level in 1990 by the year 2020.[12] In order to meet the required emissions levels, the act granted the California Air Resources Board (CARB) the power to enact appropriate legislation to reduce emissions.[13]

Greenhouse gas emissions from transportation constitute more than forty percent of California's emissions.[14] In an effort to decrease the amount of emissions from this major source, California's LCFS focuses on reducing the greenhouse gas emissions associated with the production and use of transportation fuels.[15] For a fuel to be sold in the California

11. Global Warming Solutions Act, CAL. HEALTH & SAFETY CODE § 38501-38599 (West 2006).
12. 1 TREATISE ON ENVIRONMENTAL LAW § 2.04(5)(a) (2014).
13. *Id.* § 2.04(5)(b).
14. *Corey*, 730 F.3d at 1079.
15. CAL. CODE REGS. tit. 17, § 95480.1(a) (2013).

market it must meet a specific carbon intensity level enforced by CARB.[16]

California's primary goal of enacting the LCFS is to promote alternative fuels with less carbon emissions and deter carbon intensive fuel sources such as crude oil from being utilized in the market.[17] The LCFS standard applies to both gasoline and alternative fuels.[18] The entire lifecycle of the fuel is taken into account, from the extraction or production of the feedstock through the use of the fuel in a vehicle, otherwise known as a pathways analysis.[19] California's lifecycle analysis is based on the federally established and peer reviewed GREET pathway analysis that the Environmental Protection Agency uses in the RFS.[20] The calculation considers the feedstock used to produce the fuel, the source of electricity for production, the distance the fuel must travel to the California market, and the emissions from the use of the fuel.[21] Similar to the National RFS, California set up a credit trading system where a fuel producer may produce a higher carbon intensity fuel, and offset the emissions by purchasing credits from fuel producers with a carbon budget deficit.[22] A more carbon intensive fuel can enter the California market, but in order to make a profit the fuel producer should ensure the cost of purchasing carbon credits will be recovered through retail fuel sales.[23]

In 2011, CARB established initial carbon intensity standards for crude oil.[24] In creating the carbon intensity standards for crude oil, CARB considered the make-up of the fuel market in

16. *Id.* at §§ 95481(a)(16), 95486, 95490 (defining carbon intensity as "the amount of lifecycle greenhouse gas emissions, per unit of energy of fuel delivered, expressed in grams of carbon dioxide equivalent per megajoule").

17. *Corey*, 730 F.3d at 1079-80.

18. CAL. CODE REGS. tit. 17, § 95480.1(a).

19. *Id.* tit. 17, § 95486(a)(2) (describing how a pathway analysis of the production of any type of fuel includes evaluation of feed stocks used to produce the fuel, production technology, geographic region, mode of transportation, and the amount and type of thermal and electrical energy consumed during production).

20. *Corey*, 730 F.3d at 1081-82.

21. Tit. 17, § 95486(a).

22. *Compare* 42 U.S.C. § 7545(k)(7) (2012), *with* tit. 17, § 95485(c).

23. *See generally Corey*, 730 F.3d at 1080.

24. *Id.* at 1084-85.

2006.[25] It distinguished high carbon intensity crude oil (HCICO) from non-HCICO, and existing sources of crude from emerging sources of crude.[26] The distinction between HCICOs and non-HCICOs was made to reduce emissions and encourage investment into alternative fuel development instead of investment in better ways to extract crude.[27] Shortly after establishing the standards for crude oil, CARB determined basing the current carbon intensity levels on the 2006 calculations was infeasible, and amended the LCFS so that all crude oil would be assigned the higher carbon intensity level from either the year of sale or the average for 2010,[28] meaning "all crude oil is assessed the same carbon intensity value" regardless of where it is produced.[29] The amendment was made because the regulation as written was burdensome on in-state oil refiners and benefited out-of-state crude oil due to the potential for "fuel shuffling," which occurs when high carbon intensity fuels shift to other markets rather than stay in the California market, thus decreasing the demand for California produced crude and harming California based crude producers.[30]

B. Explanation of the Dormant Commerce Clause

The dormant Commerce Clause is not explicitly stated in the Constitution, but courts have read it into the Commerce Clause.[31] Dormant Commerce Clause issues emerge when Congress "has not affirmatively acted to either authorize or forbid the challenged state activity."[32] In order to evaluate whether a state action violates the dormant Commerce Clause, courts consider if

25. *Id.* at 1085-86.
26. *Id.* at 1085.
27. *See Corey*, 730 F.3d at 1085-86.
28. *Id.*
29. *Id.*
30. *Id.* at 1085.
31. U.S. CONST. art. 1, § 8, cl. 3; Bowman v. Chicago & N. W. Ry. Co., 125 U.S. 465, 479 (1888) (holding that an Iowa law requiring certificate stating the person to whom the out-of-state liquor was being sold could actually sell the liquor before being permitted into the state violated the Commerce Clause because it discriminated against the citizens and products of other states).
32. 3 TREATISE ON ENVIRONMENTAL LAW § 4.03(3)(b) (2014) (citing Lewis v. BT Inv. Managers, Inc., 447 U.S. 27, 35 (1980)).

the action: (1) has an extraterritorial effect; (2) is facially discriminatory or has a discriminatory intent and a discriminatory effect in practice; and (3) indirectly burdens interstate commerce.[33] Heightened judicial scrutiny applies if a party is able to show the regulation has a discriminatory effect in practice because it has an extraterritorial effect.[34] A regulation violates the concept of extraterritoriality if it controls commerce outside the boundaries of the enacting state.[35]

A regulation facially discriminates when it clearly benefits in-state economic interests over out-of-state economic or directly gives a benefit to in-state economic interests, but denies that benefit to out-of-state economic interests.[36] If the regulation facially discriminates, strict scrutiny applies, and the state action is presumed to be unconstitutional unless the state can show the regulation uses the least restrictive means to achieve an important non-protectionist interest.[37] After considering whether a state action facially discriminates and has an extraterritorial effect, a court must consider whether the state enacted the regulation with a discriminatory intent or with the purpose of disadvantaging out-of-state businesses or benefitting in-state businesses.[38]

Courts must also consider the discriminatory effect by examining whether there is a disparate impact on out-of-state businesses.[39] The regulation or state action will have a disparate

33. Rocky Mountain Farmers Union v. Goldstene, 843 F. Supp. 2d 1071, 1084 (E.D. Cal. 2011); 15A AM. JUR. 2D *Commerce* §§ 40, 103 (2014); *see Corey*, 730 F.3d at 1087. *See generally* Pharm. Research & Mfrs. of Am. v. Walsh, 538 U.S. 644, 669 (2003); Pike v. Bruce Church, 397 U.S. 137 (1970).

34. 15A AM. JUR. 2D *Commerce* § 40.

35. *Id.*; *see also* Healy v. Beer Inst., 491 U.S. 324, 336 (1989).

36. *See Corey*, 730 F.3d at 1087 (citing Or. Waste Sys., Inc. v. Dep't of Envtl. Quality of Or., 511 U.S. 93 (1994)) (Discrimination "simply means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter.").

37. *Pike*, 397 U.S. at 142 (1970); *see* Or. Waste Sys., Inc. v. Dep't of Envt'l Quality, 511 U.S. 93, 100 (1994); *see also* C & A Carbone v. Town of Clarkstown, 511 U.S. 383, 390 (1994).

38. *See generally* Daniel K. Lee & Timothy P. Duane, *Putting the Dormant Commerce Clause Back to Sleep: Adapting the Doctrine to Support State Renewable Portfolio Standards*, 43 ENVTL. L. 295, 306 (2013) (citing Bacchus Imports Ltd. v. Dias, 468 U.S. 263, 273 (1984)).

39. Wyoming v. Oklahoma, 502 U.S. 437, 455 (1992).

impact when its effects result in negative repercussions for a disproportionate amount of out-of-state businesses over in-state businesses.[40] Finally, after the analysis of whether a regulation facially discriminates, or has a discriminatory effect and discriminatory purpose, a court must analyze the regulation under the *Pike* balancing test.[41] The *Pike* test directs the court to balance the burdens the regulation imposes on interstate commerce versus the benefits of the regulation.[42]

One method a state can use to defend against a dormant Commerce Clause challenge is the market participant exception.[43] Courts have determined states should have the ability to freely participate in the marketplace as "guardian and trustee for its people."[44] The market participant exception may apply when a state seeks to regulate in a particular area where the State itself participates in that particular market.[45] A state acts as a market participant when it directly participates in the market.[46] Under such circumstances, a state is permitted to "engage in otherwise discriminatory practices . . . so long as the state is acting as a market participant, rather than as a market regulator."[47] However, the market participant exception is not a complete solution to a potential dormant Commerce Clause violation. If a court reaches the *Pike* balancing test and reveals that the burdens placed on interstate commerce outweigh the

40. Lee & Duane, *supra* note 38, at 303.

41. Barr et al., *supra* note 6, § 85.03(4); *see generally Pike*, 397 U.S. 137.

42. *Pike*, 397 U.S. at 142; Rocky Mountain Farmers Union v. Corey, 730 F.3d 1070, 1078 (9th Cir. 2013).

