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Environmental Federalism and State Renewable Portfolio Standards

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ENVIRONMENTAL FEDERALISM AND STATE RENEWABLE PORTFOLIO STANDARDS

Brannon P. Denning[†]

ABSTRACT

States have, of late, become increasingly active in environmental regulation. Renewable energy standards, which commit utilities in states to purchase power from renewable sources, and climate-change mitigation requirements of various kinds, are just two recent manifestations of state (and sometimes local) regulatory activism. This article employs state renewable portfolio standards (RPS) as a case study to examine how some RPS might fare if challenged under three constitutional doctrines that restrain states—preemption, the Dormant Commerce Clause Doctrine (DCCD), and the Privileges and Immunities Clause of Article IV. Under current doctrine, it concludes, the DCCD poses the greatest threat to RPS programs, as many of those programs are currently constituted. This Article also assays prospects for judicial alteration of that doctrine in ways that would be favorable to state environmental innovations and suggests that the Ninth Circuit’s recent decision in *Rocky Mountain Farmers Union v. Corey* could serve as a blueprint for designing or refining RPS that would be resistant to constitutional challenges.

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INTRODUCTION

Though hardly quiescent in the past, states have become increasingly active in environmental regulation. Impatient with the perceived torpor or ideological hostility to regulation at the federal level, and despairing of any comprehensive, supranational solution to pressing issues like climate change, states have decided to fill the void. Renewable energy standards, which commit utilities in states to purchase power from renewable sources, and climate-change mitigation requirements of various kinds, are just two recent manifestations of state (and sometimes local) regulatory activism.

However, when states begin to regulate in ways that impact other states (and other countries), constitutional doctrines protecting federal interests from state action come into play. Part I of this paper offers a primer on three constitutional doctrines that restrain states—preemption, the Dormant Commerce Clause Doctrine (DCCD), and the Privileges and Immunities Clause of Article IV. Part II then uses state renewable portfolio standards (RPS) as a case study in how these doctrines could potentially limit state environmental initiatives. Under current doctrine, the DCCD poses the greatest threat to RPS programs, as many of those programs are currently constituted. But Part II also assays prospects for judicial alteration of the doctrine in ways that would be favorable to state environmental innovations.

I. FEDERAL CONSTITUTIONAL RESTRICTIONS ON STATE AND LOCAL REGULATION

This section offers an overview of the three main restrictions on state and local regulatory authority. I first discuss the ability of Congress to preempt conflicting state and local legislation by

exercising the affirmative authority delegated to it under Article I of the Constitution. In addition, courts have long interpreted the delegation of regulatory authority over interstate commerce to contain implied restrictions on the states, prohibiting them from discriminating against or otherwise impermissibly burdening that commerce under the DCCD. Finally, state and local governments are forbidden by Article IV, section 2 from treating nonresidents differently from their own citizens under certain circumstance. Each of these doctrines or provisions has been invoked to limit state and local environmental regulatory schemes in the past; each has a continued role to play in current debates over state environmental policy, as we will see in Part II.

A. Preemption

1. Express Preemption

Under Article VI of the Constitution, the U.S. Constitution, treaties made by the United States, and “the Laws of the United States which shall be made in Pursuance” of the Constitution are the “supreme Law of the Land,” notwithstanding contrary state laws or state constitutional provisions.¹ If Congress has exercised its valid legislative authority, conflicting state laws must give way.² Easy cases include those in which Congress included explicit language preempting contrary state law.³

But Congress’s intent is not always so unequivocally stated. As the Court has noted:

Absent explicit pre-emptive language, we have recognized at least two types of implied pre-emption: field pre-emption, where the scheme of federal regulation is “so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it,” . . . and conflict pre-emption, where

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1. U.S. CONST. art. VI; *see also* *Gade v. Nat’l Solid Wastes Mgmt. Ass’n*, 505 U.S. 88, 98 (1992) (“Pre-emption may be either expressed or implied, and ‘is compelled whether Congress’ command is explicitly stated in the statute’s language or implicitly contained in its structure and purpose.’” (quoting *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977))).
 2. *See, e.g., Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 210 (1824) (concluding that possession of valid federal coasting license by steamboat operator preempted state law granting competitor a monopoly on passage service between New York and New Jersey).
 3. *See Nat’l Meat Ass’n v. Harris*, 132 S. Ct. 965, 970 (2012) (concluding that the Federal Meat Inspection Act’s preemption clause “prevents a State from imposing any additional or different—even if non-conflicting—requirements that fall within the scope of the Act and concern a slaughterhouse’s facilities or operations”) (internal quotation marks omitted).

“compliance with both federal and state regulations is a physical impossibility,” . . . or where state law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”⁴

The Court’s “ultimate task in any pre-emption case is to determine whether state regulation is consistent with the structure and purpose of the statute as a whole.”⁵

2. Implied Preemption

Where Congress has not expressly preempted state legislation, then, the Court has found an implied intent to preempt in two broad categories of cases. *Field preemption* “reflects a congressional decision to foreclose any state regulation in the area, even if it is parallel to federal standards.”⁶ *Conflict preemption*, on the other hand, impliedly preempts state laws that either makes compliance with state and federal law impossible, or, if compliance with both is possible, nevertheless presents an obstacle to one or more congressional purposes.

a. *Field Preemption*

*United States v. Locke*⁷ furnishes an example of field preemption of a state environmental statute. Washington State had promulgated a number of regulations relating to oil tankers. The Supreme Court held that the inclusion of numerous provisions related to the design, construction, repair, equipping, and crewing of tankers in the federal Ports and Waterways Safety Act meant that “Congress has left no room for state regulation of these matters.”⁸

b. *Impossibility Preemption*

Though a little long in the tooth, *McDermott v. Wisconsin*⁹ provides an excellent illustration of “impossibility”-type conflict preemption. In *McDermott*, compliance with federal rules regarding

4. *Gade*, 505 U.S. at 98 (quoting *Fidelity Fed. Sav. & Loan Ass’n. v. De la Cuesta*, 458 U.S. 141, 153 (1982); *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142–43 (1963); *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

5. *Id.*

6. *Arizona v. United States*, 132 S. Ct. 2492, 2502 (2012). *See, e.g., Hines*, 312 U.S. 52 (preempting state alien registration statute; rejecting argument that requirements were parallel to and not in conflict with federal requirements).

7. 529 U.S. 89 (2000).

8. *Id.* at 111.

9. 228 U.S. 115 (1913).

the labeling of corn syrup would have resulted in the product's being mislabeled and subject to seizure under state law. The Court held that states could not pass laws that explicitly conflict with federal requirements, leaving the subject of the regulation incapable of complying with one regulatory regime without violating the other. In such cases, the state must give way.¹⁰

c. Obstacle Preemption

The other form of conflict preemption, termed “obstacle” preemption, is more subjective than impossibility preemption. In obstacle preemption cases, compliance with both federal and state regulatory regimes is possible, but in some cases the state regulatory choices are inconsistent with or harmful to broader federal policy objectives set by Congress. For example, in *Crosby v. National Foreign Trade Council*,¹¹ the Court invalidated a Massachusetts law prohibiting the Commonwealth from contracting with companies that did business with the government of Myanmar. Because Congress considered and rejected much more wide-ranging penalties for companies currently doing business in the country, choosing instead to prohibit only new investment, the Court concluded that “the state Burma law [was] an obstacle to the accomplishment of Congress’s full objectives under the federal Act.”¹²

Similarly, one provision of Arizona’s controversial immigration law, which prohibited undocumented aliens from working, applying for, or soliciting work in the state, was invalidated because it “enact[ed] a state criminal prohibition where no federal counterpart exists.”¹³ Congress, the Court held, “made a deliberate choice not to impose criminal penalties on aliens who seek, or engage in, unauthorized employment.”¹⁴ Arizona’s law, however:

[W]ould interfere with the careful balance struck by Congress with respect to unauthorized employment of aliens. Although [the law] attempts to achieve one of the same goals as federal law—the deterrence of unlawful employment—it involves a conflict in the method of enforcement. The Court has recognized that a “[c]onflict in technique can be fully as disruptive to the system Congress enacted [sic] as conflict in overt policy.” . . . The correct instruction to draw from the text, structure, and history of [federal law] is that Congress decided it would be inappropriate to impose criminal penalties on aliens who seek or

10. *Id.* at 133–34.

