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USING THE SUPREME COURT'S ENIGMATIC COMMERCE CLAUSE HOLDING IN *SEBELIUS* TO CHALLENGE CONGRESS'S BROKEN RENEWABLE FUEL STANDARD

COREY J. WALKER*

At the intersection of energy law, environmental law, and interstate commerce lies a complex piece of legislation called the Renewable Fuel Standard (RFS). Aimed at increasing energy efficiency and supporting alternative fuel sources, the RFS requires that oil producers and importers offset their carbon footprints by obtaining and retiring compliance credits called Renewable Identification Numbers (RINs). However, for major oil refiners, the financial burdens of this compliance system distribute unevenly. Refiners that blend oil components into gasoline and diesel generate RINs as a byproduct of their business model, mitigating their compliance costs. On the other hand, independent refiners that do not blend oil components into fuel must purchase RINs in a secondary market, often resulting in massive compliance costs.

Because the RFS and its RINs compliance regime impact some refiners more than others, it has remained hotly debated since its expansion in 2007. This RFS controversy arguably peaked in January 2018, when one of the largest oil refiners in the United States, Philadelphia Energy Solutions, filed for bankruptcy, citing RFS compliance costs as the root cause of its financial difficulties. Industry backlash was swift enough that in October 2018, the

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Trump Administration announced that it had directed the Environmental Protection Agency, the executive agency charged with enforcing the RFS, to consider reforms aimed at increasing transparency and preventing price manipulation in the RINs market.

This Comment argues that the reforms suggested by the Trump Administration are insufficient to repair a compliance regime that is deeply flawed and beyond repair. Instead, refiners like Philadelphia Energy Solutions—the so-called "losers" in the RFS compliance regime—should look to challenge the RFS on constitutional grounds. Specifically, this Comment argues that refiners may challenge the RFS using Chief Justice John Roberts's Commerce Clause holding from National Federation of Independent Business v. Sebelius, *which stated that Congress may not compel market participation as an extension of its Commerce Clause power.*

This Comment examines both the RFS and the unsettled legacy of Chief Justice Roberts's Sebelius *decision, arguing that the latter provides refiners like Philadelphia Energy Solutions with a unique constitutional challenge to a thoroughly broken piece of legislation.*

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"The EPA asserts that more E15 gasoline must be blended in order for producers to meet the RFS, true? . . . Let me ask you, do you think we are headed for a train wreck, as currently defined by Congress?"
— Representative Paul Gosar[1]

"I am not aware of the definition of train wreck by the Congress."
— Christopher Grundler,
Director, EPA Office of Transportation and Air Quality[2]

INTRODUCTION

In October 2011, federal agents raided the offices of a biofuels company called Absolute Fuels in Lubbock, Texas, leaving dozens of

1. *Up Against the Blend Wall: Examining the EPA's Role in the Renewable Fuel Standard: Hearing before the Subcomm. on Energy Policy, Health Care and Entitlements of the H. Comm. on Oversight and Gov't Reform*, 113th Cong. 90 (2013) (statement of Rep. Gosar).

2. *Id.* (statement of Christopher Grundler, Director of EPA's Office of Transportation and Air Quality).

surprised members of the community without jobs.[3] Amid local confusion, federal authorities carried out a series of similar raids on the private home and offices of Absolute Fuels's Chief Executive Officer, Jeff Gunselman.[4] In the resulting investigations, federal agents seized luxury cars, sports memorabilia, an anti-aircraft gun, a Gulfstream private jet, a flamethrower, and a decommissioned Patton military tank.[5] Two years later, in March 2013, United States District Judge Sam R. Cummings sentenced Gunselman to 188 months in federal prison and ordered him to pay nearly $55 million in restitution.[6]

At nearly the same time as Gunselman's sentencing, approximately 1800 miles away in White Plains, New York, trading firm OceanConnect, LLC filed for bankruptcy.[7] Through the summer of 2012, the company spent months in and out of federal court defending itself from breach of contract claims filed by other trading houses and oil refining interests.[8] OceanConnect lost most of these suits and failed in its

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3. *See Government Raid Raises Questions About Absolute Fuels*, KCBD (Oct. 27, 2011, 10:28 PM), http://www.kcbd.com/story/15896146/government-raid-raises-questions-about-absolute-fuels (interviewing a confused Absolute Fuels employee about the raid).

4. *See* Walt Nett, *Absolute Fuels Founder Pleads Guilty to All Charges*, LUBBOCK AVALANCHE-J. (Dec. 14, 2012, 2:57 PM), http://lubbockonline.com/courts/2012-12-14/absolute-fuels-founder-pleads-guilty-all-charges.

5. *See* Cole Shooter, *Jeffrey David Gunselman Sentenced to 15 Years in Prison for Fraudulent Bio-Diesel Business*, KFYO (Mar. 29, 2013), http://kfyo.com/jeffrey-david-gunselman-sentenced-to-15-years-in-prison-for-fraudulent-bio-diesel-business (noting that Gunselman spent $12 million on these extravagant purchases, which also included real estate, sports tickets, and corporate sponsorships); *Texas Man Accused in Biodiesel RIN Fraud Indicted*, ARGUS (Aug. 9, 2012, 4:55 PM), https://www.argusmedia.com/pages/NewsBody.aspx?id=809422&menu=yes (detailing Gunselman's purchase of "cars, sports memorabilia and a demilitarized tank, anti-aircraft gun and flamethrower, among other items").

6. Press Release, U.S. Attorney's Office, Northern District of Texas, Bio-Diesel Fuel Company Owner Sentenced to 188 Months in Federal Prison on Wire Fraud, Money Laundering and False Statements Convictions (Mar. 29, 2013), https://www.justice.gov/usao-ndtx/pr/bio-diesel-fuel-company-owner-sentenced-188-months-federal-prison-wire-fraud-money.

7. *See* Katy Stech, *Biofuel Scandal Pushes Trading Firm into Bankruptcy*, WALL ST. J.: BANKRUPTCY BEAT (Feb. 8, 2013, 5:30 PM), https://blogs.wsj.com/bankruptcy/2013/02/08/biofuel-scandal-pushes-trading-firm-into-bankruptcy (explaining that OceanConnect filed for Chapter 7 bankruptcy due to several lawsuits alleging that it sold fake biofuel credits).