43. Hughes v. Alexandria Scrap Corp., 426 U.S. 794, 810 (1976) ("Nothing in the purposes animating the Commerce Clause prohibits a State, in the absence of congressional action, from participating in the market and exercising the right to favor its own citizens over others.").

44. Reeves, Inc. v. Stake, 447 U.S. 429, 437-38 (1980) ("There is no indication of a constitutional plan to limit the ability of the States themselves to operate freely in the free market."); *see also Hughes*, 426 U.S. at 810.

45. United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth., 550 U.S. 330, 362 (2007) (Thomas, J., dissenting).

46. White v. Mass. Council of Const. Emp'rs, Inc., 460 U.S. 204, 208 (1983) ("[I]n this kind of case there is 'a single inquiry: whether the challenged 'program constituted direct state participation in the market.'") (quoting Reeves, Inc. v. Stake, 447 U.S. 429, 435 (1980)).

47. *United Haulers*, 550 U.S. at 362 (quoting *S. Cent. Timber Dev., Inc. v. Wunnicke,* 467 U.S. 82, 93 (1984)).

benefits of the regulation, the market participant exception cannot save the regulation from being struck down as constitutionally invalid.[48]

C. Overview of *Rocky Mountain Farmers Union v. Corey*

Rocky Mountain Farmers Union, representatives of the in-state and out-of-state corn ethanol industry, and American Fuels, representatives of petrochemical refineries and manufacturers, separately sued the CARB and eventually joined their claims.[49] The parties alleged the LCFS violated the dormant Commerce Clause and Supremacy Clause of the Constitution.[50] Additionally, the parties alleged the RFS, as well as the Energy Independence and Securities Act, preempted the LCFS.[51] The main argument was that the regulation facially discriminated against fuel producers based on origin, therefore unconstitutionally discriminating against out-of-state fuel producers in favor of in-state fuel producers.[52]

When the case was first consolidated, the head of the CARB was James Goldstene. He was eventually succeeded by Richard Corey, causing a change in the case name as it navigated the court system.[53] At the district court level in *Rocky Mtn. Farmers Union v. Goldstene* (hereinafter "Rocky Mtn. v. Goldstene"), economic balkanization or isolation of the market was a major concern.[54] The district court thought the LCFS isolated the

48. *Id.* at 345-46.

49. Rocky Mountain Farmers Union v. Goldstene, 843 F. Supp. 2d 1042, 1046-47 (E.D. Cal. 2011) (Order on Defendants' Summary Judgment Motion) ("Plaintiffs initiated separate actions to challenge California's LCFS.").

50. *Id.*

51. 42 U.S.C. § 7545(o) (2012); Rocky Mountain Farmers Union v. Corey, 730 F.3d 1070,1077 (9th Cir. 2013); Barr et al., *supra* note 6, § 85.03(4).

52. *Corey*, 730 F.3d.at 1077-78.

53. *See* News Release, *ARB Announces Appointment of New Executive Officer*, CALIFORNIA EPA, AIR RESOURCE BOARD (April 5, 2013), http://www.arb.ca.gov/newsrel/newsrelease.php?id=424.

54. *Corey*, 730 F.3d at 1101; *Goldstene*, 843 F. Supp. 2d at 1092. *See also* H.P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525, 554 (1949) (" [F]ear that judicial toleration of any state regulations of local phases of commerce will bring about what they call 'Balkanization' of trade in the United States—trade barriers so high between the states that the stream of interstate commerce cannot flow over them.").

California fuel market from the rest of the nation, and the regulation facially discriminated based on origin of the fuel.[55] Therefore, the court granted a preliminary injunction and a partial motion for summary judgment in favor of the plaintiffs finding the regulation, "violated the dormant commerce clause by (1) engaging in extraterritorial regulation, (2) facially discriminating against out-of-state ethanol, and (3) discriminating against out-of-state crude oil in purpose and effect."[56]

The district court did not reach the *Pike* balancing test and stopped at the analysis of the parties' dormant Commerce Clause and preemption arguments under the required standards established through dormant Commerce Clause and preemption jurisprudence.[57] The district court found that the LCFS is not expressly preempted by § 211(c)(4), and the LCFS and § 211(o) do not conflict with each other.[58] However, it did find the LCFS is still subject to Commerce Clause scrutiny despite CARB's assertion it was not.[59] The district court further determined that Rocky Mountain Farmers Union and the ethanol industry plaintiffs actually did not have standing to bring a preemption claim against CARB.[60] The court of appeals did not directly address the preemption issue as the district court did, but agreed with the district court that the LCFS is not a preempted state action and did not accept CARB's argument that California is exempt from Commerce Clause challenges.[61]

The court of appeals ultimately remanded the case to the district court after determining the LCFS was not facially discriminatory and was not preempted by federal legislation. The remand required the district court to again evaluate whether the regulation discriminates in purpose or effect and if not, to apply

55. *Goldstene*, 843 F. Supp. 2d at 1092.

56. *Id.* at 1105; Barr et al., *supra* note 6, § 85.03(4).

57. *See Corey*, 730 F.3d at 1100-07; 5A-35 BARRY S. SHANOFF, ENVIRONMENTAL LAW PRACTICE GUIDE § 35.11(2)(c) (2014).

58. *Goldstene,* 843 F. Supp. 2d at 1061.

59. *Id.* at 1047.

60. *Id.* at 1098-99.

61. *See Corey*, 730 F.3d at 1106; *Goldstene*, 843 F. Supp. 2d at 1070.

the *Pike* balancing test.[62] The appellate court in *Rocky Mtn. v. Corey* describes the process to get to the *Pike* test as follows:

> If a statute discriminates against out-of-state entities on its face, in its purpose, or in its practical effect, it is unconstitutional unless it 'serves a legitimate local purpose, and this purpose could not be served as well by available nondiscriminatory means.'[63]

The *Pike* test requires the court to balance the burdens on interstate commerce against the benefits of the regulation for the state enacting the regulation.[64] On remand, the district court will analyze whether the LCFS discriminates in purpose or effect; if the LCFS does discriminate in purpose or effect, the court must determine whether it places an undue burden on interstate commerce under *Pike v. Bruce Church*.[65] The *Pike* standard requires the plaintiff to show "that the Fuel Standard imposes a burden on interstate commerce that is 'clearly excessive' in relation to its local benefits."[66] The court must consider whether there are different burdens imposed on in-state and out-of-state fuel producers; and if the burdens are different, the court must weigh the burdens placed on the out-of-state fuel producers against the benefits of the LCFS.[67] The nature of the burden must be considered and whether the goals of the government regulation could be accomplished using less restrictive or less burdensome means.[68] As described above, the court of appeals agreed with the district court's determination of the preemption issue, so this issue will not be re-addressed on remand.[69]

The court of appeals notes in its decision for remand that "a regulation is not facially discriminatory simply because it affects

62. *Corey*, 730 F.3d at 1078; *see also* Rocky Mountain Farmers Union v. Corey, 740 F.3d 507, 509 (9th Cir. 2014) ("And we instructed the district court to apply strict scrutiny to those provisions if it found that they did discriminate, or to apply the balancing test set forth in [*Pike]* if it found that they did not.").

63. *Corey*, 730 F.3d at 1087. *See* Maine v. Taylor, 477 U.S. 131, 138 (1986).

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

65. *Id.*

66. *Id.*; *Corey*, 730 F.3d at 1078.

67. SHANOFF, *supra* note 57, § 35.11(2)(b).

68. *Pike*, 397 U.S. at 142.

69. *Corey*, 730 F.3d at 1106.

in-state and out-of-state interests unequally."[70] However, usually when a regulation is found to be facially discriminatory, it is struck down as unconstitutional because it is difficult to overcome the burden of strict scrutiny.[71] The court of appeals determined the LCFS bases the treatment of different fuels on carbon intensity, not on origin.[72] Fuel producers in the Midwest or in Brazil can and do use methods that create a less carbon-intensive fuel than some of the fuels produced within the state of California, and the calculation factors to determine fuel intensity apply indiscriminately across all producers.[73]

The Ninth Circuit Court of Appeals also determined the LCFS does not discriminate in effect because it does not violate extraterritoriality.[74] The LCFS does not regulate commerce outside California state lines because it does not require other states to adopt particular standards or impose civil or criminal penalties for any transaction not in compliance with the LCFS outside the state.[75] The LCFS regulates fuel that is only consumed in California.[76] The regulation functions as a market based incentive for fuel producers to enter the California market at competitive prices by distributing less carbon intensive fuel.[77] Because of the location-neutral characteristics of the LCFS, the court of appeals determined the regulation does not discriminate against out-of-state fuel producers, therefore strict scrutiny did not need to be applied.[78]

The Ninth Circuit Court of Appeals stressed the importance of reducing harmful emissions that contribute to climate change

70. *Id* at 1089. *See* Philadelphia v. New Jersey, 437 U.S. 617, 627 (1978).

