At the end of April, the Supreme Court decided an obscure case called *McBurney v. Young* about state public records law. Quite unexpectedly, the court's opinion turns out to be good news for state environmental regulators. In particular, it clarifies how cap and trade relates to what lawyers call the dormant commerce clause — a doctrine that prevents states from creating barriers to interstate commerce. *McBurney* may also have some implications for renewable portfolio standards, although that's less clear.

The case involved a Virginia law that allowed state residents, but not non-residents, to make FOIA requests for state documents. One issue was whether the law discriminated against interstate commerce. Here's what the Court had to say about that issue:

> *We have held that a State does not violate the dormant Commerce Clause when, having created a market through a state program, it "limits benefits generated by [that] state program to those who fund the state treasury and whom the State was created to serve." "Such policies, while perhaps 'protectionist' in a loose sense, reflect the essential and patently unobjectionable purpose of state government—to serve the citizens of the State." [citations omitted]*

This logic applies equally to cap-and-trade systems. Emissions trading is the market for a product (emissions allowances) which the state has created, so it is free to limit participation in the market to in-state firms under the reasoning of *McBurney.* The same reasoning seems to apply to offset credits.

Of course, language in a single Supreme Court case isn't necessarily decisive, since future cases have to be considered in light of other existing precedents, and differences in facts matter too. But *McBurney* is definitely a helpful precedent for defending cap and trade.

What about renewable portfolio standards that give credit only for locally generated power? This is a trickier question. To the extent states restrict trading between utilities in renewable energy credits once they're created, *McBurney* seems to apply. But more serious problem involves restrictions on how those credits are generated by purchasing power for renewable sources. Some state plans might be considered discriminatory because they in effect exclude out-of-state renewables. *McBurney* may or may not be helpful here.

Although you could view renewable portfolio credits as a market created by the state, the state doesn't create the interstate electricity market. There's some other language in *McBurney*, however, that might help the state in defending the restriction to in-state generators:

> *The ‘common thread’ among those cases in which the Court has found a dormant Commerce Clause violation is that ‘the State interfered with the natural functioning of the interstate market either through prohibition or through burdensome regulation.’*

If we consider the “natural functioning of the interstate market” to be the electricity market’s functioning without the state’s renewable portfolio standard, it’s not clear that out-of-state renewable providers would even be participating in the state’s naturally functioning electricity market. So unless they can show that the state’s program deprives them of sales they would make in the absence of the renewable portfolio standard, *McBurney* suggests that they wouldn’t have a discrimination claim. But it’s not clear whether a court would accept this argument. A judge might consider the argument just too subtle to worry about, in the face of the common sense point that in-state renewables are being treated more favorably than out-of-state renewables. On balance, *McBurney* seems to help the state in this situation, but it’s not clear how much.