8. *See, e.g.*, Vinmar Overseas, Ltd. v. OceanConnect, LLC, Nos. H-11-4311, H-11-4629, 2012 WL 3599486, at *1 (S.D. Tex. Aug. 20, 2012) (consolidating multiple suits against OceanConnect for allegedly selling the plaintiffs fake Renewable Identification Numbers (RINs)); George E. Warren Corp. v. OceanConnect, LLC, No. 2:12-cv-14125-KMM, 2012 WL 12869199, at *1 (S.D. Fla. July 25, 2012) (addressing OceanConnect's motion to dismiss a breach of contract suit brought by a gasoline company that

attempts to indemnify itself by impleading various administrative agencies, such as the Environmental Protection Agency (EPA).[9] In its filing for Chapter 7 bankruptcy protection, OceanConnect reported that it ended 2012 with a massive $1.7 million loss.[10]

But while both Gunselman and OceanConnect had a difficult 2013, they fared far better financially than major oil refiners, which suddenly faced some staggering new compliance costs. For some refiners, 2013 added hundreds of millions of dollars in operating expenditures, seemingly out of nowhere.[11] By August 2013, one major refiner faced a tab of an incredible $800 million.[12]

The unifying link in this energy industry triptych was a unique set of regulations called the Renewable Fuel Standard ("RFS"),[13] a legislative behemoth enacted in 2005 when Congress passed the Energy Policy Act.[14] Aimed at incentivizing the production and use of cleaner, more efficient transportation fuels, the RFS brought sweeping changes to

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purchased invalid RINs); Lansing Trade Grp., LLC v. OceanConnect, LLC, No. 12-2090-JTM, 2012 WL 2449514, at *1–2 (D. Kan. June 26, 2012) (suing OceanConnect over breach of contract and warranties with Lansing Trade Group).

9. *See* Lansing Trade Grp., LLC v. OceanConnect, LLC, No. 12-2090-JTM-GLR, 2013 WL 120158, at *3 (D. Kan. Jan. 9, 2013) (denying OceanConnect's motion for leave to file a third-party complaint asserting claims against the EPA); George E. Warren Corp. v. OceanConnect, LLC, No. 12-cv-14125-KMM, 2012 WL 12868746, at *2 (S.D. Fla. Dec. 14, 2012) (dismissing OceanConnect's claim against the EPA after finding that it was barred by the doctrine of res judicata); Vinmar Overseas, Ltd. v. OceanConnect, LLC, No. H-11-4311, 2012 WL 5989206, at *7 (S.D. Tex. Nov. 29, 2012) (dismissing OceanConnect's motion for leave to file a third-party impleader complaint against the EPA).

10. Stech, *supra* note 7.

11. *See, e.g.*, Tristan R. Brown, *Ballparking Valero's Future RIN Costs*, SEEKING ALPHA (Aug. 15, 2017, 10:54 AM), https://seekingalpha.com/article/4099047-ballparking-valeros-future-rin-costs (identifying as the source of Valero Energy's high annual RIN expenditure costs the spike in D6 ethanol RINs in 2013, prior to which the credits traded for mere pennies); Tristan R. Brown, *As RIN Prices Fly, a Look Back at Their Impact on Refiners*, SEEKINGALPHA (Feb. 2, 2015, 1:45 AM), https://seekingalpha.com/article/2872976-as-rin-prices-fly-a-look-back-at-their-impact-on-refiners (describing RIN prices from May 2013 through the end of 2014).

12. Sabina Zawadzki, *U.S. Refiners, Plagued by RINsanity, See 'Half Step' on Biofuels*, REUTERS (Aug. 7, 2013, 12:16 AM), https://www.reuters.com/article/us-usa-ethanol/u-s-refiners-plagued-by-rinsanity-see-half-step-on-biofuels-idUSBRE97605420130807.

13. Regulation of Fuels and Fuel Additives: Renewable Fuel Standard Program, 72 Fed. Reg. 23,900 (May 1, 2007) (codified at 40 C.F.R. pt. 80 (2017)).

14. Pub. L. No. 109-58, 119 Stat. 594 (codified as amended in scattered sections of 42 U.S.C.).

the oil industry in the United States by imposing massive financial burdens on some industry players.[15]

Oddly enough, in the same cruel 2012 summer that felled Gunselman and OceanConnect and sowed the seeds of huge financial losses for oil refiners, the Supreme Court of the United States handed down a decision with huge consequences for another industry altogether. In a landmark ruling in *National Federation of Independent Businesses v. Sebelius*,[16] the Supreme Court ruled that a portion of the Patient Protection and Affordable Care Act (ACA)[17] called the "individual mandate"[18] was an unconstitutional extension of Congress's Commerce Clause power.[19] Although the Court ultimately upheld the individual mandate as permissible use of Congress's power to tax and spend,[20] the Court took issue with Congress using the Commerce Clause to force individuals to participate in the market for health insurance.[21] In a powerful but mysterious opinion, Chief Justice John Roberts put a new wrinkle into Commerce Clause jurisprudence by stating plainly that while Congress may regulate interstate commerce under its Article I power, it may not compel market participation under the guise of regulation.[22]

Following the *Sebelius* decision, both state and federal courts and legal scholars struggled to make sense of just what Chief Justice Roberts's opinion[23]

15. *See supra* notes 10–12 and accompanying text (discussing the market effects of speculation and volatility in the RIN market).

16. 567 U.S. 519 (2012).

17. Pub L. No. 111-148, 124 Stat. 119 (2010) (codified as amended in scattered sections of 42 U.S.C.).

18. *See Sebelius*, 567 U.S. at 539 (citing 26 U.S.C. § 5000A (2012)).

19. *Id.* at 558 (Roberts, C.J.). The Court also found that the individual mandate could not be upheld under the Necessary and Proper Clause. *Id.* at 561.

20. *Id.* at 574 (majority opinion).

21. *See id.* at 552, 558 (Roberts, C.J.).

22. *See id.* at 552 ("The individual mandate . . . does not regulate existing commercial activity. It instead compels individuals to *become* active in commerce . . . . Construing the Commerce Clause to permit Congress to regulate individuals precisely *because* they are doing nothing would open a new and potentially vast domain to congressional authority.").

