

WHEN IS RENEWABLE NOT RENEWABLE? THE CONSTITUTIONALITY OF STATE LAWS DENYING NEW LARGE CANADIAN HYDROELECTRIC PROJECTS TREATMENT AS RENEWABLE RESOURCES

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I. Introduction

Over the past fifteen years, many states—twenty-nine at last count—have adopted renewable portfolio standards (RPS) as a means both to reduce their dependence on imported fossil fuels and to combat climate change.¹ To comply with these standards, electric utilities must demonstrate that a significant minimum percentage of their supply portfolios will consist of renewable resources by the various target dates specified in state law.² Most states affirmatively describe what counts as renewable resources—wind, geothermal, and solar energy are commonly referenced in RPS legislation.³ But some state RPS laws also contain negative provisions, excluding from eligibility what

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¹ The latest Environmental Protection Agency figures say that, as of March 2013, twenty-nine states and the District of Columbia have adopted binding renewable portfolio standards; eight more states have adopted non-binding renewable portfolio goals. *Renewable Portfolio Standards*, ENVTL. PROTECTION AGENCY, <http://www.epa.gov/agstar/tools/funding/renewable.html> (last visited Mar. 6, 2015).

² *Id.*; see also *Renewable Portfolio Standard Policies*, U.S. DEP'T. OF ENERGY, http://www.dsireusa.org/documents/summarymaps/RPS_map.pdf (last visited Mar. 6, 2015) (displaying map listing renewable portfolio target dates by state).

³ See *Renewable Portfolio Standards*, ENVTL. PROTECTION AGENCY, <http://www.epa.gov/agstar/tools/funding/renewable.html> (last visited Mar. 6, 2015). The Department of Energy maintains a comprehensive list of renewable resource programs and the types of resources that qualify as renewable in the Database of State Incentives for Renewables & Efficiency (DSIRE). See *Database of State Incentives for Renewables & Efficiency*, U.S. DEP'T. OF ENERGY, <http://www.dsireusa.org/> (last visited Mar. 19, 2015).

otherwise would surely be considered renewable resources.⁴ Hydroelectric projects are quintessential examples of renewable energy sources.⁵ The fuel source—water—replenishes itself. It rains; the rain evaporates and condenses; and the cycle starts all over again. Under these laws, however, only new small-scale hydroelectric projects count as renewable resources. Large-scale hydroelectric projects, both existing and new, do not.⁶

Laws of this type amount to hidden barriers to power imports from Canada, the only source of electricity from new large-scale hydroelectric facilities. This article explains why the restrictions are unconstitutional under the Commerce Clause and bad for consumers and the environment, and why other states should follow the lead of Vermont and Wisconsin and modify their statutes to permit power from large hydroelectric projects to be treated as a renewable resource under their RPS laws.

II. The “Dormant” Commerce Clause and State Regulation of Foreign Commerce

The Commerce Clause gives the federal government authority to regulate interstate and foreign commerce.⁷ The courts have found this power to be exclusive and, by negative implication, to bar states from unduly burdening or discriminating against interstate and foreign commerce.⁸ Perhaps because the temptation of legislators to protect local businesses is so strong, cases under which the federal courts have struck down state

⁴ See, e.g., KSE Focus, *States Debate Large-Scale Hydro Power and Renewable Portfolio Standards*, CONGRESS.ORG (Aug. 7, 2013), <http://congress.org/2013/08/07/state-debate-large-scale-hydro--power-and-renewable-portfolio-standards/>.

⁵ The American Heritage New Dictionary of Cultural Literacy defines a renewable resource as “any resource, such as wood or solar energy, that can or will be replenished over time.” THE NEW DICTIONARY OF CULTURAL LITERACY: WHAT EVERY AMERICAN NEEDS TO KNOW 519 (James Trefil et al. eds., 3d ed. 2005). Energy Information Administration’s “Energy Kids” website similarly defines renewable energy sources as those that “can be replenished,” and identifies biomass, hydropower, geothermal, wind and solar as the five most common forms of renewable energy. *Energy Sources—Renewable*, ENERGY KIDS, U.S. ENERGY INFO. ADMIN., http://www.eia.gov/kids/energy.cfm?page=renewable_home-basics (last visited Mar. 6, 2015).