11. 530 U.S. 363 (2000).

12. *Id.* at 373–86.

13. *Arizona v. United States*, 132 S. Ct. 2492, 2503 (2012).

14. *Id.* at 2504.

engage in unauthorized employment. It follows that a state law to the contrary is an obstacle to the regulatory system Congress chose.¹⁵

Given the enormous federal legislative and administrative footprint in environmental regulation, any new state environmental initiatives—especially those that are different in kind from or more stringent than existing federal requirements—will have to contend with arguments that they are either explicitly or impliedly preempted. Deciding whether or not they are has become more difficult in recent years as the Court has sent somewhat mixed signals in its implied conflicts cases.

B. *The Dormant Commerce Clause Doctrine*

1. The Basic Doctrine

Another important restraint on state and local laws, the DCCD prohibits subnational governments from discriminating against or otherwise impermissibly burdening interstate commerce. Laws that discriminate—either on their face or in their purposes or effects—are subject to a form of strict scrutiny requiring the state to demonstrate that it enacted the law for a legitimate (i.e., non-protectionist) purpose and that no less discriminatory means exist to effectuate that purpose.¹⁶ Truly nondiscriminatory laws, however, are subject to the more deferential *Pike* balancing test, whereby the law is upheld unless the challenger proves that the “burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits.”¹⁷ The Supreme Court has not invalidated a law under *Pike* balancing in over twenty-five years; lower courts tend to invalidate using *Pike* balancing only where the putative local benefits appear to be a pretext for discrimination or can be proven to be nil.¹⁸

15. *Id.* at 2505 (quoting *Amalgamated Ass’n of St., Elec. Ry. & Motor Coach Emps. v. Lockridge*, 403 U.S. 274, 287 (1971)).

16. *See, e.g., Bacchus Imports, Ltd., v. Dias*, 468 U.S. 263, 270–71 (1984) (invalidating law exempting locally-produced liquor and wine from 20% excise tax; holding that the purpose of the law was to insulate locally-produced goods from competition); *Philadelphia v. New Jersey*, 437 U.S. 617, 624–28 (1978) (holding that the explicit ban on in-state disposal of out-of-state garbage was subject to “virtually per se rule” of invalidity); *Hunt v. Wash. Apple Adver. Comm’n*, 432 U.S. 333, 352–53 (1977) (invalidating facially neutral law requiring all apple producers to use FDA grade or no grade on closed containers of apples; holding that the law discriminated in effect against out-of-state apples).

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

18. *See* BRANNON P. DENNING, BITTKER ON THE REGULATION OF INTERSTATE AND FOREIGN COMMERCE § 6.05 6-36 (2d ed. 2013) (“If a measure imposes significant costs, but no real benefits, or the benefits prove to be illusory, courts will invalidate them under *Pike*.”).

There is a third prong of the DCCD, but one of uncertain vitality: the prohibition on “extraterritorial” regulation.¹⁹ Probably the most that one can say about extraterritoriality is that it operates to restrain a state from attempting to control activities that occur wholly outside its jurisdiction.²⁰

2. Exceptions to the Doctrine

The DCCD is subject to a number of exceptions that would be relevant to state environmental initiatives. First, the Court has held that discrimination in favor of a public entity does not violate the DCCD’s anti-discrimination principle if all other private entities (in-state and out-of-state) are treated equally.²¹ Second, the Court has held that state and local governments acting as market “participants” as opposed to market “regulators” can escape the strictures of the DCCD.²² Finally, because the DCCD is a default rule, Congress itself can authorize the states to legislate in ways that would otherwise violate the DCCD using its affirmative power to regulate interstate commerce.²³ The remainder of this section discusses each in turn.

a. Discrimination in Favor of Public Entities

In *United Haulers Ass’n v. Oneida-Herkimer Solid Waste Management Authority*,²⁴ the Court upheld a flow control ordinance directing that all solid waste be processed at a single, publicly owned facility. Though the *United Haulers* Court applied *Pike* balancing, it held that the forced use provision of the flow control ordinance was not “discriminatory” for DCCD purposes. The Court concluded that, at least where the public entity was performing traditional governmental functions, favoritism of publicly owned entities was likely motivated for reasons other than naked protectionism and that

19. See, e.g., *Healy v. Beer Inst.*, 491 U.S. 324, 326 (1989) (involving a Connecticut “price-affirmation statute tying Connecticut beer prices to the prices charged in” bordering states). For doubts about its future, see Brannon P. Denning, *Extraterritoriality and the Dormant Commerce Clause: A Doctrinal Post-Mortem*, 73 LA. L. REV. 979 (2013).

20. See, e.g., *Midwest Title Loans, Inc. v. Mills*, 593 F.3d 660, 668–69 (7th Cir. 2010) (invalidating state application of consumer credit code to out-of-state car title lender); Denning, *supra* note 19, at 992 & n.81 (offering other examples).

21. See *infra* Part I.B.2.a.

22. See *infra* Part I.B.2.b.

23. See *infra* Part I.B.2.c.

24. 550 U.S. 330 (2007).

the DCCD should not prohibit decisions by governments to monopolize a given market.²⁵

b. *The Market-Participant Exception*

Adopted in 1976 in a case involving a state initiative to dispose of derelict car hulks,²⁶ the market participant doctrine is one of the best-known exceptions to the DCCD. In short, the Court held that when states spend taxpayer funds, they are entitled to act as private actors do in choosing with whom to trade.²⁷ For example, when South Dakota built a state-owned cement plant, it was entitled to process the orders of in-state customers before filling the orders of out-of-state purchasers during a cement shortage.²⁸

State and local governments may not, however, regulate beyond the market in which they participate. Thus, in *South-Central Timber Development, Inc. v. Wunnicke*,²⁹ a plurality held that Alaska's attempt to force purchasers of state-owned timber to process that timber in-state prior to exportation exceeded the scope of the exception.³⁰ Justice White stated:

The limit of the market-participant doctrine must be that it allows a State to impose burdens on commerce within the market in which it is a participant, but allows it to go no further. The State may not impose conditions, whether by statute, regulation, or contract, that have a substantial regulatory effect outside of that particular market.³¹

Alaska, he concluded, attached “downstream” restrictions on the processing of the timber after the sale had been completed. Alaska was not a participant in the timber processing market, but was trying

25. *Id.* at 342–44; *see also* *Dep't of Revenue v. Davis*, 553 U.S. 328 (2008) (applying *United Haulers* to state law exempting from income tax income derived from bonds issued by the taxing state or its subdivisions, but taxing income from all other bonds). For a critique of the public entities exception, *see* Norman R. Williams & Brannon P. Denning, *The “New Protectionism” and the American Common Market*, 85 *NOTRE DAME L. REV.* 247 (2009). The exception appears to apply only to the anti-discrimination principle; in both cases the Court applied *Pike* balancing. *See Davis*, 553 U.S. at 353–54; *United Haulers*, 550 U.S. at 346–47; *but see Davis*, 553 U.S. at 354–56 (questioning whether the Court should apply balancing).

26. *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976).

27. *See id.* at 809–10.

28. *Reeves, Inc. v. Stake*, 447 U.S. 429 (1980).

29. 467 U.S. 82 (1984).

30. *Id.* at 98.

31. *Id.* at 97.

to regulate that market.³² In addition, the Court subsequently held that states may not attempt to “participate” in a market by the discriminatory granting or withholding of tax credits; taxation, the Court felt, was a “primeval governmental activity” in which the average private actor could not participate.³³

c. Congressional Redelegation

The DCCD is a default rule, defeasible by congressional exercise of its affirmative power over interstate commerce. If Congress chooses, it may pass legislation disabling the DCCD, but it must “expressly state[]” its intent to do so.³⁴ In 1945, for example, Congress passed the McCarran-Ferguson Act, which left the regulation of the “business of insurance” to the states.³⁵ The Court upheld the Act in *Prudential Insurance Co. v. Benjamin*,³⁶ authorizing South Carolina’s imposition of a three percent premium tax on foreign, but not domestic, insurance companies.³⁷

C. The Privileges and Immunities Clause of Article IV

Article IV, section 2 entitles “[t]he Citizens of each State” to “all Privileges and Immunities of Citizens in the several States.”³⁸ Derived from a similar provision in the Articles of Confederation, the Privileges and Immunities Clause prescribes a rule of substantial equality for nonresidents when certain “fundamental rights” are at

32. *Id.* at 98–99.

