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The Border Battle: North Dakota's Suit Against Minnesota and the Future of the Next Generation Energy Act

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THE BORDER BATTLE: NORTH DAKOTA'S SUIT AGAINST MINNESOTA AND THE FUTURE OF THE NEXT GENERATION ENERGY ACT

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I. INTRODUCTION

Recognizing the implications that global climate change may have on Minnesota's economy, environment, and quality of life, Governor Tim Pawlenty announced the Next Generation Energy Initiative, a state program with the goals of increasing energy efficiency among electrical and natural utilities by requiring Minnesota utilities to provide twenty-five percent of electricity from renewable sources by 2025 and lowering statewide greenhouse gas emissions by fifteen percent by 2015, thirty percent by 2025, and eighty percent by 2050.[1] Pursuant to this initiative, the state legislature passed the Next Generation Energy Act of 2007 (NGEA).[2]

Five years after its enactment, the NGEA is under attack.[3] On November 2, 2011, North Dakota commenced an action against Minnesota in an effort to strike down the portion of the NGEA that prohibits the importation of any power that would contribute to the state's carbon dioxide emissions based on, among other things, its alleged violation of the Commerce Clause.[4] Despite North Dakota's protest, the NGEA does not violate the Commerce Clause and will survive this challenge unscathed, as the law is not facially discriminatory, serves an important local purpose that outweighs any incidental burden on interstate commerce, and satisfies the Pike standard.[5]

In Part II of this paper, I will review the NGEA, including the provisions currently under scrutiny.[6] In Part III, I will examine North Dakota's previous challenge to Minnesota's carbon policy and analyze the current litigation regarding the NGEA.[7] Then in Part IV, I will examine the history of Commerce Clause jurisprudence.[8] In Part V, I will assess both North Dakota and Minnesota's Commerce Clause arguments.[9] Finally, in Part VI I will conclude that the NGEA does not violate the Commerce Clause.[10]

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1 *Alternative Fuels — Federal and State Legislation*, MINN. POLLUTION CONTROL AGENCY, http://www.pca.state.mn.us/index.php/topics/energy/alternative-fuels/alternative-fuels-legislation.html (last visited May 9, 2012).

2 MINN. STAT. § 216C.05 (2010).

3 *See infra* Part III.

4 *See infra* Part III.

5 *See infra* Part V.

6 *See infra* Part II.

7 *See infra* Part III.

8 *See infra* Part IV.

9 *See infra* Part V.

10 *See infra* Part VI.

II. THE NEXT GENERATION ENERGY ACT OF 2007

The NGEA mandates the following:

> (1) the per capita use of fossil fuel as an energy input be reduced by 15 percent by the year 2015, through increased reliance on energy efficiency and renewable energy alternatives; and (2) 25 percent of the total energy used in the state be derived from renewable energy resources by the year 2025.[11]

In order to achieve these goals, the NGEA prohibits any person (1) from constructing in Minnesota a "new large energy facility that would contribute to statewide power sector carbon dioxide emissions"[12], (2) "import[ing] or commit[ting] to import from outside the state power from a new large energy facility that would contribute to statewide power sector carbon dioxide emissions"[13], and (3) "enter[ing] into a long-term power purchase agreement that would increase statewide power sector carbon dioxide emissions."[14] The NGEA defines "statewide power sector carbon dioxide emissions" as "the total annual emissions of carbon dioxide from the generation of electricity within the state and all emissions of carbon dioxide from the generation of electricity imported from outside the state and consumed in Minnesota."[15] This includes "[e]missions . . . associated with transmission and distribution line losses . . . ."[16]

III. CHALLENGING THE NEXT GENERATION ENERGY ACT

Although the provisions discussed above are the center of North Dakota's present action against Minnesota, they represent only the latest installment of North Dakota's displeasure with Minnesota's carbon policy.[17]

A. In re Quantification of Environmental Costs

In 1993, the Minnesota Legislature passed a law that "attempted to install environmental costs as a factor in resource planning decisions made by the [Public Utilities Commission (PUC)]."[18] The PUC set interim cost

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11 MINN. STAT. § 216C.05 (2010).
12 MINN. STAT. § 216H.03, subd. 3(1) (2010).
13 MINN. STAT. §216H.03 subd. 3(2) (2010).
14 MINN. STAT. §216H.03 subd. 3(3) (2010).
15 MINN. STAT. §216H.03 subd. 2 (2010).
16 *Id*.
17 *See infra* Part III.A.
18 *In re* Quantification of Envtl. Costs, 578 N.W.2d 794, 796 (Minn. Ct. App. 1998).