23. The Court styled Chief Justice Roberts's opinion as its own, but no other Justices formally joined the opinion in its entirety. Justices Ginsburg, Breyer, Sotomayor, and Kagan joined Chief Justice Roberts's opinion in Parts I, II, and III-C. Only Justices Breyer and Kagan joined his opinion in Part IV, and no other Justices joined his opinion in Parts III-A, III-B, and III-D. *See id.* at 529.

meant for the Commerce Clause.[24] Nearly six years since the decision, circuits remain split and the debate continues.[25]

However, 2018 may have introduced a catalyst with the potential to unify the embattled RFS and the unsettled legacy of *Sebelius*. In January 2018, the RFS claimed a casualty that reached beyond local and industry news when Philadelphia Energy Solutions, the tenth-largest refinery in the United States, filed for bankruptcy.[26] In a sweeping indictment of the regulatory scheme, Philadelphia Energy Solutions attributed its dire financial straits to "skyrocketing" costs under the RFS compliance regime, calling the system "broken."[27] Notably, the refiner reported that in 2017 it spent $218 million—twice what it spent on payroll—on meeting its compliance obligations.[28]

As perhaps the first perfectly situated plaintiff, Philadelphia Energy Solutions can likely challenge the RFS using the rationale articulated in Chief Justice Roberts's enigmatic Commerce Clause holding in *Sebelius*. This Comment argues that such a challenge carries the potential to remedy a thoroughly broken regulatory scheme and, in the process, provide the Supreme Court with an opportunity to bring clarity to its currently unsettled Commerce Clause jurisprudence.

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24. *See, e.g.*, Lawrence B. Solum, *How* NFIB v. Sebelius *Affects the Constitutional Gestalt*, 91 WASH. U. L. REV. 1, 32 (2013) (summarizing the struggles of circuit courts to uniformly apply the Chief Justice's Commerce Clause holding); *infra* note 254 and accompanying text (detailing scholarly disagreement on whether the Chief Justice's Commerce Clause holding reflects binding precedent).

25. *Compare* United States v. Henry, 688 F.3d 637, 641 n.5 (9th Cir. 2012) (acknowledging the existence of controversy over whether Chief Justice Roberts's Commerce Clause opinion binds federal courts and declining to opine on the matter), *and* United States v. Roszkowski, 700 F.3d 50, 58 n.3 (1st Cir. 2012) (following *Henry* and abstaining from the *Sebelius* Commerce Clause debate), *with* United States v. Rose, 714 F.3d 362, 371 (6th Cir. 2013) (treating Chief Justice Roberts's Commerce Clause holding as binding precedent), *and* United States v. Robbins, 729 F.3d 131, 135–36 (2d Cir. 2013) (assuming, for the purposes of analysis, that the Commerce Clause discussion in *Sebelius* controls in relevant cases).

26. *See, e.g.*, Jessica DiNapoli & Jarret Renshaw, *Exclusive: Philadelphia Energy Solutions to File for Bankruptcy—Memo*, REUTERS (Jan. 21, 2018, 6:59 PM), https://www.reuters.com/article/us-philadelphiaenergysolutions-bankruptc/exclusive-philadelphia-energy-solutions-to-file-for-bankruptcy-memo-idUSKBN1FA18P (attributing the company's finance issues to costly biofuel laws); Matt Egan, *Largest East Coast Oil Refinery Goes Bankrupt, Blaming "Broken" EPA Rules*, CNN MONEY (Jan. 22, 2018, 4:40 PM), http://money.cnn.com/2018/01/22/investing/oil-refinery-bankruptcy-philadelphia-energy-solutions/index.html (summarizing the circumstances behind Philadelphia Energy Solution's bankruptcy filing).

27. *Id.*

28. *Id.*

Part I of this Comment details the origins of the RFS and summarizes the regulatory framework, including how its compliance credit-based enforcement scheme burdens obligated parties.[29] Part I also provides background on the Supreme Court's *Sebelius* decision and briefly summarizes several intervening cases in which plaintiffs attempted to apply a post-*Sebelius* Commerce Clause challenge in other contexts.[30] Part I concludes with a brief overview of the legal deference courts give to administrative agency interpretations of statutory directives, a doctrine known as *Chevron* deference.[31] Next, Part II describes how the RFS remains an unresolved problem in dire need of revision or repeal.[32] After briefly distinguishing alternative methods of remedying the RFS problem, this Comment argues that because Chief Justice Roberts's Commerce Clause holding in *Sebelius* is binding precedent, a prospective challenger may seek to invalidate the RFS as an unconstitutional compulsion of commercial activity.[33] Finally, this Comment concludes that, whereas alternative methods of revision fall short, challenging the RFS as an invalid extension of Congress's Commerce Clause power represents a unique opportunity to both clean up a broken RFS and bring clarity to the Supreme Court's constitutional jurisprudence in the wake of *Sebelius*.[34]

I. BACKGROUND

Comprehending the RFS and *Sebelius* individually, much less the two in unison, requires at least a basic outline of several fundamental concepts concerning the domestic oil industry, Congress's attempts to regulate transportation fuels, the power delegated to Congress by Article I of the Constitution, and the deference owed to administrative agency rulemaking. While providing an exhaustive description of each category is far beyond the scope of this Comment, this Section nevertheless begins with a broad discussion of the issues necessary to understand the intersection of the RFS and modern Commerce Clause jurisprudence following the Supreme Court's decision in *Sebelius*.

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29. *See infra* Section I.A. and Section I.B.
30. *See infra* Section I.C.
31. *See infra* Section I.D.
32. *See infra* Section II.A.
33. *See infra* Section II.B. and Section II.C.
34. *See infra* Conclusion.

A. The Oil Industry: A Primer

Without context, the RFS is nothing but another complex set of regulations in a legislative universe chock full of confusing statutes. But beyond the technical gobbledygook, the RFS is an extremely influential piece of legislation with profound effects on the U.S. economy. Understanding its relevance requires first a brief discussion of the absolute basics of the oil industry and how petroleum refining fits into the domestic transportation sector.