33. *New Energy Co. v. Limbach*, 486 U.S. 269, 277 (1988). Though the Court has never expressly so held, it has assumed in several cases that discriminatory cash subsidies do not violate the DCCD. *See, e.g., Id.* at 278 (stating that “[d]irect subsidization of domestic industry does not ordinarily run afoul of” the antidiscrimination principle); *see also* *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 199 n.15 (1994). For a defense of the differential treatment despite the fact that the economic effects of subsidies versus tax credits are identical, see Dan T. Coenen, *Business Subsidies and the Dormant Commerce Clause*, 107 *YALE L.J.* 965 (1998); but see Edward A. Zelinsky, *Are Tax “Benefits” Constitutionally Equivalent to Direct Expenditures?*, 112 *HARV. L. REV.* 379 (1998) (taking the view they ought to be treated equally for constitutional purposes).

34. *South-Central Timber*, 467 U.S. at 91–92.

35. 15 U.S.C. §§ 1011–1015 (2006).

36. 328 U.S. 408 (1946).

37. *Id.* at 434–36. For the view that Congress does not have this power, see Norman R. Williams, *Why Congress May Not “Overrule” the Dormant Commerce Clause*, 53 *UCLA L. REV.* 153 (2005).

38. U.S. CONST. art. IV, § 2.

issue.³⁹ For our purposes, the right to pursue a common calling or conduct a lawful trade on terms of substantial equality with residents and the right not to be taxed more heavily than residents are within the universe of fundamental rights recognized by the Court.⁴⁰ To defend a discriminatory law against a Privileges and Immunities challenge, the state needs to “demonstrat[e] that ‘(i) there is a substantial reason for the difference in treatment; and (ii) the discrimination practiced against nonresidents bears a substantial relationship to the State’s objective.’”⁴¹ In determining the substantial relationship, courts will usually consider the availability of less discriminatory means.⁴²

Despite the substantial overlap between the Privileges and Immunities Clause and the DCCD, significant differences exist that limit the utility of the Clause as an all-purpose tool to combat discrimination.⁴³ Most importantly, only natural persons can invoke the protections of the Clause; corporations are not “citizens” under Article IV, section 2.⁴⁴ Moreover, the Court has refused to recognize a market participant exception to the Privileges and Immunities

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39. See generally Brannon P. Denning, *Why the Privileges and Immunities Clause of Article IV Cannot Replace the Dormant Commerce Clause Doctrine*, 88 MINN. L. REV. 384, 388–93 (2003) (discussing judicial interpretation of the Privileges and Immunities Clause from 1823 to modern times). That the Clause only guarantees equal treatment with regard to “fundamental rights” was first announced in *Baldwin v. Fish & Game Comm’n*, 436 U.S. 371, 388 (1978), in which the Court refused to apply the Clause to elk hunting licenses, which were cheaper for residents than for nonresidents.
40. See, e.g., *Lunding v. N.Y. Tax Appeals Tribunal*, 522 U.S. 287, 315 (1998) (holding that the Privileges and Immunities Clause guarantees the right not to be taxed more heavily as nonresident); *United Bldg. & Constr. Trades Council v. Mayor of Camden*, 465 U.S. 208, 221–22 (1984) (holding that the Clause protects the right of nonresidents to ply a trade on terms of substantial equality with residents). The Clause applies to municipalities as well as states. *United Bldg. & Constr. Trades Council*, 465 U.S. at 215–17.
41. *Lunding*, 522 U.S. at 298 (citing *Supreme Court of N.H. v. Piper*, 470 U.S. 274, 284 (1985)).
42. *Piper*, 470 U.S. at 284 & n.17 (“In deciding whether the discrimination bears a close or substantial relationship to the State’s objective, the Court has considered the availability of less restrictive means.”).
43. See generally Denning, *supra* note 39, at 393–404 (detailing the differences between the scope of the Clause and that of the DCCD).
44. *Id.* at 394–96.

Clause.⁴⁵ Further, as a textual restriction on the states, Congress cannot override the Clause as it can the DCCD.⁴⁶

In the next Part, I will examine an increasingly popular state initiative to curb climate change in light of these constitutional restrictions. As many are currently designed, RPS programs are vulnerable to invalidation either through preemption (should the federal government ever enact a national RPS) or under the DCCD. As for the latter, however, I will discuss the possibility that changes in that doctrine may render it less hostile even to discriminatory RPS programs.

II. RENEWABLE PORTFOLIO STANDARDS: A CASE STUDY IN ENVIRONMENTAL FEDERALISM

States have undertaken a number of environmental initiatives ranging from suing the EPA over its alleged failure to regulate carbon dioxide as a pollutant,⁴⁷ to initiating cap-and-trade plans to restrict carbon emissions,⁴⁸ to creating elaborate renewable portfolio standards (RPS) that require power generators to purchase power from renewable resources. All of these recent initiatives raise many of the constitutional issues discussed above. In this section, however, I want to use RPS as a case study in the vulnerability of some state environmental initiatives to constitutional federalism restrictions.

RPS programs make particularly good vehicles for close examination of these issues for several reasons. First, they are widespread; thirty-eight states and the District of Columbia have enacted them.⁴⁹ Moreover, the states are—so far—writing on a blank slate. Congress has not enacted a federal RPS, though several have

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45. *United Bldg. & Constr. Trades Council*, 465 U.S. at 219–20; Denning, *supra* note 39, at 396–97.
46. Denning, *supra* note 39, at 397–99; *but see* Gillian E. Metzger, *Congress, Article IV, and Interstate Relations*, 120 HARV. L. REV. 1468, 1492–93 (2007) (arguing that Congress should have power to waive the Privileges and Immunities Clause's protections as well).
47. *See, e.g.*, *Massachusetts v. EPA*, 549 U.S. 497, 515–26 (2007) (concluding that Massachusetts had standing to sue the EPA under the Clean Air Act).
48. *Clean Air Mkts. Grp. v. Pataki*, 338 F.3d 82, 89 (2d Cir. 2003) (concluding that New York State cap-and-trade program was preempted by the federal Clean Air Act).
49. *See Rules, Regulations & Policies for Renewable Energy*, DATABASE OF ST. INCENTIVES FOR RENEWABLES & EFFICIENCY, <http://www.dsireusa.org/summarytables/rpre.cfm> (last visited Mar. 5, 2014); *see also infra* note 53 and accompanying text.

been proposed. Further, many state RPS are drafted in ways that put them squarely in the crosshairs of, for example, the DCCD. But the vulnerability of RPS programs to challenge under the DCCD also provide an opportunity to explore the availability of various exceptions to the DCCD, as well as to discuss whether recent DCCD cases suggest an openness on the Court's part to environmental innovations that might have been regarded as suspect a generation ago.

A. *An RPS Primer*

RPS programs “require electric utilities and other retail electric providers to include a specified percentage of electricity supply from renewable energy sources.”⁵⁰ These obligations can be satisfied “by owning renewable energy facilities and producing their own renewable power or by purchasing such power from others’ facilities.”⁵¹ In the latter cases, utilities can satisfy their RPS requirements by purchasing Renewable Energy Credits (RECs) from qualifying generators. Those owning renewable power generation facilities in turn receive RECs—usually one REC for each kilowatt hour (kWh) of renewable energy generated—and may sell these to other utilities who need to meet the RPS requirements.⁵²

As of 2012, “[t]wenty-nine states and the District of Columbia have some form of RPS,”⁵³ which has now been expanded to thirty-eight states.⁵⁴ The popularity of RPS is due in part to the fact that “they provide various benefits including economic development, reduced emissions, increased job opportunities, establishment of more reliable energy supplies, and greater fuel diversification.”⁵⁵ Not