⁶ See Val Stori, *Environmental Rules for Hydropower in State Renewable Portfolio Standards 4*, CLEANENERGY STATES ALLIANCE (April 2013), <http://www.cesa.org/assets/2013-Files/RPS/Environmental-Rules-for-Hydropower-in-State-RPS-April-2013-final-v2.pdf> (“the majority of states allowing existing hydropower facilities to qualify for the RPS restrict eligibility to ‘small’ hydro facilities”); David C. Coen & Robert J. Thormeyer, *Should Large Hydroelectric Plants be Treated as Renewable Resources?*, 32 ENERGY L.J. 541, 543–44 (2011).

⁷ U.S. CONST. art. I, § 8, cl. 3. The Commerce Clause grants Congress the “power . . . [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.” *Id.*

⁸ *Or. Waste Sys., Inc. v. Dep’t of Env’tl. Quality of State of Or.*, 511 U.S. 93, 98 (1994) (citing *Wyoming v. Oklahoma*, 502 U.S. 437, 454 (1992)).

legislation invoking this implicit, or “dormant,” Commerce Clause restriction are “legion.”⁹

Although most of these cases have involved legislation that disadvantages out-of-state interests, the Clause also serves to prevent states from erecting barriers to foreign commerce. “Power to regulate *foreign commerce*,” after all, “is given in the same words, and in the same breath, as it were, with that over the commerce of the States and with the Indian tribes.”¹⁰ And, just as the power to regulate interstate commerce resides exclusively with the federal government, the power to regulate commerce with other nations is also solely federal.¹¹

The impact of the Commerce Clause on state laws affecting foreign commerce, in fact, is somewhat broader than in the case of state laws affecting interstate commerce. “Like the Import-Export Clause, the Foreign Commerce Clause recognizes that discriminatory treatment of foreign commerce may create problems, such as the potential for international retaliation, that concern the Nation as a whole.”¹² This means, of course, that a state cannot protect in-state interests by granting them preferential treatment over foreign competitors.¹³ But it also means that “a State’s preference for *domestic* commerce over foreign commerce is inconsistent with the Commerce Clause even if the State’s own economy is not a direct beneficiary of the discrimination.”¹⁴

III. Large-Scale Hydro Restrictions as De Facto Barriers to Foreign Competition

Numerous articles in recent years have discussed how various state RPS laws discriminate against interstate commerce in violation of the Commerce Clause.¹⁵ Many of

⁹ See *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 194 (1994).

¹⁰ *Gibbons v. Ogden*, 22 U.S. 1, 228 (1824) (Johnson, J., concurring) (emphasis in original).

¹¹ *Id.* at 228–29; see also *Japan Line, Ltd. v. Cnty. of L.A.*, 441 U.S. 434, 453–54 (1979).

¹² *Kraft Gen. Foods, Inc. v. Iowa Dept. of Revenue and Fin.*, 505 U.S. 71, 79 (1992).

¹³ *Japan Line*, 441 U.S. at 448–49.

¹⁴ *Kraft Gen. Foods*, 505 U.S. at 80 (emphasis added).

