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Weathering Rising Seas in a Sinking Ship: The Constitutional Vulnerabilities of the Regional Greenhouse Gas Initiative Note

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NOTES

WEATHERING RISING SEAS IN A SINKING SHIP: THE CONSTITUTIONAL VULNERABILITIES OF THE REGIONAL GREENHOUSE GAS INITIATIVE

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I. INTRODUCTION

Major ice sheets in Antarctica and Greenland, along with glaciers across the world, are melting due to increases in the global temperature.[1] The runoff water and ice breaks associated with this warming end up in the world's oceans and contributes to the rise in sea level.[2] Accelerated melting has led scientists to predict that sea levels could rise between 4 and 9.5 inches by 2100.[3] This poses a particular danger for the east coast of the United States, where metropolitan cities may lose an estimated $7.4 trillion in assets by 2050 alone.[4] For Boston, these risks come with an estimated price

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1. *See* TIM LENTON, ET AL., MAJOR TIPPING POINTS IN EARTH'S CLIMATE SYSTEM AND CONSEQUENCES FOR THE INSURANCE SECTOR, 9-12 (Nov. 2009), http://www.worldwildlife.org/climate/Publications/WWFBinaryitem14354.pdf.

2. *See Coastal Zones and Sea Level Rise*, ENVTL. PROT. AGENCY, http://epa.gov/climatechange/effects/coastal/index.html (last visited Sept. 28, 2011).

3. *Glaciers and Ice Caps to Dominate Sea Level Rise this Century, Says New Study*, SCIENCE DAILY, (July 20, 2007), *available at* http://www.sciencedaily.com/releases/2007/07/070719143502.htm.

4. Bennie Dinardo, *Boston Faces Deep Risk from Sea Level Rise*, BOSTON GLOBE (Nov. 24, 2009), http://www.boston.com/lifestyle/green/greenblog/2009/11/boston_faces_deep_risk_from_se.html. Global warming presents threats

tag of $463 million;[5] the New York-Newark area stands to lose approximately $1.8 trillion.[6] While there is a heavy debate in American politics as to whether climate change is anthropogenic, the scientific consensus states that global warming is a result of increased emissions of greenhouse gases into the air, which trap radiant heat in Earth atmosphere, thereby increasing its average temperature.[7] A prevalent greenhouse gas is carbon dioxide (CO_2); a byproduct of burning organic matter, in particular fossil fuels.[8] In an attempt to mitigate the effects of global warming, and thereby the potential damage which might befall them from rising sea levels, ten northeast states agreed in 2003 to establish a cap-and-trade strategy to gradually reduce carbon dioxide emissions by power producers.[9]

The Regional Greenhouse Gas Initiative (RGGI) is a cap-and-trade system among the states of Massachusetts, New York, New Jersey, New Hampshire, Vermont, Connecticut, Delaware, Maryland, Maine, and Rhode Island.[10] These signatory states signed a Memorandum of Understanding (MOU) to memorialize their commitment to the RGGI.[11] The terms of the MOU require each state to adopt independent legislation establishing a cap on carbon emissions created by power producers within the signatory state, and establish an auction system for carbon allowances.[12] The MOU requires each

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to biodiversity, and threatens deserts, rainforests and coral reefs. *Biodiversity*, GLOBAL ISSUES, http://www.globalissues.org/issue/169/biodiversity (last visited Sept. 29, 2011). Furthermore, climate change increases the habitable areas of disease spreading insects such as mosquitoes and the tsetse fly. AL GORE, AN INCONVENIENT TRUTH 172 (2006).

5. LENTON et al., *supra* note 1, at 33; Dinardo, *supra* note 4.

6. LENTON et al., *supra* note 1, at 33; Dinardo, *supra* note 4.

7. *See Global Climate Change*, NATIONAL AERONAUTICS AND SPACE ADMINISTRATION, http://climate.nasa.gov/causes/ (last visited Sept. 28, 2011).

8. *See id.*

9. *See* Guy Page, *Vermont and the Regional Greenhouse Gas Initiative*, VERMONT ENERGY PARTNERSHIP (Aug. 3, 2009), http://www.vtep.org/documents/vtepbriefingpaper.pdf.

10. *See Regional Greenhouse Gas Initiative: Memorandum of Understanding*, REGIONAL GREENHOUSE GAS INITIATIVE, 1 (DEC. 20, 2005), http://www.rggi.org/docs/mou_12_20_05.pdf [*hereinafter Memorandum of Understanding*].

11. *See id.* at 12-20.

12. *See id.* at 2-3; *see also* Michael Smith, *Murky Precedent Meets Hazy Air: The Compact Clause and Regional Greenhouse Gas Initiative*, 34 B.C. ENVT'L

state to designate at least 25% of these proceeds from these allowance auctions toward consumer benefit programs.[13] Each state retains the right to unilaterally alter or repeal its own RGGI legislation, and a signatory state can withdraw from RGGI at will.[14]

In light of the recent budgetary difficulties befalling states, some RGGI signatory states have started to dip into these established consumer and energy efficiency funds.[15] Environmental conservation advocates argue that this practice sets a poor precedent, which ultimately undermines the intent behind RGGI.[16] Simultaneously, in 2011, New Hampshire unsuccessfully initiated retraction of their RGGI legislation.[17] New Jersey governor Chris Christie was soon to follow suit by withdrawing New Jersey from the

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AFF. L. REV. 387, 404-06 (2007); J. Jared Snyder, *Regional and State Programs; Measuring, Allocating, Trading, and Complying*, SM106 ALI-ABA 91, at 7-8 (Mar. 23, 2007).

13. *See Memorandum of Understanding, supra* note 10, at 6.

14. *See* id. at 9. In 2011, the New Hampshire House of Representatives attempted to withdraw from RGGI, and New Jersey Governor Chris Christie retracted all RGGI legislation. *New Hampshire Governor Vetoes RGGI Withdrawal Bill*, POWER (July 13, 2011), http://www.powermag.com/POWERnews/New-Hampshire-Governor-Vetoes-RGGI-Withdrawal-Bill_3856.html; Mireya Navarro, *Christie Pulls New Jersey from 10 State Climate Initiative*, NY TIMES (Mar. 26, 2011), http://www.nytimes.com/2011/05/27/nyregion/christie-pulls-nj-from-greenhouse-gas-coalition.html.

15. *See e.g.*, Joey Peters, *The RGGI Raid: How Cap-and-Trade Revenues Went to Fix State Budgets*, STATELINE (June 26, 2010), http://www.stateline.org/live/details/story?contentId=494460; Bob Sanders, *Warnings Realized in RGGI Budget Raid*, NEW HAMPSHIRE BUSINESS REVIEW (Jan. 10, 2011), http://www.nhbr.com/businessnews/statenews/764176-257/warnings-realized-in-rggi-budget-raid.html; *States Raid RGGI Funds to Fill Budget Gaps*, THE ENVIRONMENTAL LEADER (Dec. 21, 2010), http://www.environmentalleader.com/2010/12/21/states-raid-rggi-funds-to-fill-budget-gaps/; *Northeast States Raiding RGGI Money to Stay Afloat*, MAINE PUBLIC BROADCASTING NETWORK (Dec. 20, 2010), http://www.mpbn.net/Home/tabid/36/ctl/ViewItem/mid/3478/ItemId/14576/Default.aspx.

16. *See* Centers for Working Families, et. al, *Re: Governor Paterson's Proposed Raid of RGGI Monies*, NYSERDA, 2-3 (Oct. 30, 2009), http://www.nyserda.org/RGGI/Program%20Planning/pace_nrdc_and_environmental_advocates_of_ny_part2.pdf.

17. *See New Hampshire Governor Vetoes RGGI Withdrawal Bill, supra* note 14. New Hampshire Governor John Lynch vetoed the House's attempted retraction of RGGI legislation. *Id.*

program in 2011.[18] Striking yet another blow to the agreement, Indeck Energy challenged New York's system, alleging the program to be illegal.[19]

This Note will analyze the applicability of the U.S. Constitution's Compact Clause on the RGGI. Of particular relevance are RGGI's vulnerabilities under both the Dormant Commerce Clause and the Supremacy Clause. Finally, this Note will analyze the advantages of congressional consent to this multi-state compact as a means to cure these constitutional defects and rectify enforcement predicaments RGGI faces.

II. RGGI: ITS FORMATION AND APPLICATION

a. RGGI in General

RGGI is the brainchild of Governor George Pataki of New York, who in 2003 sent eleven letters to governors of northeastern states inviting them to develop a regional cap-and-trade system to govern carbon emissions from power utilities.[20] In 2005, signatory states drafted and agreed to an MOU.[21] The RGGI cap-and-trade system works by first establishing a base annual emissions budget for the region. This value is then divided and apportioned accordingly, based on the energy needs of the different states partaking in the initiative.[22] Starting in 2015, this budget will shrink by 2.5% per year, so that by the year 2018, each participating state shall have reduced its annual emissions by 10%.[23] Once an individual state's emissions budget is set, it is free to establish a scheme in which

18. *See* Navarro, *supra* note 14.

19. The suit was ultimately settled by New York. Gil Keteltas, *The Regional Greenhouse Gas Initiative (RGGI) litigation settled*, GLOBAL CLIMATE LAW BLOG (Jan. 6, 2010), http://www.globalclimatelaw.com/2010/01/articles/climate-change-litigation/regional-greenhouse-gas-initiative-rggi-litigation-settled/?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A+GlobalClimateLawBlog+%28Global+Climate+Law+Blog%29.

20. *See Governor Pataki Announces Regional Agreement to Curb Greenhouse Gases*, NY DEPT. OF ENVTL. CONSERV., (Jan. 2006), http://www.dec.ny.gov/environmentdec/18981.html.

21. *See Memorandum of Understanding*, *supra* note 10, at 12-20.

22. *See id.* at 2-3.

23. *See id.* at 3.

would-be emitters purchase CO_2 emission allowances at auction.[24] These allowances grant a party permission to emit one ton of $CO_2$for a given period of time.[25] Purchasing CO_2 allowances is not limited to power producers; rather, they are available to everyone.[26] This allows environmental groups to buy carbon allowances in order to remove them completely from the market.[27]

Emitters have the ability to offset carbon dioxide emissions by taking certain actions such as landfill gas capture and combustion,[28] afforestation, end use efficiency for natural gas, and methane capture from farming operations.[29] Offset allowances allow an emitter to subtract a designated amount of CO_2 emissions from their overall carbon output.[30] Therefore, power producers that emit more than their permissive amount can bring their levels back into compliance with offset allowances.[31] The signatory states allow for a one-to-one trade for offsets made within a signatory state, thus, if a power utility creates a carbon offset of one ton, it will be awarded an allowance to

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24. *See e.g.* MASS. GEN. Laws. ch. 21A § 22 (2008); N.Y. COMP. CODES R. & REG. tit. 21, §507 (2008).

25. *See Regional Greenhouse Gas Initiative: Model Rules*, REGIONAL GREENHOUSE GAS INITIATIVE, 24 (Dec. 31, 2008), http://www.rggi.org/docs/Model%20Rule%20Revised%2012.31.08.pdf [hereinafter *Model Rules*]. *See* Steven Ferrey, *Goblets of Fire: Potentially Constitutional Impediments to the Regulation of Global Warming*, 35 ECOLOGY L.Q. 835, 845 (2008). The auction allowances are measured against the actual emissions of a site, if the emissions exceed the allowances the state can take actions to sanction the emitter. *Id.*

26. *See Green Group Buys CO_2 Emissions Permit to Retire Them*, ENV'T NEWS SERV. (Mar. 20, 2009), http://www.ens-newswire.com/ens/mar2009/2009-03-20-092.html.