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50. Steven Ferrey, *Threading the Constitutional Needle with Care: The Commerce Clause Threat to the New Infrastructure of Renewable Power*, 7 TEX. J. OIL GAS & ENERGY L. 59, 61–62 (2012); see also 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 (2008) (“Renewable portfolio standards are obligations on retail sellers of electricity to include in their generation ‘portfolios’ a certain amount of electricity from ‘renewable’ energy sources.”).
51. Endrud, *supra* note 50, at 261 (citing NANCY RADER & SCOTT HEMPLING, THE RENEWABLES PORTFOLIO STANDARD—A PRACTICAL GUIDE 2 (2001), available at <http://www.naruc.org/grants/Documents/rps.pdf>).
52. *But see infra* notes 69–70 and accompanying text (describing “multipliers” awarded to certain activities).
53. Ferrey, *supra* note 50, at 62.
54. *Rules, Regulations & Policies for Renewable Energy*, *supra* note 49,
55. *Id.* at 65 (citing K.S. CORY & B.G. SWEZEY, RENEWABLE PORTFOLIO STANDARDS IN THE STATES: BALANCING GOALS AND IMPLEMENTATION

surprisingly, then, states have tried to retain as many of those benefits as possible for their own citizens and “to prevent the ‘leakage’ of” those benefits to other states.⁵⁶ As one commentator notes, “[m]ost of these strategies involve limitations on which renewable energy sources are eligible to satisfy the states’ RPS obligations.”⁵⁷

B. State Parochialism in RPS Programs

State RPS programs vary in their particulars and implementation. I am less interested here in describing those programs in all of their complexity, than in highlighting features common to many initiatives that could be described as parochial or protectionist, thus making them particularly vulnerable to constitutional challenge. These features include (1) in-state and in-region restrictions on generation, purchase, or sale of power or requirements that RECs come from particular states or regions; (2) special multipliers altering the REC to kWh ratio for certain generators; and (3) tax-subsidy schemes benefiting in-state renewable energy construction projects.

1. In-State and In-Region Restrictions

These restrictions “limit the eligibility of qualifying renewable energy to that which is generated within the state or within the surrounding region”⁵⁸ North Carolina’s RPS program, for example, caps the amount of energy purchased out-of-state at twenty-five percent.⁵⁹ California, Colorado, and Ohio contain similar preferences for in-state generated energy.⁶⁰ Likewise, “[i]n-state consumption, metering, and sales requirements limit the eligibility of renewable energy to that which . . . is either physically consumed, or quantitatively verified (metered) within the state, or sold into the state.”⁶¹ Several states restrict the eligibility of RECs to energy generated either within the state or within the region.⁶² Iowa, Minnesota, and Hawaii prohibit the exportation of RECs.⁶³ In addition, “[r]egional delivery requirements [mandate] that qualifying

STRATEGIES 7 (2007), available at <http://www.nrel.gov/docs/fy08osti/41409.pdf>.

56. Endrud, *supra* note 50, at 264.

57. *Id.*

58. *Id.* (citations omitted).

59. Ferrey, *supra* note 50, at 76 (citing N.C. GEN. STAT. § 62-133.8(b)(2)(e) (2009)).

60. *Id.* at 75.

61. Endrud, *supra* note 50, at 264 (citations omitted).

62. Ferrey, *supra* note 50, at 76–78.

63. *Id.* at 86 n.229.

renewable energy be delivered into the regional power pool or independent system operator . . . control area serving the state.”⁶⁴ Finally, “[i]n-state benefits requirements require that qualifying renewable energy provide sufficient specific (named) or generic (unnamed) benefits to the state.”⁶⁵

Few of these provisions have generated reported cases. However, when Massachusetts passed a statute to stimulate development of renewable energy plants in 2008, one provision required companies that distributed electricity in the state to sign long-term contracts with renewable power companies that were located in Massachusetts.⁶⁶ A Canadian company filed a DCCD challenge to that provision, as well as another provision requiring the state Department of Energy Resources “to establish a requirement that a minimum percentage of electricity sales be from ‘new on-site renewable energy generating sources’ located in” state.⁶⁷ The suit was later settled when Massachusetts agreed to grandfather in some existing contracts to supply electricity into which TransCanada had entered.⁶⁸ Broader questions about the constitutionality of the law’s provisions, however, were not addressed.

2. REC Multipliers for In-State Activities

Over half the states with RPS programs provide preferential treatment for in-state or in-region generation for renewable power, usually through a “multiplier” that increases the ratio of RECs to kWh generated from 1:1 to 1+x:1.⁶⁹ Arizona, Delaware, Michigan, and

64. Endrud, *supra* note 50, at 264.

65. *Id.* at 264–65.

66. See Richard Lehfeltd, Woody N. Peterson & David T. Schur, *Commerce Clause Conflict: In-state Green Mandates Face Constitutional Challenge*, PUB. UTILS. FORTNIGHTLY, Dec. 2010, at 38, 39; see also CAROLYN ELEFANT & EDWARD A. HOLT, THE COMMERCE CLAUSE AND IMPLICATIONS FOR STATE RENEWABLE PORTFOLIO STANDARD PROGRAMS: CLEAN ENERGY STATES ALLIANCE STATE RPS POLICY REPORT 19 (2011).

67. ELEFANT & HOLT, *supra* note 66, at 21 (quoting Green Communities Act, ch. 169, sec. 32, § 11F(g), 2008 Mass. Acts 308, 334); see also Erin Ailworth, *State Looking to Settle Suit Over Law on Clean Energy*, BOSTON GLOBE, May 27, 2010, at B9, B11 (describing the suit and the state’s efforts to settle it).

68. See Erin Ailworth, *Deal Reached in State Energy Suit*, BOSTON GLOBE, May 29, 2010, at B5, B6.

69. Ferrey, *supra* note 50, at 72–78.

Montana also offer various incentives for using in-state components and labor in the construction of power generators.⁷⁰

3. SBC and Subsidy Programs

As one author observes, “an alternative strategy to energy eligibility restrictions is to lower the costs of in-state renewable power generation through subsidies, which can be financed by system benefits charges on the energy sector at large or by general tax revenues.”⁷¹ Some states with RPS programs impose system-wide, per-kWh charges (SBCs) on utility customers, the revenue from which is then placed in a segregated fund from which renewable power projects are subsidized.⁷² In some cases, the subsidies are available only for in-state projects.⁷³ California subsidizes the generation of renewable power and forbids its export to the grid.⁷⁴

C. *The Constitutionality of RPS Programs*

The biggest potential threat to state RPS programs—although that threat has not yet materialized—would come in the form of a federal mandate.⁷⁵ Unless well-drawn savings clauses were included, congressional legislation could expose the patchwork quilt of state-level RPS to preemption challenges.⁷⁶ This has already happened in

70. *Id.* at 78–79 (noting that these states have “preferences or multipliers for RECs created at power generation units that employ an in-state workforce or in-state manufacture components”).

71. Endrud, *supra* note 50, at 265.

72. *See* Ferrey, *supra* note 50, at 70 (“Approximately one-third of U.S. states have enacted SBC and ‘public benefit funds,’ as a direct subsidy mechanism to support the development of renewable energy resources.” (citing ELIZABETH DORIS ET AL., STATE OF THE STATES 2009: RENEWABLE ENERGY DEVELOPMENT AND THE ROLE OF POLICY 65–66 (2009), available at <http://www.nrel.gov/docs/fy10osti/46667.pdf>)).

73. *See id.* at 80–84 (listing Massachusetts, Illinois, Ohio, and Pennsylvania as examples, either by statute or by almost exclusively spending funds on in-state programs).

74. *Id.* at 84–85.

75. *See* Endrud, *supra* note 50, at 280 (“[A] federal RPS program could create a different kind of constitutional barrier to state RPS programs, one which could result in the invalidation of such programs altogether: federal preemption under the Supremacy Clause.”).

76. *Id.* at 281. The flipside is that Congress might *immunize* protectionist RPS programs from DCCD scrutiny, as it may do by legislating under its affirmative power to regulate interstate commerce. *See supra* Part I.A. One commentator has explicitly recommended that Congress do just this, arguing that “the overall utility of such restrictions in providing incentives for states to overcome public choice problems and enact aggressive standards may outweigh the resulting burdens on interstate commerce.” Endrud, *supra* note 50, at 285.

cases involving mitigation of cross-border air pollution and other state air quality initiatives.⁷⁷ Even if some portion of state RPS requirements were included within the scope of one or more savings clauses, the Court will nevertheless apply implied preemption principles (conflict, obstacle, and field preemption) to that portion of the legislation *not* within the savings clause.⁷⁸ While states could formerly claim a “presumption against preemption” to prevent the application of such principles, considerable question surrounds how much of that presumption remains. While federal RPS legislation has been introduced, however, none has become law.⁷⁹

Of the remaining restrictions, then, the DCCD presents the most obvious vehicle by which regulated entities could challenge state RPS requirements—especially those that seem to favor in-state over out-of-state activities. As noted above, the Privileges and Immunities Clause, while overlapping with the DCCD to a great extent, does not apply other than to natural persons, rendering it unlikely to play a large role in this context.⁸⁰

The Supreme Court has, in the past, invalidated quite a number of state laws alleged to advance some environmental goal. As

77. See, e.g., *Clean Air Mkts. Grp. v. Pataki*, 338 F.3d 82, 89 (2d Cir. 2003) (concluding that New York State cap-and-trade program was preempted by the federal Clean Air Act).