71. Or. Waste Sys. Inc. v. Dep't of Envtl. Quality, 511 U.S. 93, 100-08 (1994).

72. *Corey*, 730 F.3d at 1090.

73. *Id.*

74. *Corey*, 730 F.3d at 1102-03.

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.* at 1078 ("We hold that the Fuel Standard's regulation of ethanol does not facially discriminate against out-of-state commerce, and its initial crude-oil provisions (the '2011 Provisions') did not discriminate against out-of-state crude oil in purpose or practical effect. Further, the Fuel Standard does not violate the dormant Commerce Clause's prohibition on extraterritorial regulation.").

for the state of California.[79] For example, many of the state's inhabitants live in cities near the coastline and are threatened by sea level rise.[80] Areas of desert in the state would expand because of climate change leading to water shortages and migrations.[81] Reducing emissions falls within the police power of the state, because reductions help to mitigate the effects of climate change including economic strain associated with adaptation measures and serious public health and welfare consequences.[82]

Arguably, these benefits would be shared in the national and international communities, as a reduction in the amount of carbon in the planet's atmosphere would reduce the overall severity of global climate change.[83] Since transportation emissions constitute such a large part of harmful greenhouse gas emissions from the state, California has clear interests in taking measures to curb climate change through emissions reductions regulatory tools like the LCFS.[84]

D. Analysis of Supreme Court Dormant Commerce Clause Jurisprudence

After denial of the request for an *en banc* hearing from the court of appeals, a successful petition for certiorari from the Rocky Mountain Farmers Union to the Supreme Court would have side stepped the district court's reanalysis of the case.[85]

79. *Id.* at 1106.

80. *Corey*, 730 F.3d at 1106.

81. *See* CAL. HEALTH & SAFETY CODE § 38501(a), (b) (West 2014); *Corey*, 730 F.3d at 1079, 1106; *see also* Robin Kundis Craig, *A Public Health Perspective on Sea Level Rise: Starting Points for Climate Change Adaptation*, 15 WIDENER L. REV. 521, 522 (2010).

82. U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

83. Craig, *supra* note 81, at 522-23.

84. *See generally Corey*, 730 F.3d at 1079.

85. Rocky Mountain Farmers Union v. Corey, 740 F.3d 507, 511 (9th Cir.) (denial of motion for rehearing en banc and inference that the parties will most likely file for certiorari), *cert denied*, 134 S. Ct. 2875 (2014); Carolyn Whetzel, *Ethanol Groups Seek Supreme Court Review of California's Low Carbon Fuel Standard*, BLOOMBERG BNA (Mar. 21, 2014), https://www.bna.com/ethanol-

Unfortunately, the Supreme Court denied certiorari so the case will go back to the district court for reanalysis in accordance with the reasoning of the court of appeals.[86] In the future, however, the Supreme Court could grant certiorari to the case as it travels through the Ninth Circuit again, as well as a similar case because of how important the issues are to the future of state greenhouse gas regulation. As more states adopt regulations, laws, and programs aimed at mitigating climate change, courts will have to determine whether such actions violate the dormant Commerce Clause. The Supreme Court jurisprudence described below involving dormant Commerce Clause challenges to state actions is helpful in determining how the court might view an issue similar to *Rocky Mtn. v. Corey*. Analyzing such cases is also helpful for states to adequately draft regulations and climate change initiatives in order to avoid such constitutional challenges.

The ninth circuit in *Rocky Mtn. v. Corey* relied on the Supreme Court's dormant Commerce Clause analysis of several cases.[87] One area of Supreme Court dormant Commerce Clause jurisprudence that can be readily compared to *Rocky Mtn. v. Corey* includes cases regarding environmentally based state regulations aimed at controlling solid and hazardous waste disposal.[88] The purpose behind such regulation was to protect the citizens of a particular state from harmful health and economic effects associated with waste disposal.[89] Similarly, the goal behind measures such as the LCFS, RGGI, and a state's RPS program is to protect state inhabitants from the harmful health and economic effects of climate change.[90] To see how the Supreme Court may treat a state climate initiative if challenged, this comment will discuss four cases included in the *Rocky Mtn.* opinion, two of which are waste cases: *Oregon Waste Systems v. Department of Environmental Quality*, *Chemical Waste v. Hunt*,

groups-seek-n17179888987/ (discussing that a petition for certiorari was filed on March 20, 2014).

86. *Corey*, 740 F.3d 507, *cert denied*, 134 S. Ct. 2875 (2014).

87. *See Corey*, 730 F.3d at 1087.

88. *Corey*, 730 F.3d at 1089.

89. *Id.*

90. N.Y. COMP. CODES R. & REGS. tit. 9, § 7.24 (2009); 9 PHILIP WEINBERG ET AL. N.Y. PRAC., ENVIRONMENTAL LAW AND REGULATION IN NEW YORK § 5:57 (2013).

Minnesota v. Clover Leaf Creamery, and *Pharmaceutical Research & Manufacturers of America v. Walsh*.[91]

In *Oregon Waste* the Supreme Court examined whether an Oregon statute violated the dormant Commerce Clause because it charged a higher surcharge on out-of-state waste to be put in a state landfill than in-state waste.[92] The Court found the surcharge to be facially discriminatory; therefore, the state had to show there was a legitimate local purpose that could not be accomplished in a non-discriminatory way.[93] The regulation failed this test because the tax on waste was not sufficiently similar, meaning the tax did not apply to in-state and out-of-state waste disposers equally.[94]

In *Chemical Waste v. Hunt*, the court found a hazardous waste disposal fee imposed on out-of-state waste and not in-state waste violated the dormant Commerce Clause because it regulated activity outside the state of Alabama and the only basis for the fee was origin rather than a consideration of the harmful risks of the waste.[95]

The court in *Rocky Mtn. v. Corey* distinguished the two regulations discussed in two abovementioned Supreme Court cases from the LCFS, and relied on assertions from *Oregon Waste* and *Chemical Waste* that implied if the out-of-state waste had imposed a greater risk of harm than the waste generated within the state, a disproportionate tax could have been justified.[96] In distinguishing the waste cases, the court stressed how the LCFS is different because it is not facially discriminatory as it does not base the assessment of a fuel on origin, but on carbon intensity of the fuel pathway.[97] The difference in carbon intensity values

91. *See generally* Pharm. Research & Mfrs. of Am. v. Walsh, 538 U.S. 644, 649 (2003); Or. Waste Sys., Inc. v. Dep't of Envtl. Quality of Or., 511 U.S. 93 (1994); Chem. Waste Mgmt. v. Hunt, 504 U.S. 334, 342-44 (1992).

92. *Or. Waste Sys. Inc.*, 511 U.S. at 96.

93. *Id.* at 108.

94. *Id.* at 100, 101, 105.

95. *Chem. Waste Mgmt.*, 504 U.S. at 342-44.

96. Rocky Mountain Farmers Union v. Corey, 730 F.3d 1070, 1089 (9th Cir. 2011). *See Or. Waste Sys. Inc.*, 511 U.S. at 101; *Chem. Waste Mgmt.*, 504 U.S. at 344.

97. *Corey,* 730 F.3d at 1093.

reflects the costs imposed on the state of California from climate change.[98]

Continuing the discussion of Supreme Court dormant Commerce Clause jurisprudence, in *Minnesota v. Clover Leaf Creamery,* the Court found a regulation banning milk sold in plastic, non-recyclable bottles was valid under the Equal Protection Clause and Commerce Clause because it had minimal impact on interstate commerce, and the state interest in protecting the environment was very high.[99] The court found the regulation was not facially discriminatory because it was a general ban that applied to both in-state and out-of-state milk producers.[100] The court in *Rocky Mtn. v. Corey* relied on *Minnesota* when assessing the facial discrimination of the LCFS distinction between HCICO and non-HCICO fuels, and the assigned carbon intensity levels.[101] The court relied on the assertion in *Minnesota* that a court should assume a legislative body's reasoning for the purpose of a piece of legislation is what the legislative body has said it is in the statute, as well as the general idea that a state's environmental concern is a legitimate one.[102]

Pharmaceutical Research & Manufacturers of America[103] is a case involving the state of Maine and pharmaceutical companies wishing to sell their drugs within the state. The regulation in question required drug companies that wanted to sell medicine to Medicaid recipients within Maine to opt into a rebate program, which would result in lower drug costs for consumers.[104] If the company refused to opt into the program, "prior authorization" of any medication the company wanted to sell within the state would be required.[105] This placed an additional burden on out-of-state pharmaceutical companies. The court ultimately upheld the regulation as constitutional and not in violation of the dormant

98. *Id.* at 1089.
99. Minnesota v. Clover Leaf Creamery, 449 U.S. 456, 471-72 (1981).
100. *Id.* at 471.
101. *Corey*, 730 F.3d at 1097-99.
102. *Id.*
103. Pharm. Research & Mfrs. of Am. v. Walsh, 538 U.S. 644 (2003).
104. *See Pharm. Research & Mfrs. Of Am.*, 538 U.S. at 644.
105. *Id.* at 649-50.