27. *See id.*

28. Landfill gas capture and combustion is a process where methane gas produced by decomposing organic waste within a landfill is extracted and burned. *Capture and Combustion of Landfill Gas*, AUSTRALIAN DEPT. OF CLIMATE CHANGE AND ENERGY EFFICIENCY, http://www.climatechange.gov.au/en/government/initiatives/carbon-farming-initative/methodology-development/methodologies-under-consideration/capture-combustion-of-landfill-gas/capture-combustion.aspx (last visited Sep. 28, 2011). The combustion converts the methane to CO_2. *Id.* Methane is a far more potent greenhouse gas than CO_2, therefore, the conversion mitigates the negative effects of methane release into the atmosphere. *Id.*

29. *Memorandum of Understanding*, *supra* note 10, at 4.

30. *See id.* at 4-5.

31. *See id.* at 4.

emit one additional ton of carbon.[32] Offsets created within non-participating states have a two-to-one ratio, so for every two tons of carbon offsets a power utility creates outside of a RGGI state, it will receive a one ton allowance credit.[33] If the price of the allowances increases above $7.00, signatory and non-signatory states will enjoy the same one-to-one ratio for offsets and allowances.[34]

The RGGI only applies to those power generators that operate within the state lines of a signatory state and does not extend to out-of-state producers that transport energy into an RGGI state.[35] Therefore, of considerable concern to RGGI is the phenomenon called leakage.[36] Leakage occurs when electricity generation shifts from a source within an RGGI jurisdiction to a state not partaking in the cap-and-trade system.[37] This is partially the result of having only a regional cap-and-trade system, in which individual states do not have the power to impose such limitations on other non-willing states.[38] The MOU addresses leakage only by establishing a framework from which member states can convene to monitor and analyze leakage so as to adequately address the issue at a later time.[39]

Under RGGI, signatory states must commit at least 25% of the proceeds from the allowance auctions toward "consumer benefit and strategic energy purposes."[40] Examples of "consumer benefit and strategic energy purposes" include mitigating ratepayer impacts, promoting innovating carbon abatement technologies, or promote renewable energy technologies.[41] The states have the liberty of

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32. *See id.* at 4-5.

33. *See id.*

34. *See* id. *at* 5.

35. *See* Margaret Hupp, Note, *Congressional Consent Under the Compact Clause: Plugging the Leaks in the Regional Greenhouse Gas Initiative,* 84 TUL. L.R. 469, 479 (2009).

36. *See* Hupp, *supra* note 35, at 479.

37. *See* Hupp, *supra* note 35, at 479; *Potential Emissions Leakage and the Regional Greenhouse Gas Initiative*, REGIONAL GREENHOUSE GAS INITIATIVE, at 3 (Mar. 2008), http://www.rggi.org/docs/il_report_final_3_14_07.pdf [*hereinafter Potential Emissions Leakage*].

38. *See Potential Emissions Leakage*, *supra* note 37, at 3.

39. *See Memorandum of Understanding*, *supra* note 10, at 9-10.

40. *Id.*at 6.

41. *Id.*

choosing the proportion of the funds allocated toward this program, and the benefits that the funds will be used to promote.[42]

Although the program is largely decentralized, RGGI calls for a centralized advisory committee called the Regional Organization (RO).[43] The RO is a collective entity consisting of selected representatives from each signatory state.[44] The organization's basic function is to act as a deliberative body, coordinating the creation of model rules and acting in an advisory capacity as how RGGI should be administered.[45] Additionally, the RO compiles emissions data for various states and assists them in reviewing various offset applications.[46] The RO, although it appears to be a centralized agency, explicitly lacks the powers to enforce the program's provisions.[47] According to the RO's corporate bylaws, the "exclusive purposes for which the corporation is formed are to provide technical and scientific advisory services to Signatory States."[48]

The MOU does not create a binding legal agreement; rather, it is a statement of commitment from the governors of member states.[49] Each state retains the ability to withdraw from the agreement upon 30 days' written notice.[50] Therefore, the signatory states are not constrained from unilaterally altering their state's legislative scheme without approval from the program.[51] Importantly, if a state does withdraw from RGGI, the carbon caps established by the agreement must be reconfigured to avoid jeopardizing the reduction goals of the program.[52]

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42. *See id.*

43. *See id.* at 7-8.

44. *See Memorandum of Understanding*, *supra* note 10, at 7-8.

45. *See id.*

46. *See id.*

47. *See id.*

48. REGIONAL GREENHOUSE GAS INITIATIVE Inc., BY-LAWS, 1 (Dec. 12, 2007), http://www.rggi.org/docs/rggi_bylaws_12_12_07.pdf [hereinafter *RGGI By-laws*].

49. *See* Hupp, *supra* note 35, at 478; Smith, *supra* note 12, at 404.

50. *See Memorandum of Understanding*, *supra* note 10, at 9.

51. *See id.* at 9.

52. *See* id.

b. Implementation of RGGI by Various States

Despite RGGI's mandate that at least 25% of the funds generated go toward consumer benefit programs, many states via statute or regulation have devoted 100% of their RGGI proceeds.[53] Massachusetts allocates all of its monies into the RGGI Auction Trust Fund, which can only be used for specified purposes.[54] The specified purposes include 1) reimbursing municipalities for property taxes lost as a result of RGGI implementation; 2) funding green communities;[55] 3) promoting energy efficiency in non-green communities; or 4) reimbursing the state for the costs of RGGI implementation.[56] The New York State Energy Research and Development Authority (NYSERDA) regulations create an Energy Efficiency and Clean Energy Technology Account to prevent 100% of the auction proceeds from comingling with other administrative funds.[57] The Account designates funds to be used to establish energy

53. *See e.g.* MASS. GEN. Laws. ch. 21A § 22 (2008); N.H. REV. STAT. ANN. § 125-O:23 (2008); N.J. STAT. ANN. § 26:2C-50 (West 2008); N.Y. COMP. CODES R. & REG. tit. 21, §507 (2008).

54. *See* MASS. GEN. LAWS. Ch. 21A § 22 (2008).

55. A green community is one where a municipality employs a variety of energy efficiency and renewable energy strategies in an attempt to bring about zero net energy buildings. *About the Green Communities Division*, ENERGY AND ENVIRONMENTAL AFFAIRS, http://www.mass.gov/?pageID=eoeeaterminal&L=3&L0=Home&L1=Energy%2c+Utilities+%26+Clean+Technologies&L2=Green+Communities&sid=Eoeea&b=terminalcontent&f=doer_green_communities_gc-about&csid=Eoeea (last visited Sept. 28, 2011). Zero net energy is defined as "optimally efficient, and over the course of a year, generates energy onsite, using clean renewable resources, in a quantity equal to or greater than the total amount of energy consumed onsite." *Zero Net Energy Buildings*, ENERGY AND ENVTL AFFAIRS, http://www.mass.gov/?pageID=eoeeasubtopic&L=4&L0=Home&L1=Energy%2c+Utilities+%26+Clean+Technologies&L2=Energy+Efficiency&L3=Zero+Net+Energy+Buildings+%28ZNEB%29&sid=Eoeea (last visited Sept. 28, 2011).

56. *See* MASS. GEN. LAWS. Ch. 21A § 22 (2008).

57. N.Y. COMP. CODES R. & REG. tit. 21, §507.4 (2008). New York explicitly designates what portion of auction proceeds are placed into this account; however, the regulation's language does not designate any other destination for auction proceeds other than the "Energy Efficiency and Clean Energy Technology Account. *Id.* This implies that New York apportions all funds derived from the RGGI auctions for the limited uses outlined in section 507.4.

efficiency, promote renewable technologies, and develop state of the art emissions abatement technologies.[58]

New Hampshire's statute similarly appropriates all auction funds into a greenhouse gas emissions reduction fund, and is much more instructive as to how to appropriate the funds, suggesting improved weatherization to promote thermal and electrical efficiency and the development of useful industrial control systems.[59] Ultimately, if the administrator of the fund finds significant monies unencumbered by designated projects, the administrator "*shall* refund such unencumbered dollars to ratepayers in a timely manner."[60] New Jersey, like New Hampshire, allocated all funds produced by the allowance auctions to the Global Warming Solutions Fund.[61] The New Jersey scheme detailed how the monies are apportioned: 60% of the funds are designated for end use energy efficiency, renewable energy applications, and innovating abatement technologies; 20% for support programs for low-income residences, especially to reduce the effects of the program; 10% for energy efficiency and conservation at the municipal level; and the final 10% for natural resource redevelopment and conservation.[62]

Nowhere in New York's, New Jersey's, or New Hampshire's statutory schemes are calls for these monies to patch holes in a state's deficit, nor do they direct that the funds shall be placed in a general fund to be used at the lawmakers' discretion.[63] All three states appropriate the monies into separate accounts, not to be comingled with other monies at either the legislative or the regulatory level.[64] Yet despite these implementation statutes and RGGI's general mandate to isolate 25% of the proceeds for consumer benefits and energy efficiency, states have raided the RGGI funds to cover budget deficits.[65] New Hampshire and New Jersey have requisitioned the

58. *See id.*

59. N.H. REV. STAT. ANN. § 125-O:23 (2008).

60. *Id.* (emphasis added).

61. N.J. STAT. ANN. § 26:2C-50 (West 2008).

62. *Id.* § 26:2C-51 (West 2008).

63. *See* N.H. REV. STAT. ANN. § 125-O:23 (2008); N.J. STAT. ANN. § 26:2C-50 (West 2008); N.Y. COMP. CODES R. & REG. tit. 21, §507.4 (2008).

64. *See* N.H. REV. STAT. ANN. § 125-O:23 (2008); N.J. STAT. ANN. § 26:2C-50 (West 2008); N.Y. COMP. CODES R. & REG. tit. 21, §507.4 (2008).

65. *See* Peters, *supra* note 15; Sanders, *supra* note 15.

entirety of their RGGI funds, $3.1 million and $65 million respectively.[66] New York redirected $90 million dollars of its total Energy Efficiency and Clean Energy Technology Account, roughly half of the Account's total contents.[67]

The collective actions of New York, New Hampshire, and New Jersey create concerns in the environmental community, which fears that RGGI's underlying purpose will be undermined by the a precedent that state legislatures may siphon these funds whenever convenient.[68] States' decisions to redirect the RGGI funds toward budgetary remediation fuel RGGI's opposition, which characterizes the program as an additional tax on energy producers.[69] By placing the capital generated by the allowance auctions into a general fund to be used without restriction, RGGI's overall goal of emissions reduction is tainted by a secondary motive of generating state revenue similar to a tax.[70]

Such classifications endanger RGGI, especially in states like New Hampshire and New Jersey, where recent elections placed anti-RGGI Republicans in seats of power in legislative and executive offices.[71] In February 2011, the New Hampshire House of Representatives issued a veto-proof supermajority to repeal the RGGI program, citing RGGI as a tax ultimately burdening ratepayers.[72] Governor John Lynch ultimately vetoed the bill, but did not kill the debate as House Republicans quickly began working on an improved bill.[73] The New

66. *See* Peters, *supra* note 15; THE ENVIRONMENTAL LEADER, *supra* note 15.