values on five air emissions, including carbon dioxide.[19] After setting the interim values, the PUC initiated a contested case before an administrative law judge (ALJ) to set final values.[20] The ALJ recommended setting the environmental costs of CO_2 at $.28–$2.92 per ton, varying by geography.[21] The PUC eventually set the environmental cost values of CO_2 at $.30–$3.10 per ton for each of the geographic areas identified by the ALJ.[22] One of the geographic areas identified by the PUC was the area within 200 miles of the border.[23] Several parties then requested rehearing or reconsideration based on the geographic distinctions, which the PUC granted.[24] After reconsideration, the PUC removed cost value on the 200 mile range, even though the PUC believed it could require out-of-state utilities to use the value.[25] Relators, a nonprofit trade association that represented lignite fuel producers, users, and suppliers (including the state of North Dakota), and an environmental coalition then petitioned for writ of certiorari on the issue of the carbon dioxide values.[26]

After finding the case ripe for review, the court addressed the environmental coalition's argument that the PUC acted arbitrarily and capriciously, and against legislative intent, when it decided to set environmental costs for carbon dioxide in the 200 mile range at zero, even though it had previously determined it was practical to do so.[27] The court sided with the PUC in holding that the PUC's decision to remove the carbon dioxide value could be characterized as a decision to adhere to statutory language and thus was not reversible error.[28]

Although the court decided the case on other grounds, one can gain a sense of the history and circumstances surrounding North Dakota's continued fight against Minnesota's energy policy.[29] In addition, the underlying argument in this case was based on the dormant Commerce Clause theory, which is the same theory North Dakota Attorney General Wayne Stenehjem (Stenehjem) has indicated will be the center of his case against the NGEA.[30]

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19 *Id.*
20 *Id.*
21 *Id.* at 797.
22 *Id.*
23 *Id.*
24 *In re Quantification of Envtl. Costs,* 578 N.W.2d at 797.
25 *Id.*
26 *Id.*
27 *Id.* at 801.
28 *Id.*
29 *Id. See also supra* Part III.A.
30 *See* Patrick Zomer, Note, *The Carbon Border War: Minnesota, North Dakota, and the Dormant Commerce Clause*, 8 U. ST. THOMAS L.J. 60, 61–62 (2010); Christopher Bjorke, *N.D. Likely to Sue Minnesota over Carbon Tax*, BISMARCK TRIB., Dec. 29, 2009, http://www.bismarcktribune.com/news/local/article_a6fafd5a-f409-11de-bb24-001cc4c03286.html.

B. North Dakota v. Swanson

North Dakota first voiced its intention to commence an action against Minnesota when Stenehjem told the Bismarck Tribune on December 29, 2009 that it "is very likely that we will be suing the state of Minnesota."[31] Indicating the strength of their resolve, the North Dakota Legislature approved a litigation war chest of $500,000.[32] On November 2, 2011, Stenehjem made good on his threat and filed a complaint in the United States District Court for the District of Minnesota.[33]

1. The Complaint

In its complaint, North Dakota argued that the NGEA is unconstitutional because of multiple violations of constitutional provisions.[34]

a. The Commerce Clause

North Dakota first argued that the NGEA violates the Commerce Clause of the U.S. Constitution, as it "facially discriminates against the Plaintiffs because it prohibits the importation" of power generated from certain power plants in North Dakota into Minnesota.[35] In addition, North Dakota argued that the NGEA "facially discriminates against interstate commerce because it exempts new large energy facilities located in Minnesota and new large energy facilities owned by Minnesota-based entities."[36] The complaint goes on to state that these prohibitions unduly burden interstate commerce and are not justified "by valid public welfare, consumer protection, or procompetitive purpose unrelated to economic protectionism."[37]

b. The Supremacy Clause

Second, North Dakota argued that the NGEA violates the Supremacy Clause of the U.S. Constitution because Congress has made it clear that it intends to occupy the field of emissions regulations and the regulation of

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[31] Christopher Bjorke, *N.D. Likely to Sue Minnesota over Carbon Tax*, BISMARCK TRIB., Dec. 29, 2009, http:// www.bismarcktribune.com/news/local/article_a6fafd5a-f409-11de-bb24-001cc4c03286.html.

[32] Jennifer Bjorhus, *North Dakota vs. Minnesota: Dust-up over Carbon*, STAR TRIB., Jan. 15, 2010, http://www.startribune.com/business/81606907.html.