Commerce Clause, because in requiring manufacturers to meet certain economic standards in order to sell medications within Maine, the regulation did not regulate the price of medication outside the state boundaries.[106] In addition, in-state pharmaceutical manufacturers are subjected to the same rebate requirements as out-of-state manufacturers, and in-state manufacturers receive no benefits from the program that would place an undue burden on interstate commerce.[107] The Circuit Court in *Rocky Mtn. v. Corey* analogized the Maine case and concluded that California, much like Maine, did not try to control the price of fuel outside the state boundaries or control fuel manufacturers, but only sought to alter their behavior.[108] If producers wished to enter the pharmaceutical market in Maine, or the transportation fuel market in California, the producer has to meet a certain standard, which is a permissible level of influence over products to be marketed to consumers within a state.[109]

III. USING BEST PRACTICES TO AVOID CONSTITUTIONAL DRAMA

President Obama announced his Climate Action Plan on June 25, 2013.[110] The President's Plan consists of promises to work with Congress on developing market-based greenhouse gas initiatives and sets certain national reduction goals.[111] The President's Plan directs the EPA to create rules that regulate any newly built electric generating units and also directs the EPA to develop rules to reduce emissions from existing power plants.[112] In addition, increasing electricity generation from renewable sources is an important part of the President's Plan to meet reduction goals.[113]

106. *Id.* at 669.
107. *Id.* at 670.
108. *Corey*, 730 F.3d at 1103. *See generally Pharm. Research & Mfrs. Of Am.*, 538 U.S. at 679.
109. *See generally Corey*, 730 F.3d 1103.
110. *President's Climate Action Plan*, *supra* note 2; LEGGETT, *supra* note 2.
111. LEGGETT, *supra* note 2, at 1.
112. *Id.* at 3.
113. *Id.* at 4.

In accordance with the President's directive, the EPA created emissions standards for newly built electricity generating plants under section 111(b) and existing electricity generators under section 111(d) of the CAA.[114] The Supreme Court has recognized the importance of the EPA regulating carbon emissions under the agency's section 111 power.[115] The EPA recently proposed regulations for existing power plants that would not impact currently enacted state-based climate initiatives.[116]

Section 111(d) of the CAA provides for the cooperation of states and the EPA to reduce carbon emissions from the power sector.[117] In June 2014, EPA issued a proposed rule describing the standards a state must meet in order to be in compliance with the CAA.[118] States have the freedom to design an emissions reduction plan employing whatever methods the state chooses in order to meet the EPA standards imposed under section

114. *See generally* 42 U.S.C. §§ 7401–7431 (2012); *see generally* Carbon Pollution Standards for Modified and Reconstructed Stationary Sources: Electric Utility Generating Units, 79 Fed. Reg. 34,960 (proposed June 18, 2014) (to be codified at 40 C.F.R. pt. 60); Alice Kaswan, *Controlling Power Plants: The Co-Pollutant Implications of EPA's Clean Air Act § 111(d) Options for Greenhouse Gases*, 32 VA. ENVTL. L. J. 173, 179-80 (2014).

115. American Elec. Power v. Connecticut, 131 S. Ct. 2527, 2538-39 (2011) (recognizing the Clean Air Act gives the EPA power to create rules regulating carbon dioxide emissions from existing power plants displacing a federal common law nuisance or tort claim for abatement); Massachusetts v. EPA, 549 U.S. 497, 528-29 (2007) (holding carbon dioxide falls within the definition of "air pollutant" under the CAA and authorizes the EPA to regulate such emissions); *see also* Dan Lashof, *Clean Air Act is Key to Curbing Global Warming EPA Must Cut Carbon Pollution from Existing Power Plants*, 33 No. 16 WESTLAW J, ENVTL 1, Feb. 2013, at *3, *available at* 2013 WL 704737.

116. Carbon Pollution Standards for Modified and Reconstructed Stationary Sources: Electric Utility Generating Units, 79 Fed. Reg. at 34,960; Memorandum from the Comm. on Energy and Commerce Democratic Staff to the Subcomm. on Energy and Power Democratic Members and Staff 5, 6 (June 17, 2014), *available at* http://democrats.energycommerce.house.gov/sites/default/files/documents/Memo-EP-EPA-Carbon-Dioxide-Power-Plant-Regulations-2014-6-17.pdf.

117. 42 U.S.C. § 7411(d) (2012).

118. Carbon Pollution Standards for Modified and Reconstructed Stationary Sources: Electric Utility Generating Units, 79 Fed. Reg. at 34,960 (A final rule must be promulgated by June 2015); *see President's Climate Action Plan*, *supra* note 2.

111(d).[119] The freedom for states to create their own program is unlike the Acid Rain program codified in sections 412 and 821 of the CAA, which required states to participate in a national cap-and-trade system for SO_2.[120] States are able to reduce carbon emissions to the applicable standards set by the EPA in multiple ways, also known as the "toolbox" approach.[121] Some examples include renewable portfolio standards, programs similar to RGGI, market incentives to increase the use of renewable energy at the consumer or producer level, or the state itself investing funds into emissions reduction measures.[122]

As of right now the EPA has not established a national cap-and-trade program for greenhouse gases under the agency's § 111(d) power.[123] In the absence of a national program, states must act through their own regulatory machinery. Although states can do what they want in terms of how to achieve carbon emissions reductions, such action is still subject to the dormant Commerce Clause and Supremacy Clause. There are three main topics to consider when drafting and implementing state based climate initiatives: language, structure and effect, and intent or reasoning behind the state action. When enacting initiatives to comply with the EPA's final rule for existing power plants, states must take into account the potential for dormant Commerce

119. 42 U.S.C. § 7411(c)(1); *see* Carbon Pollution Standards for Modified and Reconstructed Stationary Sources: Electric Utility Generating Units, 79 Fed. Reg. at 34,960.

120. 42 U.S.C. §§ 7401–7671(q); 40 C.F.R. § 75.1 (2014); *see also Acid Rain Program*, EPA, http://www.epa.gov/airmarkets/progsregs/arp/ (last updated July 25, 2012).

121. EPA, CONSIDERATIONS IN THE DESIGN OF A PROGRAM TO REDUCE CARBON POLLUTION FROM EXISTING POWER PLANTS (2013), *available at* http://www2.epa.gov/sites/production/files/2013-09/documents/20130923statequestions.pdf.

122. *See, e.g.*, CONN. GEN. STAT. § 16-245a (2013) (establishing Connecticut's RPS program); MASS. GEN. LAWS ANN. ch. 25A, § 11F (West 2012) (establishing Massachusetts's RPS program); N.Y. COMP. CODES R. & REGS. tit. 6 § 242-1.1 (2008) (establishing the Regional Greenhouse Gas Initiative in New York State); OR. REV. STAT. ANN. § 469A.050 § 36 (West 2007) (establishing Oregon's RPS program); Order Regarding Retail Renewable Portfolio Standard, In the Matter of a Renewable Energy Portfolio Standard, Case 03-E-0188 (N.Y. P.S.C. 2004), *available at* www.dps.state.ny.us/03e0188.htm (establishing New York State's RPS).

123. *See generally* Carbon Pollution Standards for Modified and Reconstructed Stationary Sources: Electric Utility Generating Units, 79 Fed. Reg. at 34,960 (proposed rule for creating standards).

Clause challenges to the regulations or initiatives the state plans to use to achieve the applicable emissions standard.

Based on the reasoning of *Rocky Mtn. v. Corey* and the Supreme Court jurisprudence discussed above, a court will consider the following topics when deciding a dormant Commerce Clause challenge to state climate initiatives. First, language of the state initiative is clearly important, as courts interpret the exact meaning of the language to determine whether it facially discriminates against out-of-state industry based on origin in violation of the dormant Commerce Clause.[124] The Supreme Court begins with a facial analysis of a regulation in the cases discussed above.[125] For example, in *Rocky Mtn. v. Corey*, the court of appeals determined that the LCFS does not include language that discriminates based on origin, and that the lifecycle analysis is applied indiscriminately.[126]

Second, the effect of the state action is particularly important in dormant Commerce Clause challenges. State climate initiatives cannot ban or restrict market entry from outside the regulating state.[127] In *Rocky Mtn. v. Corey*, the Ninth Circuit Court of Appeals determined the LCFS does not place any impermissible restrictions on an ethanol producer from entering the California market.[128]

Finally, a court will focus on the intent or reasons behind the state action in a particular area. For example, courts consider whether the action was taken to promote the state's economy in some way or only to prevent the occurrence of detrimental

124. Rocky Mountain. Farmers Union v. Corey, 730 F.3d 1070, 1089-90 (9th Cir. 2013). *See, e.g.*, Am. Trucking Ass'ns, Inc. v. City of Los Angeles, 133 S. Ct. 2096, 2102 (2013) (Federal Aviation Administration Authorization Act expressly preempts certain state action).

