CONSTITUTIONAL CONTOURS FOR THE DESIGN AND IMPLEMENTATION OF MULTISTATE RENEWABLE ENERGY PROGRAMS AND PROJECTS

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States are increasingly considering multistate efforts to promote the production, sale, and use of renewable energy. For example, in August 2009, policymakers and stakeholders gathered to consider joint renewable energy (specifically, wind energy) transmission projects among Colorado, New Mexico, Utah, and Wyoming.

This Article explores a number of constitutional issues that multistate efforts to encourage, market, transmit, or distribute renewable energy could raise. It reflects the reality that for energy, as for many other issues, multistate creativity in establishing new governance regimes or in implementing interstate projects often creates constitutional ambiguities. Many of these ambiguities center on the constitutional status—private or governmental, local, state, or federal—of the resulting multistate or regional institutions.

Even so, the constitutional issues raised can usefully be divided into three categories for discussion: (1) issues that can arise as a result of the substantive content of the multistate enterprise; (2) procedural issues regarding the formation and conduct of the multistate enterprise; and (3) the core structural issue of whether the multistate enterprise requires an interstate compact. This Article discusses each of these

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sets of issues in turn, concluding that most multistate renewable energy programs and projects will require an interstate compact, but that interstate compacts afford states not only extensive flexibility to address renewable energy issues, but also substantial protection from particular kinds of constitutional challenges—especially federal preemption.

INTRODUCTION

Multistate efforts to encourage, market, transmit, or distribute renewable energy could raise a number of constitutional issues, depending on how those efforts—and the resulting governance institutions—are structured and what they are trying to do. Almost all aspects of structure and function are important. The "who" does the structuring and implementation matters: coordinated projects implemented entirely by individual states face different constitutional issues than projects implemented through new multistate or regional entities. So does the "what:" multistate coordination regarding renewable energy planning, or even renewable energy requirements and renewable portfolio standards, raise different constitutional problems than multistate regulation of interstate transmission. Finally, the "how" also matters, constitutionally: regional programs and projects implemented through an actual multistate *agreement* will trigger different constitutional concerns than coordinated but still entirely state-based actions.

This Article reflects the reality that multistate creativity in establishing new cooperative-governance institutions or implementing interstate projects often leads to constitutional ambiguities. For example, governments generally need to be cognizant of many more constitutional issues than do private entities. As a result, multistate efforts implemented purely through private entities tend to raise fewer constitutional issues than multistate efforts implemented through governments—although private implementation may raise independent issues regarding the legitimacy of any delegation of government authority. Even when multistate or regional institutions are clearly governmental, ambiguities concerning their exact governmental status—federal, state, or local—can still arise, potentially complicating the range of constitutional issues that may be relevant.[1] States that consider these issues

1. For example, litigation challenging the governmental status of the Pacific Northwest Electric Power and Conservation Planning Council raised the question of whether the Council was a federal agency, and hence bound by the strictures of the Appointments Clause, or "merely" a state and regional agency. Seattle Master Builders Ass'n v. Pac. Nw. Elec. Power & Conservation Planning Council, 786 F.2d 1359, 1361, 1364–66 (9th Cir. 1986). Multistate governance entities have also been deemed "states" for some purposes but not for others, complicating their constitutional status. *See* Lake County Estates v. Tahoe Reg'l Planning Agency, 440 U.S. 391, 399–401 (1979) (concluding that the Tahoe Regional Planning

before implementing their renewable energy programs are more likely both to design constitutionally sound multistate programs and to be prepared for any litigation that arises.

Given the many governance structures possible and the constitutional ambiguities surrounding multistate and regional projects to facilitate renewable energy and its transmission, this Article seeks to provide a broad overview of the various constitutional issues that different kinds of multistate renewable energy programs could create. It divides these constitutional issues according to three basic perspectives on multistate innovations regarding renewable energy. Part I addresses constitutional issues that can arise in response to the *substantive* content of a multistate or regional renewable energy program—that is, constitutional issues that arise because of what that program is trying to accomplish. Part II, in contrast, reviews constitutional issues relevant to any multistate initiative's *procedures*. Finally, Part III addresses the core *structural* issue for any multistate or regional renewable energy program or project: must the states enter into an interstate compact in order for the program or project to be constitutional? Although western states in particular have resisted the use of interstate compacts for energy-related issues, this Article argues that interstate compacts provide a flexible mechanism for coordinating multistate renewable energy programs that, as a bonus, also provides states with some protection against many of the constitutional issues discussed in Parts I and II, especially federal preemption.

I. POTENTIAL CONSTITUTIONAL ISSUES ARISING FROM THE SUBSTANCE OF A MULTISTATE AGREEMENT

The triggering of many constitutional provisions can depend on the substantive nature and content of the government action. This Part provides a comprehensive overview of constitutional issues that could arise with respect to multistate renewable energy programs or initiatives as a result of their substantive components.

In the past, energy regulation has raised issues involving the Commerce Clause, the Supremacy Clause, the dormant Commerce Clause, the "takings" prohibitions of the Fifth and

Agency acted as a state for purposes of constitutional liability under 42 U.S.C. § 1983, but was not enough of a state to enjoy Eleventh Amendment immunity).

Fourteenth Amendments, substantive due process, the Equal Protection Clause, and the Free Speech Clause. Because many of these issues remain important to multistate renewable energy programs, this Part will explore each in turn. However, with regard to renewable energy, the most dynamic of these issues is, and is likely to remain, the role of the Supremacy Clause and federal preemption, as a result of evolving federal energy and climate change policies.

A. The Interstate Commerce Clause and Congress's Authority over Energy

A fundamental inquiry with regard to all state or multistate initiatives in areas like energy law—where the federal and state governments share regulatory authority—is the scope of the federal government's power, which is governed by both statute and the U.S. Constitution. In the field of nonnuclear electricity generation, transmission, and distribution, Congress has statutorily conferred increasing authority over electricity to the Federal Energy Regulatory Commission ("FERC") (formerly the Federal Power Commission, or "FPC"). For example, in the Federal Power Act of 1935 ("FPA"),[2] Congress confirmed the FPC's/FERC's authority to regulate interstate transmission of electricity and added authority to regulate wholesale sales of electricity in interstate commerce.[3] In the Public Utilities Regulatory Policies Act of 1978 ("PURPA"),[4] Congress gave FERC the authority to require utilities to purchase electricity from certain qualifying sources.[5] When it amended the FPA through the Energy Policy Act of 1992 ("EPAct"),[6] Congress provided that FERC could "order individual utilities to provide transmission services to unaffiliated wholesale generators."[7] Finally, while FERC generally does not have authority to regulate wholly intrastate electricity generation and distribution, the Supreme Court has upheld its authority to order the "unbundling" of retail sales of electricity.[8]

2. 16 U.S.C. §§ 824–824w (2006).
3. New York v. FERC, 535 U.S. 1, 5–7 (2002).
4. 16 U.S.C. §§ 2601–2645.
5. *New York v. FERC*, 535 U.S. at 9.
6. Pub. L. No. 102-486, 106 Stat. 2776 (Oct. 24, 1992).
7. *New York v. FERC*, 535 U.S. at 10.
8. *Id.* at 22–23. "Unbundling" refers to the separation of the costs of generating electricity from the costs of distribution. *Id.* at 6.

Constitutionally, the federal government's authority over energy matters is grounded in the Interstate Commerce Clause.[9] As a result, it is worth beginning this Article's constitutional exploration with a brief review of the federal government's Commerce Clause authority over energy law and policy.

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

The Commerce Clause of the U.S. Constitution gives Congress the power "[t]o regulate Commerce . . . among the several States . . . ."[10] The Interstate Commerce Clause is thus a straightforward grant of power to Congress, which becomes particularly important if Congress uses this authority to enact legislation that conflicts with multistate efforts regarding renewable energy. Such legislation would link Congress's Commerce Clause authority with the operation of the Supremacy Clause.[11]

Congress is a legislative body of limited powers, and it can legislate only to the extent that the Constitution allows. While Congress's authority under the Interstate Commerce Clause has traditionally been viewed as very broad, it is not unlimited.[12] In particular, according to the Supreme Court, Commerce Clause jurisprudence attempts to balance the states' "reasonable exercise of [their] police powers over local affairs" and "matters of local concern" with the federal government's authority to oversee matters of "national interest."[13]

From the states' perspective, the constitutional balance of the Interstate Commerce Clause is the Tenth Amendment, which provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[14] In 1992, the Supreme Court noted that the Commerce Clause and Tenth Amendment

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9. Tenn. Elec. Power Co. v. Tenn. Valley Auth., 21 F. Supp. 947, 959 (D. Tenn. 1938).

10. U.S. CONST. art. I, § 8, cl. 3.

11. *See* discussion *infra* Section I.B.

12. ROBIN KUNDIS CRAIG, THE CLEAN WATER ACT AND THE CONSTITUTION: LEGAL STRUCTURE AND THE PUBLIC'S RIGHT TO A CLEAN AND HEALTHY ENVIRONMENT 110–16 (2d ed. 2009).

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

14. U.S. CONST. amend X.

> are mirror images of each other. If a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States; if a power is an attribute of state sovereignty reserved by the Tenth Amendment, it is necessarily a power the Constitution has not conferred on Congress.[15]

Even so, the authoritative spheres of Congress and the states often overlap, especially with respect to resources. Acknowledgment of this intertwined authority has emerged, for example, in the concepts of "cooperative federalism"[16] and theories of "dynamic federalism."[17]

The Supreme Court's view of Congress's Commerce Clause authority has changed over the course of time. From 1937 until 1995, for example, Congress's Commerce Clause authority seemed boundless.[18] However, in 1995, the Supreme Court decided *United States v. Lopez*,[19] invalidating the Gun Free School Zones Act of 1990[20] on the grounds that it exceeded Congress's Commerce Clause authority.

The *Lopez* Court "identified three broad categories of activity that Congress may regulate under its commerce power."[21] "First, Congress may regulate the use of the channels of interstate commerce."[22] "Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons and things in interstate commerce, even though the threat may come only from intrastate activities."[23] "Finally, Congress' commerce authority includes the power to regulate

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

16. *See*, *e.g.*, Schaffer *ex rel.* Schaffer v. Weast, 546 U.S. 49, 71 (2005) (describing the Individuals with Disabilities in Education Act, 20 U.S.C. §§ 1400–1482 (2000 & Supp. V), as a "model of cooperative federalism"); City of Rancho Palos Verdes v. Abrams, 544 U.S. 113, 128 (2005) (Breyer J., concurring) (noting that Congress rejected a national approach in the Telecommunications Act of 1934, 47 U.S.C. § 332 (2000), in favor of cooperative federalism); *New York v. United States*, 505 U.S. at 167–68 (listing several federal statutes that incorporate cooperative federalism).

17. *See generally*, *e.g.*, Kirsten H. Engel, *Harnessing the Benefits of Dynamic Federalism in Environmental Law*, 56 EMORY L.J. 159 (2006); Renee M. Jones, *Dynamic Federalism: Competition, Cooperation and Securities Enforcement*, 11 CONN. INS. L.J. 107 (2004–2005) (both comprehensively discussing the theory of dynamic federalism).

18. *See* CRAIG, *supra* note 12, at 111–14 (detailing the broadening cases).

19. 514 U.S. 549, 557 (1995).

20. 18 U.S.C. § 922(q)(1)(A) (Supp. II 1990).

21. 514 U.S. at 558.

22. *Id.*

23. *Id.*

those activities that have a substantial relation to interstate commerce."[24]

The Supreme Court subsequently affirmed these Commerce Clause limitations on Congress in *United States v. Morrison*.[25] However, in its 2005 "medical marijuana" case, *Gonzales v. Raich*,[26] the Court upheld Congress's authority, exercised pursuant to the federal Controlled Substances Act,[27] to criminalize the in-state use of marijuana grown in-state for medical purposes, even when California law legalized such use. Relying heavily on *Wickard v. Filburn*[28] and *Perez v. United States*,[29] the Court determined that:

> When Congress decides that the "total incidence" of a practice poses a threat to a national market, it may regulate the entire class. . . . In this vein, we have reiterated that when "'a general regulatory statute bears a substantial relation to commerce, the *de minimis* character of individual instances arising under that statute is of no consequence.'"[30]

As a result, the federal government's prosecution of individuals who grew and consumed marijuana for medical purposes did not violate Congress's Commerce Clause authority, even though the individuals' activities occurred wholly intrastate.[31] *Gonzales v. Raich* thus suggests that the Court is backtracking from its limiting holdings in *Lopez* and *Morrison*, allowing Congress to regulate a broader range of circumstances.

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24. *Id.* at 558–59.

25. 529 U.S. 598, 609–19 (2000) (invalidating the Violence Against Women Act's civil liability provisions on Commerce Clause grounds).

26. 545 U.S. 1, 17–22 (2005).

27. 21 U.S.C. §§ 801–904 (2006).

28. 317 U.S. 111 (1942). In *Wickard*, the Court determined that Congress's Commerce Clause authority could reach a wheat farmer who grew wheat for his own private consumption because the fact that the farmer's "own contribution to the demand for wheat may be trivial by itself is not enough to remove him from the scope of federal regulation where, as here, his contribution, taken together with that of many others similarly situated, is far from trivial." *Id.* at 127–28 (citations omitted).

29. 402 U.S. 146 (1971). Here, Congress's authority to regulate extortionate credit transactions extended to purely intrastate activities because "[w]here the *class of activities* is regulated and that *class* is within the reach of federal power, the courts have no power 'to excise, as trivial, individual instances' of the class." *Id.* at 154 (quoting Maryland v. Wirtz, 392 U.S. 183, 193 (1968)).

30. *Gonzales*, 545 U.S. at 17 (quoting *Wickard*, 317 U.S. at 125; *Perez*, 402 U.S. at 154–55; United States v. Lopez, 514 U.S. 549, 558 (1995)).

31. *Id.* at 22.

2. Congress's Authority over Energy

Congress's authority to regulate energy matters pursuant to the Interstate Commerce Clause has survived challenges in the U.S. Supreme Court. For example, when litigants challenged Titles I and II and Section 210 of PURPA[32] as violating Congress's Commerce Clause authority, the Court upheld the statute, concluding that it did not impermissibly intrude upon state regulatory authority or commandeer the states' regulatory mechanisms.[33] The Court found that the challenged provisions fell well within Congress's Commerce Clause authority, even with respect to regulation of intrastate activities, and that "federal regulation of intrastate power transmission may be proper because of the interstate nature of the generation and supply of electric power."[34]

These challenges pre-dated the Supreme Court's decision in *Lopez*. Even under *Lopez*, however, regulation of the interstate aspects of energy is within Congress's purview as direct regulation of interstate commerce.[35] Moreover, *Gonzales v. Raich* suggests that Congress's authority over energy, including renewable energy, remains very broad when Congress chooses to regulate areas that affect interstate commerce, such as the transmission of electricity, rates, rate-making, and even the sources of fuel used to produce electricity. Indeed, the relationship of energy to interstate commerce is both direct and pervasive: not only is electricity itself an article of interstate commerce,[36] but electricity also powers interstate transport, requires goods such as coal that are transported in interstate commerce, and allows for the production of new goods that are then traded in interstate commerce.