¹⁵ See Daniel K. Lee & Timothy P. Duane, *Putting the Dormant Commerce Clause Back to Sleep: Adapting the Doctrine to Support State Renewable Portfolio Standards*, 43 ENVTL. L. 295 (2013); Steven Ferrey, *Threading the Constitutional Needle With Care: The Commerce Clause Threat to the New Infrastructure of Renewable Power*, 7 TEX. J. OIL, GAS & ENERGY L. 59 (2012); CAROLYN ELEFANT & EDWARD A. HOLT, THE COMMERCE CLAUSE AND IMPLICATIONS FOR STATE RENEWABLE PORTFOLIO STANDARD PROGRAMS, CLEAN ENERGY STATES ALLIANCE STATE RPS POLICY REPORT (2011); Stephen C. Braverman, *State Renewable Portfolio Standards and the Commerce Clause*, 25 SPG NAT. RESOURCES & ENV’T 15 (2011); Trevor D. Stiles, *Renewable Resources and the Dormant Commerce Clause*, 4 ENVTL. & ENERGY L. & POL’Y J. 33 (2009); Nathan E. Endrud, *State Renewable Portfolio Standards: Their Continued Validity and Relevance in Light of the Dormant Commerce Clause, the Supremacy*

these same state laws include provisions declaring that large-scale hydroelectric facilities, both new and existing, are not to be considered renewable resources.¹⁶ None of the articles discussing in-state preferences, however, address whether the large hydro exclusions also operate as in-state preferences. But, as discussed below, the large-scale hydro exclusions are de facto restrictions on the import of Canadian hydropower since the only new sources of large-scale hydroelectric power are located in Canada. The constitutional and economic significance of that fact is the subject of this Article.

Had states that have chosen to exclude large scale hydroelectric projects from treatment as renewable resources confined the exclusion to existing facilities, no constitutional issue would have been presented. Where states are already hydro-rich, restrictions on counting existing large-scale hydroelectric facilities as renewable resources would serve the obvious purpose of promoting the development of new renewable resources.¹⁷ This may or may not be good policy,¹⁸ but it is not fashioned to exclude out-of-state or foreign competitors. Consider Washington, for example. It accounts for more than a quarter of all the hydroelectric power production in the United States, and, not surprisingly, well over half of the electricity its residents and businesses use comes from hydroelectric facilities.¹⁹ If existing hydroelectric facilities counted

Clause, and Possible Federal Legislation, 45 HARVARD J. ON LEGIS. 259 (2008); Patrick R. Jacobi, *Renewable Portfolio Standard Generator Applicability Requirements: How States Can Stop Worrying and Learn to Love the Dormant Commerce Clause*, 30 VT. L. REV. 1079 (2006); NANCY RADER & SCOTT HEMPLING, NAT'L ASS'N OF REGULATORY UTIL. COMM'RS, *THE RENEWABLES PORTFOLIO STANDARD: A PRACTICAL GUIDE*, A-2-4 (2001), available at <http://www.scotthemplinglaw.com/files/naruc.org/Publications/rps.pdf>; Kirsten H. Engel, *The Dormant Commerce Clause Threat to Market-Based Environmental Regulation: The Case of Electricity Deregulation*, 26 ECOLOGY L.Q. 243, 268-81 (1999).

¹⁶ See Coen & Thormeyer, *supra* note 6, at 543 (“Oregon, Washington, and Missouri do not include hydropower at all in their RPS, and other states, such as New Hampshire, California, and North Carolina, only make new hydropower projects eligible for inclusion in their renewable programs,” but exclude large-scale hydro projects).

¹⁷ See Mary G. Powell, *Treatment of Large Hydropower as a Renewable Resource*, 32 ENERGY L.J. 553, 556 (2011).

¹⁸ State policies excluding existing large-scale hydroelectric facilities from their definition of eligible renewable resources may also result in exclusion of additional hydroelectric output resulting from expansion of existing facilities. This impact, falling on in-state and out-of-state suppliers alike, may well be neutral in Commerce Clause terms, but the policy benefits are questionable. Expansion of existing hydroelectric projects is likely to be more economic than development of other sources of renewable energy. See Coen & Thormeyer, *supra* note 6, at 543. If the goal is to reduce carbon emissions, the exclusion becomes a costly choice for consumers.