67. *See* THE ENVIRONMENTAL LEADER, *supra* note 15. It should be noted that New York technically has not gone against the RGGI provisions as stipulated in the Memorandum of Understanding. *See Memorandum of Understanding*, *supra* note 10, at 6; MAINE PUBLIC BROADCASTING NETWORK, *supra* note 15.

68. *See* THE ENVIRONMENTAL LEADER, *supra* note 15; Sanders, *supra* note 15.

69. *See* Peters, *supra* note 15; MAINE PUBLIC BROADCASTING NETWORK, *supra* note 15.

70. *See* MAINE PUBLIC BROADCASTING NETWORK, *supra* note 15; Peters, *supra* note 15; Sanders, *supra* note 15 (quoting a WALL ST. J. editorial criticizing RGGI).

71. *See* Kevin Landrigan, *Future Bleak for NH's Part in Cap-in-Trade*, NASHUA TELEGRAPH (Feb 24, 2011), *available* http://www.nashuatelegraph.com/newsstatenewengland/910067-227/future-bleak-for-nhs-part-in-cap-trade.html; Navarro, *supra* note 14.

72. *See* Landrigan, *supra note* 71; Navarro, *supra* note 14.

73. *See New Hampshire Governor Vetoes RGGI Withdrawal Bill*, *supra* note 14.

Hampshire Senate mitigated concerns over the program's fate by upholding the veto and deciding to remain in RGGI, choosing instead to alter it slightly by including a backdoor withdrawal provision.[74] The Senate Bill included a provision allowing the state to withdraw from RGGI upon the withdrawal of another state that produced 10% or more of the electricity within the program.[75]

New Hampshire's backdoor provision, although vetoed, creates considerable questions as to the program's long-term survival, especially in light of recent developments in New Jersey. There, Governor Chris Christie unilaterally chose to withdraw New Jersey from RGGI.[76] Governor Christie, in justifying the state's withdrawal, stated "RGGI does nothing more than tax electricity, tax our citizens, tax our businesses, with no discernible or measurable impact upon our environment."[77] Although the New Jersey Senate ultimately drafted a bill to revive RGGI legislation, the narrow majority was insufficient to withstand Christie's veto.[78] It is of particular note that since New Jersey currently produces over 10% of electricity within the RGGI system, its withdrawal would clear the way for New Hampshire to use its backdoor provision and follow suit.[79]

As written, the RGGI MOU is a non-binding commitment.[80] There is no mechanism in place to grant a centralized agency the ability to seek compliance with the agreement's terms.[81] A state is therefore free to appropriate RGGI funds as it sees fit, regardless of whether it

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74. *See* Nathanael Baker, *New Hampshire Senate Votes to Stay in RGGI*, ENERGY BOOM (May 12, 2011), http://www.energyboom.com/policy/new-hampshire-senate-votes-stay-rggi.

75. *Id.*

76. Navarro, *supra* note 14.

77. *Id.*

78. *See* Terry Hurlbut, *RGGI Revival Passes NJ Assembly*, CONSERVATIVE NEWS AND VIEWS (June 30, 2011), http://www.conservativenewsandviews.com/2011/06/30/news/rggi-revival-passes-nj-assembly/; *see also* Josh Lederman, *Dems Try to Stop NJ Anti-Pollution Pact Pullout*, BLOOMBERG BUSINESSWEEK (June 14, 2011), http://www.businessweek.com/ap/financialnews/D9NRMFA00.htm.

79. *See Memorandum of Understanding*, *supra* note 10, at 3.

80. *See* Smith, *supra* note 12, at 404.

81. *See RGGI By-laws* , *supra* note 48, at 2 (stating that the purpose of the RO is to provide technical and scientific advisory services).

conforms to the 25% consumer benefit provision.[82] Furthermore, a state's ability to withdraw from RGGI makes each state's individual burden dependent upon on other members remaining in the agreement.[83] New Hampshire's and New Jersey's actions illustrate the program's precarious position. Their redirection of funds fueled RGGI's characterization as a tax, ultimately leading to strong support to repeal it.[84] New Jersey's withdrawal from RGGI, when combined with the New Hampshire House and Senate's apparent agreement to legislate for a contingent withdrawal option, would ultimately force other signatory states to alter their current carbon caps to accommodate these departures.[85] Despite this dependence, neither the signatory states as individuals, nor RGGI as a collective entity have the ability to seek judicial recourse for these actions.[86]

III. THE COMPACT CLAUSE

The Compact Clause of the Constitution states: "No State shall, without the Consent of Congress . . . enter into any agreement or Compact with any State . . . ."[87] The ultimate concern presented by interstate agreements was the fear of "balkanization" of regions in the United States.[88] If states form blocs within the United States, the power of the federal government to implement uniform laws and regulate commerce would be drastically hindered.[89] Although the

82. *See* Robin Kundis Craig, *Constitutional Contours for the Design and Implementation of Multistate Renewable Energy Programs and Projects*, 81 U. COLO. L. REV. 771, 821 (2010) (elaborating that signatory states retain the sovereign authority to alter RGGI legislation without approval from other states).

83. *See Memorandum of Understanding*, *supra* note 10, at 9 (stipulating that upon withdrawal of a signatory states need to execute adjustments in usage units).

84. *See* Landrigan, *supra* note 71; *see also Memorandum of Understanding*, *supra* note 10, at 9.

85. *See Memorandum of Understanding*, *supra* note 10, at 9.

86. *See* Craig, *supra* note 82, at 821 (discussing the states individual power to alter RGGI legislation unilaterally); *RGGI By-laws*, *supra* note 48, at 1-2 (limiting the power of the RO to seek compliance with the RGGI).

87. U.S. CONST. art. I, § 10, cl. 3.

88. *See* Ne. Bancorp, Inc. v. Bd of Fed. Governors of the Fed. Reserve Sys., 472 U.S. 159, 174 (1985).

89. *See id.* at 174 (stating the Framers' fears over regional confederations controlling economic actions in the early union).

language of the clause appears to apply to any and all instances in which two or more states might enter into an agreement, the Supreme Court has interpreted it to only apply to certain limited instances.[90] In *Virginia v. Tennessee*, Justice Field articulated the prevailing analysis when an interstate compact requires the consent of Congress.[91] An agreement demands congressional approval when it tends to "increase of political power in the states, which may encroach upon or interfere with the just supremacy of the United States."[92]

The Court expanded this doctrine in *United States Steel Corporation v. Multistate Tax Commission*.[93] Justice Powell, writing for the majority, articulated three factors to consider when analyzing these agreements: 1) whether a third party organization was formed to oversee and enforce compliance between the states, 2) whether the agreement expands upon the normal political powers enjoyed by states, and 3) whether the state retains the ability to modify or repeal legislation enacting the agreement's terms.[94] The second factor would include instances when a state, through agreement, attempts to

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90. *See* Virginia v. Tennessee, 148 U.S. 503, 519 (1893) (limiting the scope of the Compact Clause).

91. *See* Virginia v. Tennessee, 148 U.S. at 519; *see also* U.S. Steel Corp. v. Multistate Tax Comm'n, 434 U.S. 452, 460-61 (1976).

92. Virginia v. Tennessee, 148 U.S. at 519. There is no magic as to what qualifies as an agreement or compact, the court in *Virginia* stated that the language was left particularly broad to cover both formal and informal agreements. *Id.* at 517-518. Therefore, the clause can be triggered so long as there is some covenant to engage in a united effort, regardless of whether it is legally binding between the parties. *See id.* at 517-18. The determination often centers on whether the compact potentially extends this paper, and not on whether there has been an actual expansion on the state's sovereign powers. *U.S. Steel Corp. v. Multistate Tax Comm'n*, 434 U.S. at 472.

93. 434 U.S. at 472-73.

94. *See id.* at 472-73. All agreements that create third party organizations do not necessarily create Compact Clause issues. *See id.* at 472-73. In *U.S. Steel*, the agreement in question created an independent organization whose purpose was to advise on the proper implementation for taxation of multistate business entities. *Id.* at 456. The agency had no enforcement powers, and only recommended amendments to laws thereby requiring the state to implement those recommendations. *Id.* The court found this provision did not go against the Multistate Tax Commission in requiring consent. *Id.* at 472-73.

reach out beyond its geographic borders and exert its powers on other sovereign states.[95] This can include acting in a capacity reserved to Congress under the Constitution through either the Supremacy Clause or the Commerce Clause.[96]

As a measure of safety, the common practice is to seek Congressional consent, because once an agreement is approved it becomes federal law.[97] There are certain benefits that come with an interstate compact becoming federal law. Once Congress consents to an agreement it acts as if Congress was the force legislating on the issue.[98] Therefore, an agreement which might be found to unduly burden interstate commerce so as to threaten invalidation under the Dormant Commerce Clause could be acceptable, as Congress is constitutionally vested with the ability to regulate interstate commerce.[99] Secondly, as the interstate compact would be transformed into federal law upon approval, there would be no Supremacy Clause issue.[100] Along with curing some of the constitutional defects through consent, an added benefit is the indication that Congress did not intend to exert exclusive control in a certain area.[101] In *DeVeau v. Braistad*, the Court stated that adoption of an interstate compact could demonstrate for non-compact states that the federal intent was not to exert exclusive control over a certain

95. *See* U.S. Steel Corp. v. Multistate Tax Comm'n, 434 U.S. at 472-73 (outlining factors indicating whether Congressional Consent is needed).

96. *See id.* at 473-76 (determining whether the Multistate Tax Commission encroaches on issues of federal supremacy of the Commerce Clause). The most pressing question is usually whether the state could within its own sovereign powers take the actions under the compact. *See id.* at 472-73.

97. *See* Cuyler v. Adams, 449 U.S. 433, 440 (1981) (finding federal question jurisdiction due to Congressional Consent making the compact federal law).

98. *See* Craig, *supra* note 82, at 827-28 (discussing the various benefits to obtaining Congressional Consent).

99. *See id.* at 828-29 (elaborating on the benefits of achieving consent under the commerce clause).

100. *See Cuyler*, 449 U.S. at 440 (stating that approval transforms the compact into federal law); U.S. CONST. art. VI, cl. 2 (restricting the state's ability to act in contradiction of the federal government in acting within lawful authority).

101. *See* DeVeau v. Braistad, 363 U.S. 144, 152-54 (1960); *see also* Craig, *supra* note 82, at 828.

body, thereby allowing other states to engage in similar accords without fear of the Supremacy Clause.[102]

Congress does not need to give express consent. In *Virginia v. Tennessee*, the court reviewed a long-standing agreement that would adjust and solidify the border between the two states.[103] Although Congress had not explicitly deliberated on the agreement, the court found that Congress respected the boundary line when drawing electoral districts, thereby providing implicit consent.[104] Additionally, consent could be given in advance, such as when Congress passes legislation to empower a state to enter such compacts.[105] For example, in *Cuyler v. Adams* an agreement between Pennsylvania and New Jersey pertaining to the extradition of prisoners was challenged as an invalid interstate compact.[106] The Court upheld the agreement on the ground that before the states contracted, Congress explicitly sanctioned the agreement under the Crime Control Consent Act.[107] The pertinent statute granted blanket approval of "any two or more States . . . in the prevention of crime and in the enforcement of their respective criminal laws and policies . . . ."[108] So long as Congress consents through one of the above-mentioned mechanisms, the interstate compact is constitutional under the Compact Clause.[109]

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102. *See DeVeau*, 363 U.S. at 152-54. Additionally if federal approval is given, and the agreements provisions become federal law, a signatory state would be unable to pass a law contradictory to those provisions on the grounds that any conflicting state legislation would be preempted under the Supremacy Clause. *See* Mineo v. Port Auth. of New York & New Jersey, 779 F.2d 939, 948 (3d Cir. 1985).