125. *See generally* Pharm. Research & Mfrs. of Am. v. Walsh, 538 U.S. 644, 661 (2003); Or. Waste Sys., Inc. v. Dep't of Envtl. Quality of Or. 511 U.S. 93 (1994); Chem. Waste Mgmt. v. Hunt, 504 U.S. 334 (1992).

126. *Corey*, 730 F.3d at 1089.

127. *See, e.g.*, *Pharm. Research & Mfrs. of Am.,* 538 U.S. at 649; *Corey*, 730 F.3d at 1102-03. States may not "attach restrictions" to market entry for out-of-state market participants, however the LCFS does not require another state to adopt any standards or control manufacturing in another state. *Id*. The LCFS also does not require any permits or requirements to be met before an out-of-state producer can enter the California market. *Id*.

128. *Corey*, 730 F.3d at 1102-03.

environmental or safety effects from a particular industry.[129] Courts also focus on the state's broad powers of protection for their citizens.[130]

IV. DEFENDING AGAINST CONSTITUTIONAL CHALLENGES TO STATE BASED CLIMATE CHANGE INITIATIVES ANALYZING NEW YORK STATE AS A CASE STUDY

Rocky Mtn. v. Corey stressed the importance of states being able to develop their own climate initiatives to reduce greenhouse gas.[131] Part IV focuses on state climate initiatives within New York State and what states should consider when drafting or changing state climate initiatives to avoid constitutional challenges. Part IV.a discusses the Regional Greenhouse Gas Initiative ("RGGI"). Part IV.b gives an overview of New York State's Renewable Portfolio Standard ("NYS RPS"). Finally, Part IV.c provides an overview of how the implementation of New York State's RGGI regulations and the NYS RPS may be considered by other states in creating climate initiatives to creatively avoid a dormant Commerce Clause challenge.

A. Overview of the Regional Greenhouse Gas Initiative (RGGI)

The Regional Greenhouse Gas Initiative is an agreement entered into by nine states in 2005, creating a market-based regulatory program focused on reducing emissions from the power sector.[132] The program is a state-by-state authorized cap-

129. *See, e.g.*, Or. Waste Sys., Inc., 511 U.S. at 1356-57 (Rehnquist, J., dissenting) ("We have long acknowledged a distinction between economic protectionism and health and safety regulation promulgated by Oregon.").

130. *See, e.g.*, Reeves, Inc. v. Stake, 447 U.S. 429, 437-38 (1980).

131. *Corey*, 730 F.3d at 1107.

132. Exec. Order No. 24, N.Y. COMP. CODES R. & REGS. tit. 9 § 7.24 (2009); N.Y. COMP. CODES R. & REGS. tit. 6 § 242-1.1 (2008) (establishing the Regional Greenhouse Gas Initiative in New York State); Regional Greenhouse Gas Initiative, Memorandum of Understanding, Regional Greenhouse Gas Initiative (Dec. 20, 2005), *available at* http://www.rggi.org/docs/mou_final_12_20_05.pdf [hereinafter RGGI MOU]; REGIONAL GREENHOUSE GAS INITIATIVE (RGGI),

and-trade system that requires regulated electrical power producers to have a tradable CO_2 allowance equivalent to the producer's CO_2 emissions, which are initially sold at auction.[133] In addition, allowances can be sold outside of the auction and anyone can acquire an allowance, not only the regulated electrical utilities.[134] Allowances act as a form of currency and have a consistent value across state lines: one ton of carbon is equivalent to one allowance.[135] Proceeds from the quarterly auction can be used to promote energy efficiency initiatives and renewable energy research and development.[136] States in RGGI agree to cap emissions at a certain level and reduce emissions by ten percent by the year 2019.[137] The original agreed upon emissions budget was apportioned among participating states, but the determined cap has since been modified.[138] The modification occurred after the price of allowances fell between 2009 and 2012 due to a surplus of allowances available despite the decrease in emissions; this occurred because of the economic downturn of 2008.[139] In February of 2013, RGGI participants announced the cap for 2014 would be reset from 165 million tons to 91 million tons and the cap will reduce by 2.5% annually until 2020.[140]

The goal of states involved in the RGGI program is to encourage lower carbon intensive electricity production over high carbon intensive electricity production because of the reduced

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http://www.rggi.org/ (last visited Aug. 22, 2014) (An initiative of the Northeast and Mid-Atlantic States of the U.S.).

133. Bruce R. Huber, *How Did RGGI Do It? Political Economy and Emissions Auctions*, 40 ECOLOGY L.Q. 59, 62 (2013).

134. 1 TREATISE ON ENVIRONMENTAL LAW § 2.04(4) (2014).

135. *Id.*

136. Huber, *supra* note 133, at 78, 86.

137. CHARLES HOLT ET AL., AUCTION DESIGN FOR SELLING CO2 EMISSION ALLOWANCES UNDER THE REGIONAL GREENHOUSE GAS INITIATIVE 5 (2007), *available at* http://www.rggi.org/docs/rggi_auction_final.pdf.

138. 1 TREATISE ON ENVIRONMENTAL LAW § 2.04(4).

139. *Id.*

140. *Id.*; REGIONAL GREENHOUSE GAS INITIATIVE, SUMMARY OF RGGI MODEL CHANGES 1 (2013), *available at* http://www.rggi.org/docs/ProgramReview/_FinalProgramReviewMaterials/Model_Rule_Summary.pdf (describing that the Regional Emissions Cap in 2014 will be equal to 91 million tons and that the Model Rule language maintains the original 2.5% per year reduction to the regional RGGI cap for the years 2015 through 2020).

emissions.[141] For example, wind produces fewer carbon emissions than a traditional coal fired power plant.[142] RGGI is considered a major success, and the model has been discussed as a part of the program framework in a nationwide emissions trading program within the energy sector.[143] Although RGGI has thus far avoided litigation involving a dormant Commerce Clause challenge, electricity flows in the interstate market create the potential for litigation involving the dormant Commerce Clause.[144] RGGI adds a new layer of complexity to a dormant Commerce Clause challenge because it is not a single state enacting regulations or standards, but a regional program involving several states.[145]

One concern with the initial proposal of the RGGI program regarded the concept of leakage, and how a dormant Commerce Clause challenge could be brought if a participating RGGI state tries to protect against the leakage phenomenon.[146] Leakage occurs after in-state electricity producers incur additional expenses to comply with the cap set by their state, which impacts prices, leading to cheaper, more carbon-intensive electricity being imported from non-regulated sources.[147] When the memorandum of understanding was entered into, the participating states assumed a national cap-and-trade system would be established in

141. *See RGGI Benefits*, REGIONAL GREENHOUSE GAS INITIATIVE, http://www.rggi.org/rggi_benefits (last visited Aug. 22, 2014).

142. NICHOLAS BIANCO ET AL., WORLD RES. INST., CAN THE U.S. GET THERE FROM HERE: USING EXISTING FEDERAL LAWS AND STATE ACTION TO REDUCE GREENHOUSE GAS EMISSIONS 9, 11 (2013), *available at* http://pdf.wri.org/can_us_get_there_from_here_full_report.pdf.

143. Huber, *supra* note 133, at 62, 64.

144. *See generally* 1 STEVEN FERREY, LAW OF INDEPENDENT POWER § 6:7.30 (2014). RGGI has been involved in litigation. *See, e.g.,* Thrun v. Cuomo, 976 N.Y.S.2d 320, 322 (App. Div. 2013) ("Plaintiffs further asserted that the RGGI program imposes an unlawful tax upon ratepayers not authorized by the Legislature, and that the RGGI program, as implemented, is arbitrary and capricious."); *In re* Regional Greenhouse Gas Initiative, 2014 WL 1228509 (N.J. Super. Ct. App. Div. 2014) (Environmental groups argued N.J. DEC improperly failed to repeal the rules implementing RGGI in the state after N.J. withdrew from the program).

145. RGGI MOU, *supra* note 132.

146. Lawrence Fogul, *Serving a "Public Function": Why Regional Cap-and-Trade Programs Should Survive a Dormant Commerce Clause Challenge*, 2010 WIS. L. REV. 1313, 1328 (2010).

147. *Id.* at 1326.

the near future, which would eliminate the leakage problem if all states were subject to a uniform national program.[148] Unfortunately, since the RGGI program was established, a national cap-and-trade program for greenhouse gases is still not in place.