Given these clear connections between interstate commerce, on the one hand, and energy production and regulation, on the other, successful Commerce Clause challenges to Congress's energy statutes—existing or future—are unlikely. Indeed, it is difficult to imagine that Congress could violate the

32. 16 U.S.C. §§ 2601–2644, 2701–2708 (2006).

33. FERC v. Mississippi, 456 U.S. 742, 749–50, 753–57 (1982).

34. *Id.* at 755 (citing Fed. Power Comm'n v. Fla. Power & Light Co., 404 U.S. 453 (1972)).

35. New York v. FERC, 535 U.S. 1, 16 (2002).

36. *See e.g.*, NRG Power Marketing, LLC v. Maine Public Utilities Comm'n, --- U.S. ---, 130 S. Ct. 693, 696 (2010) (noting that FERC has authority over the sale of electricity in interstate commerce); *New York v. FERC*, 535 U.S. at 9 (describing the interstate transmission grid).

Commerce Clause by regulating energy, whether conventional or renewable.[37]

B. The Supremacy Clause and Federal Preemption

Given that Congress has fairly extensive authority under the Commerce Clause to address energy issues, including renewable energy, statutes it enacts on that topic are almost certain to be valid. As such, they receive the benefit of the Constitution's Supremacy Clause and hence raise the issue of federal preemption with regard to both state law and the creation and operation of multistate renewable energy programs and projects.

Federal preemption jurisprudence embraces several specific kinds of analyses. This Section first outlines these analyses and then discusses how preemption has impacted traditional energy law. It then looks at preemption issues that have already arisen with respect to renewable energy and that could emerge in connection with developing federal climate change and energy policy legislation.

1. Supremacy Clause Basics

The Supremacy Clause of the U.S. Constitution states that "[t]his Constitution and the Laws of the United States which shall be made in Pursuance thereof; . . . shall be the supreme Law of the Land; . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."[38] Pursuant to the Supremacy Clause, federal laws (including, in some cases, federal agency regulations) will trump, or preempt, any state constitutional, statutory, or regulatory provisions that conflict with federal law or work as obstacles to federal objectives.[39]

Nevertheless, the U.S. Supreme Court does not presume that federal preemption exists when state and federal laws govern related subjects—indeed, just the opposite. As the Court emphasized in 1978, under the principles of federalism, "when a State's exercise of its police power is challenged under the

37. *See, e.g.*, *id.* at 16–17 (upholding the FERC's authority to regulate bundled interstate retail sales).

38. U.S. CONST. art. VI, cl. 2.

39. Altria Group, Inc. v. Good, 129 S. Ct. 538, 543 (2008) (noting that "we have long recognized that state laws that conflict with federal law are 'without effect'" (quoting Maryland v. Louisiana, 451 U.S. 725, 746 (1981))).

Supremacy Clause, 'we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'"[40] As a result, Congress's intent in allegedly preempting federal legislation can be critical.

The Supreme Court has identified a number of different kinds of federal preemption. First, and often most clearly, Congress can *explicitly* preempt certain kinds of state laws in a federal statute.[41] Even so, the *scope* of that express preemption will be a matter of statutory interpretation, and federal courts tend to read express preemption provisions narrowly, leaving as much room as possible for state law to operate.[42]

Second, the federal courts can find that Congress *implicitly* preempted certain kinds of state laws in a federal statutory scheme.[43] While several kinds of implicit preemption exist, the preemption analysis always focuses on Congress's overall purpose in enacting the federal statute. For example, one kind of implicit preemption arises when Congress evinces an intent to "occupy the legislative field" with respect to a particular kind of regulation, leaving no room for state action.[44] In energy law, the Supreme Court has concluded that the Natural Gas Act of 1938[45] and the Natural Gas Policy Act of 1978[46] constitute a "comprehensive scheme" of federal regulation that gives FERC "exclusive jurisdiction over the transportation and sale of natural gas in interstate commerce for resale[,]" occupying this particular field, especially given that Congress gave FERC authority to regulate almost every aspect of natural gas transportation and sale.[47]

The federal courts will also imply congressional intent to preempt state law if "the Act of Congress . . . touch[es] a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on

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

41. *Altria Group*, 129 S. Ct. at 543.

42. *See* Sprietsma v. Mercury Marine, 537 U.S. 51, 63–65 (2002); CSX Transp., Inc. v. Easterwood, 507 U.S. 658, 664 (1993); Cipollone v. Liggett Group, Inc., 505 U.S. 504, 518 (1992).

43. *Altria Group*, 129 S. Ct. at 543.

44. *Id.*

45. 15 U.S.C. §§ 717–717w (2006).

46. *Id.* at §§ 3361–3432.

47. Schneidewind v. ANR Pipeline Co., 485 U.S. 293, 300–04 (1988).

the same subject."[48] For example, the Supreme Court has found dominant federal interests in cases involving fraud on federal agencies[49] and navigation of ships at sea.[50]

Finally, federal courts will find that Congress has implicitly preempted state law when "the object sought to be obtained by the federal law and the character of the obligations imposed by it may reveal" Congress's intent to preempt state law.[51] For example, the Supreme Court has held that the Medical Device Amendments to the federal Food, Drug, and Cosmetic Act[52] preempt state-law fraud claims in part because "the federal statutory scheme amply empowers the [Food & Drug Administration] to punish and deter fraud . . . and . . . this authority is used by the Administration to achieve a somewhat delicate balance of statutory objectives[,]" which state tort claims could skew.[53]

The third common type of preemption is conflict preemption. "Even if Congress has not completely foreclosed state legislation in a particular area, a state statute is void to the extent that it actually conflicts with a federal statute."[54] Conflict preemption is absolute, and "neither an express pre-emption provision nor a savings clause 'bar[s] the ordinary working of conflict pre-emption principles.'"[55] "Conflict preemption is the irreducible minimum of the Supremacy Clause's import: state law cannot directly conflict with federal."[56]

2. Preemption and Traditional Federal Energy Regulation

Given the number of federal statutes governing energy issues[57] and the continued use of cooperative federalism in ener-

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

49. Buckman Co. v. Plaintiffs' Legal Comm'n, 531 U.S. 341, 347–48 (2001).

50. *Ray*, 435 U.S. at 160–68.

51. *Rice*, 331 U.S. at 230 (citations omitted).

52. 21 U.S.C. §§ 360c–379a (2006).

53. *Buckman Co.*, 531 U.S. at 348.

54. *Ray*, 435 U.S. at 158.

55. *Buckman Co.*, 531 U.S. at 352 (quoting Geier v. Am. Honda Motor Co., 529 U.S. 861, 869 (2000)).

56. CRAIG, *supra* note 12, at 43.

57. A partial list includes the Energy Policy Act, 42 U.S.C. §§ 15801–16524 (2006); the Federal Power Act, 16 U.S.C. §§ 792–825r (2006); the Natural Gas Act, 15 U.S.C. §§ 717–717w (2006); PURPA, 16 U.S.C. §§ 2601–2644, 2701–2708 (2006); and the Rural Electrification Act of 1936, 7 U.S.C. §§ 901–950bb-1 (2006).

gy regulatory programs,[58] preemption issues have arisen in a number of contexts. In general, when Congress has chosen to regulate, federal law governs wholesale and interstate matters, while states can regulate retail and intrastate matters.

Nevertheless, given the number of federal energy statutes, preemption analysis can vary significantly from context to context. For example, in 1983, the U.S. Supreme Court determined that neither the Federal Power Act[59] nor the Rural Electrification Act[60] preempted the Arkansas Public Service Commission's assertion of "regulatory jurisdiction over the wholesale rates charged by the Arkansas Electric Cooperative Corporation ("AECC") to its member retail distributors, all of whom were located within the State."[61] As for the Federal Power Act, the AECC was a rural power cooperative and the FPC had "determined in 1967 that it did not have jurisdiction under the Federal Power Act over the wholesale rates charged by rural power cooperatives."[62] Thus, the Rural Electrification Administration had the exclusive regulatory authority among federal agencies.[63] However, according to the Court, it was a lending agency, not a public utility regulatory body.[64] As a result, neither statute preempted the state's regulation of the AECC's wholesale rates.[65]

The Natural Gas Act[66] has generated several preemption analyses. For example, in 1989, the Court determined that, despite the Act's broad preemptive force, it did not preempt the Kansas Corporation Commission's regulations governing the timing of natural gas production from the Kansas-Hugoton field.[67] The Court characterized the state laws as an attempt to regulate a common-pool resource to which many people had rights and to create an incentive to run more gas out of the

58. New York v. FERC, 535 U.S. 1, 20–24 (2002) (describing cooperative federalism under the Federal Power Act); Gen. Motors Corp. v. Tracy, 519 U.S. 278, 288–97 (1997) (describing the history of cooperative federalism under the Natural Gas Act).

59. 16 U.S.C. §§ 792–825r (2006).

60. 7 U.S.C. §§ 901–950bb-1 (2006).

61. Ark. Elec. Coop. Corp. v. Ark. Pub. Serv. Comm'n, 461 U.S. 375, 377 (1983).

62. *Id.* at 383.

63. *Id.* at 383–95.

64. *Id.* at 386.

65. *Id.* at 389.

66. 15 U.S.C. §§ 717–717w (2006).

67. Nw. Cent. Pipeline Corp. v. State Corp. Comm'n of Kan., 489 U.S. 493, 508–10 (1989).

field.[68] As such, the law regulated producers and was aimed primarily at the *production* of natural gas, not at the marketing of natural gas in interstate commerce.[69] The Natural Gas Act does not occupy the field with respect to natural gas production,[70] and the Kansas regulation did not conflict with any of the Act's provisions.[71]

In contrast, the Natural Gas Act *did* preempt the Michigan Public Service Commission's requirement that public utilities seeking to transport natural gas in Michigan get the Commission's prior approval before doing so.[72] This state regulation was preempted because the Act "confers upon FERC exclusive jurisdiction over the transportation and sale of natural gas in interstate commerce for resale."[73] Similarly, in 1979 the Court held the New Mexico Electrical Energy Tax Act[74] invalid under the Supremacy Clause because the federal Tax Reform Act of 1976[75] prohibited the states from imposing a tax on the generation or transmission of electricity that discriminated against out-of-state consumers.[76]

3. Preemption and State Promotion of Alternative Energy

Federal preemption issues have already been relevant to states' attempts to promote use of alternative energy. Alternative energy does not pose fundamentally different preemption issues from traditional energy with respect to rate-making, regulation, or transmission. For example, in 2002 the California Court of Appeals concluded that PURPA preempted the California Public Utilities Commission's adoption of a floor for the transmission loss factor for PURPA Qualifying Facilities that relied on renewable resources for their fuel sources.[77] According to the court, the Commission's order usurped FERC's exclusive authority under PURPA.[78]

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68. *Id.* at 497–98, 505.
69. *Id.* at 508–10.
70. *Id.* at 510.
71. *Id.* at 516–18.
72. Schneidewind v. ANR Pipeline Co., 485 U.S. 293, 296–97 (1988).
73. *Id.* at 300–01.
74. N.M. STAT. ANN. §§ 7-9-1 to 7-9-80 (West 1978).
75. 15 U.S.C. § 391 (2006).
76. Ariz. Pub. Serv. Co. v. Snead, 441 U.S. 141, 149–50 (1979).
77. S. Cal. Edison Co. v. Pub. Utils. Comm'n, 101 Cal. App. 4th 384, 396–99 (Cal. Ct. App. 2002).
78. *Id.* at 398–99.

Similarly, in 2004, the California Court of Appeals concluded that the Federal Power Act preempted an order from the California Public Utilities Commission that required utilities to pay the up-front costs of the system upgrades necessary to connect new sources of renewable energy to the electricity distribution system.[79] The court concluded that federal law controlled because FERC's jurisdiction includes control over interconnections to the distribution system, including the terms of such interconnections.[80]

However, mechanisms that the states have created to promote alternative energy use—especially renewable energy credits ("RECs")—have created new preemption issues. Most prominently, federal and state courts have been wrestling with the issue of whether Section 210(e) of PURPA[81] preempts the states' creation and assignment of RECs in transactions governed by existing contracts. Section 210 of PURPA requires electric utilities to purchase electricity from qualifying cogenerators or "small power production facilities" at avoided-cost rates.[82] Section 210(e) then exempts qualifying facilities from certain federal and state utility regulation, including the regulation of utility rates.[83] Courts have indicated that if a state agency modifies a power-purchasing contract involving a qualifying facility, that modification would constitute a regulation of rates that would violate PURPA.[84]

When states began enacting renewable energy portfolio requirements that allowed for the creation and sale of tradable RECs, questions arose over which party in an existing contract was entitled to the RECs—the renewable energy producer or the purchasing utility subject to renewable portfolio standard ("RPS") requirements. As state agencies and state courts decided this property rights issue, they faced arguments that the assignment of the RECs modified existing contracts in violation of PURPA and hence that those state decisions—and the entire retroactive distribution of RECs—were preempted.

79. S. Cal. Edison Co. v. Pub. Utils. Comm'n, 121 Cal. App. 4th 1303, 1310–13 (Cal. Ct. App. 2004).

80. *Id.* at 1312–13.

81. 16 U.S.C. § 824a-3(e) (2006).

82. *Id.* at § 824a-3(a).

83. *Id.* at § 824a-3(e).

84. *E.g.*, Freehold Cogeneration Assocs. v. Bd. of Regulatory Comm'rs of N.J., 44 F.3d 1178, 1192 (3d Cir. 1995).