1. The ongoing reign of fossil fuels

As of 2018, most of the energy consumed annually in the United States derives from fossil fuels.[35] While these fossil fuels supply key inputs for manufacturing and heating, they are most commonly associated with transportation.[36] Despite the growing popularity of electric, hybrid, and alternative-fuel vehicles,[37] approximately ninety-two percent of private and commercial vehicles still use petroleum as a fuel source.[38]

The most common petroleum-based fuels used in the transportation sector are gasoline and diesel.[39] Both products derive from crude oil, a mixture of hydrocarbons in liquid form[40] that companies rip from the earth using various drilling, pumping, and extraction methods.[41] Once pulled from the ground and delivered to refining facilities, oil

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35. *See Our Energy Sources: Fossil Fuels*, NAT'L ACADS. SCI., ENG'G, MED., http://needtoknow.nas.edu/energy/energy-sources/fossil-fuels (last visited Dec. 3, 2018) (noting that the United States utilizes fossil fuels for roughly eighty-one percent of its total energy expenditure).

36. *See Fossil Fuel Energy Primary Consumption in the U.S. from 1990 to 2018, by Sector*, STATISTA, https://www.statista.com/statistics/244429/us-fossil-fuel-energy-consumption-by-sector (last visited Dec. 3, 2018) (graphing the use of fossil fuel as an energy source across industries).

37. *See, e.g.*, *Alternative Fuel Vehicle Data*, U.S. ENERGY INFO. ADMIN. (Mar. 9, 2018), https://www.eia.gov/renewable/afv (charting the increase in alternative-fueled vehicle inventories among state and federal agencies between 2011 and 2016); Robert Rapier, *U.S. Electric Vehicle Sales Soared in 2016*, FORBES (Feb. 5, 2017, 11:28 PM), https://www.forbes.com/sites/rrapier/2017/02/05/u-s-electric-vehicle-sales-soared-in-2016.

38. *Use of Energy in the United States* Explained*: Energy Use for Transportation*, U.S. ENERGY INFO. ADMIN.: ENERGY EXPLAINED, https://www.eia.gov/energyexplained/?page=us_energy_transportation (last updated May 23, 2018).

39. *Id.*

40. *Oil: Crude and Petroleum Products* Explained*: Basics*, U.S. ENERGY INFO. ADMIN.: ENERGY EXPLAINED, https://www.eia.gov/energyexplained/index.cfm?page=oil_home (last updated June 19, 2018) [hereinafter *Oil Explained*].

41. *See* U.S. ENERGY INFO. ADMIN., TRENDS IN U.S. OIL AND NATURAL GAS UPSTREAM COSTS 1–3 (2016), https://www.eia.gov/analysis/studies/drilling/pdf/upstream.pdf (summarizing the costs of various extraction methods).

refiners break the mixture of crude oil into separate batches of discrete compounds using a process called "fractional distillation."[42] During this process, refining instruments heat crude oil until the constituent compounds reach their individual boiling points.[43] Collected in a tiered structure called a distillation column,[44] these subsidiary products—which exhibit markedly different chemical characteristics[45]—are then used in blending to create finished transportation fuels or utilized as feedstock for other industrial and manufacturing purposes.[46] The base forms of gasoline, collectively known as "blendstock," are but a few of the products derived from this basic oil distillation process.[47]

For gasoline, in particular, what comes directly from the refinery is not what ultimately fuels an automobile. Before motorists pump gasoline into their cars and trucks, marketers and suppliers mix gasoline blendstock sourced from refineries with ethanol[48] to reduce the resulting emissions.[49] Although the addition of ethanol slightly reduces the efficiency of gasoline,[50] ethanol-blended gasoline nevertheless now makes up approximately ninety-five percent of all the fuel used by motor vehicles with gasoline engines in the United States.[51]

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42. *See* Jack Brubaker, *How Does Fractional Distillation Work?*, SCIENCING (Mar. 13, 2018), https://sciencing.com/fractional-distillation-work-6310159.html (defining fractional distillation as "a modified distillation process that allows the separation of liquids with similar boiling points").

43. *Id.*

44. *Crude Oil Distillation and the Definition of Refinery Capacity*, U.S. ENERGY INFO. ADMIN.: TODAY IN ENERGY, (July 5, 2012), https://www.eia.gov/todayinenergy/detail.php?id=6970.

45. *See id.* (detailing the products refined from crude oil and their varying boiling points).

46. *Id.*; *see also Oil Explained*, *supra* note 40 (explaining that industrial and manufacturing uses of crude oil "fractions" include the production of plastics, polyurethane, and many other goods).

47. *See Definitions, Sources and Explanatory Notes*, U.S. ENERGY INFO. ADMIN.: PETROLEUM & OTHER LIQUIDS, https://www.eia.gov/dnav/pet/TblDefs/pet_move_wkly_tbldef2.asp (last visited Dec. 3, 2018) (defining various crude oil derivatives as "gasoline blending components").

48. *Almost All U.S. Gasoline is Blended with 10% Ethanol*, U.S. ENERGY INFO. ADMIN.: TODAY IN ENERGY, (May 4, 2016), https://www.eia.gov/todayinenergy/detail.php?id=26092 [hereinafter *U.S. Gasoline*].

49. *See How Much Ethanol is in Gasoline, and How Does it Affect Fuel Economy?*, U.S. ENERGY INFO. ADMIN.: FREQUENTLY ASKED QUESTIONS, https://www.eia.gov/tools/faqs/faq.php?id=27&t=10 (last updated June 12, 2018).

50. *Id.* (stating that the use of ethanol-blended gasoline may decrease fuel economy by approximately three percent when compared to the use of pure gasoline).

51. *See U.S. Gasoline*, *supra* note 48.

While this basic explanation overlooks many nuances of the fuel chain and greatly oversimplifies the production scheme, a more thorough and detailed explanation is beyond the scope of this Comment. Still, it is important to keep in mind two important realities: (1) most of the transportation fuel used in the United States derives from petroleum, and (2) before gasoline reaches the tank, federal law mandates that intermediaries blend it with ethanol to reduce pollution. How and when fuel blending takes place is key to understanding how the RFS functions, requiring a brief explanation of the oil refining industry.