[33] *See infra* Part 3.B.1.

[34] Amended Complaint for Declaratory and Injunctive Relief at 27–39, North Dakota v. Swanson, No. 0:11-cv-03232 (8th Cir. Dec. 1, 2011) [hereinafter Amended Complaint]. S*ee also infra* Part III.B.1.A–D.

[35] *Id.* at 27.

[36] *Id.*

[37] *Id.* at 29.

energy sales and transmission.[38] Regarding the field of emissions regulations, North Dakota cites case law surrounding the Clean Air Act that states there exists "a scheme of federal regulation so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it."[39] North Dakota argued that the NGEA "conflicts with the Clean Air Act because it purports to regulate emissions of carbon dioxide."[40] Regarding the field of electricity sales and transmission, North Dakota argued that pursuant to the Federal Power Act and the authority delegated to the Federal Energy Regulatory Commission under the Energy Policy Act of 1992, the federal government acts as the exclusive regulator and the NGEA unlawfully expands Minnesota's regulatory prowess into the area of transmission of electricity in interstate commerce.[41] According to North Dakota, Minnesota's expansion into this field violates the Supremacy Clause, as Congress has shown intent to occupy the field.[42]

c. The Privileges and Immunities Clause

Next, North Dakota argued that the NGEA violates the Privileges and Immunities Clause of the U.S. Constitution by unfairly discriminating against and imposing an unreasonable burden on citizens of other states.[43] North Dakota contends that the NGEA imposes an unreasonable burden on the citizens of North Dakota, especially those working in the lignite and coal-powered electricity industries, by giving preferential treatment to Minnesota citizens and entities.[44] North Dakota argued that this preferential treatment negatively impacts employment opportunities for North Dakota citizens.[45] North Dakota further contends that these practices embodied in the NGEA do not bear a substantial relationship to the goals of the law nor does Minnesota have a substantial reason for them.[46]

d. Due Process

In addition to the previous arguments, North Dakota alleged deprivation of property without due process of law on the basis that "Plaintiffs have property interests in the productive use of coal and other resources that are . . . consumed in the creation and operation of facilities" that are subject to the prohibition in the NGEA.[47]

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38 *Id*. at 29–34.
39 *Id.* at 30 (quoting Rice v. Sante Fe Elevator Corp., 331 U.S. 218, 230 (1947)).
40 Amended Complaint*, supra* note 34, at 30.
41 *Id*. at 31–32.
42 *Id*. at 33–34.
43 *Id.* at 34–35.
44 *Id*. at 35.
45 *Id*.
46 Amended Complaint*, supra* note 34, at 35.
47 *Id*. at 38.

Finally, North Dakota made one argument unrelated to the U.S. Constitution: that the NGEA violates the prohibition of special legislation provision of the Minnesota Constitution.[48] This provision states, "[t]he legislature shall pass no local or special law . . . granting to any private corporation, association, or individual any special or exclusive privilege, immunity, or franchise whatever . . . ."[49] North Dakota argued that the NGEA violates this provision by "grant[ing] special privileges and immunities to several private corporations," such as Essar Global, Steel Dynamics, Inc., Excelsior Energy, Inc., Otter Tail Power Company, and Great River Energy, by exempting them from the requirements of the NGEA.[50] According to North Dakota's Amended Complaint, this violation constitutes a defect in the legislative process thereby denying Plaintiffs due process of law under the Fourteenth Amendment of the U.S. Constitution.[51]

After setting forth its arguments, North Dakota moved for declaratory judgment holding the NGEA unconstitutional, enjoining Minnesota Attorney General Lori Swanson from enforcing the NGEA, and awarding costs and expenses incurred during the litigation.[52]

2. The Answer

In its answer, Minnesota denied that the NGEA was unconstitutional and provided the following three separate defenses:

> (1) The Amended Complaint fails to state a claim upon which relief can be granted; (2) The Amended Complaint is barred in part by the Eleventh Amendment; and (3) The Amended Complaint fails in whole or in part otherwise for lack of subject matter jurisdiction.[53]

In addition, Minnesota asked the court to dismiss North Dakota's complaint with prejudice and award costs.[54]

3. Motion for Partial Judgment on the Pleadings

After filing its answer, Minnesota filed a motion for partial judgment on the pleadings.[55] Minnesota moved the court to "dismiss counts II through

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[48] *Id.* at 37.

[49] MINN. CONST. art. XII, § 1.

[50] Amended Complaint, *supra* note 34, at 38.