103. *See* Virginia v. Tennessee, 148 U.S. 503, 524-25 (1893) (finding implicit congressional consent).

104. *See id.*

105. *See Cuyler*, 449 U.S. at 441.

106. *Id.* at 436-38 (reciting the facts of *Cuyler*).

107. *See id.* at 441-42.

108. *Id.* at 441.

109. *See* U.S. CONST. art. I, § 10, cl. 3 (requiring consent of Congress); *Cuyler*, 449 U.S. at 441-42 (holding Congress granted consent through encouraging states to pass like agreements); *Virginia v. Tennessee*, 148 U.S. at 524-25 (holding Congress granted implied approval through acquiescence of the agreement).

IV. THE COMMERCE CLAUSE AND THE SUPREMACY CLAUSE

Of particular importance in the discussion of RGGI's constitutional issues under the Compact Clause are the Constitution's Commerce Clause[110] and the Supremacy Clause.[111] Both clauses involve instances in which Congress may act and when the state cannot. Because the test for needing congressional consent falls on the agreement expanding the normal boundaries of state power, a brief analysis of these articles in light of energy generation is relevant.

a. The Commerce Clause

The Congress of the United States has the ability "to regulate commerce...among the several states."[112] The modern trend has been to interpret this power broadly.[113] As recently as 1995, the Supreme Court has upheld the Congress' ability to regulate a wide variety of activities, including the channels of interstate commerce, the instrumentalities of interstate commerce, people and things in interstate commerce, as well as those activities that have a substantial affect on interstate commerce.[114] Courts view energy as archetypal articles in interstate commerce,[115] thus, it is Congress' prerogative to regulate energy as an article of commerce.[116]

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110. U.S. CONST. art. I, § 8, cl. 3.

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

112. U.S. CONST. art I, § 8, cl. 3.

113. *See* Gonzales v. Raich, 545 U.S. 1, 32-33 (2005) (upholding Congress' ban on marijuana grown and used solely intrastate due to the potential effect on the national market). This case upholds the broad Commerce Clause powers established in *Wickard v. Filburn*, which found allowed Congressional legislation over agricultural actions grown and sold entirely intrastate as such activities might discourage national regulatory efforts of goods sold interstate. 317 U.S. 111, 118-19, 127-28 (1942).

114. *See* United States v. Lopez, 514 U.S. 549, 558-59 (1995) (holding Congress did not have a rational basis to ban firearms in local schools under the Commerce Clause). Although *Lopez* reigned back Congress' extensive powers under the Commerce Clause, *Gonzales* has injected a level of uncertainty into when an activity creates a "substantial effect". *See Lopez*, 514 U.S. at 567-68; *Gonzales*, 545 U.S. at 25-26.

115. *See* FERC v. Mississippi, 456 U.S. 742, 757 (1982).

116. *See Lopez*, 514 U.S. at 553-54; *FERC*, 456 U.S. at 757.

A corollary doctrine to Congress' ability to regulate interstate commerce is the Dormant Commerce Clause's prohibition of states to burden interstate commerce.[117] At the heart of this doctrine is the need to prohibit economic protectionism states may exert to favor in-state businesses.[118] A state can violate the Dormant Commerce Clause in two ways. The first is by discriminating against the importation or exportation of an article in commerce based upon a geographical distinction.[119] When a state statute facially discriminates based on the point of origin of a good, the reviewing court applies strict scrutiny and will consider it per se invalid under the Dormant Commerce Clause.[120] The court can also apply this strict scrutiny standard when a state restricts a good from leaving that state.[121]

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117. *See* City of Philadelphia. v. New Jersey, 437 U.S. 617, 623 (1978).

118. *See* New Energy Co. of Ind. v. Limbach, 486 U.S. 269, 273-74 (1988).

119. *See* City of Philadelphia v. New Jersey, 437 U.S. at 624-25. An important distinction needs to be made when there is economic favoritism being exerted by the state when the state is acting in the capacity of a market participant. Hughes v. Alexandria Scrap Corp., 426 U.S. 794, 808-10 (1976). When the state creates the market for a good, the Supreme Court stated that the state is free to demonstrate favoritism for goods produced in that state. *See id.* at 809-10.

120. *See* City of Philadelphia v. New Jersey, 437 U.S. at 624. A state which grants tax benefits for in-state producers of an article, only to extend such benefits to out-of-state producers upon that other state creating reciprocal tax benefits has been deemed to be facially discriminatory. *New Energy*, 486 U.S. at 274. In *New Energy* the Supreme Court found that an Ohio statute granting a tax benefit only for intrastate produced ethanol and ethanol produced in states granting ethanol producers similar benefits was facially discriminatory. *Id.* Under strict scrutiny, the court declined finding that there was a necessary purpose to survive the per se invalidity, as the primary purpose was revenue generation and not environmental protection. *Id.* at 278-80. The characteristic of the program as a tax was a fatal determination by the court. *Id.* at 275.

121. *See* New England Power Co. v. New Hampshire, 455 U.S. 331, 339 (1982). *New England Power* involved New Hampshire allowing the public utilities commission to restrict the flow of electricity of power generated in New Hampshire from leaving the state, in order to benefit the individuals citizens to the harm of out-of-state citizens. *Id.* at 339. The court held that such activities were the precise protectionist initiatives prohibited by the Dormant Commerce Clause. *See id.* at 339.

The second way a state can violate the doctrine is through enacting legislation that creates an undue burden on interstate commerce.[122] This standard is applied when the statute in question which is reserved for laws "directed to legitimate local concerns, with effects upon interstate commerce that are only incidental."[123] When this standard is triggered, courts are much more lenient and implement the Pike Balancing Test to determine whether the benefits and interests of the state in enacting the legislation outweigh the burden it poses to interstate commerce.[124]

Using the Pike Balancing Test, a court will uphold a nondiscriminatory statute unless the "burden imposed on [interstate commerce] is clearly excessive in relation to the putative local benefits."[125] The first step is to identify the incidental burden on interstate commerce, which requires a showing that there is a heavier

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122. *See, e.g.,* Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 471 (1981); *Alexandria Scrap*, 426 U.S. at 804.

123. United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth., 550 U.S. 330, 346 (2007) (quoting City of Philadelphia v. New Jersey, 437 U.S. at 624); *see also Clover Leaf Creamery Co.*, 449 U.S. at 471.

124. *See, e.g., United Haulers*, 550 U.S. at 346; *Clover Leaf Creamery Co.*, 449 U.S. at 471; *Alexandria Scrap*, 426 U.S. at 804. Those interests usually in the purview of the states are the "health, safety, and welfare of citizens" as well as promotion of environmental health. *See United Haulers*, 550 U.S. at 342, 346-47. One interest that is not tolerated is the protection of a dying industry. *See* West Lynn Creamery, Inc. v. Healy, 512 U.S. 186, 197 (1994). There the statute in question levied a tax on all dairy dealers to pay into a "Massachusetts Dairy Equalization Fund." *Id.* at 190-91. This fund was then paid out to intrastate dairy farms for the purpose of subsidizing their production. *Id.* at 205. Although the two actions individually would be sanctioned under the Commerce Clause, the combination of the actions was deemed to be an impermissible burden on interstate commerce. *Id.* at 199.

125. *United Haulers*, 550 U.S. at 346 (*quoting Pike v. Bruce Church, Inc.,* 397 U.S. 137, 142 (1970)). In *United Haulers*, the Supreme Court was faced with a local initiative, which required all trash in that locality to be brought to a special processing facility, and pay fees directly to the town for the use of that facility. *Id.* at 336-37. The Court held that the statute in question passed the Pike Balancing Test because the "rather abstract harm" that would exist. *Id.* at 346. The Court found that the benefits the state's interests exceeded any harm to interstate commerce because the initiative had the effect of generating necessary revenues and promoted both environmental health concerns. *Id.* at 346-47.

burden on out of state interests than in state interests.[126] The second step is to ascertain what the state's interest is.[127] The Supreme Court holds that the conservation of natural resources and reduction of solid waste were legitimate state interests.[128] The Pike Balancing Test does not outlaw all unequal burdens on out of state interests; it only prohibits burdens that are clearly excessive when compared with the substantial local interest of the state.[129]

b. Federal Preemption under the Supremacy Clause

The Supremacy Clause of the Constitution states: "the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land."[130] The concept of federal preemption prevents a state from enacting legislation contradictory to legitimate federal laws.[131] There are three types of preemption: express preemption, field preemption, and conflict preemption.[132] Field preemption occurs when Congress has enacted a scheme that is "so pervasive as to make reasonable the inference that Congress left no room to supplement it."[133] This can occur where the federal interest is so dominant that courts assume that state enforcement will be

126. *See Clover Leaf Creamery Co.*, 449 U.S. at 472-73. *Clover Leaf* centered on a Minnesota law, which required all suppliers in the state to sell only milk contained in paperboard cartons and not in non-returnable plastic containers. *Id.* at 458-59. The Supreme Court upheld the law stating that the burdens imposed by the statute effected in- and out-of-state interests equally, and any minor burden was insufficient to override the state's interest in conserving natural resources and promoting health. *Id.* at 472-74.

127. *See id.* at 473.

128. *See id.*

129. *See id.* at 473-74.

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

131. *See id.*

132. Express preemption involves Congress explicitly stating that a certain statute overrides all state initiatives of a similar nature. *See* Pac. Gas & Elec. Co. v. State Energy Res. Conserv. & Dev. Comm'n, 461 U.S. 190, 203-04 (1983); Int'l Paper Co. v. Ouellette, 479 U.S. 481, 491-92 (1987). Conflict preemption applies when there has not been an express preemption but the state law either is contradictory to the federal law or undermines the federal regime. *See Int'l Paper*, 479 U.S. at 492.

133. *See Pac. Gas & Elec. Co.*, 461 U.S. at 204 (quoting Fid. Fed. Sav. & Loan Assn'n v. de la Cuesta, 102 S. Ct. 3014, 3022 (1982)).

precluded on that same subject.[134] However, in analyzing whether a state law is susceptible under field preemption, courts will take the claimed purpose of the state action at face value.[135] Although courts employ a presumption of constitutionality when considering preemption of a state law, when a state law enters into a field where federal authority is exclusive, the presumption favors preemption.[136]

Congress demonstrated its intent to exercise exclusive authority in the realm of pricing of power in interstate commerce through the Federal Power Act of 1935 (FPA) and the Natural Gas Act of 1938.[137] The Federal Energy Regulatory Commission (FERC) was established to implement the Federal Power Act's mandate of regulating "public utilities for the benefit of consumers" by establishing rates for the interstate transmission and sale of electricity.[138] As the national interest in energy purveyance is the focal interest of FERC, the FPA only has jurisdiction when the electricity is or has the potential to be distributed in interstate commerce.[139] This jurisdiction therefore is particularly broad, as it would govern sales of power from a generator to an in-state retailer if the power is to be subsequently consumed in another state.[140]

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134. *See id.*

135. *See id.* at 216 (declining the investigate into the true motive of California in placing a moratorium in the creation of nuclear power plants). *Pac. Gas & Elec. Co.*involved interpreting whether a California moratorium on the production of nuclear power facilities until better disposal technology was created and adopted was federally preempted. *Id.* at 197-200. The court held that although the Atomic Energy Act demonstrates Congress' exclusive intent to regulate the safety involved in nuclear energy production, the California moratorium was not involved in the field of safety but rather was motivated by economic considerations and did not enter the realm of Congress' exclusive authority. *Id.* at 210-16.