In October 2003, FERC concluded that PURPA did not preempt the creation or assignment of RECs.[85] According to the agency:

> What is relevant here is that RECs are created by the States. They exist outside the confines of PURPA. PURPA thus does not address the ownership of RECs. And the contracts for sales of [qualifying facility] capacity and energy, entered into pursuant to PURPA, likewise do not control the ownership of the RECs (absent an express provision in the contract). States, in creating RECs, have the power to determine who owns the REC in the initial instance, and how they may be sold or traded; it is not an issue controlled by PURPA.[86]

In 2005, the U.S. Court of Appeals for the District of Columbia Circuit held that it lacked jurisdiction to review this declaratory order.[87]

In the mean time, REC and PURPA issues continue to play out in the federal and state courts, although FERC's position appears to be emerging as the consensus view. For example, Connecticut enacted laws in 2002 that require electricity suppliers to use electricity from renewable sources. In 1991, Wheelabrator Lisbon, a Connecticut-based waste-to-energy facility, entered into a long-term contract with Connecticut Light & Power Company for the energy that Wheelabrator produced. As a result of the 2002 Connecticut renewable energy laws, "[t]he energy conveyed in [Wheelabrator's 1991] Agreement possesses certain renewable energy attributes that, since the signing of the Agreement, have become independently tradeable commodities known as 'renewable energy credits' ('RECs')."[88] In 2004, the Connecticut Department of Public Utility Control ("DPUC") assigned the RECs created under the agreement to Connecticut Light & Power.[89] When Wheelabrator challenged DPUC's decision as violating PURPA, both the federal district court and the U.S. Court of Appeals for the Second Circuit upheld DPUC's assignment, concluding—and relying on FERC's 2003 declaratory ruling—that the 2004

85. American Ref-Fuel Co., 105 F.E.R.C. 61004, 61007 (2003).

86. *Id.* at ¶ 23.

87. Xcel Energy Servs., Inc. v. FERC, 407 F.3d 1242, 1243–44 (D.C. Cir. 2005).

88. Wheelabrator Lisbon, Inc. v. Conn. Dept. of Pub. Util. Control, 531 F.3d 183, 186 (2d Cir. 2008).

89. *Id.*

DPUC decision did not modify Wheelabrator's Agreement or regulate rates.[90] As a result, PURPA did not preempt the DPUC's decision.[91] Several other courts have reached the same conclusion.[92]

4. Potential Sources of Federal Preemption in the Future

As the above discussion indicates, federal preemption arguments can take many forms and rely on several sources of federal law, such as tax statutes and the existing federal energy statutes. States pursuing multistate arrangements regarding renewable energy should consider the possibility that proposed and future federal legislation could preempt all or part of such multistate programs. Such future preemption is especially likely in light of Congress's growing interest in enacting climate change legislation and comprehensive national energy policies.

Since the 104th Congress began in 1995, over 1350 bills introduced into Congress have addressed "renewable energy" or "alternative capacity" in a wide variety of contexts.[93] For example, in July 2009, the New Alternative Transportation to Give Americans Solutions Act was introduced into the Senate to amend the Internal Revenue Code to provide tax incentives for renewable energy.[94] At the same time, the Water Protection and Reinvestment Act of 2009 was introduced in the House of Representatives to provide funding to promote the use of alternative energy in connection with water supply.[95]

The proposed legislation that is likely to be most directly relevant to multistate renewable energy programs and agreements seeks to establish national energy plans, to combat climate change, or both. For example, on June 26, 2009, the

90. *Id.* at 189.

91. *Id.*

92. Arippa v. Pa. Pub. Util. Comm'n., 966 A.2d 1204, 1208–11 (Pa. Commw. Ct. 2009) (upholding the Pennsylvania Public Utility Commission in giving alternative energy credits to the electric distribution companies and holding that PURPA does not preempt the state's assignment of RECs); *In re* Ownership of Renewable Energy Certificates, 913 A.2d 825, 831 (N.J. Super. Ct. App. Div. 2007) (same result).

93. A Westlaw search ran in the "CONG-BILLTEXT-ALL" database on December 18, 2009 for "renewable energy" and "alternative energy" revealed 1433 proposed bills since January 1, 1995.

94. S. 1408, 111th Cong. (2009).

95. H.R. 3202, 111th Cong. (2009).

House passed the American Clean Energy and Security Act of 2009 (also known as the Waxman-Markey bill).[96] If this bill is enacted into law in anything like its current form, it would contain a number of provisions relevant to multistate renewable energy endeavors.

As one example, the Waxman-Markey bill explicitly addresses interstate transmission of renewable energy for states located in the Western Interconnection.[97] These provisions would give FERC authority to "issue a certificate of public convenience and necessity for the construction or modification of a transmission facility" for multistate facilities "needed in significant measure to meet demand for renewable energy . . . ."[98] However, under the bill, those new facilities must further regional grid plans and FERC's own national grid-planning principles.[99] These provisions thus would enact a substantial source of federal preemption authority for multistate renewable energy transmission projects in the West.

In addition, the Act would amend Title VI of PURPA to add a new Section 610, governing combined efficiency and renewable electricity standards.[100] These new provisions would allow FERC to regulate Federal Renewable Electricity Credits ("FRECs"), requiring FERC to "issue to each generator of renewable electricity, Federal renewable electricity credit for each megawatt hour of renewable electricity generated by such generator after December 31, 2011."[101] The existence of FRECs, apparently issued to generators, could thus preempt or otherwise affect state-issued RECs already in existence, as the bill recognizes and addresses.[102]

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96. H.R. 2454, 111th Cong. (2009).

97. *Id.* § 151. The Western Interconnection is the power grid in the western United States. Western Area Power Administration, *Frequently Asked Questions About Transmission*, http://www.wapa.gov/about/faqtrans.htm (last viewed March 19, 2010).

98. H.R. 2454, § 150, 111th Cong. (2009).

99. *Id.*

100. As proposed, this new section would define "renewable energy resource" to include wind, solar, and geothermal energy, "renewable biomass," biogas and biofuels "derived exclusively from renewable biomass," "qualified hydropower," and "marine and hydrokinetic renewable energy" as defined in 42 U.S.C. § 17211. *Id.* § 101(a) (establishing § 610(a)(17)).

101. *Id.* (establishing § 610(e)(1)).

102. Specifically, the bill states that:

> (A) Except as provided in subparagraph (B), where renewable electricity is generated with the support of payments from a retail electric supplier pursuant to a State renewable electricity program (whether through State alternative compliance payments or through payments to a State

Other provisions, however, would codify and support state authority over renewable energy issues. For example, the Act would amend Section 210 of PURPA to clarify state authority regarding RECs in light of the Section 210(e) litigation. The bill would add a new Section 210(o) to provide that,

> [n]otwithstanding any other provision of this Act or the Federal Power Act, a State legislature or regulatory authority may set the rates for a sale of electric energy by a facility generating electric energy from renewable energy sources pursuant to a State-approved production incentive program under which the facility voluntarily sells electric energy.[103]

Several other provisions would also be of interest to states should this bill become law. For example, the bill would provide support to state renewable energy and energy efficiency programs[104] and would create loans for states and Indian Tribes to carry out activities to promote renewable energy

> renewable electricity procurement fund or entity), the Commission shall issue Federal renewable electricity credits to such retail electric supplier for the proportion of the relevant renewable electricity generation that is attributable to the retail electric supplier's payments, as determined pursuant to regulations issued by the Commission. For any remaining portion of the relevant renewable electricity generation, the Commission shall issue Federal renewable electricity credits to the generator, as provided in paragraph (1), except that in no event shall more than 1 Federal renewable electricity credit be issued for the same megawatt hour of electricity. In determining how Federal renewable electricity credits will be apportioned among retail electric suppliers and generators in such circumstances, the Commission shall consider information and guidance furnished by the relevant State or States.
>
> (B) In the case of a central procurement State that pursuant to subsection (g) has assumed responsibility for compliance with the requirements of subsection (b), the Commission shall issue directly to the State Federal renewable electricity credits for any renewable electricity for which the State, pursuant to a mandate described in subsection (a)(7), has centrally procured credits or certificates issued based on generation of such renewable electricity.

Id. (establishing § 610(e)(2)).

103. *Id.* § 102. "'State-approved production incentive program'" as defined in the Act, "means a requirement imposed pursuant to State law, or by a State regulatory authority acting within its authority under State law, that an electric utility purchase renewable energy (as defined in section 609 of this Act) at a specified rate." *Id.*

104. *Id.* § 132.

sources.[105] The Act would also create supplemental incentive programs for agriculture and renewable energy.[106]

In late September 2009, Senators Barbara Boxer (D-Cal.) and John Kerry (D-Mass.) introduced the Clean Energy Jobs and American Power Act into the Senate to address climate change.[107] The bill defines "renewable energy" as "electric energy generated from solar, wind, biomass, landfill gas, ocean (including tidal, wave, current, and thermal), geothermal, municipal solid waste, or new hydroelectric generation capacity."[108] In clear support of state regulatory authority, it would provide grants to states to increase renewable energy requirements through renewable portfolio standards,[109] favoring binding standards.[110]

The preemptive effect of some of the bill's other provisions, however, is not entirely clear. Most interestingly, the Boxer-Kerry bill would incorporate state energy efficiency programs and renewable energy programs into its greenhouse gas allowance provisions (a form of cap-and-trade approach), which are otherwise implemented through the federal Clean Air Act.[111] The bill would gift these federally created emissions allowances to states, but restrict the ways in which states could use them. Specifically, allowances issued to states could be used only for listed purposes, including, *inter alia*, for "[s]tate implementation of electricity transmission planning and siting activities that facilitate renewable energy development;" for "[s]tate or regional studies of renewable energy zones and resources with insufficient transmission capacity;" and for "[g]rants to transmission providers."[112] Thus, this or similar federal legislation could actually encourage states to pursue regional renewable energy transmission projects, but simultaneously require states to tailor those projects to federal priorities and requirements, significantly shaping the substantive content of multistate renewable energy programs.

105. *Id.* § 299D.
106. *Id.* § 321.
107. S. 1733, 111th Cong. (2009), *available at* http://kerry.senate.gov/cleanenergyjobsandamericanpower/pdf/bill.pdf.
108. *Id.* § 161(a)(1).
109. *Id.* § 161(b).
110. *Id.* § 161(c), (d).
111. *Id.* § 202(c).
112. *Id.* § 202(a)(1)(A)(iii).

C. The Dormant Commerce Clause and State Restrictions on Energy Use and Transmission

Any multistate agreement on alternative energy—particularly if it favors the participating states—is likely to raise questions regarding whether the dormant Commerce Clause applies. According to the U.S. Supreme Court, the Interstate Commerce Clause "has long been understood . . . to provide 'protection from state legislation inimical to the national commerce [even] where Congress has not acted.'"[113] Thus, for example, if a multistate agreement prevented users in the party states from purchasing electricity generated outside the party states, or prohibited generators outside the party states from selling electricity to users within the party states, the multistate agreement would be vulnerable to dormant Commerce Clause challenges.

1. Dormant Commerce Clause Basics

In 2008, the Supreme Court emphasized that "[t]he modern law of what has come to be called the dormant Commerce Clause is driven by concern about 'economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors.'"[114] With this principle as the touchstone, courts evaluate dormant Commerce Clause challenges in two steps. First, if state legislation facially discriminates against interstate commerce, it is nearly *per se* invalid.[115] The federal courts will uphold such a law "only if it 'advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives.'"[116]

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

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113. Barclays Bank PLC v. Franchise Tax Bd. of Cal., 512 U.S. 298, 310 (1994) (quoting S. Pac. Co. v. Ariz. *ex rel.* Sullivan, 325 U.S. 761, 769 (1945)).

114. Dep't of Revenue of Ky. v. Davis, 128 S. Ct. 1801, 1807 (2008) (quoting New Energy Co. of Ind. v. Limbach, 486 U.S. 269, 273–74 (1988)).

115. *Id.* at 1808–09 (citing Or. Waste Sys., Inc. v. Dep't of Envtl. Quality of Or., 511 U.S. 93, 99 (1994)); Wyoming v. Oklahoma, 502 U.S. 437, 454–55 (1992); Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth., 476 U.S. 573, 579 (1986); City of Philadelphia v. New Jersey, 437 U.S. 617, 624 (1978).

116. *Davis*, 128 S. Ct. at 1808–09 (quoting *Or. Waste Sys.*, 511 U.S. at 100).

> Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.[117]

State laws are almost always constitutional under the *Pike* balancing test.[118]

2. The Dormant Commerce Clause and State Regulation of Renewable Energy

At one point, pursuant to its 1927 decision in *Public Utilities Commission of Rhode Island v. Attleboro Steam & Electric Co.*, the U.S. Supreme Court followed a fairly mechanical rule regarding state regulation of electricity with respect to the dormant Commerce Clause: state regulation of wholesale sales of electricity was constitutional as an indirect regulation of interstate commerce, while state regulation of retail sales was unconstitutional as direct regulation of interstate commerce.[119] By the 1980s and 1990s, however, the Court had rejected *Attleboro*'s mechanical test in favor of a more nuanced balancing approach.[120]

A number of dormant Commerce Clause cases have involved energy production, and they systematically conclude that states cannot create legal requirements or preferences based on the source of the fuel or energy. In *Wyoming v. Oklahoma*, for example, the U.S. Supreme Court struck down an Oklahoma statute that required Oklahoma coal-fired electric

117. Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970); *see also Davis*, 128 S. Ct. at 1808–09 (reciting this same test).

118. *But see* Levy v. Rowland, 359 F. Supp. 2d 267, 273 (E.D.N.Y. 2005) (suggesting that the burdens on interstate commerce caused by Connecticut's moratorium on transmission of electricity to New York via high-voltage fiber optic cables outweighed the alleged environmental benefits to Connecticut citizens of the moratorium).

119. Pub. Utils. Comm'n v. Attleboro Steam & Elec. Co., 273 U.S. 83, 86–90 (1927).

120. *See also* Quill Corp. v. North Dakota *ex rel.* Heitkamp, 504 U.S. 298, 316–18 (1992); Ark. Elec. Coop. Corp. v. Ark. Pub. Serv. Comm'n, 461 U.S. 375, 391–92 (1983).

power plants producing power for sale in Oklahoma to burn a mixture of coal containing at least ten percent Oklahoma-mined coal.[121] Moreover, the "savings clause" of the Federal Power Act did not prevent the conclusion that the Oklahoma statute was unconstitutional.[122] Similarly, the U.S. District Court for the Northern District of Illinois concluded that a Clean Air Act compliance plan that favored Illinois coal violated the dormant Commerce Clause.[123]

Nor can states "hoard" state-created energy within their borders. Thus, in 1982, the U.S. Supreme Court concluded that New Hampshire could not constitutionally restrict interstate transportation of hydroelectric power generated in New Hampshire.[124]

In contrast, the courts generally uphold other kinds of state regulation related to energy in the face of dormant Commerce Clause challenges. For example (and perhaps questionably), the Virginia Supreme Court recently concluded that a state statute that allowed electric utilities to apply for approval of a rate adjustment from customers to cover the costs of a coal-fired generation facility that "utilized Virginia coal" did *not* violate the dormant Commerce Clause, because the statute did not require utilities to use Virginia coal but rather allowed them to be compensated for the costs of doing so.[125] Similarly, the U.S. Supreme Court held in 1989 that the Kansas Corporation Commission's regulations governing the timing of natural gas production from the Kansas-Hugoton field were not aimed at economic protectionism but rather at more productively running gas out of the field in the face of common pool management problems.[126] As a result, the regulations did not facially discriminate against interstate commerce and were clearly constitutional under the *Pike* balancing test.[127] Nor did the Arkansas Public Service Commission's assertion of "regulatory jurisdiction over the wholesale rates charged by the Arkansas Electric Cooperative Corporation (AECC) to its member retail distributors" who all were located within Arkansas vi-

121. Wyoming v. Oklahoma, 502 U.S. 437, 454–56 (1992).

122. *Id.* at 457–58 (citing 16 U.S.C. § 824(b)(1) (1988)).