[51] *Id*. at 38–39.

[52] *Id.* at 39–40.

[53] Defendants' Answer to Plaintiffs' Amended Complaint at 16, North Dakota v. Swanson, No. 0:11-cv-03232 (8th Cir. Dec. 7, 2011) [hereinafter Answer].

[54] *Id.*

[55] Defendants' Motion for Partial Judgment on the Pleadings at 1, North Dakota v. Swanson, No. 0:11-cv-03232 (8th Cir. Dec. 7, 2011) [hereinafter Motion].

VI of [North Dakota's] amended complaint, and to dismiss the Attorney General as a party, for lack of subject matter jurisdiction and for failure to state a claim upon which relief can be granted."[56]

An order was entered on September 30, 2012, granting the motion in part and denying it in part. The court granted Minnesota's Motion for Judgment on the Pleadings as to the Privileges and Immunities and Due Process claims. The court also dismissed Attorney General Swanson as a party to the claim. The court, however, denied the motion on the federal preemption claims, finding North Dakota adequately alleged the Federal Power Act and Clean Air Act preemptions.[57] Though the preemption claims persist at present, for the sake of brevity, this paper assumes that the court will decide the case based on the Commerce Clause and focuses its discussion accordingly.

IV. THE COMMERCE CLAUSE

The U.S. Constitution retains for the federal government the power to "regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes."[58] The Constitution also provides that federal law is supreme when federal and state laws conflict.[59] Together, these two provisions act as an "express limitation upon state regulation of interstate commerce"[60] where Congress has acted. These provisions, however, do not preclude a state from regulating some areas of interstate commerce.[61]

The dormant Commerce Clause is implicated when a state regulates some aspect of interstate commerce where Congress has not enacted legislation that would preempt the state action.[62] When this sequence of events occurs, the courts must decide whether the state has "overstepped its role in regulating interstate commerce"[63] and thereby violated the U.S. Constitution. The U.S. Supreme Court has outlined two different lines of analysis for determining whether a state action violated the dormant Commerce Clause.[64]

First, "[w]hen a state statute directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests, [the Court has] generally struck down the

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[56] *Id*.

[57] Memorandum Opinion and Order at 40, North Dakota v. Swanson, No. 0:11-cv-03232 (8th Cir. Sept. 30, 2012).

[58] U.S. CONST. art. I, § 8, cl. 3.

[59] U.S. CONST. art. VI, cl. 2.

[60] CALVIN R. MASSEY, AMERICAN CONSTITUTIONAL LAW: POWERS AND LIBERTIES 251 (2d ed. 2005).

[61] *See* Maine v. Taylor, 477 U.S. 131, 137–38 (1986).

[62] MASSEY, *supra* note 60, at 252.

[63] *Taylor*, 477 U.S. at 138.

[64] *See infra* notes 65–71 and accompanying text.

statute without further inquiry."[65] "Indeed, when the state statute amounts to simple economic protectionism, a 'virtually *per se* rule of invalidity' has applied."[66] Under these circumstances, state statutes are subjected to strict scrutiny and are invalid "unless the discrimination is demonstrably justified by a valid factor unrelated to economic protectionism,"[67] or the state "can demonstrate, under rigorous scrutiny, that it has no other means to advance a legitimate local interest."[68]

The second line of analysis, known as the Pike Test, stands for the principle that "[w]here the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits."[69] Under either test, "the critical consideration is the overall effect of the statute on both local and interstate activity."[70] "There is no 'clear line' separating those cases to which strict scrutiny applies and those to which the Pike [T]est applies."[71]

V. ASSESSING THE ARGUMENTS

Both North Dakota and Minnesota have strong arguments to make in their favor.[72] This section of the paper analyzes arguments on each side and attempts to identify the most persuasive.[73]

A. North Dakota's Case

North Dakota has a strong argument that the NGEA violates the Commerce Clause because the NGEA (1) is facially discriminatory, (2) is discriminatory in practical effect, and (3) sets up a regulatory regime that has impermissible extraterritorial effects.[74]

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[65] Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth., 476 U.S. 573, 579 (1986) (citing City of Philadelphia v. New Jersey, 437 U.S. 617, 628–29 (1978); Shafer v. Farmers Grain Co., 268 U.S. 189, 199 (1925); Edgar v. MITE Corp., 457 U.S. 624, 640–44 (1982)).

[66] Wyoming v. Oklahoma, 502 U.S. 437, 454–55 (1992) (quoting City of Philadelphia v. New Jersey, 437 U.S. at 624).