78. See, e.g., *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 869 (2000) (“[T]he savings clause . . . does *not* bar the ordinary working of conflict pre-emption principles.”); see also Scott Gallisdorfer, Note, *Clean Air Act Preemption of State Common Law: Greenhouse Gas Nuisance Claims After AEP v. Connecticut*, 99 VA. L. REV. 131, 141–42 (2013) (“Although the Supreme Court has generally interpreted savings clauses to preclude any finding of express preemption, it has ‘decline[d] to give broad effect to saving clauses where doing so would upset the careful regulatory scheme established by federal law.’ Thus, savings clauses do not usually prevent the operation of ordinary implied preemption principles, and they may even create a negative inference ‘that everything else not preserved by [the savings clause] is preempted.’”) (footnotes omitted) (alteration in original).

79. See Trevor D. Stiles, *Renewable Resources and the Dormant Commerce Clause*, 4 ENVTL. & ENERGY L. & POL’Y J. 34, 50–51 (2009) (discussing proposals for federal RPS).

80. Which is not to say that it hasn’t previously played a role in environmental or conservation contexts. For example, conservation was cited as a reason in *Baldwin* to charge out-of-state hunters more for elk hunting licenses. *Baldwin v. Fish & Game Comm’n*, 436 U.S. 371 (1978). Similarly, in *Toomer v. Witsell*, 334 U.S. 385 (1948), South Carolina cited conservation of native shrimp stocks as a reason to charge out-of-state shrimpers 100 times more for a shrimping license than Palmetto State shrimpers. *Id.* at 389. The Court rejected this, however, finding in-state shrimpers just as likely to pose a threat as those from out-of-state. *Id.* at 398–99.

Professor Ferrey has noted, “[g]ood environmental motives do not matter or change the constitutional analysis.”⁸¹ The Court has, for example, invalidated a number of state efforts to prohibit or discourage the importation of out-of-state solid waste.⁸² It has also invalidated attempts to require the use of a *privately owned* in-state facility, prohibiting the disposal of waste at other, possibly cheaper, out-of-state disposal sites.⁸³ The Court has also held unconstitutional state efforts to conserve valuable resources by, for example, prohibiting the exportation of minnows,⁸⁴ restricting nonresident fishing,⁸⁵ and barring the export of water.⁸⁶

In a case with obvious implications for the fate of discriminatory RPS programs, the Court struck down, on DCCD grounds, an Oklahoma law requiring coal-fired plants located in the state to favor local industry by requiring it to burn at least ten percent Oklahoma-mined coal.⁸⁷ The outcome of *Wyoming v. Oklahoma* is of a piece with numerous earlier cases rejecting state defenses that discriminatory laws were motivated not by a desire to *harm* out-of-state actors, but rather to *benefit* in-state industries.⁸⁸ A common feature of these laws is that they facially discriminated against out-of-state products or

81. Ferrey, *supra* note 50, at 98.

82. *See, e.g.*, *Or. Waste Sys., Inc. v. Dep’t of Env’tl. Quality*, 511 U.S. 93 (1994) (invalidating a discriminatory per ton waste disposal fee); *Fort Gratiot Sanitary Landfill, Inc. v. Mich. Dep’t of Natural Res.*, 504 U.S. 353 (1992) (invalidating a state law permitting counties to prohibit out-of-county waste); *Chem. Waste Mgmt., Inc. v. Hunt*, 504 U.S. 334 (1992) (invalidating a disposal fee on out-of-state hazardous waste shipped into the state); *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978) (invalidating a ban on importation of out-of-state solid waste).

83. *See, e.g.*, *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383 (1994). *But see* *United Haulers Ass’n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330 (2007) (refusing to extend *C & A Carbone* to an ordinance requiring disposal at a *publicly owned* processing facility); *see also infra* Section II.D.3 (discussing possible implications of *United Haulers* for RPS programs).

84. *Hughes v. Oklahoma*, 441 U.S. 322 (1979).

85. *Douglas v. Seacoast Prods., Inc.*, 431 U.S. 265 (1977) (striking down Virginia restriction on nonresident fishing in Chesapeake Bay).

86. *Sporhase v. Nebraska*, 458 U.S. 941 (1982).

87. *Wyoming v. Oklahoma*, 502 U.S. 437 (1992).

88. *See, e.g.*, *Bacchus Imps., Ltd. v. Dias*, 468 U.S. 263 (1984) (rejecting Hawaii exemption of locally-produced wine and liquor from excise tax); *Foster-Fountain Packing Co. v. Haydel*, 278 U.S. 1 (1928) (invalidating statute forbidding export of shrimp before heads and tails removed locally); *Pennsylvania v. West Virginia*, 262 U.S. 553 (1923) (striking down state statute requiring in-state natural gas customers be preferred over those from out-of-state).

economic actors, could not take advantage of one of the DCCD's exceptions, and could not satisfy the DCCD's heightened scrutiny applicable to discriminatory law.

It appears that a substantial number of state RPS provisions are discriminatory, either because they have preferences for power generated in state, or limit the amount of out-of-state RECs that can be used to satisfy the required renewable percentage.⁸⁹ Even "in-region location requirements, while not discriminatory towards certain neighboring states, would still be facially discriminatory against the remainder of states"⁹⁰ To the extent they are related to the geographic origins of the renewable power generated, multipliers, too, could be seen as discriminatory. Could these programs nevertheless pass muster under either an exception to the DCCD or because there are no less discriminatory means to meet the goals of RPS program?

I begin with the exceptions to the DCCD. Because Congress has not explicitly authorized discriminatory aspects of these programs,⁹¹ states would either have to fit their programs under the newly minted "public entity" or the older market participant exception. Either would be a difficult fit unless each is expanded by the Court. Putting aside the question whether climate change mitigation is a "traditional governmental function," the public entities exception would not apply unless the utilities from which consumers obtained their power were (to some uncertain extent) government-owned. As described in the literature, it does not seem as if state governments have monopolized the renewable energy market and forced all consumers to buy from state-owned generators, regardless whether customers would prefer to purchase power elsewhere.

Because RPS are mandates to private utilities to meet certain renewable energy targets prescribed by the states, moreover, it would be difficult for states to claim that they were merely participating in the energy market.⁹² These prescriptions apply to the supply of energy to *all* the utilities' customers, not just to the state as a customer.

Could the laws escape invalidation because there are no less discriminatory means available to effectuate the goal of these RPS

89. See Ferrey, *supra* note 50, at 72–85, 106 (concluding that "[m]any states" facially discriminate).

90. Endrud, *supra* note 50, at 271 (citing NANCY RADER & SCOTT HEMPLING, *THE RENEWABLES PORTFOLIO STANDARD: A PRACTICAL GUIDE A-1* (2001), available at energy.gov/sites/prod/files/oeprod/DocumentsandMedia/narucrps.pdf).

91. See *supra* Section I.B.2.c; see also Endrud, *supra* note 50, at 285 (arguing that Congress should consider doing so).

92. Ferrey, *supra* note 50, at 103–05 (agreeing that because RPS programs are regulatory in nature, the market participant exception likely is not available).

programs—viz., to reduce harmful emissions and foster the creation of viable alternative energy sources? Assuming that the latter would constitute a legitimate (i.e., non-protectionist) end, the answer to the question largely turns on what is meant by “less discriminatory means”? Does the requirement mean states are obligated to use the *least* discriminatory means possible? Or must it at least show that a good reason—unrelated to economic protectionism—exists for taking account of the regulated subject’s geographic origin?