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

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

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

126. Nw. Cent. Pipeline Corp. v. State Corp. Comm'n, 489 U.S. 493, 505, 523–26 (1989).

127. *Id.*

olate the dormant Commerce Clause, again because there was no economic protectionism involved and the burden of the regulation on interstate commerce was not clearly excessive under the *Pike* test.[128]

As a result, in the absence of overt economic protectionism, courts tend to uphold state regulation of energy issues. Nevertheless, multistate renewable energy arrangements could implicate the dormant Commerce Clause in a number of ways. Clearly, at the state level, RPS requirements that favor in-state RECs or forbid out-of-state RECs could run afoul of the dormant Commerce Clause. Similarly, multistate agreements that allow REC trading within the consortium but prohibit RECs from other states could raise constitutional concerns. Finally, multistate arrangements that favor—either through RECs, transmission access, or taxes or other financial incentives—renewable energy produced in certain states and to disfavor renewable energy produced in others could raise dormant Commerce Clause concerns.

3. Potentially Relevant Exceptions to the Dormant Commerce Clause for Multistate Renewable Energy Programs

Two exceptions to the application of the dormant Commerce Clause are potentially relevant to multistate agreements regarding alternative energy. First, the U.S. Supreme Court has recognized a market participant exception for state or local governments. If the state or local government is participating freely in the marketplace rather than acting as a regulator, its actions do not violate the dormant Commerce Clause.[129] Thus, if a multistate agreement fashioned the states as market participants buying and selling alternative energy, each state's activity would be free of dormant Commerce Clause restrictions.

It is less certain, however, whether the states can create a new multistate entity that would enjoy the same benefits as the states themselves under the dormant Commerce Clause. As a result, the dormant Commerce Clause status of the Regional Greenhouse Gas Initiative's (RGGI's) allowance auction platform—which cannot sell carbon dioxide allowances to enti-

128. Ark. Elec. Coop. Corp. v. Ark. Pub. Serv. Comm'n, 461 U.S. 375, 377, 391–95 (1983).

129. Dep't of Revenue v. Davis, 128 S. Ct. 1801, 1809 (2008).

ties outside RGGI-qualified states[130]—could be of interest to states seeking to enter multistate agreements involving, for example, trading of renewable energy credits.

Second, in its 2007 decision, *United Haulers Ass'n v. Oneida-Herkimer Solid Waste Management Authority*, the Supreme Court determined that facilities operated by public authorities do not facially discriminate against interstate commerce even if they impose requirements that restrict interstate commerce.[131] In 2008, the Court concluded that this reasoning applied to state-issued municipal bonds, as well.[132] *United Haulers* thus suggests that state-owned alternative energy facilities and transmission projects would be protected against the most forceful application of the dormant Commerce Clause, even if the operations of those facilities and projects discriminated against other states.

Again, it is unclear whether the *United Haulers* logic extends to facilities owned by a multistate entity created by multistate agreement. Indeed, the *United Haulers* Court emphasized the government's accountability to voters as one reason for not subjecting it to the same dormant Commerce Clause scrutiny as private facilities operating pursuant to government regulation.[133] If a multistate entity is not subject to the same political accountability as governments, its ownership of the facility or project at issue may be irrelevant.

D. Fifth and Fourteenth Amendment Takings

Energy markets and regulation generate various types of property rights, from contractual rights to rate returns to, most recently, RECs. Like all property rights, the Constitution protects these from uncompensated "takings" by governments through the Fifth and Fourteenth Amendments' Takings Clauses. Energy regulation has a long history of raising takings issues, a tradition that now continues in the renewable energy sector through the introduction of RECs.

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130. *See* CHARLES HOLT ET AL., AUCTION DESIGN FOR SELLING CO_2 EMISSION ALLOWANCES UNDER THE REGIONAL GREENHOUSE GAS INITIATIVE 10 (2007), http://www.rggi.org/docs/rggi_auction_final.pdf; Regional Greenhouse Gas Initiative, Auction Platform, http://www.rggi.org/co2-auctions/platform (last visited Feb. 4, 2010) (giving access to the auction).

131. United Haulers Ass'n, v. Oneida-Herkimer Solid Waste Mgmt. Auth., 550 U.S. 330, 342–45 (2007).

132. *Davis*, 128 S. Ct. at 1810–11.

133. *United Haulers*, 550 U.S. at 345.

This Section provides an overview of takings issues in energy regulation, beginning with a survey of the Constitution's prohibition on uncompensated takings. It then looks at the predominant takings issue in traditional energy regulation—ratemaking—before surveying emerging takings issues with respect to RECs. Importantly, takings claims against the government tend to be unsuccessful, regardless of context, especially when the alleged taking occurred as a result of government regulation—a so-called "regulatory taking," as opposed to physical takings of property through government condemnation.

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

The Fifth Amendment to the U.S. Constitution provides that the United States shall not take "private property . . . for public use, without just compensation."[134] This prohibition on uncompensated takings applies to states and municipalities through the Fourteenth Amendment's Due Process Clause.[135]

For most of the United States' history, the Takings Clause was most relevant to physical takings of real property, such as through eminent domain for public projects. The U.S. Supreme Court has affirmed that *any* physical occupation of private property as a result of government action requires compensation,[136] although it has also construed the "public uses" for which such property may be taken quite broadly, allowing condemnation for almost any "public purpose."[137] Thus, for example, the promotion of competition in natural gas markets is a legitimate public purpose justifying condemnation of property for a pipeline.[138]

In 1922, the U.S. Supreme Court first recognized that unconstitutional takings could arise not just from physical occupation, but also from governmental regulation that restricts

134. U.S. CONST. amend. V.

135. Dolan v. City of Tigard, 512 U.S. 374, 383–84 (1994); Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 481 n.10 (1987); Penn. Cent. Transp. Co. v. City of New York, 438 U.S. 104, 122 (1978).

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

137. Kelo v. City of New London, Conn., 545 U.S. 469, 477–83 (2005); Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 245 (1984).

138. Midcoast Interstate Transmission, Inc. v. FERC, 198 F.3d 960, 973 (D.C. Cir. 2000).

property rights—so-called "regulatory takings."[139] The regulatory takings analysis, the Court has emphasized, is "designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[140]

The Supreme Court evaluates regulatory takings under two standards. In the 1992 case of *Lucas v. South Carolina Coastal Council*,[141] the Court established a *per se* regulatory takings claim "when the owner of real property has been called upon to sacrifice *all* economically beneficial uses in the name of the common good, that is, to leave his property economically idle."[142] In these circumstances, "[w]here the State seeks to sustain regulation that deprives land of all economically beneficial use, we think it may resist compensation only if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with."[143]

In 2002, however, the Supreme Court clarified that *Lucas*-type *per se* regulatory takings—those which deprive rightholders of all economically beneficial uses—are a very narrow category of regulatory takings.[144] For all other regulatory takings, including temporary takings, the balancing test from *Penn Central Transportation Co. v. New York City* controls.[145] This factor-based test looks at: (1) "[t]he economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations;" and (2) "the character of the governmental action."[146]

139. Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).
140. Armstrong v. United States, 364 U.S. 40, 49 (1960).
141. 505 U.S. 1003 (1992).
142. *Id.* at 1019.
143. *Id.* at 1027.
144. Specifically, "*Lucas* carved out a narrow exception to the rules governing regulatory takings for the 'extraordinary circumstance' of a permanent deprivation of all beneficial use." Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 325 n.19 (2002).
145. *Id.* at 321 (referencing Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104 (1978)).
146. *Penn Cent.*, 438 U.S. at 124.

2. Takings Claims and Traditional Energy Regulation

As is generally true for takings claims overall, takings claims in the energy realm are largely unsuccessful. However, early ratemaking takings claims did have substantive consequences for energy regulation. Since the nineteenth century, the U.S. Supreme Court has considered the ramifications of the Takings Clause in connection with state and federal rate setting for utilities. As the Court summarized in 1989,

> The guiding principle has been that the Constitution protects utilities from being limited to a charge for their property serving the public which is so "unjust" as to be confiscatory. If the rate does not afford sufficient compensation, the State has taken the use of the utility property without paying just compensation.[147]

Originally, the federal courts judged the constitutionality of the rate order according to the "fair value" rule, which "required rates to be set according to the actual present value of the assets employed in the public service."[148] However, in 1944, the Court held that the fair value rule was not the only constitutionally acceptable method for fixing utility rates,[149] and state and federal rate setters have since moved toward "prudential investment" or "historical cost" rules.[150] Regardless of the rule used, "whether a particular rate is 'unjust' or 'unreasonable' will depend to some extent on what is a fair rate of return given the risks under a particular rate-setting system and on the amount of capital upon which the investors are entitled to earn that return."[151] Moreover, the courts do not assess the consti-

147. Duquesne Light Co. v. Barasch, 488 U.S. 299, 307–08 (1989) (citing Fed. Power Comm'n v. Texaco, Inc., 417 U.S. 380, 391–92 (1974); Fed. Power Comm'n v. Natural Gas Pipeline Co. of America, 315 U.S. 575, 585 (1942); Covington & Lexington Turnpike Rd. Co. v. Sandford, 164 U.S. 578, 597 (1896)).

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

149. Fed. Power Comm'n v. Hope Natural Gas Co., 320 U.S. 591, 605 (1944). *See also id.* at 602 (noting that "the Commission was not bound to the use of any single formula or combination of formulae in determining rates. Its rate-making function, moreover, involves the making of 'pragmatic adjustments.' And when the Commission's order is challenged in the courts, the question is whether that order 'viewed in its entirety' meets the requirements of the Act. Under the statutory standard of 'just and reasonable' it is the result reached not the method employed which is controlling" (citations omitted)).

150. *Duquesne Light Co.*, 488 U.S. at 309.

151. *Id.* at 310.

tutionality of the rate set on a piecemeal basis, but rather judge the overall "net effect of the rate order."[152]

Constitutional takings claims also arise in a variety of energy contexts besides ratemaking. Thus, for example, when FERC issued orders that required all transmission facilities to adopt standard agreements for interconnecting with generators larger than twenty megawatts to avoid discrimination, the U.S. Court of Appeals for the District of Columbia Circuit denied the plaintiffs' takings claims based on the loss of landowners' good will because "the Order explicitly requires that any uses of eminent domain by transmission providers be at the expense of the benefiting generator."[153] While the court acknowledged that the use of eminent domain for unaffiliated generators might indeed undermine that good will, the same sort of undermining was also likely when eminent domain was used for interconnection to affiliated generators, and hence no taking had occurred simply because of FERC's efforts to avoid discrimination.[154]

The Energy Policy Act of 1992[155] has generated a number of recent takings claims—again, largely unsuccessful. For example, the Act curtails the ability of claimants to perfect or obtain patents to mining claims on federal lands.[156] However, when the owner of 229 shale oil mining claims sued for an unconstitutional taking of his property rights, the U.S. Court of Appeals for the Federal Circuit concluded that no taking had occurred because there is no property "right" to a federal patent—just the opportunity to participate in a highly conditional claim process.[157]

The Energy Policy Act also imposed an assessment on domestic nuclear power utilities to help pay for the decontamination and decommissioning of the United States' uranium enrichment facilities.[158] Various federal courts have concluded that this assessment is constitutional and not a taking, either because the assessment is not large or disproportionate enough to qualify as a regulatory taking under the *Penn Central* bal-

152. *Id.* at 314.
153. Nat'l Ass'n of Regulatory Util. Comm'rs v. FERC, 475 F.3d 1277, 1283–84 (D.C. Cir. 2007).
154. *Id.*
155. Pub. L. No. 102-486, 106 Stat. 2776 (Oct. 24, 1992) (codified as amended in scattered sections of 42 U.S.C.).
156. 30 U.S.C. § 242 (2006).
157. Grover v. United States, 73 F. App'x 401, 404–05 (Fed. Cir. 2003).
158. 42 U.S.C. §§ 2297g to -1 (2006).

ancing test,[159] or under a more general rule that there can be no takings claim when the government imposes an obligation to pay money.[160]

3. Takings Claims and State Promotion of Alternative Energy

When state renewable energy programs create new property rights, new kinds of takings claims become possible. For example, RECs qualify as valuable property rights and have begun to give rise to takings claims. Thus, when the Connecticut Department of Public Utility Control ("DPUC") assigned RECs to power distributors in existing contracts rather than the renewable energy producers, the producers repeatedly sued, claiming that the DPUC's decision constituted an unconstitutional taking of private property. In 2007, the Connecticut Supreme Court disagreed, concluding that there was no unconstitutional taking under the Connecticut Constitution because the RECs were new property that had never belonged to the power producers.[161]

The cases to date indicate that multistate renewable energy programs that create new forms of property rights are unlikely to run afoul of the Taking Clause. However, if such programs destroy existing property rights, or result in unjust rates, they could violate the Constitution's taking prohibition. As a result, states should consider potential takings claims when entering into multistate renewable energy arrangements.

E. Conclusion

As this Part demonstrates, states creating a multistate renewable energy program could make a number of decisions regarding the substantive content of that program that could raise constitutional concerns or prompt constitutional challenges. Nevertheless, the most important substantive constitutional issue for such programs is likely to be the operation of the Supremacy Clause and the scope of federal preemption of

159. Carolina Power & Light Co. v. United States, 48 Fed. Cl. 35, 46–50 (2000).
160. Commonwealth Edison Co. v. United States, 271 F.3d 1327, 1338–40 (Fed. Cir. 2001); *see also* Yankee Atomic Elec. Co. v. United States, 112 F.3d 1569, 1580 n.8 (Fed. Cir. 1997).
161. Wheelabrator Lisbon, Inc. v. Dep't of Pub. Util. Control, 931 A.2d 159, 176–77 (Conn. 2007); Minn. Methane, LLC v. Dep't of Pub. Util. Control, 931 A.2d 177, 184 (Conn. 2007).

such multistate efforts. Moreover, new and complex preemption issues are especially likely if Congress acts to address climate change or enacts a comprehensive federal energy policy that explicitly regulates renewable energy.