¹⁹ *State Profile and Energy Estimates—Washington, 2014*, U.S. ENERGY INFO. ADMIN., <http://www.eia.gov/state/?sid=WA> (last updated July 17, 2014). Oregon similarly relies on hydroelectric

toward a renewable portfolio goal of, say, thirty percent, there would be no impetus to develop any new renewable energy sources. And, since the states that have chosen to adopt these restrictions already have their own existing hydroelectric facilities,²⁰ the purpose of the exclusion would be neutral from a Commerce Clause perspective. This is so, even though the statutory distinction is fictitious; existing hydroelectric facilities produce energy from water, an indisputably renewable energy source.²¹

But the picture is completely different where the exclusion extends, as it does in several states, to new large-scale hydroelectric projects.²² Although the statutes in question do not single out Canadian energy suppliers, a restriction can be discriminatory under the Commerce Clause even if it is not express.²³ The viable sites for new large-scale hydroelectric production are located in British Columbia, Manitoba and Québec,²⁴

energy for seventy percent of its energy needs. *State Profile and Energy Estimates—Oregon, 2014*, U.S. ENERGY INFO. ADMIN., <http://www.eia.gov/state/?sid=OR> (last updated July 17, 2014).

²⁰ There are existing hydroelectric projects in all of these states. The Federal Energy Regulatory Commission posts a “Complete list of Issued Licenses” on its website. *Licensing*, FED. ENERGY REGULATORY COMM’N, <http://www.ferc.gov/industries/hydropower/gen-info/licensing.asp> (last updated Dec. 4, 2014).

²¹ See Mary G. Powell, *Treatment of Large Hydropower as a Renewable Resource*, 32 ENERGY L.J. 553 (2011). See generally Coen & Thormeyer, *supra* note 6.

²² See Coen & Thormeyer, *supra* note 6. Large-scale hydroelectric projects are considered to be those with a capacity of thirty or more megawatts. See ELECTRIC POWER RESEARCH INST., *Assessment of Waterpower Potential and Development Needs 2-1* (2007), <http://www.epri.com/abstracts/Pages/ProductAbstract.aspx?ProductId=00000000001014762&Mode=download>.

²³ See *Best & Co. v. Maxwell*, 311 U.S. 454, 455–56 (1940) (“The commerce clause forbids discrimination, whether forthright or ingenious. In each case it is our duty to determine whether the statute under attack, whatever its name may be, will in its practical operation work discrimination against interstate commerce.”).

²⁴ Canada is a major exporter of electricity to the United States, most of which comes from hydroelectric facilities. See Charlotte Helston, *Large Hydro*, ENERGY BC (2012), <http://www.energybc.ca/profiles/largehydro.html> (last visited Mar. 6, 2015) (“60% of electricity produced in Canada is drawn from hydro. Only a portion of that hydroelectricity is used in Canada; the rest is exported for profit.”). And, while many of the most suitable sites for large-scale hydroelectric projects in Canada have already been developed, there still remains the potential for additional large-scale project development, particularly in Québec and British Columbia. Hydro-Québec, for example, broke ground in 2009 on the Romaine project, a 1550-megawatt hydroelectric project on the Romaine River. See *Strategic Plan 2009-2013*, HYDRO-QUÉBEC 20 (2009), <http://www.hydroquebec.com/publications/en/docs/strategic-plan/plan-strategique-2009-2013.pdf>. The project is part of a larger plan to develop up to 4,500 megawatts of new large-scale hydroelectric facilities. *Id.* at 22. Further, in British Columbia, plans have been underway for several years to develop the Site C Clean Energy Project, a 1,100-megawatt hydroelectric facility on the Peace River in the northeastern portion of the province. See SITE C CLEAN ENERGY PROJECT, <https://www.sitecproject.com>

the three Canadian provinces with the largest hydroelectric output.²⁵ It is of course true that a state law does not discriminate against out-of-state (or foreign) commerce simply because it adversely affects out-of-state or foreign entities.²⁶ But when a state excludes new large-scale hydroelectric facilities, even for ostensibly environmental reasons, its only targets are foreign producers. There are no sites left in the United States where large-scale hydro facilities can be developed.²⁷ The de facto effect of the restrictions, then, is to limit competition from Canadian entities to supply renewable energy. This should be enough of a reason to strike down the restrictions on Commerce Clause grounds as state interference with federal regulation of foreign trade.²⁸