[67] *Id.* at 454.

[68] C & A Carbone, Inc. v. Town of Clarkstown, N.Y., 511 U.S. 383, 392 (1994).

[69] Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970).

[70] Nathan E. Enrud, Note, *State Renewable Portfolio Standards: Their Continued Validity and Relevance in Light of the Dormant Commerce Clause, the Supremacy Clause, and Possible Federal Legislation*, 45 HARV. J. ON LEGIS. 259, 266 (2008) (quoting *Brown-Forman*, 476 U.S. at 579).

[71] *Id.*

[72] *See infra* Part V.A–B.

[73] *See infra* Part V.A–B.

[74] *See infra* Part V.A.1–3.

1. The NGEA is Facially Discriminatory.

North Dakota will most likely begin its argument by trying to establish that the NGEA is facially discriminatory so that the district court's reasoning follows the first line of analysis detailed above.[75] The benefit of the court finding the NGEA facially discriminatory is that it raises the standard of review to strict scrutiny; therefore, the court would be acting under a presumption of per se invalidity.[76] This is similar to *City of Philadelphia v. New Jersey*.[77] In that case, a New Jersey law prohibited the importation of any solid or liquid waste that originated anywhere outside New Jersey until the Commissioner of the New Jersey Department of Environmental Protection determined that the solid or liquid waste could be imported safely and promulgated regulations of such actions.[78] The Commissioner promulgated regulations that permitted four categories of waste to enter New Jersey.[79] Landfill operators and cities in other states that had agreements with the operators sued New Jersey and the Department of Environmental Protection, arguing that the statute and regulations were unconstitutional.[80] The trial court found the law an unconstitutional limitation on interstate commerce.[81] The New Jersey Supreme Court reversed, holding that the law "advanced vital health and environmental objectives with no economic discrimination against, and with little burden upon, interstate commerce."[82] The court also found that the Solid Waste Disposal Act did not preempt the state statute.[83] The U.S. Supreme Court conducted its inquiry using the Pike Test, stating "[t]he crucial inquiry . . . must be directed to determining whether [New Jersey's law] is basically a protectionist measure, or whether it can fairly be viewed as a law directed to legitimate local concerns, with effects upon interstate commerce that are only incidental."[84]

In order to discern whether the New Jersey law was simply a protectionist measure or whether it was directed at legitimate local concerns, the Court looked first looked to the purpose of the statute itself.[85] The Court eventually held that the ultimate legislative purpose need not be resolved because:

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75 *See supra* notes 65–68 and accompanying text.
76 *See e.g.*, H. P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525,544 (1949).
77 City of Philadelphia v. New. Jersey, 437 U.S. 617, 624 (1978).
78 *Id.* at 618–19.
79 *Id.* at 619.
80 *Id.*
81 *Id.*
82 *Id* at 620.
83 *City of Philadelphia,* 437 U.S. at 620.
84 *Id*. at 624.
85 *Id.* at 625.

> whatever New Jersey's ultimate purpose, it may not be accomplished by discriminating against articles of commerce coming from outside the State unless there is some reason, apart from their origin, to treat them differently. Both on its face and in its plain effect, [the New Jersey law] violates this principle of nondiscrimination.[86]

Therefore, the Court held that the law was unconstitutional because there was no reason to treat the waste created outside the state differently from that created inside the state.[87]

North Dakota will likely begin its argument by attempting to analogize the NGEA with the New Jersey law in *City of Philadelphia v. New Jersey*.[88] For example, North Dakota may argue that the NGEA "erect[ed] a barrier against the movement of interstate trade"[89] similar to New Jersey's prohibition on the importation of waste by prohibiting the importation of electric power that would increase the state's level of carbon emissions. Despite Minnesota's good faith attempt to reduce the state's carbon emissions, North Dakota will likely emphasize that this purpose may not be "accomplished by discriminating against articles of commerce coming from outside the State unless there is some reason . . . to treat them differently."[90] Moreover, in *City of Philadelphia*, the Court held that the New Jersey law was not equivalent to a quarantine law, which had been held constitutional as a health-protective measure,[91] because the quarantine laws "did not discriminate against interstate commerce as such, but simply prevented traffic in noxious articles, whatever their origin."[92] Like the New Jersey law, the NGEA does not prohibit the importation of certain articles in interstate commerce because of their noxious nature; rather, as the argument goes, the NGEA seeks to "saddle those outside the State"[93] with the burden of improving Minnesota's level of carbon emissions. If the Court finds this argument convincing, it will likely strike down the NGEA as discriminatory and unconstitutional.[94]

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86 *Id*. at 626–27.
87 *Id*. at 629.
88 *See infra* notes 89–93 and accompanying text.
89 *City of Philadelphia*, 437 U.S. at 628.
90 *Id.* at 626–27.
91 *Id*. at 629; *see* Baldwin v. G. A. F. Seelig, Inc., 294 U.S. 511, 525 (1935); Bowman v. Chicago & Nw. R. Co., 125 U.S. 465, 489 (1888).
92 *City of Philadelphia*, 437 U.S. at 629.
93 *Id.*
94 *See supra* notes 89–93 and accompanying text.