II. POTENTIAL PROCEDURAL CONSTITUTIONAL ISSUES FOR MULTISTATE RENEWABLE ENERGY PROGRAMS

While the substantive constitutional issues potentially affecting multistate renewable energy programs are plentiful, as Part I elaborated, procedural and jurisdictional issues are also likely to become important and are discussed this Part. For example, states enjoy Eleventh Amendment sovereign immunity, but multistate entities often do not. In particular, regulatory entities created through multistate agreements (including interstate compacts) tend *not* to be entitled to Eleventh Amendment immunity and hence can usually be sued in federal court. States entering a multistate agreement regarding renewable energy may thus want to consider the potential for federal court litigation if they create a new multistate regulatory body.

Other procedural issues may also become important. Procedural due process is always a concern for governmental bodies. Transmission of renewable energy in the West could easily involve Tribes and tribal lands, requiring federal involvement in the program through the Indian Commerce Clause. Finally, multistate entities have been subjected to Appointments Clause challenges, reflecting their often ambiguous constitutional status.

A. *Eleventh Amendment Sovereign Immunity*

1. Eleventh Amendment Basics

States enjoy sovereign immunity from lawsuits by citizens in the federal courts.[162] The Eleventh Amendment to the U.S. Constitution provides that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United

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

States by Citizens of another State, or by Citizens or Subjects of any Foreign State."[163] Thus, states, as sovereigns, enjoy Eleventh Amendment sovereign immunity. This immunity does not apply to suits brought by the federal government against states. Otherwise, however, Congress's authority to waive states' sovereign immunity from citizen-brought suits in federal courts is generally confined to federal statutes based in Congress's authorities pursuant to the post-Civil War amendments to the Constitution, especially Section 5 of the Fourteenth Amendment.[164]

A state's Eleventh Amendment immunity extends to all "arms of the State," such as state agencies.[165] However, it does not extend to counties and municipalities.[166] In case of doubt regarding an entity's Eleventh Amendment status, the federal courts have devised a multi-factor test for deciding whether an entity is entitled to immunity. Relevant factors include: the nature of the entity's duties and functions (land use is municipal; transportation is more debatable); how the entity's directors or governing board are appointed; the level of state control over the entity's actions; how the entity is described in the relevant implementing legislation; the state's financial responsibility for the entity and its actions; and the state's legal responsibility for the entity and its actions.[167] If these "indicators of immunity point in different directions, the Eleventh Amendment's twin reasons for being remain [the] prime guide": (1) whether suit in federal court will threaten a state's dignity; and (2) whether suit in federal court will threaten the state's purse.[168] Of these two factors, the latter is generally more important,[169] but multistate entities can fail to qualify for Eleventh Amendment immunity on any of several grounds.

2. The Eleventh Amendment Status of Multistate Entities

Multistate entities generally present an Eleventh Amendment problem. In the absence of an interstate compact, a mul-

163. U.S. CONST. amend. XI.
164. United States v. Georgia, 546 U.S. 151, 158–59 (2006); Tennessee v. Lane, 541 U.S. 509, 518 (2004).
165. N. Ins. Co. of N.Y. v. Chatham County, Ga., 547 U.S. 189, 193 (2006).
166. *Id.* at 193–94 and cases cited therein.
167. *Hess*, 513 U.S. at 44–46.
168. *Id.* at 47–48.
169. *Id.* at 48.

tistate entity's Eleventh Amendment status is generally a matter of the states' intent—specifically, because states can waive their Eleventh Amendment sovereign immunity, the issue becomes whether the participating states' multistate agreement has waived their immunity.[170]

However, if the multistate agreement is an interstate compact approved by Congress, the "federalization" of the states' agreement results in a different analysis of the resulting multistate entity's Eleventh Amendment status. As the Supreme Court has explained:

> [W]here the waiver is, as here, claimed to arise from a compact between several States, the Court is called on to interpret not unilateral state action but the terms of a consensual agreement, the meaning of which, because made by different States acting under the Constitution and with congressional approval, is a question of federal law. In making that interpretation we must treat the compact as a living interstate agreement which performs high functions in our federalism, including the operation of vast interstate enterprises.[171]

Thus, when Tennessee and Missouri specified in an interstate compact that the Tennessee-Missouri Bridge Commission could sue and be sued, the Supreme Court determined that, under federal law, the "sue-and-be-sued" clause effectively waived the Commission's asserted Eleventh Amendment immunity—even though the law in both states would have concluded otherwise.[172]

In 1994, the Supreme Court again emphasized that interstate-compact-created "[b]istate entities occupy a significantly different position in our federal system than do the States themselves. The States, as separate sovereigns, are the constituent elements of the Union. Bistate entities, in contrast, typically are creations of three discrete sovereigns: two States and the Federal Government."[173] As a result:

> Suit in federal court is not an affront to the dignity of a Compact Clause entity, for the federal court, in relation to such an enterprise, is hardly the instrument of a distant,

170. *See* Petty v. Tenn.-Mo. Bridge Comm'n, 359 U.S. 275, 278 (1959).
171. *Id.* at 278–79 (citation omitted).
172. *Id.* at 279–80.
173. *Hess*, 513 U.S. at 40.

> disconnected sovereign; rather, the federal court is ordained by one of the entity's founders. Nor is the integrity of the compacting States compromised when the Compact Clause entity is sued in federal court. As part of the federal plan prescribed by the Constitution, the States agreed to the power sharing, coordination, and unified action that typify Compact Clause creations.[174]

Thus, there is a presumption that agencies created through a congressionally approved interstate compact do not qualify for Eleventh Amendment sovereign immunity, although in doubtful cases courts will still apply the factor-based test for "arms of the state."[175]

3. The Potential for Multistate Entities to Acquire Multivalent Status

One of the more perverse aspects of Eleventh Amendment jurisprudence for multistate agencies is that they can qualify as state actors for some legal purposes while still being denied Eleventh Amendment immunity. For example, the U.S. Supreme Court determined that the Tahoe Regional Planning Agency, created through an interstate compact between California and Nevada, was enough of a state entity to act "under color of state law" for purposes of being subject to suit for constitutional "takings" pursuant to 42 U.S.C. § 1983 and 28 U.S.C. § 1343,[176] but not an "arm of the state" entitled to Eleventh Amendment immunity.[177]

Regarding the statutory liability issue and the prominence of state law, the Supreme Court emphasized that:

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

174. *Id.* at 41–42.
175. *Id.* at 43–46; *see* discussion of "arm of the state" test *supra* notes 165–69 and accompanying text.
176. Lake Country Estates, Inc. v. Tahoe Reg'l Planning Agency, 440 U.S. 391, 399–400 (1979).
177. *Id.* at 400–02.

> of one nonvoting member to the governing board. While congressional consent to the original Compact was required, the States may confer additional powers and duties on TRPA without further congressional action. And each State retains an absolute right to withdraw from the Compact.[178]

In contrast, Eleventh Amendment sovereign immunity "is only available to 'one of the . . . [s]tates.'"[179] While state agencies may share such immunity "in order to protect the state treasury from liability that would have had essentially the same practical consequences as a judgment against the State itself," lesser entities receive no such immunity.[180] Multistate agencies receive no such immunity "[u]nless there is good reason to believe that the States structured the new agency to enable it to enjoy the special constitutional protection of the States themselves, and that Congress concurred in that purpose."[181]

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

B. Procedural Due Process

All governmental entities, whether the states themselves or multistate regulatory bodies, must observe the strictures of procedural due process.[182] Thus, for example, if a multistate renewable energy program engages in licensing, leasing, or land condemnation, the Constitution will impose minimal procedural requirements on it. Specifically, the Fourteenth Amendment to the U.S. Constitution states that "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any

178. *Id.* at 399.

179. *Id.* at 400.

180. *Id.* at 401.

181. *Id.*; *see also* Hess v. Port Auth. Trans-Hudson Corp., 513 U.S. 30, 32–33 (1994) ("Concluding that . . . the Port Authority Trans-Hudson Corporation (PATH), is not cloaked with the Eleventh Amendment immunity that a State enjoys . . . .").

182. *See* Dist. Atty's Office for the Third Jud. Dist. v. Osborne, 129 S. Ct. 2308, 2319 (2009) (noting that the Due Process Clause "imposes procedural limitations on a State's power to take away protected entitlements").

State deprive any person of life, liberty, or property, without due process of law."[183]

Nevertheless, the requirements of the Due Process Clause are generally not onerous. As the U.S. Supreme Court has emphasized, if a liberty or property interest is actually at stake (the pre-requisite for the Due Process Clauses' applicability), the fundamental due process guarantees are notice and an opportunity to be heard.[184]

Procedural due process is already a constitutional requirement in state and federal energy-related proceedings, such as rate-making or licensing.[185] Moreover, compliance with normal state or federal administrative procedural requirements virtually guarantees compliance with the rather minimal constitutional requirements.[186] Nevertheless, the parties to any multistate renewable energy program would want to ensure that any of the resulting administrative processes—permitting, licensing, ratemaking, applications for renewable energy credits, and so on—comply with at least the minimum constitutional procedural due process requirements.

C. Indian Commerce Clause

Especially in the West, and especially with regard to renewable energy transmission, multistate renewable energy programs may require or desire the cooperation of federally recognized Tribes or the use of tribal lands. Procedurally, such arrangements require the federal government's involvement because the Indian Commerce Clause is a separate provision of the Interstate Commerce Clause and provides Congress with the power "[t]o regulate Commerce . . . with the Indian Tribes."[187] This Clause could become relevant to a multistate renewable energy program or project if, for example, Tribes seek to sell electricity from renewable sources into a program oper-

183. U.S. CONST. amend. XIV, § 1.

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

185. R.R. Comm'n of Cal. v. Pac. Gas & Elec. Co., 302 U.S. 388, 393–95 (1938); Duncan's Point Lot Owners Ass'n v. FERC, 522 F.3d 371, 378 (D.C. Cir. 2008).

186. *See*, *e.g.*, United Gas Pub. Serv. Co. v. Texas, 303 U.S. 123, 138–39 (1938) (concluding that the procedures in a Texas rate-making proceeding satisfied constitutional procedural due process requirements).

187. U.S. CONST. art. I, § 8, cl. 3.

ating through a multistate agreement, or if states seek to lease tribal lands for alternative energy production or transmission.

1. The Complexity of Indian Law in General

Indian law is a complex and nuanced area of federal law. In general, however, recognized Indian Tribes are sovereigns, but subordinate to the United States. Through the Indian Commerce Clause, "Congress has plenary authority to limit, modify or eliminate the powers of local self-government which the tribes otherwise possess."[188] As a result, Tribes are subject to any federal law that Congress chooses to impose upon them.[189]

However, Tribes are not automatically subject to state regulation. Unfortunately, state authority to regulate on-reservation activities is one of the most complex and murky topics in federal Indian law and often depends on a particular Tribe's precise history and the exact language of any treaties it has with the United States.[190] Nevertheless, some general trends can be discerned. First, Congress can waive a Tribe's sovereign immunity in favor of state regulation.[191] Second, in the first two-thirds of the twentieth century, Congress tended to allow state regulation of on-reservation activities.[192] Third, however, both Congress and the U.S. Supreme Court have more recently become more respectful of tribal sovereignty.[193]

2. Indian Law in Energy Law

The Federal Power Act provides one example of the complexities of tribal issues in energy regulation. As between

188. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 56–57 (1978) (citing Cherokee Nation v. Hitchcock, 187 U.S. 294, 305–07 (1902); United States v. Kagama, 118 U.S. 375, 379–81, 383–84 (1886)).

189. *See* Fed. Power Comm'n v. Tuscarora Indian Nation, 362 U.S. 99, 116 (1960) (stating that "a general statute in terms applying to all persons includes Indians and their property interests").

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

191. Rice v. Rehner, 463 U.S. 713, 719–21 (1983).

192. Organized Vill. of Kake v. Egan, 369 U.S. 60, 73–74 (1962).

193. *See*, *e.g.*, United States v. Lara, 541 U.S. 193, 199 (2004) (recognizing "inherent tribal sovereignty").

states and the federal government, the U.S. Supreme Court established in 1955 that the FPC, now FERC, has exclusive jurisdiction to issue licenses for hydroelectric projects on lands considered "reservations" under the Act, which includes formal tribal reservations; states cannot veto those licenses.[194] However, federal exclusivity does not apply to non-reservation lands owned by a Tribe.[195] As a result, the Tuscarora Indian Nation was subject to the normal operation of Section 21 of the Act,[196] which allowed the Power Authority of New York, as a FERC licensee, to condemn the Nation's non-reservation lands for a hydroelectric project.[197]

Even on reservation lands, however, FERC does not operate with a free hand. Pursuant to Section 4(e) of the Federal Power Act, the Secretary of the Interior can condition FERC licenses for hydropower projects on reservations in order to protect the reservation and its utilization.[198] According to the Supreme Court, FERC *must* implement all of the Secretary's conditions and cannot second-guess the Secretary regarding which conditions are "really" necessary.[199] Moreover, according to the U.S. Court of Appeals for the District of Columbia Circuit, FERC cannot impose strict time limits on the Secretary's submission of conditions, and "so long as some portion of the project is on the reservation, the Secretary is authorized to impose any conditions that will protect the reservation, including *utilization* of the reservation in a manner consistent with its original purpose."[200] Finally, according to the U.S. Court of Appeals for the Ninth Circuit, the Federal Power Act does not preempt Tribes' treaty-based claims for damages in connection with the FPC- or (by implication) FERC-licensed projects.[201]

Thus, to the extent that a multistate renewable energy program or project seeks to incorporate tribal lands and governments, it could be subject to tribal resistance and claims of tribal sovereignty or federal preemption. Moreover, long-term

194. Fed. Power Comm'n v. Oregon, 349 U.S. 435, 444–46 (1955).

195. Fed. Power Comm'n v. Tuscarora Indian Nation, 362 U.S. 99, 110–12 (1960).

196. 16 U.S.C. § 814 (2006).

197. *Tuscarora Indian Nation*, 362 U.S. at 101, 115, 123.

198. 16 U.S.C. § 797(e) (2006).

199. Escondido Mut. Water Co. v. La Jolla Band of Mission Indians, 466 U.S. 765, 775–79 (1984).

200. City of Tacoma, Wash. v. FERC, 460 F.3d 53, 64–65, 66–67 (D.C. Cir. 2006).

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

agreements with any Tribe would require the involvement of the federal government because Congress has used its Indian Commerce Clause and federal Property Clause authorities to enact two generally relevant statutes that require such involvement. First, "[n]o agreement or contract with an Indian Tribe that encumbers Indian lands for a period of 7 or more years shall be valid unless that agreement or contract bears the approval of the Secretary of the Interior or a designee of the Secretary."[202] Second, if the agreement or contract involves tribal trust property or funds held by the United States, the United States must consent to the contract.[203]

D. Appointments Clause

Multistate entities generally suffer ambivalent constitutional status because they are neither wholly state nor necessarily federal, even when created through an interstate compact. Attempts to invoke the Appointments Clause in connection with such multistate entities, even though unsuccessful to date, reflect those entities' ambiguous status.