For a RGGI state like New York, leakage is a real threat because of the coal industry in neighboring states like Pennsylvania and Ohio.[149] RGGI states could curb leakage problems by implementing requirements on out-of-state energy producers set up similarly to the LCFS. For instance, a fuel pathway system calculating the carbon intensity of different electricity production processes applied in the same way to in-state and out-of-state electricity producers could be used in conjunction with the auction program. The initial pathway evaluation could create a surcharge for more carbon intensive producers. It seems the auction model is dealing with the leakage problem by promoting energy efficiency, thus decreasing the overall demand of electricity, and therefore, decreasing the likelihood cheaper unregulated carbon intensive electricity would be outsourced.[150] The potential for leakage is being studied, but RGGI states have to predict any leakage problems that could occur and determine what program to implement to prevent leakage from occurring.[151] Adoption of protectionist provisions in a state such as New York to prevent against leakage could lead to a better basis for a dormant Commerce Clause challenge.[152]

Besides leakage concerns, a dormant Commerce Clause challenge to RGGI could be based on the control of commerce

148. William Funk, *Constitutional Implications of Regional CO2 Cap-and-Trade Programs: The Northeast Regional Greenhouse Gas Initiative as a Case in Point*, 27 UCLA J. ENVTL. L. & POL'Y 353, 363-64 (2009).

149. *See* Huber, *supra* note 133, at 86.

150. *Id.* at 86-87.

151. REGIONAL GREENHOUSE GAS INITIATIVE, POTENTIAL EMISSIONS LEAKAGE AND THE REGIONAL GREENHOUSE GAS INITIATIVE (RGGI) 8-9 (2008) [hereinafter FINAL REPORT] *available at* http://www.rggi.org/docs/20080331leakage.pdf.

152. ASSEMB. 08872, at 1 (N.Y. 2014), *available at* http://assembly.state.ny.us/leg/?default_fld=&bn=A08872&term=2013&Summary=Y&Text=Y (recently proposed bill recognizing how some out-of-state power generators may have economic advantages over New York state power producers because of having to purchase RGGI allowances).

outside of the boundaries of participating states, also known as extraterritorial regulation.[153] *Healy v. Beer Inst.* established that the dormant Commerce Clause inquiry should be "whether the practical effect of the regulation was to control conduct beyond the boundary of the state."[154] The price of electricity for out-of-state consumers could increase if the consumers purchase electricity from regulated facilities under RGGI because regulated facilities have to participate in the auction to purchase emissions allowances.[155] Consumers are protected from drastic rate hikes by state public utility commissions; however, a company could still increase rates or pass costs onto consumers. For example, after approval of such a surcharge by the Public Service Commission ("PSC") an emitter could pass costs through an additional charge on an electricity bill deposited in a fund directed toward energy efficiency or storm hardening current infrastructure. Although a rate increase would affect in-state and out-of-state consumers, consumers living in a participating RGGI state, like New York, would receive the benefits of the money collected through the auction process because their electricity system would be receiving the energy efficiency benefits and benefits of offsetting projects conducted by utilities. A RGGI state can even create a consumer benefit program such as one that benefits low income consumers with energy efficiency retrofitting in their residence.[156] Out-of-state consumers would receive no such benefit, but instead feel the brunt of any price increases on their electricity bill. Arguably this is a form of controlling commerce outside the state boundaries, which would be in violation of the dormant Commerce Clause.

153. *See generally* Eric Maher, Note, *Weathering Rising Seas in a Sinking Ship: The Constitutional Vulnerabilities of The Regional Greenhouse Gas Initiative*, 23 FORDHAM ENVTL. L. REV. 162, 177-79 (2012).

154. Rocky Mountain Farmers Union v. Corey, 730 F.3d 1070, 1101 (9th Cir. 2013) (quoting Healy v. Beer Inst., 491 U.S. 324, 336 (1989)).

155. Huber, *supra* note 133, at 78-79.

156. FINAL REPORT, *supra* note 151, at 51; Maher, *supra* note 153, at 185.

B. Overview of New York State's Renewable Portfolio Standard

Many states have developed Renewable Portfolio Standards, or RPSs, in order to promote development and expansion of renewable energy resources within their state.[157] An RPS is "[a] statutory or regulatory requirement that a load-serving entity provide a certain portion of the electricity it supplies to its customers from renewable energy sources, or any other statutory or regulatory requirement that a certain portion of electricity supplied to the electricity grid be generated from renewable energy sources."[158] The renewable energy can be generated within the state or procured from out-of-state renewable energy producers.[159] In the original order from the PSC, establishing the NYS RPS, at least twenty-five percent of the state's electricity had to come from renewable sources by the year 2013.[160] Renewable technologies that fall within the state's RPS include, "biogas, biomass, liquid biofuel, fuel cells, hydroelectric, photovoltaics, ocean or tidal power, and wind."[161] The PSC expanded the 25% requirement to 30% in January of 2010, and the target year for this increase was changed from 2013 to 2015 based on the progress the state was making in increasing the use

157. *See, e.g.,* CONN. GEN. STAT. § 16-245a (2013) (establishing Connecticut's RPS program); MASS. GEN. LAWS ANN. ch. 25A, § 11F (West 2012) (establishing Massachusetts's RPS program); OR. REV. STAT § 36.469A (2007) (establishing Oregon's RPS program); Order Regarding Retail Renewable Portfolio Standard, In the Matter of a Renewable Energy Portfolio Standard, Case 03-E-0188 (N.Y. P.S.C. 2004), *available at* www.dps.state.ny.us/03e0188.htm (establishing New York State's RPS).

158. NY. COMP. CODES R. & REGS. tit. 6 § 242-10.2(af) (2008) (definition of Renewable Portfolio Standard).

159. Nathan E. Endrud, Note, *State Renewable Portfolio Standards: Their Continued Validity and Relevance in Light of the Dormant Commerce Clause, the Supremacy Clause, and Possible Federal Legislation*, 45 HARV. J. ON LEGIS. 259, 261-62 (2008).

160. Order Regarding Retail Renewable Portfolio Standard at 3, In the Matter of a Renewable Energy Portfolio Standard, Case 03-E-0188 (N.Y. P.S.C. 2004), *available at* www.dps.state.ny.us/03e0188.htm (establishing New York State's RPS); *see also* WEINBERG ET AL., *supra* note 90.

161. WEINBERG ET AL., *supra* note 90, at 1.

of renewable energy.[162] Funding for the RPS is obtained when investor-owned utilities charge a surcharge on customer's electricity bills.[163] The RPS uses a "central procurement model" where the surcharge funds collected are given to the New York State Energy Research and Development Authority (NYSERDA), which implements the programs to meet the RPS reduction goals.[164] There are two tiers within the RPS, the Main Tier and the Customer-Sited Tier.[165] The Main Tier is established to fund medium to large-scale renewable energy generation projects that deliver electricity to the wholesale market.[166] The Customer-Sited Tier is meant to target smaller scale projects such as individual photovoltaic systems on a customer's home.[167]

The RPS was enacted in order to promote in-state energy production and decrease the amount of out-of-state energy production New York State relied upon.[168] In 2013, NYSERDA petitioned the Commission to adopt a new order after recognizing that the economic and environmental benefits of the RPS should be intrastate rather than interstate.[169] NYSERDA asked the Commission to only grant Main Tier renewable energy projects to meet the RPS program goals to projects located within the state of New York.[170] This creates a more difficult hurdle for out-of-

162. *See 03-E-0188: Renewable Portfolio Standard – Home Page*, N.Y. PUB. SERV. COMM'N., http://www3.dps.ny.gov/W/PSCWeb.nsf/All/1008ED2F934294AE85257687006F38BD?OpenDocument (last visited Sept. 28, 2014).

163. *Id.*

164. *See* N.Y. PUB. SERV. COMM'N, *supra* note 163; NYSERDA, NEW YORK STATE RENEWABLE PORTFOLIO STANDARD: ANNUAL REPORT THROUGH DECEMBER 31, 2013 1 (2014), *available at* http://www3.dps.ny.gov/W/PSCWeb.nsf/All/1008ED2F934294AE85257687006F38BD?OpenDocument#psc.

165. NYSERDA, *supra* note 164, at 4.

166. *Id.*

167. *Id.* at 4.

168. *Id.* at 3.

169. *Id*. at 2; *see also* Petition for Modification of Main Tier Program at 1, In the Matter of a Renewable Energy Portfolio Standard, Case 03-E-0188 (N.Y. P.S.C. 2012), *available at* http://statepowerproject.files.wordpress.com/2014/03/nyserda-2012-petition.pdf.