2. The NGEA is Discriminatory in Practical Effect.

In addition to the facially discriminatory argument, North Dakota may argue that the NGEA is discriminatory in practical effect.[95] The NGEA effectively prohibits a utility company from using new coal power to provide electricity to its customers by prohibiting the construction of any new coal plants within the state and importation of any coal power from outside the state.[96] As existing coal plants inside and outside the state are retired, utilities providing electricity to Minnesotans will no longer be able to provide coal power because Minnesota has no coal resources of its own and the utilities will be unable to import coal for power generation purposes.[97] Therefore, the practical effect of the statute is to unlawfully prohibit the ability of North Dakota coal companies and power plants from marketing coal power to consumers in Minnesota.[98]

3. The NGEA Establishes an Impermissible Extraterritorial Regime.

Lastly, North Dakota may argue the extraterritorial effects of the NGEA require the court to strike the law down as unconstitutional.[99] The Court in *Healy v. Beer Institute* articulated the extraterritorial facet of the dormant Commerce Clause.[100] The Court in that case stated that it would strike down extraterritorial language that "directly controls commerce occurring wholly outside the boundaries of a State"[101] as a per se violation of the Constitution. Although the Court has not extensively articulated the principle, it appears that the principle applies only to state laws that further economic protectionism, and thus cannot be defended on the grounds of health and safety regulations, which are subject to a far more deferential review.[102]

One of the key elements of a state law that signals it will likely be struck down based on the extraterritorial principle is a law that has a predominant effect on conduct in other states.[103] North Dakota will likely emphasize that the NGEA greatly affects the conduct of utility companies in North Dakota.[104] Indeed, the NGEA effectively removes Minnesota as a market for North Dakota utility companies, the eventual conclusion of which is the preclusion of the construction of coal-fired power plants in North

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95 *See infra* notes 96–97 and accompanying text.

96 MINN. STAT. § 216H.03, subd. 3 (2010).

97 Zomer, *supra* note 30, at 91–92.

98 *See supra* notes 96–97 and accompanying text.

99 *See infra* notes 100–102 and accompanying text.

100 Healey v. Beer Inst., 491 U.S. 324, 336 (1989).

101 *Id.*

102 *See* Sporhase v. Nebraska *ex rel*. Douglas, 458 U.S. 941, 956 (1982).

103 *See* Mark D. Rosen, *Extraterritoriality and Political Heterogeneity in American Federalism*, 150 U. PA. L. REV. 855, 926 (2002).

104 *See id*.; *supra* notes 35–37 and accompanying text.

Dakota because construction and operation of such plants becomes economically impractical without access to the Minnesota market.[105] This situation will require that North Dakota utilities comply with the NGEA in order to be able to sell power to consumers in Minnesota, thereby "project[ing] [Minnesota's] regulatory regime into the jurisdiction of [North Dakota]."[106]

B. Minnesota's Defense

Despite North Dakota's strong arguments, the NGEA will survive this challenge because (1) the statute does not discriminate against articles of commerce that come from outside Minnesota, (2) even if the law is discriminatory, there are multiple reasons, aside from origin, to treat them differently, and (3) the NGEA passes the Pike Test.[107]

1. The NGEA is Not Discriminatory.

As mentioned above, *City of Philadelphia v. New Jersey* stands for the proposition that a statute is invalid if it "discriminat[es] against articles of commerce coming from outside the State unless there is some reason, apart from their origin, to treat them differently."[108] Although North Dakota will argue that the facts of the two cases are analogous, that is simply not the case.[109] The coal moratorium does not discriminate "against articles of commerce coming from outside the State" and therefore it is outside the bounds of *City of Philadelphia v. New Jersey*.[110] The coal moratorium is not discriminatory because it both prohibits the use and generation of coal power that has been imported from other states and restricts the use and generation of coal power in Minnesota; thus, Minnesota is not simply prohibiting the importation of all electricity generated outside the state – a purely protectionist measure.[111] Due to this distinction, coal power generated both inside and outside the state will cease to be an option for utilities in Minnesota because the coal moratorium prohibits the importation of coal power from outside the state and will eventually force the retirement and closure of existing coal plants in Minnesota.[112]

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[105] *See supra* notes 11–16 and accompanying text.