The Appointments Clause of the U.S. Constitution provides that the President

> shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.[204]

This constitutional provision has been raised when regional energy-related entities appear to take on federal authority, prompting arguments that the members of those entities need to be appointed by the President and approved by Congress in conformance with the Clause.

For example, an interstate compact entered into by Washington, Oregon, Montana, and Idaho and approved by Congress created the Pacific Northwest Electric Power and Conservation

202. 25 U.S.C. § 81(b) (2006).
203. *Id.* § 85.
204. U.S. CONST. art. II, § 2, cl. 2.

Planning Council. Through the compact, the terms of which Congress adopted as federal statute, the Council was charged with preparing a regional conservation and electricity usage plan for the Pacific Northwest region.[205] Litigants challenging the Council and its plan argued, in part, that the Council was a federal agency because it influenced federal actors, such as the Bonneville Power Administration. Consequently, its members were "federal officers" who should have been appointed in conformity with the Appointments Clause.

However, the U.S. Court of Appeals for the Ninth Circuit disagreed. First, it noted that both the compact and the federal statutes implementing the compact specified that the Council is not a federal agency.[206] Second, it emphasized that "[t]here is no bar against federal agencies following policies set by non-federal agencies."[207] Finally, the Council members were not federal officers because "the Council members' appointment, salaries and administrative operations are pursuant to the laws of the four individual states, within parameters set by the Act. More important, the states ultimately empower the Council members to carry out their duties."[208] Thus, states controlled the appointments process, and the compact and its implementing federal statues created "an innovative system of cooperative federalism" that did not violate the Appointments Clause.[209]

E. Conclusion

Overall, multistate renewable energy programs should be alert to potential procedural issues, particularly if such programs employ a new multistate entity rather than operating through the states themselves. While procedural due process requirements are unlikely to differ according to what kind of governmental entity implements the program, Eleventh Amendment sovereign immunity and, at least potentially, the Appointments Clause could apply very differently to multistate entities than to the states themselves. Moreover, the involve-

205. 16 U.S.C. §§ 839b(a), 839b(c)(2) (2006).

206. Seattle Master Builders Ass'n v. Pac. Nw. Elec. Power & Conservation Planning Council, 786 F.2d 1359, 1363 (9th Cir. 1986) (citing 16 U.S.C. § 839b(a)(2)(A)(iv) (1982)).

207. *Id.* at 1364.

208. *Id.* at 1365 (citing 16 U.S.C. §§ 839b(a)(3), 839b(a)(4) (1982)) (internal citations omitted).

209. *Id.* at 1366.

ment of tribes in the program could substantially increase federal and tribal procedures as a result of the Indian Commerce Clause.

III. THE INTERSTATE COMPACT CLAUSE AND MULTISTATE RENEWABLE ENERGY PROGRAMS

While substantive and procedural considerations may influence the design as well as the content of a multistate renewable energy program, the most important structural issue facing the states designing such a program is whether to proceed through an interstate compact. As this Part explains, the Interstate Compact Clause may well require a compact for a multistate renewable energy program. If so, a program proceeding without a compact would simply be illegal.

Even when a compact is not constitutionally required, it offers such programs potentially valuable insulation from other constitutional issues. In particular, the existence of a compact could shield a multistate renewable energy program from the normal operation of federal preemption.

This Part first presents an overview of the Interstate Compact Clause and the three critical issues that arise under it: whether an interstate compact exists or is needed; whether Congress consented; and the legal status of the compact. It then looks at the applicability of the Clause to multistate renewable energy programs in general and concludes by detailing the positive legal advantages that a compact could provide to such programs. States should consider both the potential need for a compact and the potential advantages of operating through one when designing their multistate renewable energy programs.

A. Overview of the Interstate Compact Clause

The U.S. Constitution both specifically allows for and limits multistate agreements. Specifically, the Interstate Compact Clause provides that:

> *No State shall, without the Consent of Congress,* lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, *enter into any Agreement or Compact with another State*, or with a foreign Power, or engage in War, unless ac-

> tually invaded, or in such imminent Danger as will not admit of delay.[210]

As the italicized language indicates, the Interstate Compact Clause operates as an explicit restriction on state authority. States entering into any kind of agreement regarding renewable energy need to consider whether Congress's approval is necessary, because multistate agreements that are deemed interstate compacts for purposes of this clause are invalid (unconstitutional) without such approval.[211]

The Interstate Compact Clause creates three initial issues regarding its application. First is what kind of multistate actions or agreements qualify as interstate compacts subject to the clause. Second is the issue of whether Congress actually consented (and how) to the multistate agreement. Finally, interstate compacts approved by Congress raise the issue of their own legal status vis-à-vis state and federal law. This Subsection addresses each of these issues in turn.

1. Is There an Interstate Compact?

The U.S. Supreme Court's first—but still guiding—statement about the applicability of the Interstate Compact Clause derives from the 1893 case of *Virginia v. Tennessee*.[212] In this case, Virginia sought to void an 1802–1803 agreement with Tennessee regarding the border between the two states on the grounds that the agreement was an interstate compact that Congress had not approved.[213] The Court held (1) that the agreement *did* require Congress's approval to be legal, but (2) that Congress had indeed approved the compact, albeit implicitly.[214]

The Supreme Court acknowledged that "[t]here are matters upon which different states may agree that can in no respect concern the United States."[215] It cited as examples one state's purchase of land on which to construct a building in another state; a short-term agreement to transport materials in a canal; the draining of a shared waterway to prevent dis-

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210. U.S. CONST. art. I, § 10, cl. 3 (emphasis added).
211. State *ex rel.* Dyer v. Sims, 341 U.S. 22, 27–28 (1951).
212. 148 U.S. 503 (1893).
213. *Id.* at 516–17.
214. *Id.* at 518–22.
215. *Id.* at 518.

ease; and joint measures to fight "cholera, plague, or other causes of sickness and death . . . ."[216]

To determine whether any particular multistate agreement will require Congress's approval, courts are guided by the Interstate Compact Clause's purposes. According to the Supreme Court, "it is evident that the prohibition is directed to the formation of any combination tending to the increase of political power in the States, which may encroach upon or interfere with the just supremacy of the United States."[217] In other words, Congress's approval of interstate compacts acts as a check on multistate agreements that might otherwise infringe upon the rights of the federal government[218] or change the relative power of the states.[219]

Under these principles, Virginia and Tennessee did not need Congress's approval to select parties to run and designate the border between them.[220] Even intrastate approval of that boundary by each state's legislature did not trigger the Interstate Compact Clause.[221] However, when the two states contracted with each other to mutually recognize the boundary as correct, Congress's approval was required[222] because states' agreements regarding borders could encroach "upon the full and free exercise of federal authority."[223] Thus, under *Virginia v. Tennessee*, coordinated multistate action triggers the Interstate Compact Clause when: (1) two or more states enter into an agreement (2) to engage in coordinated legal behavior (3) that could affect the federal government's legitimate interests and authority.

In contrast, in 1985, in its most recent Interstate Compact Clause case, the Supreme Court determined that Massachusetts and Connecticut had not formed an interstate compact when both enacted statutes that allowed regional but out-of-state bank-holding companies to purchase banks and bank-

216. *Id.*
217. *Id.* at 519.
218. *Id.* at 519–20.
219. *Id.* at 520. *See also* Cuyler v. Adams, 449 U.S. 433, 440 (1981) ("Where an agreement is not 'directed to the formation of any combination tending to the increase of political power in the States, which may encroach upon or interfere with the just supremacy of the United States,' it does not fall within the scope of the Clause and will not be invalidated for lack of congressional consent." (quoting *Virginia v. Tennessee*, 148 U.S. at 519)).
220. *Id.*
221. *Id.* 519–20.
222. *Id.* at 521.
223. *Id.* at 520.

holding companies within each state's borders.[224] First, the Court doubted whether the two states had actually entered an agreement, even though they had enacted similar statutes and both states favored regional banking in New England.[225] According to the Court, "several of the classic indicia of a compact are missing," including the establishment of a joint entity or agency; conditional and coordinated actions between the states; and, most importantly, reciprocal commitments to the regional limitation.[226] Moreover, even if a compact could be said to exist, it did not infringe upon either federal supremacy or other states' sovereignty and hence Congress's consent would not be required.[227]

Similarly, in 2002, the Fourth Circuit concluded that the Master Settlement Agreement ("MSA") in the state tobacco litigation, which involved forty-six states and most of the major tobacco manufacturers, was *not* an interstate compact requiring Congress's approval.[228] Most of the MSA governed vertical releases of liability and payments from the tobacco companies to each state. However, the agreement also created a single administrative body for all forty-six participating states. Thus, "[t]o the extent that the States agree on the creation of this single administrative body and its functioning, there is a horizontal aspect to the Master Settlement Agreement that establishes a compact among the states, implicating the Compact Clause."[229]

Nevertheless, the MSA did not encroach on federal power and hence did not require Congress's approval. As the Fourth Circuit explained, while "the Master Settlement Agreement may result in an increase in bargaining power of the States vis-à-vis the tobacco manufacturers, . . . this increase in power does not interfere with federal supremacy because the Master Settlement Agreement 'does not purport to authorize the member States to exercise any powers they could not exercise in its absence.'"[230] "In addition, the Master Settlement Agreement does not derogate from the power of the federal government to regulate tobacco," especially because the MSA anticipated—

224. Ne. Bancorp, Inc. v. Bd. of Governors, 472 U.S. 159, 175–77 (1985).
225. *Id.* at 175.
226. *Id.*
227. *Id.* at 175–76.
228. Star Scientific, Inc. v. Beales, 278 F.3d 339, 343, 360 (4th Cir. 2002).
229. *Id.* at 360.
230. *Id.* (quoting U.S. Steel Corp. v. Multistate Tax Comm'n, 434 U.S. 452, 473 (1978)).

and expressly subordinated itself to—any future federal statutes regulating tobacco, as well as making its terms subject to consistency with the federal Bankruptcy Code.[231]

2. If There Is an Interstate Compact, Did Congress Give Its Consent, and How?

Multistate agreements that require congressional consent as interstate compacts will be deemed unconstitutional when such consent is absent. This issue arose in the U.S. Court of Appeals for the Ninth Circuit in connection with interstate agreements regarding low-level radioactive waste. The court first noted that "[t]he regulation of the disposal of low-level radioactive waste is a legitimate federal activity, and Congress has not waived or delegated its authority over the subject."[232] Although Congress gave permission in the Low-Level Radioactive Waste Policy Act[233] for states to enter into interstate compacts to deal with regional disposal of such waste, Washington's agreement with Oregon, Idaho, Montana, and Utah on the subject was ineffective because Congress had not approved the agreement.[234] As a result, Washington laws regulating such waste were unconstitutional.[235]

Nevertheless, if Congress's consent to a multistate agreement is required, Congress can give it in many ways. Congressional consent can precede the multistate agreement or be given afterward, as a form of congressional ratification. In addition, Congress's consent to a multistate agreement need not be explicit. In *Virginia v. Tennessee*, for example, Congress's consent was implied because of Congress's acquiescence to the two states' agreed-upon boundary.[236]

When Congress explicitly grants *ex post* consent to an interstate compact, Congress can impose conditions upon that compact. According to the Supreme Court, "[t]he States who are parties to the compact by accepting it and acting under it assume the conditions that Congress under the Constitution

231. *Id.*
232. Wash. State Bldg. & Constr. Trades Council, AFL-CIO v. Spellman, 684 F.2d 627, 630 (9th Cir. 1982).
233. 42 U.S.C. §§ 2021b–2021j (2006).
234. *Spellman*, 684 F.2d at 630.
235. *Id.* at 632.
236. Virginia v. Tennessee, 148 U.S. 503, 521–22 (1893).

attached."[237] Of course, states remain free to reject Congress's conditions, dissolving the compact.[238]

3. What Is the Legal Status of a Congressionally Approved Interstate Compact?

Once Congress consents to a multistate compact, the compact becomes federal law binding on all parties, including the courts.[239] For example, when the District of Columbia, Maryland, and Virginia entered into an interstate compact to create the Washington Metropolitan Area Transit Authority ("WMATA"), and then Congress enacted the compact for the District of Columbia, the compact became federal law.[240] As a corollary principle, the U.S. Supreme Court has clarified, "[t]he construction of a compact sanctioned by Congress under Art. I, § 10, cl. 3, of the Constitution presents a federal question."[241] "Moreover, the meaning of a compact is a question on which this Court has the final say."[242]

However, because the compact qualifies as a federal statute, the Supreme Court cannot *amend* the compact. Instead, all such amendments must also go through Congress.[243]

4. Conclusion

As this discussion shows, multistate arrangements can raise several issues under the Interstate Compact Clause re-

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237. Petty v. Tenn.-Mo. Bridge Comm'n, 359 U.S. 275, 281–82 (1959).

238. *See*, *e.g.*, MCI Telecomm. Corp. v. Bell Atl.-Pa., 271 F.3d 491, 505 (3d Cir. 2001) (likening states' acceptance of compact conditions to consent to conditions on receipts of federal money, and hence implying that they are free to refuse); Tobin v. United States, 306 F.2d 270, 273 (D.C. Cir. 1962) (noting that Congress's consent leaves states "free to conclude an interstate compact" and acknowledging that Congress's consent does not automatically complete formation of the compact).

239. Cuyler v. Adams, 449 U.S. 433, 439–40 (1981); *see also* Doe v. Pa. Bd. of Prob. & Parole, 513 F.3d 95, 103 (3d Cir. 2008) (noting that an interstate compact becomes federal law when: (1) it falls within the scope of the Compact Clause; (2) Congress has consented to the compact; and (3) the compact's subject matter would be appropriate for federal legislation).

240. Wash. Metro. Area Transit Auth. v. One Parcel of Land, 706 F.2d 1312, 1316–18 (4th Cir. 1983).

241. Petty v. Tenn.-Miss. Bridge Comm'n, 359 U.S. 275, 278 (1959).

242. *Id.* *See generally* New Jersey v. New York, 523 U.S. 767 (1998) (construing a boundary compact between New Jersey and New York to determine which state had jurisdiction over filled portions of Ellis Island).