In *Maine v. Taylor*,⁹³ the Court upheld a ban on the importation of baitfish into Maine, because of fears that parasites from non-native species could endanger the native fish population.⁹⁴ The Court accepted the trial court’s finding that no test was available to screen the imported fish at the border and further held that the State was not obligated to create one before interfering with trade.⁹⁵ Elsewhere I have argued that the outcome in *Taylor* suggests that when there’s no taint of protectionism in its end, the state should receive some leeway in the means it employs and that “less discriminatory” should not ipso facto be read to require that the state employ the *least* discriminatory means.⁹⁶

The problem for many state RPS programs, however, is that they appear specifically designed to secure economic benefits for the state, or at least prevent or minimize the export of those benefits to other states.⁹⁷ Several states specifically instruct implementing agencies to maximize the in-state benefits when writing regulations or drafting policies to operationalize the programs.⁹⁸ Under current doctrine—an important qualification to which I’ll return—courts are likely to look skeptically on such explicitly discriminatory programs.

However, programs that combine nondiscriminatory taxes with subsidies to in-state renewable energy projects⁹⁹ could fare much better, despite the Court’s holding in *West Lynn Creamery, Inc. v. Healy*.¹⁰⁰ *West Lynn Creamery* invalidated a tax-subsidy program designed to benefit Massachusetts dairy farmers. A nondiscriminatory tax was levied on the sale of milk, much of which came from out of

93. 477 U.S. 131 (1986).

94. *Id.* at 137–52.

95. *Id.* at 146–47.

96. Brannon P. Denning, *One Toke Over the (State) Line: Constitutional Limits on “Pot Tourism” Restrictions*, 66 FLA. L. REV. (forthcoming 2014), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2277078 (last revised Dec. 18, 2013).

97. *See supra* Section II.B.

98. *See supra* Section II.B.1.

99. *See supra* Section II.B.3.

100. 512 U.S. 186 (1994).

state, by milk dealers. The revenue was placed in a special fund and used to dole out subsidies to the Massachusetts farmers.¹⁰¹ While acknowledging that each component of the scheme was constitutionally permissible, the combination, the Court held, could not withstand scrutiny. As it operated, *only* out-of-state milk producers ended up paying taxes; in fact, in-state farmers often received much more than the value of the tax imposed.¹⁰² This was too much for even a staunch DCCD critic like Justice Scalia, who concurred in the Court's decision.¹⁰³

Important differences exist between Massachusetts's program and some SBC/subsidy plans that have been put in place. The fatal flaw in Massachusetts's plan was that in actual operation, the nondiscriminatory nature was illusory because of the offsetting subsidies. As a result of the latter, only out-of-state milk producers paid the tax.¹⁰⁴ By imposing a system charge on all power consumers, you reduce the chances that only out-of-state interests will pay the SBCs because in states subject to the charge will be made whole (or more) by receiving subsidies. The identity of the groups subject to the tax and then eligible for subsidies will likely not, as it did in *West Lynn Creamery*, divide along in-state/out-of-state lines.

D. *The Future of the DCCD*

The analysis above assumes no change in current doctrine. However, the current Court has signaled some interest in restricting the scope of the DCCD in ways that could aid RPS programs' defenses against constitutional challenges. First, the Court could expand a prior holding requiring that plaintiffs prove they were "similarly situated" to the in-state beneficiary of an allegedly discriminatory law or regulation. Second, recent cases demonstrate a willingness to expand the market participant doctrine or create entire new exceptions to the DCCD. Finally, the Court might simply restrict the DCCD by requiring that discriminatory or protectionist intent be proven to prevail.

1. "Similarly Situated"

In *General Motors Corp. v. Tracy*,¹⁰⁵ the Court upheld a state exemption from sales and use taxes for certain in-state sales of natural

101. *Id.* at 190–91.

102. *Id.* at 194.

103. *Id.* at 207–12 (Scalia, J., concurring).

104. The Court stressed this element in a subsequent case. *Pharm. Research & Mfrs. of Am. v. Walsh*, 538 U.S. 644, 670 (2003) (“[T]he order effectively imposed a tax on out-of-state producers to subsidize production by their in-state competitors.”).

105. 519 U.S. 278 (1997).

gas. Ohio imposed a use tax on property purchased outside the state and brought into the state for use. It exempted natural gas purchased from a “natural gas company,” defined as anyone “engaged in the business of supplying natural gas for lighting, power, or heating purposes to consumers within the state,” and further construed by the Ohio Supreme Court to be limited to public utilities.¹⁰⁶ GM sued, alleging that the exemption discriminated against out-of-state natural gas—it purchased gas for operating its plants from out-of-state independent gas sellers and had to pay a use tax on the natural gas.¹⁰⁷

The Court, however, rejected the claim, holding that “the market for exempt natural gas purchases from local public utilities was discrete from the market for taxable natural gas purchases from interstate gas marketers.”¹⁰⁸ In other words, the Court concluded, because the in-state and out-of-state natural gas in the case were not similarly situated “there can be no local preference, whether by express discrimination against interstate commerce or undue burden upon it, to which the dormant Commerce Clause may apply.”¹⁰⁹

Were states to abandon the geographic limitations in favor of specifying, for example, the *types* of renewable energy that will satisfy the RPS program requirements, as many commentators have advised doing, a DCCD challenge might be harder to maintain even if the eligible renewable energy correlates with a particular state or region. If states can explain that different types of energy or even different types of renewable energy represent discrete markets, as in *Tracy*, then they might avoid invalidation. Even regulations regulating transmission distance might be defensible, despite having a geographic component, if regulators can demonstrate why it compromises the programs’ goals to import energy from far away as opposed to requiring it to be transmitted closer to home.

2. Expand Existing Exceptions or Create New Ones

With the “public entities” exception, the Roberts Court showed itself willing to limit the DCCD by simply carving out an exception to the anti-discrimination principle. The flow control ordinance in *United Haulers*¹¹⁰ was clearly market regulation, not market participation—private actors usually lack the legal authority to force customers to

106. *Id.* at 281–82 (citing OHIO REV. CODE ANN. § 5727.01(D)(4) (1996); OHIO REV. CODE ANN. § 5727.01(E)(4) (Supp. 1990); OHIO REV. CODE ANN. § 5727.01(E)(8) (1986); *Chrysler Corp. v. Tracy*, 652 N.E.2d 185 (Ohio 1995)).

107. *Id.* at 285–86.

108. WALTER HELLERSTEIN ET AL., *STATE AND LOCAL TAXATION: CASES AND MATERIALS* 151 (9th ed. 2009).

109. *Tracy*, 519 U.S. at 300.

110. *See supra* notes 24–25 and accompanying text.

buy goods or services from it. However, as Norman Williams and I have observed elsewhere, the exemption is undertheorized and its scope uncertain.¹¹¹ For example, it is not at all clear how much involvement by the state is needed to convert something into a “public entity.”¹¹² Perhaps states could argue that because the state has chosen to monopolize the provision of power—even where it delegates that power to a private entity—it can dictate the terms on which that entity purchases power. States would likely have little trouble selling the claim that the provision of electricity is a “traditional governmental function.”

On the other hand, it might be that the Court expands the market participant doctrine to encompass at least some aspects of RPS programs. Just last term the Court rejected a DCCD challenge to Virginia’s Freedom of Information Act, which permitted queries only by state citizens.¹¹³ While most of the opinion addressed the challengers’ Privileges and Immunities Clause claim, the Court briefly addressed the DCCD at the end. In his opinion, Justice Alito suggested the Act could be defended under the market participant exception because the market for publicly available state information “is a market for a product that the Commonwealth has created and of which the Commonwealth is the sole manufacturer.”¹¹⁴

Similarly, it might be said that the state is the sole creator of RECs and that the market for them would not exist but for the state’s involvement; therefore, the state is entitled to offer whatever ratio of credits to kWhs it deems appropriate, and restrict the transfer of those RECs however it wishes. Or it might agree that because there is no economic difference between a cash subsidy and a tax exemption or credit, states can “participate” in the market for renewable energy through the use of its tax code to stimulate construction of renewable energy projects.¹¹⁵

3. Further Restrict Scope of the DCCD

Just as *United Haulers* simply created a categorical exception from the DCCD’s antidiscrimination principle for discrimination in favor of public entities, the Court might be inclined to further roll back the coverage of the DCCD in cases involving RPS programs. In

111. Williams & Denning, *supra* note 25, at 262–79.

112. *Id.* at 282–92.

113. *McBurney v. Young*, 133 S. Ct. 1709, 1713 (2013).