[106] *Healy*, 491 U.S. at 336–37.

[107] *See infra* Part V.B.1–3.

[108] City of Philadelphia v. New Jersey, 437 U.S. 617,626–27 (1978); *see supra* note 90 and accompanying text.

[109] *See supra* notes 88–93 and accompanying text; *infra* note 110 and accompanying text.

[110] *City of Philadelphia,* 437 U.S. at 626–27; *see supra* notes 86–87 and accompanying text. .

[111] *See supra* notes 11–16 and accompanying text.

[112] *See supra* notes 11–16 and accompanying text.

Moreover, the coal moratorium has no effect on sales outside of the state.[113] This is important because the lack of such effect means that the NGEA does not require out-of-state commerce to be conducted according to in-state terms, thereby avoiding any argument of extraterritorial reach.[114] In this sense, the NGEA does not discriminate against interstate commerce at all.[115]

The coal moratorium's negligible burden on interstate commerce and its large local benefit preclude it from falling victim to a Commerce Clause challenge like some similar state programs, such as California's Low Carbon Fuel Standard (LCFS).[116] The LCFS requires that the carbon intensity of fuels used for transportation be reduced by ten percent from 2006 levels by 2020.[117] In order to accomplish this goal, the California Air Resources Board requires fuel providers to determine the "carbon intensity" of fuel throughout its entire lifecycle, including direct emissions from the burning of the fuel and the emissions resulting from transporting the fuel to California.[118] Thus, the LCFS penalizes fuels produced in and transported from other states.[119] This means that products such as biofuels produced in the Midwest have a higher carbon intensity number than biofuels produced in California, even if the product is exactly the same.[120] For these reasons, opponents of the program argued that the LCFS is discriminatory on its face.[121]

The federal district court in *Rocky Mountain Farmers Union v. Goldstene* agreed and held that the LCFS discriminates against fuels produced outside of California (thus subjecting the regulation to strict scrutiny analysis) and impermissibly regulates extraterritorial conduct.[122] The district court also found that the LCFS provides a local benefit in reducing global warming but that purpose could have been achieved through nondiscriminatory means.[123] Moreover, the district court held that based on the purposes of the LCFS set forth in its guiding principles, the main function of the program was economic protectionism.[124] For these reasons,

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113 *See supra* notes 11–16 and accompanying text.

114 *See* Cotto Waxo Co. v. Williams, 46 F.3d 790, 794 (8th Cir. 1995).

115 *See supra* notes 113–114 and accompanying text.

116 *Compare* CAL. CODE REGS. tit. 17, §§ 95480–95490 (2006) *with* MINN. STAT. § 216H.03, subd. 3(1) (2010).

117 Rocky Mountain Farmers Union v. Goldstene, 843 F. Supp.2d 1071, 1079 (E.D. Cal. 2011).

118 *Id.*at 1080.

119 *Id.*

120 *See id* at.1081.

121 *Id.*

122 *Id* at 1105

123 Rocky Mountain Farmers Union v. Goldstene, 843 F. Supp.2d 1071, 1093–94 (E.D. Cal. 2011).

124 *Id.* at 1086–90.

the district court issued an injunction that prohibited the enforcement of the LCFS program.[125]

Minnesota's coal moratorium is distinguishable from California's LCFS program because, as mentioned above, the coal moratorium treats coal power generated in and out of state in the same way and does not assign a higher price to coal or coal power produced outside of the state.[126] In this way, the coal moratorium does not seek to regulate the coal power generation companies and their practices that occur outside of the state in the same way the LCFS does.[127] Because of these key differences, Minnesota's coal moratorium is not discriminatory on its face and therefore will not meet the same fate as California's LCFS program.[128]

2. The NGEA Treats Coal Power Differently for Reasons Other than Origin

Even if a court does find that the NGEA discriminates against articles of commerce, the NGEA will still survive this challenge.[129] Minnesota can still argue that there is a reason, apart from origin, to treat coal power differently.[130] For instance, using coal to generate power is carbon intensive and contributes more to atmospheric pollution than other sources of power, and the NGEA treats all future coal generation the same, regardless of its origin.[131] Thus, rather than arbitrarily discriminating against coal power because of its origin, Minnesota treats coal power differently than other types of power because of its greater adverse effect on the environment.[132]