Were proof of a discriminatory or protectionist motive needed, however, there seems ample evidence to support that conclusion as well. Renewable energy advocates in New England, for example, have successfully argued that defining large hydroelectric facilities as renewable resources “would slow down the development of renewable energy projects in the region.”²⁹ This, in fact, was official government policy in Vermont for over a quarter century. “Vermont policy-makers reached a consensus that if large hydropower were deemed renewable, it would hinder the development of smaller renewable energy projects.”³⁰ And New Hampshire’s protectionist intent is quite explicit. The text of its

(last visited Mar. 6, 2015). Manitoba also has some potential, although more limited, to develop new large-scale hydro projects. Manitoba Hydro’s current development plan contemplates the construction of a 695 MW project and a 1,485 MW project that would support the province’s demand growth and exports to the U.S. *See Development Plan and NFAT*, MANITOBA HYDRO, http://www.hydro.mb.ca/projects/development_plan/index.shtml (last visited February 26, 2015).

²⁵ *See Helston, supra* note 24.

²⁶ *See City of Philadelphia v. New Jersey*, 437 U.S. 617, 627 (1978); *Rocky Mtn. Farmers Union v. Corey*, 730 F.3d 1070, 1089 (9th Cir. 2013).

²⁷ *See* PEW CENTER ON GLOBAL CLIMATE CHANGE, *CLIMATE TECHBOOK—HYDROPOWER 5* (2011), http://www.c2es.org/docUploads/Hydropower_0.pdf (stating “[t]he best sites for large hydropower generation in the United States have already been developed,” and “the construction of new large hydropower dams is not considered a practical option for increasing hydropower generation due to the environmental impacts and unavailability of proper sites to develop for large-scale hydropower generation”); Lea Kosnik, *The Potential of Water Power in the Fight Against Global Warming in the U.S.*, ENERGY POLICY 1, 2 n.1 (2008), <http://www.umsl.edu/~kosnikl/Saved%20Emissions.pdf> (“We do not consider any potential coming from the construction of new large (i.e. traditional) hydropower dams.”); *Water Use FAQ: What is hydroelectric power and how is it used?*, U.S. GEOLOGICAL SURVEY, <http://www.usgs.gov/faq/node/3248> (last modified Nov. 19, 2004) (“New large-scale hydroelectric facilities will be few and far between in the future as most of the prime locations to place large dams suitable for hydroelectric-power production have already been used.”).

²⁸ *See Japan Line*, 441 U.S. at 448–49.

²⁹ *See Powell, supra* note 17, at 556.

³⁰ *Id.* Vermont has since amended its laws to allow the inclusion of large-scale hydroelectric facilities

RPS states as its “purpose” that “[r]enewable energy generation technologies can provide fuel diversity to the state and New England generation supply through use of *local* renewable fuels and resources that serve to displace and thereby lower regional dependence on fossil fuels.”³¹

To be sure, there are unquestionable environmental concerns associated with the construction and operation of large-scale hydroelectric facilities. “Damming rivers,” notes former Vermont Public Service Board Member David Coen (an advocate for treating large hydroelectric projects as renewable resources), “forever alters a region’s geologic landscape, and a hydroelectricity facility’s turbines often kill the fish that get caught in the plant.”³² And, he adds “roughly 600 dams have been removed in the last 50 years” because of “safety concerns and concerns over their long-term impact on the environment and recreation.”³³

It is highly doubtful, however, that environmental concerns about large-scale hydroelectric projects in Canada could justify denying their eligibility as renewable resources. For one thing, a good environmental motive will not save discriminatory legislation. “Even if environmental preservation were the central purpose” of a state law or regulation, it “would not be sufficient to uphold a discriminatory regulation.”³⁴

In any event, restrictions like exclusions from RPS eligibility are economic, not environmental. Canadian hydropower producers are not banned from exporting; their products are simply not credited toward meeting the buyer’s renewable portfolio obligations.³⁵ Indeed Canadian suppliers continue to sell large amounts of hydroelectric

as a renewable resource for RPS purposes, becoming the first state in the nation to do so. *Id.* at 553.