243. New Jersey v. New York, 523 U.S. at 769 (citing Texas v. New Mexico, 462 U.S. 554, 564 (1983)).

garding the need for congressional approval. Among the most important are: (1) the existence of an actual interstate agreement, particularly if that agreement has legal consequences; (2) the impact of that agreement on federal interests and prerogatives or on other states; and (3) the existence and type of congressional consent. These issues are likely to impact multistate renewable energy projects, as the next Section argues.

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

Given the pervasive regulatory authority of the federal government in energy matters and Congress's repeated announcements that there is a national interest in energy and electricity,[244] a multistate agreement regarding renewable energy is likely to trigger the Interstate Compact Clause, as Subsection 1 below discusses. This is particularly true if that agreement deals with interstate matters or electricity transmission.

Conversely, coordinated single-state-based plans and laws that encourage production of renewable energy, in the absence of any contract-like multistate agreement or multistate regulation of transmission, interstate rates, or access to the grid itself, could avoid triggering the Interstate Compact Clause. Subsections 2 and 3 explore two examples of multistate programs proceeding without compacts—respectively, the Regional Greenhouse Gas Initiative ("RGGI") and the Northern Tier Transmission Group ("NTTG"). These Subsections suggest that the RGGI is operating on much shakier constitutional grounds than the NTTG—shakier than many investors might tolerate.

Finally, new multistate renewable energy programs will not operate in a vacuum, compact-wise. Existing compacts, approved as federal law, may well affect their operation. The last Subsection acknowledges this possibility through recent examples in the conventional energy context.

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244. *E.g.*, 15 U.S.C. §§ 717(a), 720e, 764 (2006); 42 U.S.C. §§ 6201, 6807a, 8201 (2006).

1. Any Actual Agreement Between or Among States Is Likely to Trigger the Interstate Compact Clause

Most multistate cooperative agreements involving electricity have proceeded as interstate compacts. For example, when Washington, Oregon, Montana, and Idaho sought to create a regional conservation and electricity usage plan, they entered an interstate compact—which Congress approved—creating the Pacific Northwest Electric Power and Conservation Planning Council.[245] The U.S. Court of Appeals for the Ninth Circuit upheld this compact even against challenges that the Council and its plan were *too* federal in nature, strongly suggesting that the Council was impacting federal authority regarding electricity and hence that the compact had been necessary.[246]

Even earlier, the U.S. Court of Appeals for the Third Circuit indicated, in 1941, that states intrude on federal authority when they enter agreements to cooperate regarding interstate rates and transmission of electricity.[247] In this case, the Safe Harbor Water Power Corporation operated a hydroelectric power plant that sold energy to both Consolidated Gas Electric Light and Power in Baltimore, Maryland, and the Pennsylvania Water and Power Company in Holtwood, Pennsylvania.[248] The greater part of the electricity from the plant entered interstate commerce, but the states were setting the wholesale electric rates.[249]

The Third Circuit acknowledged that under Section 20 of the Federal Power Act,[250] the states could set up regulatory commissions to regulate electric power.[251] However, it also noted that:

> [t]he transmission of power from state to state may be such a matter of national concern as to require regulation solely by a Federal agency, while on the other hand the consump-

245. *See* 16 U.S.C. §§ 839–839b (2006).
246. Seattle Master Builders Ass'n v. Pac. Nw. Elec. Power & Conservation Planning Council, 786 F.2d 1359, 1363–66 (9th Cir. 1986).
247. Safe Harbor Water Power Corp. v. Fed. Power Comm'n, 124 F.2d 800, 806–08 (3d Cir. 1941).
248. *Id.* at 802.
249. *Id.* at 802–03.
250. 16 U.S.C. § 813 (2006).
251. *Safe Harbor Water Power Corp.*, 124 F.2d at 805.

> tion of that power in the state to which it has been transmitted may be purely a matter of local interest.[252]

Thus, even though states play legitimate roles in regulating electricity, it was obvious that Maryland and Pennsylvania were in an agreement to cooperate regarding hydroelectricity crossing their borders, and that "the power generated by Safe Harbor and used in Pennsylvania and Maryland must be treated as an integrated whole."[253]

As a result, Maryland and Pennsylvania had effectively created an interstate compact requiring Congress's approval. Nevertheless, the Third Circuit also concluded that Congress had given permission for such agreements in Section 20 of the Act,[254] and so the compact was constitutional.

2. A Questionable Model for Avoiding the Interstate Compact Clause: The Regional Greenhouse Gas Initiative

The RGGI[255] is an example of a multistate-coordinated enterprise currently operating without an interstate compact. While the ten states involved appear to have designed the RGGI specifically to avoid triggering the Clause, structural components of the Initiative nevertheless render its constitutional status questionable. As a result, current litigation challenging the RGGI's status as an interstate compact[256] could provide a valuable test case for states contemplating a multistate renewable energy program, because the RGGI is arguably quite vulnerable to a Compact Clause challenge.

The ten states implementing the RGGI are Connecticut, Delaware, Maine, Maryland, Massachusetts, New Hampshire,

252. *Id.* at 806–07.

253. *Id.* at 807.

254. *Id.* at 808.

255. *See* Regional Greenhouse Gas Initiative, Welcome, http://www.rggi.org/home (last visited Feb. 8, 2010) (describing the basics of the RGGI).

256. Petition and Complaint at 22–23, InDeck Corinth, L.P. v. Paterson, No. 5280/2009 (N.Y.Sup. Ct. Jan. 29, 2009), *available at* http://www.globalclimatelaw.com/uploads/file/InDeck%20Complaint.pdf (challenging New York's authority to implement the RGGI, in part on Interstate Compact Clause grounds); *see also* William Funk, *Constitutional Implications of Regional CO_2 Cap-and-Trade Programs: The Northeast Regional Greenhouse Gas Initiative as a Case in Point*, 27 UCLA J. ENVTL. L. & POL'Y 353, 360–61 (2009) (discussing this litigation).

New Jersey, New York, Rhode Island, and Vermont.[257] In December 2005, they entered into a Memorandum of Understanding outlining the goals and requirements of the RGGI.[258]

Legally, the RGGI operates almost entirely through individual state efforts. For example, each state participating in the RGGI has enacted an individual carbon dioxide budget trading program pursuant to its own state's laws and regulations,[259] although based on the RGGI Model Rule.[260] Enactment of a state program that substantially complies with the Model Rule is a requirement for each state's emitters to participate in interstate trading of allowances, but:

> The RGGI Model Rule does not supplant any state regulatory or legislative efforts, but instead facilitates them by including the types of provisions necessary to implement RGGI. The RGGI Model Rule does so in a way that preserves state sovereignty and provides certainty and consistency to the regulated community and to the public.[261]

Similarly, although there is a regional "cap" on carbon dioxide emissions designed to reduce those emissions from the power sector by ten percent by 2018, each state's individual program establishes its respective share of the regional cap as a matter of state law.[262]

Nevertheless, each state allows the affected sources to meet the state cap and their individual emissions requirements by buying allowances issued by *any* of the states participating in the RGGI.[263] As the RGGI itself noted, "[t]aken together, the ten individual state programs function as a single regional

257. Regional Greenhouse Gas Initiative, Participating States, http://www.rggi.org/states (last visited Feb. 5, 2010).

258. Memorandum of Understanding from Regional Greenhouse Gas Initiative (Dec. 20, 2005), *available at* http://rggi.org/docs/mou_final_12_20_05.pdf.

259. *Id.* at 2–3.

260. *Id.* (citing Regional Greenhouse Gas Initiative, RGGI Model Rule, *available at* http://www.rggi.org/docs/Model%20Rule%20Revised%2012.31.08.pdf).

261. Regional Greenhouse Gas Initiative, Overview of RGGI CO_2 Budget Trading Program, at 1 n.2 (Oct. 2007), *available at* http://rggi.org/docs/program_summary_10_07.pdf.

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

263. *See* RGGI Model Rule, *supra* note 260, at § XX-1.2 (defining "CO_2 Allowance" to include allowances from other states); Regional Greenhouse Gas Initiative, About RGGI, http://www.rggi.org/about (last visited Feb. 05, 2010 (noting that the ten state programs "are linked through CO_2 allowance reciprocity").

compliance market for carbon emissions."[264] The allowances are auctioned quarterly through a regional auction platform.[265] Thus, the state participants in the RGGI are clearly structurally coordinated and have effectively agreed to reciprocally honor each others' allowances, producing a coordinated regional program that effectively acts as a unified whole—much like Maryland and Pennsylvania's treatment of their hydropower. Congress has not (yet) given consent to such regional arrangements. Moreover, in the wake of the U.S. Supreme Court's 2007 decision in *Massachusetts v. EPA*, which determined that the U.S. Environmental Protection Agency (EPA) had authority to regulate carbon dioxide and other greenhouse gases under the federal Clean Air Act,[266] the RGGI is intruding into an established federal regulatory authority. Therefore, the RGGI arguably violates the Interstate Compact Clause.[267]

3. The Regional Planning Model for Avoiding the Interstate Compact Clause: The Northern Tier Transmission Group

In contrast to regional markets like the RGGI, regional planning efforts are more likely to survive Compact Clause challenges because they do not involve reciprocal legal obligations. For example, the NTTG is "a group of transmission providers and customers that are actively involved in the sale and purchase of transmission capacity" for customers in the Pacific Northwest and Mountain states.[268] While the "NTTG coordinates individual transmission systems operations, products, business practices, and planning of their high-voltage transmission network,"[269] it has structured itself in such a way as to

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264. Regional Greenhouse Gas Initiative, About RGGI, *supra* note 263.

265. Regional Greenhouse Gas Initiative, CO_2 Auctions, http://www.rggi.org/co2-auctions (last visited Feb. 5, 2010).

266. Massachusetts v. EPA, 549 U.S. 497, 528–32 (2007).

267. A the time of this Article, scholarly papers are evenly split on the constitutionality of the RGGI. *Compare* this analysis *and* Claire Carothers, Note, *United We Stand: The Interstate Compact as a Tool for Effecting Climate Change*, 41 GEORGIA L. REV. 229, 249–60 (Fall 2006) (both questioning the constitutionality of the RGGI and promoting the use of interstate compacts), *with* Funk, *supra* note 256, at 358–61 *and* Note, *The Compact Clause and the Regional Greenhouse Gas Initiative*, 120 HARV. L. REV. 1958, 1979 (May 2007) (both concluding that the RGGI does *not* violate the Interstate Compact Clause).

268. Northern Tier Transmission Group, What We're Doing, http://www.nttg.biz/site/ (last visited Feb. 2, 2010).

269. *Id.*

not need an interstate compact, and its structure is likely to withstand judicial scrutiny on those grounds.

First, while an NTTG Planning Agreement exists, it is an agreement among electric utilities—not states.[270] The utilities currently participating in the agreement are the Desert Power Electric Cooperative, Idaho Power, NorthWestern Energy, Pacificorp, and Utah Associated Municipal Power Systems.[271]

Second, the Planning Agreement states that its purpose is to facilitate "efficient and coordinated planning and expansion" of electric transmission capacity.[272] While some coordination is evident, the Planning Agreement also specifies that the parties undertake no joint actions and enter no binding legal commitments.[273] Therefore, even if the utilities could be deemed state representatives, the Planning Agreement lacks one of the "classic indicia" of an interstate compact: reciprocity of commitments.

The NTTG, however, does create two coordinating bodies. The NTTG Steering Committee consists of the state regulatory utility commissioners, utility representatives, and representatives of consumers groups.[274] Thus, states do participate, although they do not control the proceedings. Moreover, while the Steering Committee does approve project charters, projects in the Northern Tier Initiatives, and expansion plans,[275] its goal is planning and coordination.[276] Most importantly, none of its actions replace, supersede, or even influence individual state or federal regulatory requirements, and the state commissioners remain explicitly free to take neutral or even contrary positions in their state regulatory processes.[277] Thus, the contract-like commitments that characterize interstate compacts are absent.

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270. Northern Tier Transmission Group, NTTG Planning Agreement, at 8–9 (Aug. 10, 2007), *available at* http://nttg.biz/site/index.php?option=com_docman&task=cat_view&gid=58&dir=DESC&order=date&Itemid=31&limit=5&limitstart=10.

271. Northern Tier Transmission Group, Fact Sheet, at 1 (2008), *available at* http://nttg.biz/site/index.php?option=com_content&task=view&id=122&Itemid=1.

272. Northern Tier Transmission Group, NTTG Planning Agreement, *supra* note 270, at 2.

273. *Id.* §§ 7.2–7.3.

274. Northern Tier Transmission Group, NTTG Steering Committee Charter, at 2 (Jan. 30, 2009), *available at* http://nttg.biz/site/index.php?option=comdocman&task=cat_view&gid=58&dir=DESC&order=date&Itemid=31&limit=5&limitstart=5.

275. *Id.* at 3.

276. *Id.* at 1.

277. *Id.* at 4–6.

Similarly, the NTTG Planning Committee exists to provide a forum for planning, coordination, and implementation of a "robust transmission system."[278] However, planning and coordination efforts commit none of the parties to particular courses in the actual regulatory proceedings, which remain the province of the individual states and FERC.

Thus, the NTTG appears to have successfully avoided creating an interstate compact that requires Congress's approval. At the same time, however, none of its members are bound by the NTTG's coordinating and planning efforts. While this voluntary participation can sometimes be more effective in achieving real progress in regional developments than contract-like commitments, it is always worth remembering that the choice to proceed without an interstate compact does involve legal and pragmatic trade-offs.

4. Existing Compacts May Also Impact New Multistate Projects Regarding Renewable Energy

A number of interstate compacts already exist that address issues that could affect multistate renewable energy programs. Such agreements govern water allocations,[279] water management,[280] and other relevant environmental and resource issues.[281] These existing compacts—which are enforceable as federal law—may shape multistate renewable energy programs.

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278. Northern Tier Transmission Group, Planning Committee Charter, at 1 (Feb. 24, 2010), *available through* http://nttg.biz/site/index.php?option=comdoc man&task=cat_view&gid=236&Itemid=31.

279. E.g., Arkansas River Basin Compact, Pub. L. No. 93-152, 87 Stat. 569 (1973) (Arkansas and Oklahoma); Bear River Compact, Pub. L. No. 96-189, 94 Stat. 4 (1980) (Idaho, Utah, and Wyoming); Upper Colorado River Basin Compact, 81 Cong. Ch. 48, 63 Stat. 31 (1949) (Arizona, Colorado, New Mexico, Utah, and Wyoming).

280. E.g., Animas-La Plata Project Compact, Pub. L. No. 90-537, § 501(c), 82 Stat. 885, 897–98 (1968); Tahoe Regional Planning Compact, Pub. L. No. 96-551, 94 Stat. 3233 (1980) (California and Nevada).