There is another reason, other than origin, for Minnesota to treat coal power differently: that the NGEA's regulatory scheme is set up to avoid the problem of carbon leakage, which would undermine Minnesota's entire carbon emissions reduction plan.[133] Carbon leakage occurs when a utility company must comply with a carbon restriction within a jurisdiction and instead of reducing its emissions, imports carbon intensive electricity from outside the jurisdiction.[134] If the NGEA were devoid of the coal moratorium, the whole scheme would be ineffective in reducing Minnesota's carbon emissions because utilities would simply import coal power from other

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125 *Id.*at 1105.
126 *See supra* notes 116–119 and accompanying text.
127 *See supra* notes 116–119 and accompanying text.
128 *See supra* notes 126–127 and accompanying text.
129 *See infra* notes 130–132 and accompanying text.
130 *See infra* notes 131–132 and accompanying text.
131 Zomer, *supra* note 30, at 93.
132 *Id.*
133 *See supra* notes 11–16 and accompanying text.
134 *See* IPCC Fourth Assessment Report: Climate Change 2007, INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, http:// www.ipcc.ch/publications _and_data /ar4/wg3/en/ch11s11-7-2.html (last visited Mar. 14, 2012).

states.[135] Thus, the NGEA does not discriminate against coal power from other jurisdictions as an economic protectionist measure; rather, the NGEA discriminates against all coal power for the sake of establishing a coherent regulatory scheme that cannot be bypassed via importation.[136] For these reasons, even if the district court finds the NGEA is facially discriminatory, it will uphold the law because it permissibly discriminates for reasons other than origin.[137]

3. The NGEA Passes the Pike Test.

Because the district court will likely find that the coal moratorium is not discriminatory, the court may look to the Pike standard in order to weigh whether the coal moratorium, despite regulating "evenhandedly with only 'incidental' effects on interstate commerce,"[138] still runs afoul of the dormant Commerce Clause. The district court will not strike down the nondiscriminatory law "unless the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits."[139] The NGEA will survive judicial scrutiny under the Pike Test because the benefits from reducing its carbon emissions outweigh the burden the NGEA places on interstate commerce.[140] Minnesota has a convincing argument that reducing its carbon emissions has great value after the Supreme Court held as much in *Massachusetts v. Environmental Protection Agency*.[141] In that case, the Court recognized that "[t]he harms associated with climate change are serious and well recognized."[142] Therefore, steps taken to diminish a state's carbon emissions — and by extension global climate change — have benefits.[143] Thus, the NGEA satisfies the Pike Test because the steps taken by the state legislature to reduce the state's carbon emissions have benefits that outweigh the incidental burden placed on interstate commerce by the coal moratorium.[144]

VI. CONCLUSION

Although the court has not yet dispensed with North Dakota's preemption arguments, the Commerce Clause issue will most likely control

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135 *See supra* notes 133–134 and accompanying text.
136 *See supra* notes 133–135 and accompanying text.
137 *See supra* notes 133–136 and accompanying text.
138 Hughes v. Oklahoma, 441 U.S. 322, 336–37 (1979).
139 Dep't of Revenue of Ky. v. Davis, 553 U.S. 328, 338–39 (2008) (alteration in original) (citing Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970)).
140 *See infra* note 141 and accompanying text.
141 Massachusetts v. Envtl. Prot. Agency, 549 U.S. 497, 526 (2007).
142 *Id.* at 521.
143 *Id.* at 524–26.
144 *See supra* notes 138–143 and accompanying text.

the decision reached in this case.[145] Despite North Dakota's protest, the coal moratorium will survive unscathed because the law does not discriminate on its face and even if it does, it discriminates for reasons other than origin, such as the effectiveness of the overall carbon emissions reduction scheme and the fact that using coal to generate power is carbon intensive and contributes more to atmospheric pollution than other sources of power.[146] In addition, the NGEA satisfies the Pike standard because it regulates "evenhandedly with only 'incidental' effects on interstate commerce."[147] For these reasons, the district court will reject North Dakota's claim and uphold the constitutionality of the NGEA.[148]

145 *See supra* note 57.
146 *See supra* Part V.B.
147 Hughes v. Oklahoma, 441 U.S. 322, 336–37 (1979). S*ee supra* Part V.B.3.
148 *See supra* notes 145–147 and accompanying text.