³¹ See N.H. REV. STAT. ANN. § 362-F:1 (2015) (emphasis added). There is both some protectionist consistency and some irony in New Hampshire’s position. Years earlier, the Supreme Court struck down the State’s legislation seeking to limit the export of energy from its own valuable large hydroelectric facilities for violating the Commerce Clause. *New England Power Co. v. New Hampshire*, 455 U.S. 331, 339 (1982).

³² Coen & Thormeyer, *supra* note 6, at 544.

³³ *Id.*

³⁴ *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 204 (1994). States excluding new large hydroelectric projects from the definition of renewable resources may argue that their statutes do not single out Canadian energy sources in purpose or effect. The reason to advance such an argument is obvious: statutes that are discriminatory are subject to strict scrutiny under the dormant Commerce Clause, *Or. Waste Sys.*, 511 U.S. at 101, while statutes alleged to burden interstate commerce come under the more lenient *Pike* balancing test, *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). In the author’s view, however, convincing a court that the restrictions on new large hydro facilities do not single out Canadian sellers is a pretty tough sell; they are the only entities selling power from facilities of this type.

³⁵ To be sure, while the exclusions are economic in nature, some legislators may have seen the

power to U.S. buyers.³⁶ Several New England states have proposed legislation to ease restrictions on the eligibility of large hydro facilities to satisfy renewable energy targets.³⁷ But, the environmental groups that have opposed these initiatives have, no doubt unintentionally, articulated their concerns in economic, not environmental terms.

When, for example, New Hampshire was considering legislation to allow large hydro to qualify as a renewable resource, the Conservation Law Foundation described the legislation as simply a way to allow Hydro-Québec to take business away from homegrown renewables. As one reporter recounted the statement of the Foundation's director:

Tom Irwin, VP and Director of the Conservation Law Foundation, New Hampshire, writes in his blog that HB 302 is "clearly intended to tilt the playing field in favor of the Northern Pass." He said that "HB 302 will greatly undermine one of the core purposes of New Hampshire's RPS law: the stimulation of investment in renewable energy technologies in New England and, in particular, in New Hampshire."³⁸

exclusions as a deterrent, albeit an unconstitutional one, aimed at limiting the environmental harm from large hydro projects.

³⁶ It bears emphasis that when we are talking about Canadian hydroelectric facilities, we are not talking about ecological disasters like the Three Gorges Dam in China, which are subject to only limited environmental review. See [Mara Hvistendahl, *China's Three Gorges Dam: An Environmental Catastrophe?*, SCIENTIFIC AMERICAN \(March 25, 2008\), <http://www.scientificamerican.com/article/chinas-three-gorges-dam-disaster/>](#). As Hydro-Québec points out in its recent Strategic Plan, the Romaine Project now under way is subject to strict environmental review and was preceded by a required 2,500-page environmental impact statement. See *Strategic Plan 2009–2013*, HYDRO-QUÉBEC, *supra* note 24 at 21.

³⁷ See Jennifer Runyon, *Small States Grapple with Big Canadian Hydropower*, RENEWABLE ENERGY WORLD, (March 7, 2011), <http://www.renewableenergyworld.com/rea/blog/post/print/2011/03/small-states-grapple-with-big-canadian-hydropower>; Erin Ailworth, *Legislation raises question: What is clean energy?*, BOSTON GLOBE, (February 26, 2014), <http://www.bostonglobe.com/business/2014/02/26/legislation-would-increase-clean-energy-requirements-for-utilities/xrcj54IRKPudoYjnPZAFCK/story.html>.