136. *See id.* at 203-04.

137. Fed. Power Comm'n v. S. Cal. Edison Co., 376 U.S. 205, 212-14 (1964)

138. Pub. Util. Dist. No. 1. of Snohomish Cnty Wash. v. FERC., 471 F.3d 1053, 1057-58 (9th Cir. 2006). This does not apply to the setting of rates which consumers are charged by local utilities. *See id.* at 1058. FERC therefore acts indirectly to protect consumers by determining the fair rates of electricity sold between generators and retailers. *See id.*

139. *See* Ferrey, *supra* note 25, at 890-91.

140. *See id.* at 892.

The FPA's regulatory scheme works through FERC's interaction with private contracts between purveyors and retailers of energy.[141] The utility company sets the rates, which under Title 16 section 824d must be "just and reasonable."[142] FERC investigates these rates and can require modification if they do not conform to the statutory standard that the utility company must then file the new rate with FERC.[143] Once FERC approves a rate, a state cannot directly or indirectly alter those rates through state regulation.[144] Therefore, states cannot interfere with FERC-approved rates as a matter of preemption.[145] Courts have upheld this doctrine when states attempt to promote higher prices for renewable energy producers, thereby prohibiting states from interfering with FERC-approved pricing schemes regardless of their interests.[146]

V. DOES RGGI REQUIRE CONGRESSIONAL CONSENT?

As it stands without congressional consent, RGGI may be on shaky constitutional ground. The agreement does not seem to have the classic indices of an interstate compact that would require congressional consent as outlined in *U.S. Steel*. Nevertheless, RGGI may contain elements of facial discrimination and undue burdens on interstate commerce that raise serious issue under the Dormant Commerce Clause. RGGI also creates issues under the Supremacy Clause as it may intrude on FERC's exclusive authority to determine the "just and reasonable" electricity rates.[147]

RGGI is non-binding and as such is atypical of traditional contracts or agreements.[148] However, as the court stated in *Virginia v. Tennessee*, an agreement need not be formal in order to fall under the gaze of the Compact Clause.[149] The dispositive inquiry under the

141. *See Snohomish County*, 471 F.3d at 1058.
142. *See id.*
143. *See id.*
144. *See* Entergy La., Inc. v. La. Pub. Ser. Comm'n, 539 U.S. 39, 47 (2003).
145. *See id.*
146. *See* Ferrey, *supra* note 25, at 895 (citing Indep. Energy Producers Ass'n v. Cal. Pub. Utils. Comm'n, 36 F.3d 848 (9th Cir. 1994)).
147. Ferrey, *supra* note 25, at 890.
148. *See* Smith, *supra* note 12, at 404.
149. Virginia v. Tennessee, 148 U.S. 503, 517-18 (1893).

Compact Clause concerns not the form of the agreement, but rather the effect it will have on the federal sphere.[150] Although RGGI purports to be non-binding, it is still subject to the Compact Clause because it presents a unified agreement among several states to establish a complementary system for addressing greenhouse gases.[151] Therefore, RGGI's non-binding nature will not save it from constitutional review.[152] The central issue is whether RGGI "increase[s] . . . political power in the states, which may encroach upon or interfere with the just supremacy of the United States."[153]

U.S. Steel provides a practical guide for testing whether an agreement among states requires Congressional consent.[154] The test uses three indicators to determine when states increase their political power so as to invade the federal sphere.[155] RGGI is analogous to the Multistate Tax Commission in that it creates a third party organization, but the RO would not hurt the agreement's constitutionality.[156] Similar to the Multistate Tax Commission, the RO has only advisory and monitoring capabilities.[157] Its sole purposes are to aid states in enacting legislation that follows the RGGI guidelines and to provide suggestions for addressing future issues like leakage.[158] What is missing from the RO's capabilities is the power to enforce compliance or seek judicial recourse from the

150. *See* U.S. Steel Corp. v. Multistate Tax Comm'n, 434 U.S. 452, 472 (1976).

151. *See* Virginia v. Tennessee, 148 U.S. at 517-18 (observing the comprehensive definition of agreement and compact under the Constitution to cover such agreements). Although it could be argued that RGGI is more like Bancorp, where the alleged agreement was only passage of reciprocal statutes, RGGI is different in that in addition to passing reciprocal statutes the states are uniting to address a specific purpose, and creating a market for the sale of allowances to the express exclusion of non-participating states. *See* Ne. Bancorp, Inc. v. Bd of Fed. Governors of the Fed. Reserve Sys., 472 U.S. 159, 175-76 (1985). Therefore there is a mutuality of assent present in RGGI that was missing from the Bancorp situation. *See id.*

152. *See* Virginia v. Tennessee, 148 U.S. at 517-18.

153. *See id.* at 519.

154. *See U.S. Steel Corp.*, 434 U.S. at 472-73.

155. *See id.* For a detailed explanation of the three-factor test, *see supra* page 12.

156. *Compare Memorandum of Understanding, supra* note 4, at 7, 9, *with U.S. Steel Corp.*, 434 U.S. at 456.

157. *See RGGI Inc., By-Laws, supra* note 48, at 4.

158. *Id.*

signatory states. This limitation does not support a finding that the states have stepped beyond their normal means and entered into a realm reserved for federal power.[159]

Another influential factor is RGGI's non-binding nature. As it stands, RGGI has no means of seeking compliance, leaving the states free to repeal or modify their statutes.[160] This indicates that signatory states have not extended their political influence to infringe upon the sovereign powers of participants.[161] States maintain their freedom to alter their legislation, and as a corollary preserve their limited powers in not controlling the normal political processes in other RGGI states.[162]

Although the first two factors of *U.S. Steel* do not indicate a constitutional vulnerability in RGGI for failure to obtain congressional consent, the third factor, expansion of the state's political power, does indicate such a weakness. RGGI expands signatory states' power into areas traditionally reserved to Congress. The agreement encourages states to both create potentially facially discriminatory legislation, and at the same time burden interstate commerce. Additionally, RGGI may trespass into an area where Congress has demonstrated intent to exercise exclusive interstate commerce power, thereby triggering concerns under the Supremacy Clause.

SHOULD RGGI BE "SCRAP"-ED? THE APPLICATION OF THE DORMANT COMMERCE CLAUSE

RGGI is meant to increase the costs of power production within a participant's borders in order to create incentives for producers to exercise better carbon emissions controls.[163] However, these increases in production costs ultimately pass onto consumers.[164]

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159. *See U.S. Steel Corp.*, 434 U.S. at, 472-73 (1976); *see also* Virginia v. Tennessee, 148 U.S. 503, 519 (1893).

160. *See Memorandum of Understanding*, *supra* note 10, at 9.

161. *See generally, U.S. Steel Corp.*, 434 U.S. at 472-73.

162. *See Memorandum of Understanding*, *supra* note 10, at 9 (allowing states the freedom to modify or repeal RGGI legislation).

163. *See id.* at 1.

164. *See* Pub. Util. Dist. No. 1. of Snohomish Cnty Wash. v. FERC, 471 F.3d 1053, 1057-58 (9th Cir. 2006) (stating the reason for the FPA is to create an

Electricity consumers affected would not be located solely within the borders of signatory states. Yet, the mitigation benefits and privileges RGGI offers are only geared toward intrastate activities.[165] These provisions create significant concerns under the commerce clause both in terms of facial discrimination and the Pike Balancing Test.

When a statute is facially discriminatory based on the article's point of origin it is considered "per se invalid," and therefore if RGGI's provisions are centered on a point of origin, it will run afoul of the Dormant Commerce Clause.[166] One potential challenge could come from RGGI's limitation on out-of-state offsets. Under RGGI, offsets generated within a participating state enjoy a one-to-one ratio for allowance credits, while out-of-state offsets garner only half the number of allowance credits.[167] Ultimately, the offset provisions in RGGI base the value of offsets on a point of origin determination.[168] The rationale for this distinction likely centers on a desire to reward those activities emitters take in signatory states to benefit the local environment.[169]

This structure creates an incentive for emitters to generate offsets within signatory states at the exclusion of non-signatories.[170] In *City of Philadelphia v. New Jersey*, the Supreme Court recognized a balance between a state attempting to engage in economic protectionism and its legitimate exercise of protecting the health and

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indirect restraint on the allocation of costs on consumers). This is subject to the rate increases imposed on retailers being approved by FERC. *See id.*

165. *See e.g.*, N.H. REV. STAT. ANN. § 125-O:23 (2008) (establishing the programs auction proceeds will be spent on); N.J. STAT. ANN. § 26:2C-51 (West 2008) (allocating allowance auction resources).

166. *See e.g.*, City of Philadelphia v. New Jersey, 437 U.S. 617, 624 (1978) (holding that geographically discriminatory legislation is de facto invalid).

167. *See Memorandum of Understanding*, *supra* note 10, at 4-5.

168. *See id.* (distinguishing between in state offsets and out-of-state offsets).

169. *See id.* at 4-5 (allowing for an exchange of a one ton allowance for offsets reducing carbon dioxide by one ton for in signatory states, and a one allowance to two ton offset exchange outside a signatory state).

170. *See id.* at 4-5 (creating a better benefits for offsets taken within participating states).

safety of its citizens.[171] There, New Jersey prohibited the importation of out-of-state waste for disposal in New Jersey landfills.[172] The Court held that the statute was passed with the intent to conserve the ever-shrinking landfill space for the sole benefit of New Jersey citizens.[173] The offset restrictions demonstrate a similar protectionist motive to incentivize beneficial actions within signatory states' borders to the exclusion of non-signatory states.[174]

However, the particular focus of RGGI's protectionism may save it. Dormant Commerce Clause cases invalidate state actions when they are *economically* protectionist.[175] RGGI's offset provision is geared more toward benefitting the environment of signatory states over that of non-signatories – in other words, it could be argued that RGGI's discrimination is not demonstrably economic.[176] Offsets are not transferable, and can only be redeemed for emission allowances under the RGGI program.[177] This makes offsets different from traditional articles of interstate commerce in that they do not flow through the market in the same way as commercial goods.[178] RGGI does not restrict interstate commerce through geographical discrimination because offset allowances would not be of interest to non-signatory states.[179] Because offsets are arguably not economic instruments, RGGI may merely be supporting a form of environmental, not economic, protectionism.[180]

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171. *See* City of Philadelphia v. New Jersey, 437 U.S. at 624-25 (stating the rationale behind the Dormant Commerce Clause).

172. *See id.* at 628.

173. *See id.*

174. *See Memorandum of Understanding*, *supra* note 10, at 4-5.

175. *See* West Lynn Creamery, Inc. v. Healy, 512 U.S. 186, 192-93 (1994).

176. *See Memorandum of Understanding*, *supra* note 10, at 4-5.