170. NYSERDA, *supra* note 164, at 2; *see also* Petition for Modification of Main Tier Program at 1, In the Matter of a Renewable Energy Portfolio Standard, Case 03-E-0188 (N.Y. P.S.C. 2012), *available at* http://statepowerproject.files.wordpress.com/2014/03/nyserda-2012-petition.pdf. *See generally* Order Authorizing Customer-Sited Tier Program Through 2015

state renewable energy producers who want to provide energy to the New York State market from receiving funding through the RPS for a project or from receiving production incentives.[171]

The NYS RPS has main policy objectives that are related to supporting the economy of New York State.[172] The main objectives include creating jobs, reducing energy costs for consumers, and promoting investment in-state based projects.[173] Although the program has many positive environmental effects because it reduces harmful greenhouse gas emissions, the environmental effects are not the focus of the initiative. As previously stated, the NYS RPS collects funds through the ratepayers, and those funds then go toward state based programs and incentives to increase renewable energy use and production.[174]

C. Defending against Commerce Clause Challenges to State Based Climate Initiatives

The decision in *Rocky Mtn. v. Corey*, Supreme Court jurisprudence, and NYS emission reduction programs are helpful sources of information for states trying to avoid constitutional challenges to enacted climate change initiatives that focus on emissions in the energy sector.[175] Although the decision in *Rocky*

and Resolving Geographic Balance and Other Issues Pertaining to the RPS Program, In the Matter of a Renewable Energy Portfolio Standard, Case 03-E-0188, (N.Y. P.S.C. 2010), *available at* http://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId=%7BC05CD0D6-8EA5-4CB9-A9FA-6ADD3AECB739%7D.

171. JACKSON MORRIS ET AL., NEW YORK'S RENEWABLE PORTFOLIO STANDARD: WHERE TO FROM HERE? 12-13 (2013), *available at* http://energy.pace.edu/sites/default/files/publications/RPS%20Report.pdf.

172. *See generally* NYSERDA, *supra* note 164.

173. *Id.* at 3.

174. *See generally* Order Regarding Retail Renewable Portfolio Standard, In the Matter of a Renewable Energy Portfolio Standard, Case 03-E-0188 (N.Y. P.S.C. 2004), *available at* www.dps.state.ny.us/03e0188.htm (establishing New York State's RPS).

175. *See, e.g.*, North Dakota v. Heydinger 11-CV-3232 (SRN/SER), 2014 WL 1612331, at *13 (D. Minn. 2014). Plaintiffs argued the Minnesota's Next Generation Energy Act violated the Constitution and was preempted by the Clean Air Act and Federal Power Act and court found it violated the dormant Commerce Clause. *Id.*

Mtn. v. Corey focused on gasoline, diesel fuel, and various forms of ethanol produced using renewable feedstock, the LCFS treats electricity as a transportation fuel since it can be used to power plug-in electric vehicles.[176] A producer of an alternative fuel under the LCFS, such as electricity, has the option of opting-in and submitting to regulation.[177] After a party opts in they are able to trade LCFS credits and are subject to the requirements of the LCFS.[178] The regulation requires an electricity fuel provider to submit a carbon intensity calculation for the electricity a facility is producing under section 95484 if the facility opts in as a regulated party.[179] Including electricity as a type of regulated fuel under the LCFS marks a move forward in recognizing the large part electricity plays in climate change.

Electricity is also taken into account in the lifecycle analysis of any fuel under the LCFS.[180] California actually applies additional regulations to electricity producers beyond the LCFS in order to limit emissions. The previously mentioned Global Warming Solutions Act of 2006 regulates the electricity being produced and imported into the state through a cap-and-trade system that is somewhat similar to RGGI.[181]

When evaluating the types of electricity a fuel production facility is able to use, the Ninth Circuit Court of Appeals in *Rocky Mtn. v. Corey* determined although the source of electricity might be dependent on geographic location, this does not mean the LCFS is discriminating against out-of-state producers because it continues to allow the market to function.[182] The court notes, "if producers of out-of-state ethanol actually cause more GHG emissions for each unit produced, because they use dirtier electricity or less efficient plants, CARB can base its regulatory

176. CAL. CODE REGS. tit. 17, §§ 95480.1(a)(5), 95480.5(a)(1), 95484(a)(6) (2010).

177. *Id.* § 95480.5(a)(1).

178. Tit. 17, § 95480.5(a)(1).

179. *Id.* § 95484(b)(3)(C)(5) (describing that for electricity used as a transportation fuel, a regulated party must also submit the following: The carbon intensity value of the electricity determined pursuant to section 95486).

180. *Id.* § 95486(a)(2)(E).

181. 1 TREATISE ON ENVIRONMENTAL LAW § 2.04(5)(g) (2014).

182. Rocky Mountain Farmers Union v. Corey, 730 F.3d 1070, 1092 (9th Cir. 2013).

treatment on these emissions."[183] For example, a facility near coal production can use the cheapest most convenient fuel; however, the dormant Commerce Clause does not "guarantee that ethanol producers may compete on the terms they find most convenient."[184]

A court analyzing a state's climate initiative would begin at the same place the court in *Rocky Mtn. v. Corey* began: determining whether the measure is facially discriminatory. RGGI resists a dormant Commerce Clause claim in a similar way as the LCFS. RGGI does not discriminate facially against out-of-state electricity producers because such producers can enter the auction and purchase allowances if they want.[185] RGGI also does not discriminate in purpose or effect because the market continues to function in a competitive way. RGGI has an additional strong defense against a dormant Commerce Clause challenge that the LCFS does not, because the program is not limited to one state. RGGI involves a collective of several states enacting the provisions of the program in their own ways,[186] and is considered a major success for cap-and-trade programs because of the nature of electricity as a commodity.[187] Further, in response to the *Pike* balancing test, a state involved in RGGI or a similar program can assert the burdens on interstate commerce are not clearly excessive when compared to the benefits the states are receiving in avoiding costs due to climate change caused by anthropogenic greenhouse gas emissions.[188]

In addition, any dormant Commerce Clause challenge to state action for violating extraterritoriality and burdening commerce outside of the participating state could be defended by adopting the reasoning in *Rocky Mtn. v. Corey*. The plaintiffs in *Rocky Mtn. v. Corey* tried to argue that the LCFS was regulating commercial activity outside of California.[189] The court of appeals

183. *Id.* at 1090.

184. *See generally id.* at 1092.

185. 1 TREATISE ON ENVIRONMENTAL LAW § 2.04(5)(g).

186. RGGI MOU, *supra* note 132, at 2.

187. Huber, *supra* note 133, at 62-64, 93.

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

189. Rocky Mountain Farmers Union v. Corey, 730 F.3d 1070, 1102-03 (9th Cir. 2013).

determined the regulation was not controlling any market activity outside the state of California because it imposed no duty on fuel producers to submit to regulation, and did not threaten civil or criminal penalties for compliance failure.[190] A challenge to state initiatives alleging the regulation impermissibly controls commerce outside the participating states would be evaluated under the *Healy* standard.[191] *Healy* requires the court to evaluate the direct consequences of the regulation and the interaction between the regulation and other state's regulations, particularly if multiple states or all of the states adopted the same regime.[192]

As the LCFS does not require fuel producers outside the state to submit to regulation by changing their business in any way, RGGI imposes no duty on utilities to raise consumer prices in order to participate in the auction or change the way they are producing electricity. A utility may choose to change its production processes if it is economically more feasible for them to reduce emissions rather than pay for allowances. Finally, the very goal of RGGI is to act as a model for a potential national regulatory scheme, and is even somewhat dependent on the eventual adoption of a national program.[193] If a national program is established, it is impossible for the phenomenon of economic Balkanization, or separation and isolation of markets, to occur in violation of the Constitution.

The concern of the district court in *Rocky Mtn. v. Goldstene* regarding economic Balkanization is not a real threat in a program like RGGI where an electricity grid is already arguably divided into regions or states acting as their own market.[194] The court in *Rocky Mtn. v. Corey* discredited the lower court's Balkanization concern by concluding the LCFS only regulates the California market and if each state adopted such a regulation, it would not impermissibly interfere with interstate trade or create conflicting standards for fuel producers because, "no form of fuel

190. *Id.*

191. *See generally* Healy v. Beer Inst., Inc., 491 U.S. 324 (1989).

192. *Id.* at 336.

193. FINAL REPORT, *supra* note 151, at 12-15.

194. *See generally* Rocky Mountain Farmers Union v. Goldstene, 843 F. Supp. 2d 1071 (E.D. Cal. 2011).

would be excluded from or charged an unapportioned fee to enter any state's market, no state would attempt to control which fuels were available in other states, and no state would peg its fuel prices or regulatory standards to those of another."[195] A program like RGGI is similar because electricity producers and those who want to trade allowances are not prevented from entering the auction market in any way, and participating states are not controlling the behavior of electricity producers or limiting the access of consumers to a particular type of electricity production outside their own boundaries. If a similar program was enacted in every state, each state would be able to participate in a nationwide auction where allowances would have equal value across state lines, and consumers, who are already limited in their choice of electricity provider due to geographical limitations, would not be prevented from purchasing electricity from a chosen provider.