2. Oil refining and fuel blending

Both oil refining and the blending of petroleum products into finished transportation and heating fuel takes place in the "downstream" portion of an industry, generally split into three segments: upstream, midstream, and downstream.[52]

The upstream segment includes the physical exploitation of petroleum resources, usually through oil exploration, drilling, and the actual removal of crude oil from the ground.[53] By comparison, crude oil and natural gas transportation via truck, barge, and pipeline generally characterizes the midstream sector.[54] However, most relevant to the RFS is the downstream sector, where the actual oil refining process takes place.[55]

Unlike the upstream and midstream segments, the downstream sector is best understood as two distinct halves.[56] In what might be called the "upper" half of the downstream sector, companies utilize massive oil refining assets to convert physical crude oil and feedstock to petroleum products like gasoline blendstocks, diesel, blending

52. *See Industry Overview*, PSAC, https://www.psac.ca/business/industry-overview (last visited Dec. 3, 2018) (dividing the oil and gas industry into the three main components and describing each).

53. *See id.* (noting that the upstream industry is referred to as the "exploration and production (E&P) sector").

54. *See id.* (dubbing the midstream segment the "vital link" between remote oil production areas and consumers).

55. *See id.* (listing "oil refineries, petrochemical plants, petroleum products distributors, retail outlets and natural gas distribution companies" as part of the downstream industry).

56. *See* Michael Teague, *Major Integrated Oil & Gas: Standard Oil, Super-Majors, and Resource Nationalism*, EQUITIES.COM (Feb. 6, 2014, 9:28 AM), https://www.equities.com/news/major-integrated-oil-gas-from-super-majors-to-resource-nationalism (separating the tasks of downstream refiners into processing resources and handling aspects of the sale of goods).

components like naphtha, and even asphalt.[57] The second, "lower," half of the downstream sector includes the blending, marketing, delivery, and terminal distribution of finished transportation fuel, heating fuel, and jet fuel.[58] While many of the largest oil companies maintain an asset presence in each segment of the industry,[59] the RFS is most impactful among refiners and blenders in the downstream segment, where the compliance burden falls. Here, the origins and innerworkings of the RFS become immediately relevant to understanding the financial footprint of this compliance burden.

B. The Renewable Fuel Standard

At its most basic, the RFS simply reflects Congress's intent to incentivize the production and use of cleaner, more efficient fuels.[60] Like many statutes currently in force, the RFS evolved through amendment and revision.

1. Birth of the RFS: The Energy Policy Act and the Clean Air Act

In passing the Energy Policy Act of 2005, Congress supplemented the existing Clean Air Act[61] by instituting a "renewable fuel program."[62] In its introduction, the Energy Policy Act evinced a shift in policy aimed at reducing the United States' reliance on foreign energy,[63] increasing the efficiency of existing energy sources,[64] and supporting a push for a diversified fuel production.[65] Notably, the Energy Policy Act

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57. *See Oil Explained*, *supra* note 40 (cataloging the average distillation yield of a forty-two-gallon barrel of crude oil); *see also* Michael Freemantle, *What's that Stuff?: Asphalt*, CHEM. & ENG'G NEWS (Nov. 22, 1999), https://pubs.acs.org/cen/whatstuff/stuff/7747scit6.html (tying the source of asphalt to the petroleum refining process).

58. *See Industry Overview*, *supra* note 52 and accompanying text.

59. *See* Teague, *supra* note 56 (specifying ExxonMobil, Chevron, and BP as vertically integrated oil companies with asset footprints across all three industry segments).

60. *See* 151 Cong. Rec. H6,960 (statement of Rep. Joe Burton) (explaining that "[t]here are numerous provisions in this bill to give incentives to renewable and clean energy resources, there are numerous provisions in this bill to increase the efficient use of those resources); *c.f.* Energy Independence and Security Act of 2007, Pub. L. No. 110-140, 121 Stat. 1492, 1492 (2007) (declaring in the Act's preamble the congressional intent to "increase the production of clean renewable fuels").

61. Clean Air Act, Pub. L. No. 88-206, 77 Stat. 392 (1963) (codified as amended in scattered sections of 42 U.S.C.).

62. Pub. L. No. 109-58, § 1501, 119 Stat. 594, 1067 (establishing the general parameters of the RFS).

63. 42 U.S.C. § 16181(a)(3) (2012).

64. *Id.* § 16181(a)(1).

65. *Id.* § 16181(a)(2).

included a provision that set forth renewable fuel blending requirements[66] for petroleum refiners and importers[67] and established annual volume requirements[68] for qualifying renewable fuel types. For compliance purposes, the RFS[69] designated all refiners and importers as "obligated parties"[70] and required the blending of renewable fuels directly proportionate to petroleum production or importation.[71]

In 2007, Congress passed the Energy Independence and Security Act (EISA),[72] which expanded the qualifying types of renewable fuels[73] and increased the blending obligations for petroleum refiners and importers.[74] The result was a second, modernized RFS that requires producers and importers to blend, as a means of compliance with regulatory targets, one or more of four statutorily recognized renewable

66. *See id.* §§ 7545(o)(2)(A)(ii), 7545(o)(2)(B)(i) (authorizing the Secretary of Energy to promulgate regulations necessary to ensure that "gasoline sold or introduced into commerce in the United States . . . , on an annual average basis," contains applicable volumes of renewable fuel in annually increasing amounts from 2006 to 2012).

67. *Id.* § 7545(o)(3)(B)(ii)(I) (specifying that the renewable fuel obligation shall "be applicable to refineries, blenders, and importers"). *But see* 40 C.F.R. § 80.1106(a)(1) (2017) (clarifying that the renewable volume obligation does not apply to blenders, since they are "part[ies] that simply add[ ] renewable fuel to gasoline").

68. The Energy Policy Act mandated the blending of 4.0 billion gallons of renewable fuel in 2006; 4.7 billion gallons in 2007; 5.4 billion gallons in 2008; 6.1 billion gallons in 2009; 6.8 billion gallons in 2010; 7.4 billion gallons in 2011; and 7.5 billion gallons in 2012. *See* 42 U.S.C. § 7545(o)(2)(B)(i).

69. *Id.* § 7545(o).

70. *See id.* § 7545(o)(3)(B)(ii)(I) (applying renewable fuel obligations to "refineries" and "importers"); 40 C.F.R. § 80.1106(a)(1) (restating that "[a]n obligated party is a refiner that produces gasoline within the 48 contiguous states, or an importer that imports gasoline into the 48 contiguous states").

71. *See* 42 U.S.C. § 7545(o)(3)(B)(ii)(II) (establishing that each refiner or importer's obligation takes the form of a "percentage of [gasoline] sold or introduced into commerce in the United States").