³⁸ Runyon, *supra* note 37. The reaction of Jake Brown, spokesman for the Vermont Natural Resources Council, to similar legislation in Vermont was not much different from Mr. Irwin's:

So Vermont would be in many ways a domino falling and in our view a standards being dropped which is very unlike Vermont, Vermont is a place that has high standards and is proud of its high standards and what we're doing here is really just slicing off a little piece of our reputation and giving it to Hydro Quebec.

Bob Kinzel, *Lawmakers Pass Bill Making Hydro-Québec 'Renewable'*, VERMONT PUBLIC RADIO (May 7, 2010 5:49 PM), http://www.vpr.net/news_detail/87979/. Environmental groups opposing legislation that would relax the restrictions on large hydro in Connecticut and Wisconsin likewise articulated protectionist objections. The Sierra Club similarly criticized a 2011 Wisconsin bill allowing large hydro to qualify as a

Mr. Irwin's objections, in other words, were not that removing the limitations would damage the environment, but that they would force New Hampshire's mom and pop renewable energy producers to compete with the Hydro-Québec behemoth. That may articulate a populist theme, but it is not an environmental one.

IV. Conclusion

As the courts have construed it, the core purpose of the interstate commerce provisions of the Commerce Clause was to prevent states from erecting protectionist barriers to interstate trade.³⁹ By contrast, as University of Chicago law professor Richard Epstein put it, "there was clear, if regrettable, evidence that protectionism against foreign competition was one reason why Congress was given (and given first) power over foreign commerce" in the very same provision of the Constitution.⁴⁰ In other words, if anyone was going to discriminate against foreign competition, it would be the federal government, not the states.

Happily, the conflicting motives behind the inclusion of these two aspects of the Commerce Clause do not produce conflicting Constitutional outcomes. Even accepting an environmental impetus for restrictions on the treatment of new large hydro facilities under state RPS laws, under the Commerce Clause the judgment whether to limit foreign imports based on environmental (or any other) considerations would reside exclusively with the federal government, not the states. And while the federal government's silence would not create space for state-imposed restrictions on foreign trade, here the federal government has spoken loudly against trade restrictions through ratification of both the North American Free Trade Agreement (NAFTA) and its companion treaty, the North American Agreement on Environmental Cooperation (NAAEC). The latter obligates each of the signatory states—Canada, Mexico, and the United States—to adhere to responsible

renewable resource, referring to it as the "Outsourcing Clean Energy Jobs to Canada Bill." See *Sierra Club – John Muir Chapter 2012 Legislative Scorecard*, SIERRA CLUB, http://www.sierraclub.org/sites/www.sierraclub.org/files/sce/wisconsin-john-muir-chapter/newsletters/SCJMC_2012_LegScorecard.pdf. In Connecticut, the Conservation Law Foundation warned that "RPS recognition of large-scale hydropower will merely serve to funnel ratepayer funds to foreign Canadian utilities for a resource that is already economically viable." Letter from N. Jonathan Peress, Dir., Clean Energy and Climate Program, Conservation Law Found., to Debra Morrell, Connecticut Dep't. of Energy and Env't. Protection, Bureau of Energy and Tech. Policy, regarding 2012 Comprehensive Energy Strategy for Connecticut at 8 (December 21, 2012) (on file with author).

³⁹ See *West Lynn Creamery*, 512 U.S. at 205 ("Preservation of local industry by protecting it from the rigors of interstate competition is the hallmark of economic protectionism that the Commerce Clause prohibits.").

⁴⁰ RICHARD A EPSTEIN, HOW PROGRESSIVES REWROTE THE CONSTITUTION 23 (Cato Institute, 2006).

environmental policies.⁴¹ So, not only are states barred from erecting their own barriers to foreign competition, but the federal government has made a policy choice that it should embrace competition from Canada and Mexico as well.