Also, RGGI's auction system eliminates problems associated with cap-and-trade. For example, giving away allowances to regulated parties has proven to be ineffective in a cap-and-trade program because it can result in a profit windfall for facilities because they receive some allowances for free rather than purchasing them at market price, while the RGGI auction allows the market to set its own price.[196] If a program similar to RGGI were set up in other regions, or nationally, it would promote the free market auction of allowances, as well as the development and use of less carbon intensive energy production. Like the LCFS, the program is able to avoid a challenge of economic Balkanization, and it clearly passes the *Healy* standard because RGGI is not trying to control commerce outside the boundaries of the states involved in the memorandum.

195. Rocky Mountain Farmers Union v. Corey, 730 F.3d 1070, 1105 (9th Cir. 2013).

196. *Huber*, supra note 133, at 62, 74.

D. Jobs: The Trojan Horse of State Based Climate Initiatives

Dormant Commerce Clause challenges have actually been litigated against state RPS programs including New York.[197] New York State's RPS program could continue to be attacked if the Commission allows the program to focus on developing renewable energy projects and contracts with renewable energy generators within the state in order to provide economic and environmental benefits to the people of New York.[198] When the purpose of a regulation is to benefit in-state producers over out-of-state producers, it is a *per se* violation of the dormant Commerce Clause.[199]

Out-of-state renewable energy producers can still provide renewable energy that counts towards the RPS goal with the current structure in place.[200] In *Rocky Mtn. v. Corey*, the Ninth Circuit Court of Appeals determined the LCFS was not regulating commercial activity outside of California because it imposed no duty on fuel producers to submit to regulation, and did not threaten civil or criminal penalties for compliance failure.[201] The RPS does not require renewable electricity producers outside the state to submit to any additional requirements.[202] The renewable fuel market continues to function within the state, and the power

197. *See e.g.,* Petition for Rehearing at 1, HQ Energy Servs. (U.S.) Inc. v. NYSERDA, Case 03-E-0188 (N.Y. P.S.C. 2013), *available at* http://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId=%7B513E6095-F3C1-4188-814E-BD3AF83CE5D6%7D; TransCanada Power Mktg, Ltd.. v. Mass. Dep't Pub. Utils., No. 4:10-CV-40070-FDS (D. Mass. 2010) (Partial Settlement Agreement), *available at* http://www.mass.gov/eea/docs/doer/renewables/solar/settlement-agreement.pdf.; Bruce Mohl, *Bowles Sued on Renewable Policies*, COMMONWEALTH (Apr. 21, 2010), http://www.commonwealthmagazine.org/News-and-Features/Online-exclusives/2010/Spring/Bowles-sued-on-renewable-policies.aspx (describing how the developer of a wind energy project suing the state for directing subsidies towards in-state renewable projects through the Green Communities Act).

198. Endrud, *supra* note 159, at 270.

199. Maine v. Taylor, 477 U.S. 131, 138 (1986); Rocky Mountain Farmers Union v. Corey, 730 F.3d 1070, 1087 (9th Cir. 2013).

200. MORRIS ET AL., *supra* note 171, at 12.

201. *Corey*, 730 F.3d at 1102-03.

202. *See* Order Regarding Retail Renewable Portfolio Standard at 62-63, In the Matter of a Renewable Energy Portfolio Standard, Case 03-E-0188 (N.Y. P.S.C. 2004), *available at* www.dps.state.ny.us/03e0188.htm.

produced by a renewable electricity producer outside the state boundaries can still be used to meet RPS goals.[203] The NYS RPS does not violate the concept of extraterritoriality, and it does not have a discriminatory effect on out-of-state renewable electricity producers.[204]

If a court found the RPS does not facially discriminate, or discriminate in purpose or effect, the court would then reach the *Pike* test.[205] Like RGGI, the limited range of electricity to travel as a commodity in the market makes the product of electricity different from traditional transportation fuel regulated under the LCFS.[206] The burden on interstate commerce is very unlikely to be considered "clearly excessive in relation to the putative local benefits," because of electricity's limited range caused by the physical constraints of the energy transmission system.[207] If the New York State RPS was challenged under the dormant Commerce Clause in its current form, it is unlikely a court would find it fails the *Pike* balancing test.

The NYS RPS is a model for states to consider when drafting their own RPS, particularly based on recent case law. In *North Dakota v. Heydinger*, a Minnesota district court determined Minnesota's Next Generation Energy Act impermissibly regulated commerce outside the state's boundaries—a per se violation of the dormant Commerce Clause.[208] The regulation stated that "no person shall . . . import or commit to import from outside the state power from a new large energy facility that would contribute to statewide power sector carbon dioxide

203. *Id.* ("For commerce to occur, the product, electricity generated from renewable resources, must be in the State to be sold to retail customers. The RPS promotes interstate commerce by allowing imports on the same terms as electricity generated within the State. The delivery requirement applies to domestic Case 03-E-0188 generation as well as imports. Therefore, it is equivalently applied to in-State and out-of-State renewable generation sources and imposes only a minimal, if any, burden on commerce.").

204. *See* Healy v. Beer Inst., Inc., 491 U.S. 324, 336 (1989).

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

206. Endrud, *supra* note 159, at 264 n.34.

207. *Id.* at 271-72; *see generally* John R. Norris and Jeffrey F. Dennis, *Electric Transmission Infrastructure: A Key Piece of the Energy Puzzle*, 25 NATURAL RES. & ENV'T 3 (Spring 2011).

208. North Dakota v. Heydinger, 11-CV-3232 (SRN/SER), 2014 WL 1612331, at *13 (D. Minn. 2014).

emissions; or enter into a new long-term power purchase agreement that would increase statewide power sector carbon dioxide emissions."[209] This type of overbroad language, and the attempt to regulate interstate power contracts, clearly will not survive a dormant Commerce Clause challenge.[210]

The NYS RPS has two additional characteristics that limit the program's susceptibility to a dormant Commerce Clause challenge. First, as previously discussed, the state's reasons for implementing the RPS are primarily economic, and the economic reasons continue to be stressed over the positive environmental effects.[211] Presenting the program in this way makes it much more approachable to a variety of legislators and more accepted by the public. However, climate change and environmental benefits should not be overlooked when creating similar programs, particularly since states might enact similar programs in response to the EPA's final 111(d) rule on carbon emissions.[212] The second characteristic is the application of the market participant exception to the NYS RPS. The state participates in the market by directly collecting the funds from consumers, and then NYSERDA determines what projects to fund within the state.[213] The state is arguably directly participating in the market and not regulating in the traditional sense.[214] The state is merely re-distributing funds collected through resident's electricity bills. Therefore, NYS RPS likely falls within the exception. States creating an RPS program should structure the program similarly to the NYS RPS to limit dormant Commerce Clause challenges.

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209. MINN. STAT ANN § 216H.03(3) (West 2007); *Heydinger*, 2014 WL 1612331, at *3.

210. This type of regulation will also not survive a preemption challenge as the regulation of interstate power contracts is left to the federal power of FERC under the Federal Power Act. *See* 16 U.S.C. § 824 (2012).

211. *See generally* NYSERDA, *supra* note 164.

212. 42 U.S.C. § 7411(c)(1) (2012); Carbon Pollution Standards for Modified and Reconstructed Stationary Sources: Electric Utility Generating Units, 79 Fed. Reg. 34,960 (proposed June 18 2014) (to be codified at 40 C.F.R. pt. 60).

213. *See* N.Y. PUB. SERV. COMM'N, *supra* note 162; NYSERDA, *supra* note 164, at 1.

214. United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth., 550 U.S. 330, 345-46 (2007); White v. Mass. Council of Const. Emp'rs, Inc., 460 U.S. 204, 208 (1983).

V. CONCLUSION

Developing state and national climate change regulations is of the utmost importance and urgency. With the EPA's final rule proposal due in June 2015, states are encouraged to develop regulations, laws, or programs to comply with the promulgated greenhouse gas emissions standards.[215] However, these new regulations or state initiatives must fall within the existing bounds of constitutionality and legality. Specifically, the dormant Commerce Clause presents a unique threat to comprehensive greenhouse gas regulation in the absence of federal legislation.

Facing this risk, as states follow a "toolbox" approach in using various programs to reduce emissions, state regulators should also follow a "toolbox" approach in drafting emissions regulation. Best practices for such regulation include clear language, non-discriminatory and equal treatment provisions for in-state and out-of-state market participants, and express intent to regulate carbon for the purpose of mitigating climate change and the corresponding economic benefits that can occur from mitigation. California's ongoing experience with the LCFS and New York's success with RGGI and the NYS RPS, demonstrate the potential for states to act against climate change with measurable success.

215. 42 U.S.C. § 7411(c)(1).