281. A number of existing and emerging compacts either directly address energy or relate to development more generally. E.g., Bi-State Development Compact, 64 Stat. 568 (1950) (Missouri and Illinois); Desert Pacific Economic Region Compact, ARIZ. REV. STAT. ANN. § 41-3701 (2003) (repealed Sept. 2, 2003) (explicitly identifying energy as an issue with possible benefits from regional cooperation and open also to Colorado, Nevada, New Mexico, and Utah and the Mexican states of Chihuahua, Sinaloa, and Sonora); Midwest Energy Compact, IOWA CODE § 473A.1 (2009).

As one recent example, in March 2008, the U.S. Supreme Court interpreted a 1905 interstate compact between New Jersey and Delaware regarding the states' jurisdiction over activities in the Delaware River.[282] The litigation arose when Delaware refused to grant permission to allow construction of a liquefied natural gas terminal along the New Jersey shore when the constructed facility would extend about 2000 feet into Delaware's territory.[283] The Supreme Court concluded that the compact did not give New Jersey exclusive jurisdiction over the facility and upheld Delaware's right to refuse permission for the facility.[284]

Other existing compacts may be more directly relevant to the implementation of new multistate renewable energy programs and arrangements. In 2007, for example, the U.S. Court of Appeals for the Ninth Circuit determined that the Bonneville Power Administration, a federal power marketing agency for the hydroelectric power generated by the dams on the Columbia River in Oregon and Washington, was arbitrary and capricious when it tried to transfer the functions of a fish passage center without showing how the transfer was consistent with the fish and wildlife program established through an interstate compact.[285]

C. The Advantages of an Interstate Compact

As discussed, depending on how they are structured, multistate renewable energy programs and agreements may well constitutionally *require* an interstate compact. There is no escaping the fact that the Interstate Compact Clause's applicability adds procedural requirements and another level of formality to multistate renewable energy programs and projects, including the possibility that Congress will object or attempt to impose its own conditions and requirements on the multistate agreement. In addition, if the compact creates a regional or multistate regulatory agency, that agency is unlikely to enjoy Eleventh Amendment sovereign immunity.[286]

282. New Jersey v. Delaware, 552 U.S. 597, 128 S. Ct. 1410, 1415 (2008).
283. *Id.* at 1415–16.
284. *Id.* at 1427.
285. Nw. Envtl. Defense Ctr. v. Bonneville Power Admin., 477 F.3d 668, 688–90 (9th Cir. 2007).
286. *See* discussion *supra* Part II.A.

Nevertheless, even if the Interstate Compact Clause's applicability is questionable, states still should consider interstate compacts for multistate renewable energy programs and projects. There are no general federal substantive requirements or prohibitions imposed on interstate compacts, giving compacts all the flexibility of a contract among states. As the National Center for Interstate Compacts within Council of State Governments has emphasized:

> Interstate compacts are contracts between two or more states creating an agreement on a particular policy issue, adopting a certain standard or cooperating on regional or national matters. Interstate compacts are the most powerful, durable, and adaptive tools for ensuring cooperative action among the states. Unlike federally imposed mandates that often dictate unfunded and rigid requirements, interstate compacts provide a state-developed structure for collaborative and dynamic action, while building consensus among the states and evolving to meet new and increased demands over time.
>
> General purposes for creating an interstate compact include:
>
> • Establish a formal, legal relationship among states to address common problems or promote a common agenda.
> • Create independent, multistate governmental authorities (e.g., commissions) that can address issues more effectively than a state agency acting independently, or when no state has the authority to act unilaterally.
> • Establish uniform guidelines, standards, or procedures for agencies in the compact's member states.
> • Create economies of scale to reduce administrative and other costs.
> • Respond to national priorities in consultation or in partnership with the federal government.
> • Retain state sovereignty in matters traditionally reserved for the states.
> • Settle interstate disputes.[287]

Several of these purposes could arise in multistate renewable energy programs, suggesting the relevance and value of an

287. National Center for Interstate Compacts, Council of State Governments, Understanding Interstate Compact*s*, at 1, *available at* http://www.cglg.org/projects/water/CompactEducation/Understanding_Interstate_Compacts--CSGNCIC.pdf.

interstate compact. A formal legal relationship among participating states could provide investors and utilities with the confidence to participate in such programs, in contrast to a legally suspect RGGI-like structure. Multistate regulatory authorities might be more efficient in this context than regulation by multiple states, and similar efficiencies may arise with regard to program-wide contracting. Uniformity of standards and priorities may also prove beneficial to multistate renewable energy programs. Finally, a compact in this context allows participating states to ensure (through federal approval) that their program aligns with federal priorities, short-circuiting federal preemption problems.

In addition, because interstate compacts become federal law, they can offer states constitutional advantages in their pursuit of coordinated renewable energy policies, programs, and projects. In particular, as the rest of this Section will discuss, interstate compacts can offer states protection against existing and future federal preemption, relieve states of dormant Commerce Clause restrictions, alleviate some potential takings liability, and eliminate separate negotiations to respect tribal sovereignty and federal authority under the Indian Commerce Clause.

1. Interstate Compacts and Federal Preemption

In light of continuing (and currently unpredictable) congressional activity with respect to renewable energy, it is worth emphasizing that the existence of an interstate compact affects the application of the Supremacy Clause and the federal preemption analysis. Interstate compacts approved by Congress become federal law, with the result that other federal statutes cannot automatically preempt a compact.[288]

More specifically, the Interstate Compact Clause and the Supremacy Clause can interact in three ways. First, if Congress has already preempted state law in a given area, multistate agreements to regulate in that area require an interstate compact approved by Congress.[289] Second, a congressionally approved interstate compact can help to convince a court that

288. *See supra* notes 239–242 and accompanying text.

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

Congress has not preempted state laws and regulations enacted pursuant to the compact.[290] Thus, the interstate compact can blunt the operation of the Supremacy Clause. For example, the U.S. Supreme Court has acknowledged that the existence of a compact can eliminate the standard federal preemption analysis, even for non-compact state statutes enacted to further the compact's purposes and goals, because Congress has approved the compact itself and the states' legislative plans.[291]

Third, if Congress adopts detailed provisions of the compact as federal statute, the compact can itself preempt state law. For example, because Congress not only approved the 1987 Tahoe Regional Planning Authority's management plan but also wrote it into federal law, that plan "preempts state law and state constitutional provisions."[292] Similarly, the U.S. Court of Appeals for the Third Circuit has noted that an interstate compact's status as federal law "makes available the doctrine of preemption to prevent states from avoiding their compact obligations by citing contrary state law."[293]

2. Interstate Compacts and the Dormant Commerce Clause

The dormant Commerce Clause is a restriction on *state* regulatory authority; Congress may discriminate against interstate commerce at will.[294] Thus, congressional approval of an interstate compact and its status as federal law insulates multistate programs from dormant Commerce Clause scrutiny.

The U.S. Court of Appeals for the Ninth Circuit has been most decisive regarding this point. When challengers sought to invalidate the provisions of the Yellowstone River Compact on the grounds that the compact prohibited the transfer of water

290. *See* Waterfront Comm'n v. Constr. & Marine Equip. Co., 928 F. Supp. 1388, 1401 (D.N.J. 1996).

291. DeVeau v. Braisted, 363 U.S. 144, 152–54 (1960). *See also* Carson v. Waterfront Comm'n, 73 F.3d 24, 25 (3d Cir. 1995) (carefully analyzing the reconcilability of federal statutes and an interstate compact to reject a Supremacy Clause challenge to the compact).

292. Stephans v. Tahoe Reg'l Planning Agency, 697 F. Supp. 1149, 1152 (D. Nev. 1988).

293. Mineo v. Port Auth., 779 F.2d 939, 948 (3d Cir. 1985).

294. Prudential Ins. Co. v. Benjamin, 328 U.S. 408, 434 (1946); *see also* Hillside Dairy, Inc. v. Lyons, 539 U.S. 59, 66 (2003), and New York v. United States, 505 U.S. 144, 171 (1992) (both noting that Congress can also authorize states to discriminate against interstate commerce if it does so clearly enough).

out of the Yellowstone Basin and hence violated the dormant Commerce Clause, the Ninth Circuit held that the dormant Commerce Clause did not apply.[295] Specifically, the court reasoned that because congressional approval converts an interstate compact into federal law, the compact's provisions are insulated from dormant Commerce Clause challenges.[296] The Supreme Court denied the petition for *certiorari* to review the Ninth Circuit's decision.[297]

The U.S. Courts of Appeals for the First and Seventh Circuits have also indicated that congressionally approved interstate compacts are not subject to dormant Commerce Clause analyses. Indeed, the Seventh Circuit apparently found the point so obvious that it stated without elaboration that interstate "compacts, after being ratified by Congress[,] take the dormant Commerce Clause out of the picture . . . ."[298] More circumspectly, the First Circuit limited itself to observing that because Congress has approved and ratified an interstate compact, the standard dormant Commerce Clause analysis does not apply to compact provisions.[299] Although states participating as amici argued "that when an interstate compact becomes federal law under the Compacts Clause, it becomes immune from a Dormant Commerce Clause challenge by its very nature," the First Circuit did not ultimately need to decide the issue in its resolution of the compact dispute.[300]

3. Interstate Compacts and State Constitutional Takings

As noted in the discussion of federal preemption, an interstate compact's status as federal law not only insulates it from preemption by other federal statutes but also allows the compact itself to preempt conflicting state law.[301] Under the Su-

295. Intake Water Co. v. Yellowstone River Compact Comm'n, 769 F.2d 568, 569 (9th Cir. 1985).

296. *Id.* at 569–70.

297. Intake Water Co. v. Yellowstone River Compact Comm'n, 476 U.S. 1163, 1163 (1986).

298. Cent. Midwest Interstate Low-Level Radioactive Waste Comm'n v. Pena, 113 F.3d 1468, 1470 (7th Cir. 1997).

299. N.Y. State Dairy Foods, Inc. v. Ne. Dairy Compact Comm'n, 198 F.3d 1, 12 (1st Cir. 1999).

300. *Id.* at 12 n.12.

301. *See* discussion *supra* notes 292–93 and accompanying text.

premacy Clause, this preemptive force extends to state constitutions.[302]

Most state constitutions include provisions prohibiting the taking of private property without just compensation, and state courts often interpret these state constitutional provisions along the same lines as the prohibition in the U.S. Constitution. However, if Congress codifies a specific interstate program or plan into federal law in the course of approving an interstate compact, the compact can preempt state constitutional takings claims.[303]

4. Interstate Compacts and the Indian Commerce Clause

As was discussed in connection with the Indian Commerce Clause, multistate renewable energy projects that involve tribal-produced energy or leasing of tribal lands will require negotiations with both the Tribe and the federal government. In addition, such projects generally require the approval of the federal government, especially if the multistate agreement contemplates a long-term arrangement with a Tribe.

Interstate compacts can provide a recognized structure for involving Tribes and the federal government in renewable energy negotiations. As the National Center for Interstate Compacts has emphasized, interstate compacts can be negotiated "in consultation or in partnership with the federal government."[304]

Moreover, if federal approval would be required for both the multistate agreement itself, under the Interstate Compact Clause, and the arrangement with the Tribe under the Indian Commerce Clause and its implementing statutes, then a compact that involves the Tribe and the federal government from the outset can consolidate the two federal approval requirements. For example, in 1999, the State of Montana, the Crow Tribe, and the United States negotiated a compact to settle water rights, which Montana has since enacted as state law.[305] Protests from Wyoming regarding the quantities of federal and

302. Stephans v. Tahoe Reg'l Planning Agency, 697 F. Supp. 1149, 1152 (D. Nev. 1988).

303. *Id.* at 1152.

304. National Center for Interstate Compacts, Council of State Governments, Understanding Interstate Compacts, *supra* note 287, at 1.

305. MONT. CODE ANN. § 85-20-901 (2009).

tribal water rights stalled congressional approval, but federal legislation approving the compact is likely in the 2009–2010 congressional term.[306]

CONCLUSION

Constitutional considerations should inform the structural, procedural, and substantive components of any multistate renewable energy program or project. Even where the constituent states predict that the program or project would survive constitutional challenge, constructing those rationales in advance can better prepare the states and any resulting multistate agency against future lawsuits.

Structurally, the primary question for the states involved in a multistate renewable energy agreement or program is whether to proceed as independent states or to act jointly through an interstate compact. As a practical matter, it may be difficult for states to both coordinate their renewable energy actions and programs and avoid the application of the Interstate Compact Clause, given the pervasive federal presence in energy regulation. In addition, certain attributes of a multistate renewable energy program would make an interstate compact constitutionally necessary. For example, if states enter an actual agreement regarding the sale, distribution, or transmission of renewable electricity, especially across state lines, an interstate compact will likely be required.

The RGGI provides one example of a complex and coordinated multistate program operating without an interstate compact by relying almost entirely on state-specific implementation of generally shared principles. Importantly, however, the RGGI is currently being challenged on Interstate Compact Clause grounds, and arguments can be made that it should not survive that challenge: there is obviously a high level of coordination among the ten participating states, and the Supreme Court, Congress, and the EPA have now acknowledged the federal interest in greenhouse gas regulation. In contrast, the NTTG, with its emphasis on nonbinding planning efforts, is likely to survive any future Interstate Compact Clause chal-

306. The Crow Tribe Water Rights Settlement Act of 2009, S. 375, 111th Cong. (2009), was introduced on February 4, 2009, and passed out of the Committee on Indian Affairs on September 9, 2009. Open Congress, *S.375—Crow Tribe Water Rights Settlement Act of 2009*, http://www.opencongress.org/bill/111-s375/show (last viewed October 4, 2009).

lenge—but its efforts do not commit the state participants to any particular course of action, or even to continued planning and cooperation.

The RGGI and NTTG suggest a state reluctance to pursue interstate compacts in the energy arena. Rather than reflexively trying to avoid an interstate compact, however, states should consider the advantages that an interstate compact can offer them, even if a compact may not be constitutionally required. As one limited example, if the states desire the long-term participation of Tribes in the program, or plan to lease tribal lands for renewable energy development, federal consent will likely be required regardless, making an interstate compact more attractive.

An interstate compact can also help states to avoid other constitutional issues that could arise in the implementation of a multistate renewable energy program. For example, the courts have indicated that the existence of a congressionally approved interstate compact can shield a multistate program from dormant Commerce Clause challenges. Such insulation may provide multistate renewable energy efforts with the ability to offer regional incentives and preferences to encourage renewable energy development that would be unavailable to individual states.

More importantly, congressional approval of an interstate compact would insulate a multistate program or project from Supremacy Clause challenges and federal preemption. This protection might be a significant benefit to multistate or regional renewable energy endeavors, given the significant current congressional work on climate change and energy policy legislation—and the significant uncertainties regarding the substantive content and particular details of the laws that Congress may enact.