177. *See id.*

178. *See* United States v. Lopez, 514 U.S. 549, 558-59 (1995) (establishing the various means Congress can regulate interstate commerce); *see also* City of Philadelphia v. New Jersey, 437 U.S. at 622-23 (providing framework for definition of articles in interstate commerce).

179. *See* U.S. CONST. art I, §8, cl. 3 (triggering constitutional limits only in instances in which commerce is involved).

180. *See Memorandum of Understanding*, *supra* note 10, at 1-2, 4-5 (establishing the intent to promote environmentally friendly and efficient technologies through the initiative).

What harms this conclusion is the fact that RGGI does in fact offer economic benefits based on activities occurring within signatory states.[181] Although offsets are not themselves articles in commerce, the power generators who inject electricity into interstate commerce are ultimately harmed based on their geographic location.[182] This fact alone does not condemn RGGI as unconstitutional, since such carbon offsets are only available for redemption within signatory states.[183] In *Hughes v. Alexandria Scrap*, Maryland instituted a program where the state would buy discarded automobiles from both in- and out-of-state tow companies.[184] Before accepting the junked car, the state required in-state wreckers to produce an agreement indemnifying the state or wrongdoing; for out–of-state wreckers the requirement was proof of title, a much more onerous burden on the wrecking companies.[185] The Supreme Court upheld the facially discriminatory statute, holding that when states do not act as regulators, but as market participants, they are free to favor activities that benefit themselves at the exclusion of other states.[186] The entire market for exchanging carbon offsets for emissions allowances centers on the participation of RGGI states.[187] Peculiar to this scenario is that signatory states hold a dual role: they act as regulators through imposing requirements for utility companies to purchase allowances, and simultaneously create a market for power generators to exchange offsets for allowance credits.[188] This puts RGGI on a more dubious footing than the challenged statute in *Alexandria*

181. *See Memorandum of Understanding*, *supra* note 10, at 4-5 (devaluing out-of-state offsets).

182. *See id.* (limiting the benefits offered under RGGI based on status of states as participating in RGGI).

183. *See id.* (allowing for the use of offsets to obtain allowance credits).

184. Hughes v. Alexandria Scrap Corp., 426 U.S. 794, 800-01 (1976).

185. *Id.*

186. *See id.* at 808-10 (holding Maryland did not facially discriminate due to its status as a market participant).

187. *See Memorandum of Understanding*, *supra* note 10, at 4-5.

188. *Model Rules*, *supra* note 25, at 23 (implementing sanctions for failure to have sufficient allowances).

Scrap, and its double identity may bring the strict scrutiny of the facial discrimination analysis to bear on its offset provisions.[189]

The program is also vulnerable because it may increase the price of energy for out-of-state consumers. RGGI requires emitters to purchase greenhouse gas emissions credits, adding an extra cost to electricity production and potentially increasing rates.[190] Consumers in both participating and non-participating states will feel this increase.[191] The difference between the rate increases felt by in- state and out-of-state consumers, however, lies in RGGI's consumer benefit scheme, which states can use to "directly mitigate electricity ratepayer impacts."[192] New Hampshire implemented its consumer benefits by funding weatherization initiatives and subsidies for low-income energy consumers.[193] Along with funding similar efficiency initiatives, New Jersey refunded some of its proceeds directly back to consumers to defray rate increases.[194] In neither instance were affected out-of-state consumers reimbursed for the increase in electricity prices.[195]

In *New England Power*, a statute intended to benefit in-state citizens at the expense of out-of-state consumers was deemed per se illegal.[196] New Hampshire restricted the exportation of power generated within the state, which the Supreme Court found to be the exact type of protectionist measure the Constitution intended to

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189. *Compare Model Rules*, *supra* note 25, at 23 (implementing sanctions for failure to have sufficient allowances) *with Alexandria Scrap*, 426 U.S. at 809-10.

190. *See* N.H. REV. STAT. ANN. § 125-O:23 (2008); *see also Memorandum of Understanding*, *supra* note 10, at 6. Although RGGI predicts that certain "ratepayer impacts" will gradually present themselves, average users are usually federal shielded from excessive increases through the Federal Power Act's oversight of contracts between power generators and wholesalers. *See* Pub. Util. Dist. No. 1. of Snohomish Cnty Wash. v. FERC, 471 F.3d 1053, 1058 (9th Cir. 2006); *Memorandum of Understanding*, *supra* note 10, at 4-5.

191. *See* Ferrey, *supra* note 25, at 892.

192. *Memorandum of Understanding*, *supra* note 10, at 4-5.

193. *See* N.H. REV. STAT. ANN. § 125-O:23 (2008).

194. *See* N.J. STAT. ANN. § 26:2C-51 (West 2008).

195. *See* N.H. REV. STAT. ANN. § 125-O:23 (2008); N.J. STAT. ANN. § 26:2C-51 (West 2008).

196. *See* New England Power Co. v. New Hampshire, 455 U.S. 331, 339-40 (1982).

prohibit.[197] As implemented, RGGI envisions increases to electricity costs for both in- and out-of-state consumers, while its benefit programs reimburse only in-state consumers.[198] This appears to be similar to the scheme of protectionism that the Court outlawed in *New England Power*.[199] Missing, though, is the same type of states' direct action. *New England Power* involved a state's explicit attempt to restrict the flow of electricity and generate benefits flowing directly from such restriction.[200] No RGGI provisions restrict the flow of power from the state. Consumers in signatory and non-signatory states alike bear the costs, and it is up to the states to reimburse their own citizens for those increases.[201] It is therefore questionable whether this scheme would succeed under the holding of *New England Power*.[202]

Although RGGI may not be facially discriminatory, its effects on electricity markets may be an unjustifiable burden on interstate commerce and therefore invalid under the Pike Balancing Test.[203] The burdens in this instance include increased costs of generating units of electricity and the energy producers' inability to alter the

197. *See id.*

198. *See Memorandum of Understanding*, *supra* note 10, at 4-5 (repaying ratepayers for any increase in power caused by RGGI).

199. *Compare New England Power*, 455 U.S. at 335-36 *with Memorandum of Understanding*, *supra* note 10, at 4-5.

200. *See New England Power*, 455 U.S. at 335-36.

201. *See e.g.*, N.H. REV. STAT. ANN. § 125-O:23 (2008); N.J. STAT. ANN. § 26:2C-51 (West 2008).

202. *See New England Power*, 455 U.S. at 335-36. These schemes would not likely be invalidated under *West Lynn Creamery* as the scheme is not meant to create a more hospitable environment for certain businesses against out of state competitors. *See* 512 U.S. 186, 205. Unlike *West Lynn Creamery*, the subsidies in these states are used to reimburse in state commerce, not dying industries. *Compare West Lynn Creamery*, 512 U.S. at 190-91 *with Memorandum of Understanding*, *supra* note 10, at 4-5.

203. *See, e.g.*, United Haulers Ass'n. v. Oneida-Herkimer Solid Waste Mgmt. Auth., 550 U.S. 330, 346 (2007); Minnesota. v. Clover Leaf Creamery Co., 449 U.S. 456, 471 (1981); Hughes v. Alexandria Scrap Corp., 426 U.S. 794, 804 (1976).

price of such units without the FERC's consent.[204] These burdens may damage power generators' financial ability to produce quantities of energy that would potentially reach the interstate market, thereby creating an advantageous situation for purveyors in non-signatory states.[205] Additionally, as the RGGI consumer benefit provisions demonstrate, these allowance costs may factor into the calculation of a "just and reasonable" price for energy.[206] This would allow power producers in signatory states to increase wholesale energy prices, which will ultimately be borne by both in- state and out-of-state consumers.[207] Out-of-state consumers will face a higher burden due to the absence of the allowance-auction funded state trusts in RGGI signatories.[208] This burden is minimal, as power generated outside the signatory states would not be hindered by the RGGI cap-and-trade program and rate increases would be contained to RGGI states and immediately adjacent locales. By adding incentives for generators to utilize carbon reduction technology while simultaneously funding green initiatives, RGGI's benefits likely outweighs its costs;[209] climate change stands to cause trillions of dollars in damage for East Coast states alone.[210] As such, RGGI likely passes the Pike Balancing Test.

VI. RGGI V. FERC: A BATTLE OF THE ACRONYMS

A state need not unduly burden interstate commerce to impermissibly extend its political powers and trigger the Compact

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204. *See Memorandum of Understanding*, *supra* note 10, at 1 (stating the purpose as to provide incentives for energy providers to alter their present business practices).

205. *See West Lynn Creamery*, 512 U.S. at 199 (stating a variety of reasons for imposing certain burdens on interstate commerce).

206. *Memorandum of Understanding*, *supra* note 10, at 6.

207. *See Clover Leaf Creamery Co.*, 449 U.S. at 471-74.

208. *See* N.H. REV. STAT. ANN. § 125-O:23 (2008); *Memorandum of Understanding*, *supra* note 10, at 6.

209. *See Memorandum of Understanding*, *supra* note 10, at 1-2.

210. *See* Dinardo, *supra* note 4.

Clause.[211] For RGGI, the principle of field preemption is particularly relevant. As stated above, the FPA grants the FERC exclusive authority to determine what electricity prices are "just and reasonable."[212] Courts have interpreted this broad expression of authority to preempt any state action that may touch upon this field of federal jurisdiction.[213] In its present form, the RGGI cap-and-trade system may impermissibly insert signatory states into a field Congress may have intended to be exclusive to FERC.[214]

RGGI's aim is to increase the cost of production for power generators by no longer granting facilities the ability to emit greenhouse gases for free.[215] RGGI envisions that this will incentivize power producers to utilize more efficient carbon reduction technology, thereby decreasing a demand for allowances.[216] Under the filed rate doctrine, the rates submitted to and approved by FERC have pre-emptive effect over state actions that attempt to alter the wholesale market cost of energy transported in interstate commerce.[217] RGGI, by requiring generators to purchase emissions allowances, creates an added cost to electricity, perhaps entering into an area that Congress has intended to occupy exclusively.[218] This creates significant concerns for the program's ability to survive a Supremacy Clause challenge.

The states' express rationale for implementing RGGI does not provide it a safe haven. In *PG & E*, the Supreme Court held that it would accept a state's rationale for adoption of a statute at face value

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211. *See* U.S. Steel Corp. v. Multistate Tax Comm'n, 434 U.S. 452, 472-73 (1976) (stating the various ways a state could expand its political power through an interstate compact).

212. Pub. Util. Dist. No. 1. of Snohomish Cnty Wash. v. FERC, 471 F.3d 1053, 1058 (9th Cir. 2006) (elaborating on how the FPA operates).

213. *See* Entergy La., Inc. v. La. Pub. Ser. Comm'n, 539 U.S. 39, 47 (2003) (upholding the filed-rate doctrine).

214. *See id.* at 47-48 (explaining the filed rate doctrine).

215. *See Memorandum of Understanding*, *supra* note 10, at 1-2.

216. *See id.*

217. *See Entergy*, 539 U.S. at 47 (holding that a state cannot interfere with the tariffs approved by FERC by implementing additional costs).