This, in the author's view, is a good outcome for consumers and for the environment. There are certainly environmental concerns associated with the development of large-scale hydroelectric projects. But, no renewable resource is without its warts.⁴² Just as hydroelectric projects can alter an ecosystem and damage aquatic life, so too can wind farms and large solar arrays pose risks to birds and other wildlife.⁴³ And, somewhat counterintuitively, large solar installations, if not dry cooled, can also put stress on critical water resources.⁴⁴ Constitutional considerations aside, the solution is to mitigate environmental effects, not to erect economic barriers to the use of carbon-free technology.

The question from the consumers' perspective is why, if the goal is to reduce carbon emissions, should they be forced to pay for less efficient and more costly solar or wind-based power when equally carbon-free hydroelectric power is available for less? Propping up local businesses or protecting local jobs by erecting trade barriers is simply bad economics. "[W]hile protectionism is sold as job saving, it probably really amounts to job swapping. It protects jobs in some industries only by destroying jobs in others."⁴⁵

Protectionist economic legislation targeting efficient sources of renewable energy may cause the environment to suffer as well. With scarce dollars to go around, subsidizing inefficient or comparatively less efficient home grown renewable resources

⁴¹ North American Agreement on Environmental Cooperation, U.S.-Can.-Mex., Sept. 14, 1993, 32 I.L.M. 1480, available at <http://www.cec.org/Page.asp?PageID=1226&SiteNodeID=567> (last visited Mar. 19, 2015).

⁴² Harvey L. Reiter, *America's Energy Future: So Who Are the Good Guys?*, 151 PUBLIC UTILITIES FORTNIGHTLY, no. 10 52, 56 (2013) (and sources cited therein).

⁴³ See, e.g., John Upton and Climate Central, *Solar Farms Threaten Birds*, SCIENTIFIC AMERICAN (August 27, 2014), <http://www.scientificamerican.com/article/solar-farms-threaten-birds/> (describing how thousands of birds have crashed into or been incinerated by large solar arrays in Arizona and Nevada); Rose Eveleth, *How Many Birds Do Wind Turbines Really Kill*, SMITHSONIAN.COM (December 16, 2013), <http://www.smithsonianmag.com/smart-news/how-many-birds-do-wind-turbines-really-kill-180948154/?no-ist> (citing estimates that "somewhere between 140,000 and 328,000 birds die each year from collisions with wind turbines").

⁴⁴ See Todd Woody, *Water Use by Solar Projects Intensifies*, N.Y. TIMES (Oct. 27, 2009), http://green.blogs.nytimes.com/2009/10/27/water-use-by-solar-projects-intensifies/?_r=0.

⁴⁵ Alan S. Blinder, *Free Trade*, in THE CONCISE ENCYCLOPEDIA OF ECONOMICS (David R. Henderson ed., 2d ed. 2007), available at <http://www.econlib.org/library/Enc/FreeTrade.html>.

leaves fewer consumer resources to pay for other climate-friendly options, like energy efficient devices or conservation technologies.⁴⁶

Vermont, no environmental slouch among the states, made the choice a few years ago to remove its longstanding restriction on the treatment of new large hydroelectric facilities as renewable resources.⁴⁷ Wisconsin followed suit about a year later.⁴⁸ One can hope that, in the interests of consumer protection—or maybe simply to forestall legal challenges by disadvantaged foreign competitors and their would-be customers—other states will follow their lead.

⁴⁶ Reiter, *supra* note 42, at 59, 69.

⁴⁷ See VT. STAT. ANN. tit. 30, § 8002(2)(C) (West 2014).

⁴⁸ See WIS. STAT. ANN. § 196.378 (West 2014) (under Wisconsin's law, removal of the limitation on treating large-scale hydroelectric facilities as renewable will take effect on December 31, 2015).