114. *Id.*

115. *Cf. Dep’t of Revenue v. Davis*, 553 U.S. 328, 343–48 (2008) (plurality op.) (Souter, J.) (arguing that Kentucky’s discriminatory taxation of income produced by out-of-state municipal bonds could be defended under the market participant doctrine). *But see* Williams & Denning, *supra* note 255, at 296–304 (criticizing such an expansion).

McBurney, for example, Justice Alito questioned the DCCD's applicability. "Virginia's FOIA law neither 'regulates' nor 'burdens' interstate commerce," he wrote, "rather, it merely provides a service to local citizens that would not otherwise be available at all."¹¹⁶ At other points in the opinion, he stressed the lack of discriminatory or protectionist intent behind Virginia's law.¹¹⁷

Justice Alito's discussion echoed Chief Justice Roberts' justification for the newly minted exception created in *United Haulers*, in which he referred to reasons other than simple economic protectionism for favoring public entities over in-state and out-of-state private entities. This might suggest that the Court is poised to require proof of discriminatory or protectionist intent for state laws challenged under the DCCD.¹¹⁸ If so, that would mark a departure from current doctrine, and would likely make DCCD claims more difficult to win.¹¹⁹ But criticism of the DCCD on the Court has intensified;¹²⁰ the Court has invalidated only one law under the DCCD in the last decade.¹²¹ It is not out of the realm of possibility that the Court would radically alter doctrine, especially if it has a sense that, relative to forty or fifty years ago when the contemporary DCCD began to really take shape, state laws are much less nakedly protectionist today.¹²²

116. *McBurney*, 133 S. Ct. at 1720.

117. *See id.* at 1715–19 (finding the petitioner "offered no proof—that the challenged provision . . . was enacted in order to provide a competitive economic advantage for Virginia citizens").

118. *Cf. Washington v. Davis*, 426 U.S. 229, 240–45 (1976) (requiring proof of discriminatory intent to sustain a race discrimination claim under the Equal Protection Clause, and holding that disparate impact alone is not sufficient).

119. Scholars have criticized *Davis* on similar grounds. *See, e.g.*, LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 16–20, at 1511–14 (2d ed. 1988); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987); Daniel R. Ortiz, *The Myth of Intent in Equal Protection*, 41 STAN. L. REV. 1105 (1989); David A. Strauss, *Discriminatory Intent and the Taming of Brown*, 56 U. CHI. L. REV. 935 (1989).

120. Only Justices Kennedy and Alito dissented in *United Haulers* and *Davis*. *Davis*, 553 U.S. at 362–76 (Kennedy, J., dissenting); *United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 356–71 (2007) (Alito, J., dissenting). Justice Stevens dissented in the latter, but not the former. *United Haulers*, 550 U.S. at 356–71 (Alito, J., dissenting).

121. *See Granholm v. Heald*, 544 U.S. 460 (2005) (invalidating New York law permitting mail-order direct shipment of in-state, but not out-of-state wines).

122. *Cf. Suzanna Sherry, Foundational Facts and Doctrinal Change*, 2011 U. ILL. L. REV. 145, 145–46 (arguing that changes in constitutional

E. Rocky Mountain Farmers Union v. Corey:¹²³ *A Harbinger?*

The recent *Rocky Mountain Farmers Union* case, in which parties challenged various provisions of California's new low carbon fuel standards suggests that even without wholesale changes to the DCCD, courts may grant states considerable leeway in crafting their RPS programs, at least where the programs are untainted by economic protectionism.¹²⁴ In seeking to reduce state greenhouse gas emissions, California crafted fuel standards that employed "'a lifecycle analysis' to determine the total carbon intensity of a given transportation fuel."¹²⁵ Instead of simply focusing on the emissions from tailpipes in the state, California chose "to account for emissions associated with all aspects of the production, refining, and transportation of a fuel, with the aim of reducing total, well-to-wheel [greenhouse gas] emissions."¹²⁶

In order to compare the emissions of fuels created from a diverse group of "feedstocks," California created tables of fuels that "incorporate[d] comprehensive data on the lifecycle emissions of various fuels."¹²⁷ These tables included data on the emissions from production and transportation of the fuels before they entered the tanks of California vehicles.¹²⁸ The schedules issued by the state included "default pathways" comprised of "average values" of the carbon intensity of a fuel.¹²⁹ In addition, regulated parties were entitled "to register individualized pathways" that either "rel[y] in part on a default pathway but proposes a replacement for one or more of the pathway's average values" or "a new, individualized pathway" for the fuel.¹³⁰

According to the court, "[e]thanol production is a resource-intensive process, requiring electricity and steam. . . . The choices of type of feedstock, source of electricity, and source of thermal energy affect the carbon intensity of the fuel pathway."¹³¹

doctrine are caused by "shifts" in Justices' "tacit factual assumptions underlying legal doctrine").

123. 730 F.3d 1070 (9th Cir. 2013), *cert. denied*, 134 S. Ct. 2875 (2014).

124. *Id.* at 1077.

125. *Id.* at 1080.

126. *Id.* at 1081 (citing CAL. CODE REGS. tit. 17, § 95481(a)(38) (2007)).

127. *Id.*

128. *Id.* at 1082.

129. *Id.*

130. *Id.* (citing CAL. CODE REGS. tit. 17, § 95486(c),(d) (2007)).

131. *Id.* (citing Changes to Renewable Fuel Standard Program, 75 Fed. Reg. 14,745 (Mar. 26, 2010)).

To determine the total carbon intensity values for each ethanol pathway, the [state] model considers the carbon intensity of factors including: (1) growth and transportation of the feedstock, with a credit for the GHGs absorbed during photosynthesis; (2) efficiency of production; (3) type of electricity used to power the plant; (4) fuel used for thermal energy; (5) milling process used; (6) offsetting value of an animal-feed co-product called distillers' grains, that displaces demand for feed that would generate its own emissions in production; (7) transportation of the fuel to the blender in California; and (8) conversion of land to agricultural use.¹³²

These factors were then “separate[d] . . . into those that are correlated with location and those that are not, using a regional identifier as a shorthand for the factors correlated with location.”¹³³ While “[e]missions from transporting the feedstock and the refined fuel are related to location,” the court noted, “they are not directly proportionate to distance traveled.”¹³⁴ The court further explained that “[t]ransportation emissions reflect a combination of: (1) distance traveled, including distance traveled inside California to the fuel blender; (2) total mass and volume transported; and (3) efficiency of the method of transport.”¹³⁵ This combination can produce some apparently anomalies. “California ethanol produces the most transportation emissions because California grows no corn for ethanol, so its producers import raw corn, which is bulkier and heavier than the refined ethanol shipped by producers in Brazil and the Midwest.”¹³⁶ Brazilian ethanol, which comes by ship, produces few transportation emissions relative to the distance traveled because of the efficiency of shipping.¹³⁷ A number of ethanol producers obtained individualized pathways as well.¹³⁸

As for crude oil, to which the state also assigned values, it “presents different climate challenges from ethanol and other

132. *Id.* at 1083.

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.* (citing CAL. ENVTL. PROT. AGENCY AIR RES. BD., DETAILED CALIFORNIA-MODIFIED GREET PATHWAYS FOR BRAZILIAN SUGARCANE ETHANOL: AVERAGE BRAZILIAN ETHANOL, WITH MECHANIZED HARVESTING AND ELECTRICITY CO-PRODUCT CREDIT, WITH ELECTRICITY CO-PRODUCT CREDIT (Sept. 23, 2009), available at http://www.arb.ca.gov/fuels/lcfs/092309lcfs_cane_etoh.pdf).