218. *See id.*; Pub. Util. Dist. No. 1. of Snohomish Cnty Wash. v. FERC, 471 F.3d 1053, 1058 (9th Cir. 2006).

without a deep inquiry into its unstated motives.[219] If RGGI had a stated rationale other than to increase the wholesale price of power in interstate commerce, it could possibly survive an attack based on field preemption.[220] However, the drafters of the program's MOU did not limit their purpose to becoming "world leaders in the . . . deployment of carbon emission control technology" or to reducing dependence on fossil fuels.[221] The MOU explicitly states a desire to create a carbon restraint system that incentivizes the use of carbon control technologies and decrease sources of carbon emissions.[222] Hence, the system desires to burden the generation of electricity as a form of economic pressure to drive down carbon emissions.[223] This removes *PG & E* as a viable defense to a preemption challenge, leaving RGGI with a long line of precedent that casts its constitutionality into doubt.

VII. CARBON AND STEEL: RGGI'S STATUS AS AN INTERSTATE COMPACT

RGGI, because it permits its signatory states to retain the ability to modify and repeal enacting legislation and lacks a third-party enforcement organ, appears to be constructed similar to the Multistate Tax Commission challenged in *U.S. Steel*. Yet despite RGGI being non-binding and without a third party organization capable of enforcing compliance, the susceptibility of the program under the Commerce Clause and Supremacy Clause may demonstrate that participating states have exceeded their normally enjoyed powers. RGGI's potentially discriminatory offset provisions and consumer benefit programs may also trigger the Dormant Commerce Clause.[224] Additionally, the program's objective to interfere with pricing schemes between electricity generators and wholesalers likely

219. *See* Pac. Gas and Elec. Co. v. State Energy Resource Conservation & Dev. Comm'n, 461 U.S. at 216.

220. *See id.* (holding that the court will accept at face value the stated purpose for legislation).

221. *Memorandum of Understanding*, *supra* note 10, at 1-2 (stating the purpose of RGGI).

222. *See id.*

223. *See id.*

224. *See supra* Part IVa.

intrudes into FERC's exclusive pricing authority under the FPA. These serious constitutional issues may be fatal to RGGI unless it can secure congressional consent.

a. Seeking Big Brother's Approval: Issues of Consent under the Compact Clause

Under the Compact Clause, an agreement found to intrude on the powers of the federal government can only be valid with a grant of congressional consent.[225] As stated above, it is highly likely that RGGI has crossed the line into areas traditionally reserved for the federal government.[226] In addition, RGGI is noticeably lacking in explicit congressional consent. A bill in Congress seeking federal ratification of the agreement could rectify its various constitutional deficiencies; however, approval is not a certainty.[227] Ratification may depend on the political climate present upon such a bill's submission.[228] In 1955, Congress failed to ratify the California-Nevada Interstate Compact due to strong opposition from Native American tribes.[229] Congress demonstrated a similar reluctance when it refused to ratify the Truckee River Compact in 1994 due to concerns of state interference with a federal water regulatory regime.[230]

A similar opposition could be expected against a regional cap-and-trade program. The popularity of cap-and-trade is in steep decline in

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225. *See* U.S. CONST. art. I, § 8, cl. 3; Virginia v. Tennessee, 148 U.S. 503, 519 (1893).

226. *See supra* Part IVa.

227. *See* Bonnie G. Colby, et. al., *Mitigating Environmental Externalities Through Voluntary and Involuntary Water Reallocation: Nevada's Truckee-Carson River Basin*, 31 NAT. RES. J. 757, 773 (providing guidelines for when Congress has previously denied approval for an interstate compact).

228. *See id.*

229. *See id.*

230. *See* Erik Davis, *Interstate Compacts That Are For the Birds: A Proposal for Reconciling Federal Wetlands Protection with State Water Rights Through Federal-Interstate Compacts*, 10 BYU J. PUB. L. 325, 350 (1996) (discussing the failure of Congress to pass an interstate compact). *But see* Smith, *supra* note 6, at 329 (stating that when an interstate compact is presented to Congress, approval is usually "automatic").

Washington.[231] In 2009, the Waxman-Markey Bill, also known as the American Clean Energy and Security Act, was defeated in the Senate despite passing the House.[232] Since that time, the capital has become a less hospitable environment for climate change legislation; recently elected Tea Party members often characterize these initiatives as a "cap and tax."[233] In April 2011, Congress rejected an amendment that would have recognized EPA's findings of climate change's existence.[234] Such opposition creates significant skepticism regarding the viability of any approval measure RGGI may take.[235] Charged statements like those of the "Americans for Prosperity," which calls RGGI a tax, likely reflect similar sentiments in a Republican House.[236] The potential burdens that the program places on energy generation and the ancillary effects on out-of-state consumers only strengthen RGGI's opposition.[237] Ultimately, it is doubtful that motion for approval would survive on the floor of the Capitol.

There is an inverse to this argument: the failures of a federal cap-and-trade program may indicate a desire to leave such determinations to the states.[238] The large Republican opposition to climate change legislation may be premised in part on a larger hostility toward big government and a federal environmental scheme.[239] In March 2011, Republican Congressman Fred Upton introduced the Energy Tax

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231. *See* John M. Broder, *'Cap-and-trade' Loses Its Standing as Energy Policy of Choice*, NY TIMES , Mar. 25, 2010, at A13 (chronicling the history of cap-and-trade).

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

233. *See* Broder, *supra* note 231.

234. *See* James M. Taylor, *Congress Rejects EPA's Global Warming Claims*, HEARTLAND INSTITUTE, (Apr. 12, 2011), http://www.heartland.org/article/29753/Congress_Rejects_EPAs_Global_Warming_Claims.html.

235. *See id.* (demonstrating congressional members skepticism of climate change).

236. *See* Peters, *supra* note 15; Sanders, *supra* note 15.

237. *See Memorandum of Understanding*, *supra* note 10, at 1-2, 6 (demonstrating the intent of RGGI to increase costs and recognizing the potential affect on consumers).

238. *See, e.g.*, Sanders, *supra* note 15.

239. *See EPA Tramples State's Rights; Texas, Environment Suffers*, AMERICANS FOR PROSPERITY: TEXAS, http://www.americansforprosperity.org/010411-epa-tramples-states-rights-texans-environment-suffers (last visited Sept. 29, 2011).

Prevention Act.[240] The bill, if passed, would remove the ability of the EPA to regulate greenhouse gases or address climate change.[241] Contemporaneously, President Obama's recent budget proposal strips approximately $1.6 billion from the EPA, which will significantly hinder the agency's ability to enforce Clean Air Act provisions.[242] These reductions in federal environmental protection programs want to scale back EPA programs aimed at addressing climate control in order to leave such endeavors within the states' control.[243]

Given the amount of control already retained by the states under various environmental initiatives,[244] this conclusion may be unfounded. Much of the hostility toward these agencies is based on views that environmental regulation hurts economic job growth within the United States.[245] RGGI, a multistate initiative with extra-regional effects, can be characterized as an obstacle to a struggling job market.[246] Due to the potential harm to out-of-region markets, opponents of "oppressive" EPA regulation could be similarly averse to ratifying a multistate compact that exhibits similar "evils." Although chances of approval are at best unclear, it is unequivocal

240. *See Republicans Launch Bill to Ax EPA Carbon Rules*, REUTERS, Mar. 3, 2011, http://news.cnet.com/8301-11128_3-20039060-54.html?tag=mncol;txt.

241. *See id.* As of September 2011, the Energy Tax Prevention Act was referred to congressional committee; it has yet to be voted on. *Energy Tax Prevention Act*, GOVTRACK.US, http://www.govtrack.us/congress/bill.xpd?bill=s112-482 (last updated June 17, 2011).

242. *See* Jim Efstathiou Jr., *EPA Budget Cut Will Restrict Enforcement of Clean-Air Rules, Activists Say*, BLOOMBERG (April 12, 2011, 1:35 PM), http://www.bloomberg.com/news/2011-04-12/epa-budget-cut-will-restrict-enforcement-of-clean-air-rules-activists-say.html.

243. *See generally EPA Tramples State's Rights*, *supra* note 239; U.S. SENATE COMM. ON ENV'T. & PUB. WORKS, 112th Cong., INHOFE JOINS UPTON, INTRODUCES ENERGY TAX PREVENTION ACT, (Comm. Print 2011), *available at* http://epw.senate.gov/public/index.cfm?FuseAction=Minority.PressReleases&ContentRecord_id=7d62b087-802a-23ad-41e4-93481b22c4a8&Region_id=&Issue_id= (providing House and Senate members' comments on Energy Tax Prevention Acts).

244. *See e.g.* Union Elec. Co. v. EPA, 427 U.S. 246, 252 (1976) (allowing states the discretion to implement more stringent air quality standards than what is required under the Clean Air Act).

245. *See* Broder, *supra* note 231; Peters, *supra* note 15; Sanders, *supra* note 15.

246. *See* Broder, *supra* note 231 (describing critics' characterizations of environmental protection initiatives as damaging to a struggling economy).

that the political atmosphere presents a considerable roadblock to RGGI ratification.

Although express approval may be out of the realm of possibility, the Clean Air Act (CAA) may have provided RGGI with implicit congressional approval. When Congress supports a state in adopting an interstate compact that may intrude on the federal sphere, courts usually hold those agreements as impliedly ratified.[247] The CAA's State Implementation Plan (SIP) requirement may be the source of this implicit approval.

Under the 1970 amendments to the CAA, "each State shall have the primary responsibility for assuring air quality within the entire geographic area comprising such State . . . ."[248] Once the EPA establishes a National Ambient Air Quality Standard (NAAQS), each state must submit a SIP, detailing its implementation of that standard.[249] If such plan satisfies all relevant criteria then the EPA "*must approve*" the proposal.[250] This allows the state to create more stringent air quality standards regardless of their financial burden to industries, as the CAA's purpose is to establish air quality standards meant to drive innovations in clean industrial technologies.[251] The EPA has previously authorized regional cap-and-trade systems for nitrogen oxides in the Ozone Transport Region (OTR) NOx Cap and

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247. *See* Cuyler v. Adams, 449 U.S. 433, 440 (1981); *see e.g., Seelye* v. *Stephens*, No. 91-35847, 1992 WL 337674, at *3 (9th Cir. Oct. 8, 1992); Fairchild Corp. v. Metro. Wash. Airports Auth., No. 18746, 2000 WL 124867, at *3 (Va. Cir. Ct. January 11, 2000).

248. Train v. Natural Res. Def. Council, Inc., 421 U.S. 60, 64 (1975) (providing history of the Clean Air Act).

249. *See id.* at 64-65.

250. Union Elec. Co. v. EPA, 427 U.S. 246, 257 (1976) (emphasis added). Under the Clean Air Act, each state must formulate an implementation plan tailored to achieve national primary ambient air quality standards as "expeditiously as practicable but...in no case later than three years from the date of approval." *Id.* at 246 (quoting 42 U.S.C. § 1857c-5(a)(2)). A state must also formulate an implantation plan designed to achieve secondary ambient air standards within a "reasonable time." If the EPA finds that the state's implementation plan is tailored to attain those air quality standards, they *must* approve that implementation plan. *Id.*

251. *See Union Elec. Co.*, 427 U.S. at 266.