72. Pub. L. No. 110-140, 121 Stat. 1492 (2007) (codified as amended in scattered sections of 42 U.S.C.).

73. *See* 121 Stat. at 1519 (adding "advanced biofuel" as a qualifying renewable fuel and generally characterizing the fuel as ethanol and biodiesel deriving from a source other than corn starch).

74. *See Summary of the Energy Independence and Security Act*, EPA: LAWS & REGS., https://www.epa.gov/laws-regulations/summary-energy-independence-and-security-act (last visited Dec. 3, 2018) (summarizing the policy changes effectuated by the EISA by the introduction of "more aggressive requirements").

fuels:[75] conventional renewable fuel ("D6");[76] advanced biofuel ("D5");[77] cellulosic biofuel ("D3");[78] and biomass-based diesel ("D4").[79]

Most recently, reports in October 2018 indicate that some form of RFS revision is forthcoming,[80] as the EPA is expected to release a proposed rule concerning RINs in February 2019, with the final rule expected in May 2019.[81] However, despite initial characterizations of these changes as a "broad overhaul,"[82] there is no suggestion that expected changes will modify the governing compliance system at the heart of the RFS. To the contrary, advance reports suggest that imminent revision may simply reduce the number of waivers available to refineries unable to meet their compliance obligations.[83] Indeed, following a May 2018 meeting with White House officials, an oil industry representative criticized the impending policy changes as inadequate.[84] Accordingly,

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75. *See Renewable Fuel Annual Standards*, EPA: RENEWABLE FUEL STANDARD PROGRAM, https://www.epa.gov/renewable-fuel-standard-program/renewable-fuel-annual-standards (last visited Dec. 3, 2018) (providing basic definitions and example feedstocks for each recognized renewable fuel within the "nesting scheme" of the new RFS).

76. Conventional renewable fuel, commonly known as ethanol, derives from corn starch. *See id.*

77. Advanced biofuel derives from sugarcane and other fermented sugars. *See id.*

78. Cellulosic biofuel results from the processing of corn stalks, leaves, and cobs (as opposed to the corn kernels themselves), wood chips, and biogas. *See id.*

79. Biomass-based diesel derives from soybean oil, canola oil, waste oil, and animal fats. *See id.*

80. *See* Erin Voegele, *OMB Releases Estimated Timelines for EPA's E15 Rule, 2 RFS Rules*, ETHANOL PRODUCER MAG. (Oct. 18, 2018), http://www.ethanolproducer.com/articles/15698/omb-releases-estimated-timelines-for-epaundefineds.

81. *See Modifications to Fuel Regulations to Provide Flexibility for E15; Modifications to RFS RIN Market Regulations*, Off. Info. & Reg. Aff., https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201810&RIN=2060-AU34 (last visited Dec. 3, 2018) (listing expected dates for proposed and final rules concerning "regulatory changes [modifying] certain elements of the renewable identification number (RIN) compliance system under the Renewable Fuel Standard (RFS) program").

82. *See* Jarrett Renshaw & Chris Prentice, *Trump Biofuel Policy Overhaul to Include Fewer Refinery Waivers: Source*, REUTERS (May 11, 2018, 1:20 PM), https://www.reuters.com/article/us-usa-trump-biofuels/trump-biofuel-policy-overhaul-to-include-fewer-refinery-waivers-source-idUSKBN1IC263?il=0 (detailing the Trump Administration's soon-expected structural changes to the RFS).

83. *See id.* (expecting cuts to the numbers of waivers the EPA may give to small refiners who produce less than 75,000 barrels of fuel per day).

84. *See* Snow, *infra* note 187 ("We . . . believe that small refiner exemptions are evidence that the RFS is broken and comprehensive legislative reforms, including a sunset of the program, are needed.").

barring any unexpected shift in directive, it appears the current administration intends to keep the core goals of the RFS intact.[85]

The RFS achieves these policy goals through a uniquely structured compliance system that requires producers to fulfill individualized obligations at the close of each fiscal year.[86] How the RFS determines these obligations requires a brief detour into the finer details of the RFS's compliance regulations.

2. *The RFS compliance framework*

The RFS not only specifies the parties that must adhere to its renewable fuels policies; it also dictates how they may demonstrate compliance. To this end, the RFS vests in the EPA the power to determine annual Renewable Volume Obligations ("RVOs"), which each obligated party accrues based on their petroleum production or import activities.[87] Functionally, the EPA computes these RVOs by drawing a direct relationship between the annual gallons produced or imported by an obligated party and the renewable volume that entity must produce to offset.[88] To calculate each individual obligation, the RFS sets forth annual national volume mandates for each type of renewable fuel.[89] The EPA then converts this nationwide volume to a percentage basis for each biofuel using gasoline and diesel fuel consumption projections for the forthcoming year derived from U.S. Energy Information Administration statistics.[90] Each refiner

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85. *See* Renshaw & Prentice, *supra* note 80 (clarifying that regardless of the use of waivers, the Trump Administration intends to ensure there is no effect to "the amount of biofuels blended" overall).

86. *Overview for Renewable Fuel Standard: Program Compliance Basics*, EPA: RENEWABLE FUEL STANDARD PROGRAM, https://www.epa.gov/renewable-fuel-standard-program/overview-renewable-fuel-standard (last visited Dec. 3, 2018) [hereinafter *Program Compliance Basics*].

87. *See* 42 U.S.C. §§ 7545(o)(2)(A)(i), (iii)(I) (2012) (requiring that the EPA promulgate compliance regulations covering "refineries, blenders, distributors, and importers"); *see also* 40 C.F.R. § 80.1106(a)(1) (2017) (indicating that refiners and importers are obligated parties, but blenders are not).

88. *See* 40 C.F.R. § 80.1107(a) (defining an obligated party's RVO as a function of the RFS-mandated total volume for a specified calendar year and the volume of non-renewable fuel produced or imported by that party for the same calendar year).

89. *See* 42 U.S.C. § 7545(o)(2)(B)(i) (setting forth the nationwide volume mandates for all four recognized categories of renewable fuel by year until 2022).

90. *See* § 7545(o)(3)(A) (stating that the Energy Information Administration must provide an estimate of the projected volume of gasoline sales for the next calendar year). *See generally Program Compliance Basics*, *supra* note 86 (explaining that the EPA calculates RVOs based on gasoline production estimates for the following year).