138. *Id.* at 1084.

biofuels.”¹³⁹ As the court noted, “[c]orn and sugarcane absorb carbon dioxide as they grow, offsetting emissions released when ethanol is burned. By contrast, the carbon in crude oil makes a one-way trip from the Earth’s crust to the atmosphere.”¹⁴⁰

For crude oil and its derivatives, emissions from combustion are largely fixed, but emissions from production vary significantly. As older, easily accessible sources of crude are exhausted, they are replaced by newer sources that require more energy to extract and refine, yielding a higher carbon intensity than conventional crude oil. As extraction becomes more difficult, emissions from crude oil will only increase, but [the state] expects that fuels with carbon intensity values fifty to eighty percent lower than gasoline will be needed to meet its emissions-reduction targets. No matter how efficiently crude oil is extracted and refined, it cannot supply this level of reduction. To meet California’s ambitious goals, the development and use of alternative fuels must be encouraged.¹⁴¹

To provide the encouragement, the state “required regulated parties to meet the Fuel Standard’s carbon-intensity-reduction targets by supplying alternative fuels or buying credits from the sellers of alternative fuels.”¹⁴²

To calculate the carbon intensity score of crude oil, the state distinguished between “existing” sources (those comprising “at least two percent of California’s crude-oil market in 2006,” the year used to calculate baseline values) and “emerging” sources (everything else).¹⁴³ It also differentiated between “high-carbon-intensity crude oil” (HCICO) and non-HCICO.¹⁴⁴ Existing and emerging non-HCICO were assigned a carbon intensity value equal to the 2006 average of grams of CO₂ equivalent produced per mega joule of energy.¹⁴⁵ Existing HCICO were assigned a separate average value, while emerging HCICO were required to obtain an individual measure of carbon intensity.¹⁴⁶

Various parties challenged the values assigned to imported ethanol, as well as those developed for crude oil sold in the state. The

139. *Id.*

140. *Id.*

141. *Id.* at 1084–85.

142. *Id.* at 1085.

143. *Id.*

144. *Id.*

145. *See id.* (comparing the 2006 averages for HCICO and non-HCICO).

146. *Id.*

parties alleged that the ethanol standards facially discriminated against out-of-state ethanol and that the crude oil standards discriminated against out-of-state crude oil in purpose and effect.¹⁴⁷ The parties also alleged that the crude oil standards impermissibly regulated extraterritorially.¹⁴⁸ The Ninth Circuit rejected all of the DCCD claims.

The court framed its inquiry as whether California's assignment of different carbon intensities to ethanol from different regions can be explained by "some reason, apart from their origin"¹⁴⁹ It concluded that California's assignment of different values was driven not by geography, but rather by differences in carbon intensity.¹⁵⁰ That constituted a nondiscriminatory reason for the higher carbon intensity value. Further, the court noted, "[t]he Fuel Standard does not isolate California and protect its producers from competition."¹⁵¹ In fact, it observed, "the lowest ethanol carbon intensity values, providing the most beneficial market position, have been for pathways from the Midwest and Brazil."¹⁵² The court found nothing discriminatory in California's insistence that it include "emissions from the transportation of feedstocks and fuels" in the carbon intensity score.¹⁵³ "California," it observed, "if it is to have any chance to curtail GHG emissions, must be able to consider all factors that cause those emissions when it assesses alternative fuels."¹⁵⁴ It concluded:

The dormant Commerce Clause does not require California to ignore the real differences in carbon intensity among out-of-state ethanol pathways, giving preferential treatment to those with a higher carbon intensity. These factors are not discriminatory

147. *Id.* at 1086.

148. *Id.* For a brief explanation of the extraterritoriality prong of the DCCD, see *supra* notes 19–20 and accompanying text. See also Denning, *supra* note 19 (suggesting that DCCD extraterritoriality is largely moribund).

149. *Rocky Mountain Farmers Union*, 730 F.3d at 1089 (quoting *City of Philadelphia v. New Jersey*, 437 U.S. 617, 627 (1978)).

150. See *id.* at 1090 ("Comparing all sources of ethanol and all factors that contribute to the carbon intensity of an ethanol pathway, it appears that CARB's method of lifecycle analysis treats ethanol the same regardless of origin, showing a nondiscriminatory reason for the unequal results of this analysis.").

151. *Id.*

152. *Id.* (citing CAL. CODE REGS. tit. 17, § 95486(b)(1) (2007)).

153. *Id.* at 1091–92.

154. *Id.* at 1090.

because they reflect the reality of assessing and attempting to limit GHG emissions from ethanol production.¹⁵⁵

The court also rejected the discriminatory purpose and effect claims against the crude oil provisions. Though some California oil was assigned a carbon intensity value that was much lower than its individual carbon intensity, other California oil “suffered more from the same arrangement than light crude from Alaska or abroad.”¹⁵⁶ Seen in context, then, the court found no evidence of discriminatory purpose behind the crude oil provisions; moreover, it concluded the parties had not produced sufficient evidence of an actual discriminatory effect sufficient to trigger heightened scrutiny.¹⁵⁷

The Ninth Circuit also rejected arguments that the fuel standards attempted to regulate extraterritorially by attempting to control out-of-state conduct.¹⁵⁸ “The Fuel Standard,” the court wrote, “regulates only the California market.”¹⁵⁹

The Fuel Standard . . . says nothing at all about ethanol produced, sold, and used outside California, it does not require other jurisdictions to adopt reciprocal standards before their ethanol can be sold in California, it makes no effort to ensure the price of ethanol is lower in California than in other states, and it imposes no civil or criminal penalties on non-compliant transactions completed wholly out of state. The district court identified several factors that might encourage ethanol producers to adopt less carbon-intensive policies. . . . For lifecycle analysis to be effective, it must consider all these factors and more. But California does not control these factors—directly or in practical effect—simply because it factors them into the lifecycle analysis.¹⁶⁰

While California “cannot exceed its powers” or “impose its own regulatory standards on another jurisdiction,” it “may regulate with reference to local harms, structuring its internal markets to set

155. *Id.* at 1093.

156. *Id.* at 1099. “We conclude that [the State’s] stated purpose was genuine. There was no protectionist purpose, no aim to insulate California firms from out-of-state competition.” *Id.* at 1100.

157. *Id.* The court did remand the case to the district court to assess whether the provisions nevertheless impermissibly burdened interstate commerce under *Pike* balancing. *Id.* at 1100–01.

158. *Id.* at 1106.

159. *Id.* at 1101.

160. *Id.* at 1102–03.

incentives for firms to produce less harmful products for sale in California.”¹⁶¹

Rocky Mountain Farmers Union furnishes a potential roadmap for states wishing to successfully defend their RPS programs. First, the Ninth Circuit’s treatment of California’s fuel standards demonstrates the wisdom of adopting facially neutral regulations. Doing so shifts the burden to challengers to demonstrate that RPS provisions are discriminatory in purpose or in their effects. In addition, the case offers some aid to states wishing to adopt requirements that renewable energy be purchased from a particular geographic region or that some types of energy should be excluded. As long as states can demonstrate that the regional restrictions or the excluded energy source were adopted for some non-protectionist purpose (i.e., that transportation of the energy would contribute to harms the program was trying to ameliorate), then courts will likely be more receptive to upholding them. The Ninth Circuit’s concern with protectionism generally is of a piece with the Supreme Court’s own conception of the DCCD as concerned not simply with discrimination per se, but with discrimination in the service of protectionist aims.¹⁶²

Despite the fact that the court remanded for application of *Pike* balancing, it seems unlikely that a reviewing court would conclude that the burdens on interstate commerce “clearly exceed” benefits that might accrue to a state from the mitigation of climate change. The prospect of defending RPS programs on this much more hospitable ground is reason enough to design RPS programs to be as indifferent as possible to geography and in no event as a vehicle for protecting or enhancing parochial economic interests.

CONCLUSION

Given the difficulties of passing major structural legislation at the federal level, states will likely continue to lead the way in some environmental regulation—especially in controversial areas such as climate change mitigation. Those that do so should appreciate the federal constitutional doctrines that operate to constrain the states. At the moment, only one, the DCCD, seems to loom large. RPS programs furnish a good context in which to examine how the DCCD can restrict state choice.

161. *Id.* at 1103–04. The court likewise rejected the related argument that California’s standards exposed producers to the risk of inconsistent and conflicting regulations. *See id.* at 1104–05. “If we were to invalidate regulation every time another state considered a complementary statute,” the court wrote, “we would destroy the states’ ability to experiment with regulation.” *Id.* at 1105.

162. *See supra* Part I.B.2.a.

What might be termed RPS 1.0, not unlike earlier attempts to deal with state and municipal governments' solid waste problems, could run into rough sailing in court, even in the absence of a federal RPS program preempting state efforts. Many current programs are framed in parochial and protectionist terms that will make courts wary of upholding them. Advocates of RPS programs recognize this; many have urged states to strip out or revise the provisions—such as in-state and in-region generation requirements—most vulnerable to invalidation under the DCCD. However, that doctrine itself is in some flux and RPS programs could furnish the impetus to alter its contours for the future, providing states with more flexibility, provided there are sufficient assurances that protectionism and economic self-dealing are not the primary motives behind the legislation.