Allowance Trading Program.[252] The EPA approved this program in an amended SIP, and it became a federally enforceable cap-and-trade program for nitrous oxide emissions.[253] In *Massachusetts v. EPA*, the Supreme Court held that the EPA has the power to regulate greenhouse gases.[254] Shortly after the Supreme Court's 2007 ruling, the EPA announced forthcoming regulations regarding carbon dioxide in an effort to address climate change.[255] As the EPA has previously authorized regional cap-and-trade systems for nitrogen oxides (NOx), and is required to regulate greenhouse gas emissions under the CAA, states are impliedly authorized to implement carbon cap-and-trade programs to meet air quality standards established for carbon dioxide.[256]

The CAA's broad grant of authority to the states to formulate a plan to address designated pollutants may be the advance ratification RGGI states need. The EPA has already made calls for states to draft implementation plans for addressing greenhouse gases, going so far as to propose a federal implementation plan for Texas after rejecting its submission.[257] Signatory states under the CAA must create greenhouse gas standards, and so long as the RGGI program satisfies all the criteria, the EPA must approve such plan.[258] This would include instances in which RGGI places higher burdens on capping greenhouse gas emissions than the NAAQS mandates.[259] Because the EPA encourages states to engage in such activities, and each state

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252. *See Nitrogen Oxides (NOx) Control Regulations*, EPA, http://www.epa.gov/ne/airquality/nox.html (last visited April 18, 2011).

253. *See id.*

254. Massachusetts. v. EPA., 549 U.S. 497, 528-29 (2007) (finding CAA gave EPA the ability to regulate greenhouse gases as an air pollutant).

255. *See* Energy Tax Prevention Act of 2011, H.R. 910, 112th Cong. § 4 (2011).

256. *See* Massachusetts v. EPA, 549 U.S. at 528-29; *Nitrogen Oxides (NOx) Control Regulations*, *supra* note 252 (stating that EPA has previously approved NOx cap-and-trade understate SIPs).

257. *See EPA Tramples State's Rights: Texas Environment Suffers*, *supra* note 239.

258. *See* Jeffrey W. Johnson, *EPA Sets Schedule for CO_2 Regulation*, CHEM. & ENG'G. NEWS, (Jan 3, 2011), http://pubs.acs.org/cen/news/89/i01/8901notw6.html.

259. *See* Union Elec. Co. v. EPA, 427 U.S. 246, 252 (1976) (holding that EPA must approve SIP that meet minimum criteria including if the SIP is more stringent than necessary).

is responsible for setting and enforcing its own carbon emissions cap, RGGI may already have secured federal consent.[260]

The interplay between the CAA and FPA is central to this issue. The CAA should not be interpreted as a blanket license for states to engage activities otherwise prohibited under other statutes. Because RGGI potentially crosses FERC's exclusive authority to determine the "just and reasonable" prices, the availability of the CAA as a defense is limited.[261] Courts would be hesitant to find congressional consent, implied or otherwise, for states to engage in conduct that is contradictory to other statutory schemes.[262] Therefore, although the CAA grants broad power to the states to implement the NAAQS, it is highly unlikely that they have the power to violate well-established precedent under the filed rate doctrine.[263] Consequently, the CAA is a potential but unlikely source of consent, and RGGI may still lack Congressional ratification.

b. Take the Money and Run: The Benefits of Obtaining Congressional Consent

Besides remedying RGGI's various constitutional issues, congressional consent has several additional benefits. Most obvious would be the establishment of the RGGI agreement as federal law, which opens up opportunities for federal enforcement in instances of a state's non-compliance.[264] Another added benefit would be the ability of RGGI states to use more binding language and grant broader powers to third party organization such as the RO.[265] In light

260. *See* Train v. Natural Res. Def. Council, Inc., 421 U.S. 60, 64-66 (1975) (providing analysis for operation of CAA).

261. *See* Pub. Util. Dist. No. 1. of Snohomish Cnty Wash. v. FERC, 471 F.3d 1053, 1058 (9th Cir. 2006) (upholding the filed rate doctrine).

262. *See* Cuyler v. Adams, 449 U.S. 433, 441 (1981) (holding that implied congressional consent can be found through encouraging a state to establish a certain regulatory scheme).

263. *See Train*, 421 U.S. at 64-66 (discussing a state's obligations under the CAA).

264. *See Cuyler v. Adams*, 449 U.S. at 439.

265. *See* U.S. Steel Corp. v. Multistate Tax Comm'n, 434 U.S. 452, 472-73 (1976) (stating that establishment of a regional organization is indicative of a compact needing consent).

of states' recent raids on their individual allowance funds, such powers may be desirable.[266]

The moment Congress consents to an interstate agreement, it is transformed into federal law.[267] This means that the participating states, for which the agreement would be binding, would not be able to alter these statutes as a matter of federal preemption.[268] This remedy is particularly beneficial to a regional cap-and-trade system. When a state withdraws from a cap-and-trade system, lifting whatever limitations it had imposed upon carbon dioxide emissions, those gases are able to move in and out of its borders.[269] This imposes higher concentrations of greenhouse gases on those states that are attempting to limit the quantities within their own borders.[270] Thus, one state's withdrawal can consequently frustrate the attempts of signatories to mitigate CO_2 emissions, forcing them to lower their caps and create heavier burdens on their own emitters.[271] If RGGI had status as a federal law, then the participating states would be locked in, and could not withdraw for risk that such retraction would be contradictory to federal law and therefore preempted.[272] This provides both security to signatory states as well as foreseeability for the businesses within them.[273] Withdrawal, and the aftershocks it can create, is a very real problem facing RGGI. New Hampshire is attempting to withdraw from the RGGI, and Governor Christie of

266. An obvious drawback to having more restrictive language is that certain states may be scared away from the agreement due to fears of being locked into a compact after a new political party has come into power.

267. *See Cuyler*, 449 U.S. at 440-41 (stating that upon approval the state law becomes federal law).

268. *See id.*

269. *See Memorandum of Understanding*, *supra* note 10, at 9 (requiring a reworking of state caps upon member withdrawal).

270. *See id.*

271. *See id.*

272. *See Cuyler*, 449 U.S. at 440-41 (obtaining congressional approval allows interstate agreements to become federal law).

273. *See Letter to NH State Senators*, NEW ENGLAND CLEAN ENERGY COUNCIL (April 28, 2011), http://www.cleanenergycouncil.org/files/NECEC_RGGI_Letter%20to%20NH%20Senate_FINAL%20April%2028%202011.pdf.

New Jersey has already repealed RGGI legislation.[274] New Jersey alone accounts for 1/6 of the total allowable emissions under the MOU, making its regional contribution to greenhouse gas emissions narrowly third only to New York and Massachusetts.[275]

Consent injects a binding element into the agreement, allowing for judicial recourse for failure to abide by the initiatives terms. In this context, individual state consumer benefit fund raids a la New Hampshire, New Jersey, and New York could be challenged in court.[276] Consent could make binding the MOU's requirement that states devote 25% of funds toward consumer benefit initiatives.[277] Any state's failure to respect this requirement would be actionable.[278] These raids have harmed the overall image of RGGI by fueling the criticism that the program is a tax,[279] therefore it is in the interest of participating states to prevent them.[280] By enforcing its provisions, participating states can maintain RGGI as an environmental initiative, without the taint of being just another revenue generator.

A second benefit to obtaining congressional consent would be the creation of a third party compliance assurance agency through the grant of broader enforcement powers to the RO.[281] Under *U.S. Steel*, interference with the normal sovereignty of a state through an enforcement mechanism is a strong indicator that an interstate

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274. *See* Baker, *supra* note 74 (reporting New Hampshire Senate's vote on RGGI); Landrigan, *supra* note 71 (reporting the passage of a bill to withdraw New Hampshire from RGGI); Navarro, *supra* note 14 (reporting New Jersey's expected withdrawal).

275. *See Memorandum of Understanding*, *supra* note 10, at 3, 8 (stating emissions caps in signatory states).

276. *See Cuyler*, 449 U.S. at 440-41 (limiting a state's ability to alter a congressional approved interstate compact); *See* Peters, *supra* note 15; *States Raid RGGI Funds to Fill Budget Gaps, supra* note 15.

277. *See Cuyler*, 449 U.S. at 440-41; Craig, *supra* note 82, at826-27 (providing the benefits of consent); *Memorandum of Understanding*, *supra* note 10, at 6.

278. *See e.g., Cuyler*, 449 U.S. at 440-41;Craig, *supra* note 82, at 826-27.

279. *See* Navarro, *supra* note 14; Broder, *supra* note 231.

280. *See* Peters, *supra* note 15; Sanders, *supra* note 15.

281. *See* U.S. Steel Corp. v. Multistate Tax Comm'n, 434 U.S. 452, 472-73 (1976) (establishing a factor based determination for necessity of congressional consent).

compact requires congressional consent.[282] Flowing from congressional consent is the approval to formulate a stronger RO, or even to utilize the EPA, as a compliance mechanism.[283] Forming a more empowered RO allows for the organization to settle inconsistencies between the states and create more uniform guidelines.[284] Certain RGGI states, in particular Massachusetts, New Hampshire, Rhode Island, and Connecticut, are familiar with regional cap-and-trade programs.[285] The OTR Cap and Allowance Trading Program received federal approval and as such was enforceable.[286] Because OTR was federally approved in an amended SIP, the EPA could enforce its provisions.[287] Similarly, if RGGI secured congressional consent, its transformation into federal law would make it EPA-enforceable.[288] Such centralization of enforcement could be beneficial given the various policing issues RGGI has encountered in withdrawal and raiding. The enforcement powers that could follow from federal approval of RGGI could act as a remedy for many of the recent problems that have surfaced since the program's inception.

VIII. CONCLUSION

Climate change presents a significant threat to the fiscal and physical health of the United States. Dangers such as rising sea levels, decreased biodiversity, and increased mosquito habitation deserve swift action from state and federal governments.[289] Despite the increasing need for action, RGGI signatories stand in the minority as some of the few states that have taken demonstrable measures to

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282. *See id.* (stating that the existence of a third party organization with enforcement powers can trigger the Compact Clause).

283. *See U.S. Steel Corp.* 434 U.S. at 472-73; *Memorandum of Understanding*, *supra* note 10, at 7-8.

284. *See* Craig, *supra* note 81, at 826-27.

285. *See Nitrogen Oxides (NOx) Control Regulations*, *supra* note 251 (discussing the OTR Cap and Allowance Trading Program).

286. *See id.*

287. *Id.*

288. *See* Cuyler v. Adams, 449 U.S. 433, 440-41 (1981) (detailing the benefits of congressional consent).

289. *See* GORE, *supra* note 3; *Biodiversity*, *supra* note 3.

mitigate these risks. Furthermore, the Constitution and a long line of precedent represent significant obstacles to regional carbon dioxide cap-and-trade initiatives such as RGGI. Without congressional consent and resulting federal enforceability, RGGI may be defeated in either the courts or in its own implementation. Political climate also acts as a potential roadblock for RGGI, especially since the Tea Party and Republican legislatures have begun to show considerable hostility toward similar initiatives. This leaves RGGI on extremely shaky ground.

As a final note, a reminder to the reader of the 1958 movie "The Blob." Upon discovering that only cold can defeat the Blob, Steve, the film's hero, has the alien dumped in the Arctic.[290] A police officer asks Steve if the frozen environment will hold the monster, to which he replied, "So long as the Arctic stays cold."[291] The longer the debate over climate change continues, the harder it will be to prevent significant ecological disaster. We would be wise to consider: if the trillions of dollars of property at risk is not a sufficient incentive, maybe fear of the Blob's return will be.

290. THE BLOB (Paramount Pictures 1958).

291. *Id.*