"multiplies the percentage RFS for each biofuel times its combined petroleum gasoline and diesel fuel production and arrives at the RVO for each biofuel."[91]

Once established, an obligated party has two options: (1) blend renewable fuels into transportation or heating fuels to offset its RVO, or (2) secure compliance credits as a substitute for actual blending efforts.[92] Under either option, the means to demonstrate compliance take the form of statutorily created credits called Renewable Identification Numbers (RINs).[93]

a. RINs

Ultimately, RINs are just thirty-eight-character numeric codes identifying various characteristics related to the RINs' creation.[94] Every time any party produces or imports into the United States a qualifying renewable fuel under the RFS, that party generates a RIN.[95] The RIN generation process occurs simultaneously with the production or importation of the associated "batch"[96] of biofuel at no additional cost to the producer;[97] only producers and importers that create or import less than 10,000 gallons of renewable fuel each year are exempt from this RINs generation process.[98] These RINs, which travel with the

91. Bob Neufeld & Rebecca Lynne Fey, *Winners and Losers: The EPA's Unfair Implementation of Renewable Fuel Standards*, 60 S.D. L. REV. 258, 264 n.15 (2015); *see also* 40 C.F.R. § 80.1107 (providing the exact calculation for an obligated party's RVO).

92. *Program Compliance Basics*, *supra* note 86; *see also Renewable Identification Numbers (RINs) Under the Renewable Fuel Standard*, EPA: RENEWABLE FUEL STANDARD PROGRAM, https://www.epa.gov/renewable-fuel-standard-program/renewable-identification-numbers-rins-under-renewable-fuel-standard (last visited Dec. 3, 2018) (modeling the holistic, generation-to-retirement regime employed by obligated parties who also blend renewable fuels and illustrating, by contrast, the necessity for non-blending obligated parties to purchase separated RINs to meet compliance obligations).

93. *See* 42 U.S.C. § 7545(o)(5)(A) (establishing the credit program); 40 C.F.R. § 80.1125 (describing the basic coding format for RINs).

94. *See* 40 C.F.R. § 80.1125(a)–(i) (identifying the features incorporated into the RIN codes, including the type of renewable fuel, the year the fuel was produced or imported, and the registration number of the refiner or importer).

95. *See id.* § 80.1126(a)(1).

96. Under the RFS, a "batch" is simply any volume of renewable fuel as designated by the specific RIN code. *Id.* § 80.1126(c).

97. *See id.* § 80.1426(e)(2).

98. *See id.* § 80.1126(b).

physical biofuel at the point of sale,[99] are ultimately the offset credits used for compliance under the RFS.[100]

Each RIN is valid only in the year it was produced or in the year immediately following, and all RINs expire immediately after an obligated party uses them for compliance.[101] Of the four types of RINs,[102] those generated by the blending of ethanol into gasoline blendstock are by far the most ubiquitous and, as a result, most commonly traded.[103] Known colloquially by their regulatory designation as D6 RINs, ethanol compliance credits make up the largest portion, in sheer volume, of the renewable fuels mandate.[104]

Perhaps mindful that not all obligated parties would choose to blend renewable fuels as a means to demonstrate compliance, Congress fostered a secondary RIN market by allowing any RIN-generating party to transfer the credits to another.[105] Congress also authorized the EPA to issue regulations permitting "the generation of . . . credits by any person that refines, blends, or imports gasoline that contains a quantity of renewable fuel that is *greater* than the quantity required" to satisfy

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99. *See id.* ("A RIN is assigned to a volume of renewable fuel when ownership of the RIN is transferred along with the transfer of the volume of renewable fuel . . . .").

100. *See id.* § 80.1428(a)(1) (clarifying that the RINs assigned to volumes of renewable fuel for compliance purposes are those "gallon-RINs" generated through § 80.1426(e)).

101. *Id.* § 80.1127(a)(3).

102. The designation ties the RIN to the underlying renewable fuel whose blending produced it. *See supra* notes 75–79 and accompanying text (outlining the renewable fuel types and the origins of each).

103. *See Annual RIN Sales Report*, EPA: FUELS REGISTRATION, REPORTING, & COMPLIANCE HELP, https://www.epa.gov/fuels-registration-reporting-and-compliance-help/rin-trades-and-price-information (click on the "Data Sets" dropdown box to change the displayed report; select "RIN Transaction Volumes"; click on "Total RINs Traded" to organize from most to least) (last visited Dec. 3, 2018) (showing that D6 ethanol RINs traded at far higher volumes than other renewable fuel credits between 2010 and 2018).

104. Of the approximately 23.85 billion gallons of renewable fuel the EPA required for blending in 2016, ethanol made up 18.11 billion gallons, or nearly seventy-six percent of the total mandate. *Final Renewable Fuel Standards for 2014, 2015 and 2016, and the Biomass-Based Diesel Volume for 2017*, EPA: RENEWABLE FUEL STANDARD PROGRAM, https://www.epa.gov/renewable-fuel-standard-program/final-renewable-fuel-standards-2014-2015-and-2016-and-biomass-based (last visited Dec. 3, 2018).

105. 42 U.S.C. § 7545(o)(5)(B), (E) (2012) (expressly permitting the transfer of compliance credits and authorizing the EPA to promulgate regulations governing the exchange and use of the credits).

that party's RVO.[106] In so doing, Congress both anticipated and provided for the existence of a separate financial market involving compliance credits.[107]

b. The secondary compliance market

Any party that registers with the EPA may trade RINs,[108] which seems worthless because of their intangibility but nonetheless have intrinsic value because any obligated party may use the credits to satisfy its annual RVO.[109] Accordingly, RINs change hands frequently in a secondary market,[110] exposing RIN prices to volatility based on fundamental influences like supply and demand as well as more esoteric drivers such as trading sentiment and market speculation.[111] This exposure to third-party speculation appears the likeliest candidate for regulatory attention, as the Trump Administration in October 2018 announced that it had directed the EPA to consider reforms aimed at "increas[ing] transparency and prevent[ing] price manipulation in the

106. § 7545(o)(5)(A)(i) (emphasis added); *see also* § 7545(o)(5)(A)(ii) (authorizing the same generation of extra credits for blending efforts exceeding biodiesel obligations).

107. In its final rulemaking, the EPA explained:

> Under the RFS program the trading provisions comprise an integral element of compliance. Many obligated parties do not have access to renewable fuels or the ability to blend them, and so must use credits to comply. The RFS trading program is also unique in that the parties liable for meeting the standard (refiners, importers, and blenders of gasoline) are not generally the parties who make the renewable fuels or blend them into gasoline. This creates the need for trading mechanisms that ensure that the means to demonstrate compliance will be readily available for use by obligated parties.

Regulation of Fuels and Fuel Additives: Renewable Fuel Standard Program, 72 Fed. Reg. 23,900, 23,904 (May 1, 2007) (codified at 40 C.F.R. pt. 80).

108. *See* 40 C.F.R. § 80.1428(b)(2) (2012) (permitting any person registered per EPA requirements to "own a separated RIN").

109. *See id.* § 80.1127(a).

110. *See, e.g.*, ARGUS, ARGUS AMERICAS BIOFUELS, ISSUE 18-121 1–4 (2018), https://www.argusmedia.com/-/media/Files/sample-reports/argus-americas-biofuels-report (detailing the trading in D6 ethanol RINs, D4 biomass-based diesel RINs, and D3 cellulosic RINs over a single day in June 2018).

111. *See, e.g.*, Tristan R. Brown, *Ballparking Valero's Future RIN Costs*, SEEKINGALPHA (Aug. 15, 2017), https://seekingalpha.com/article/4099047-ballparking-valeros-future-rin-costs (discussing the volatility of the RINs market and its impact on Valero, a major oil refiner and obligated party under the RFS scheme).

RIN market."[112] Among the proposed reforms, the Trump Administration announced that it encouraged the EPA to consider prohibiting any entity other than obligated parties from purchasing RINs, requiring public disclosure of RIN holdings at a certain volume threshold, placing a time limit on third-party possession of RINs, and mandating the real-time retirement of RINs for compliance purposes.[113]

Current regulatory proposals notwithstanding, the RIN market's current exposure to speculative influence has a tendency to exacerbate the price effects of shifts in supply and demand, often resulting in sharp moves in RIN prices and, by extension, the compliance costs for obligated parties seeking to satisfy their RVOs with purchased credits.[114] Additionally, even if one or more of the Trump Administration's regulatory proposals were to survive the notice and comment process intact,[115] a diverse range of obligated parties would still populate the RIN market, making the elimination of all speculative influence impossible. Regardless of market composition, because some obligated parties produce RINs as a natural consequence of their business model,[116] those parties who do not are faced with a difficult reality.

c. Compliance burdens among oil refiners

Although the RFS places an obligation on both parties, it is ultimately refiners, not importers, that shoulder the bulk of the compliance burden under the RFS.[117] Furthermore, under the RFS,

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112. *President Donald J. Trump is Expanding Waivers for E15 and Increasing Transparency in the RIN Market*, WHITEHOUSE.GOV (Oct. 11, 2018), https://www.whitehouse.gov/briefings-statements/president-donald-j-trump-expanding-waivers-e15-increasing-transparency-rin-market.

113. *See id.*

114. *See id.* (attributing Valero's 2017 RIN costs of approximately $850 million to strong volatility in the RINs market).

115. Although a nuanced analysis of the Trump Administration's directives and proposed EPA rulemaking is beyond the scope of this comment, many of the proposals seem likely to attract scrutiny from financial interests and legal theorists alike. Categorically barring or severely limiting market access to selected actors could have more direct Commerce Clause implications.

116. *See infra* Section I.B.2.c.i (summarizing the vertically integrated refiner business model).

117. In 2016, importers retired approximately 343 million D6 ethanol RINs to satisfy compliance obligations, while refiners retired over 12 billion D6 ethanol RINs for the same compliance year. *See Annual Compliance Data for Obligated Parties and Renewable Fuel Exporters Under the Renewable Fuel Standard (RFS) Program*, EPA: FUELS REGISTRATION, REPORTING, & COMPLIANCE HELP (Oct. 23, 2017), https://www.epa.gov/fuels-registration-reporting-and-compliance-help/annual-compliance-data-obligated-parties-and#refiner.

not all oil refiners are created equal. Refiners vary in business model due to organizational differences and geographic realities. Parties most affected by the RINs scheme are thus separated into two distinct camps: vertically integrated refiners and independent refiners.

i. Vertically integrated refiners

Vertically integrated refiners are companies that engage in fuel blending in addition to their oil refining operations.[118] For these companies, the RVOs incurred in the production of oil products are naturally offset by the refiner's blending of those products into finished fuels for sale through retail distribution assets like branded retail fuel stations.[119] By regulatory design, this offset process is, in many respects, unavoidable because almost all of the gasoline sold in the United States today contains ethanol.[120]

It is even possible for the retail obligations of vertically integrated refiners to exceed their refining capacity.[121] In such situations, vertically integrated refiners must purchase gasoline blendstocks from refiners with limited or no downstream assets on an as-needed basis to cover their retail exposure.[122] In this arrangement, vertically integrated refiners blend petroleum products that they did not create, permitting the generation of RINs with no underlying renewable volume obligation.[123] This allows the vertically integrated refiner to sell RINs independent of the blended fuel, oftentimes back to the same refiners who sold them the enabling blendstock.[124] Additionally, this advantage offers the vertically integrated refiner another potential revenue stream,

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118. *See* Maria Kielmas, *Stages of Vertical Integration in the US Oil Industry*, CHRON, http://smallbusiness.chron.com/stages-vertical-integration-oil-industry-58830.html (last visited Dec. 3, 2018) (explaining the history of vertical integration, beginning with John D. Rockefeller and Standard Oil).

119. *Id.*

120. *See U.S. Gasoline*, *supra* note 48 (explaining that "more than [ninety-five percent] of the fuel consumed in motor vehicles with gasoline engines" in the United States is petroleum-based gasoline mixed with ten percent ethanol).

121. *See* Neufeld & Fey, *supra* note 91, at 262–63 (detailing how the nationwide reach of large-scale vertically integrated companies exhausts their petroleum production).

122. *See id.* at 264–65 (discussing the "symbiotic relationship" between vertically integrated refiners and independent refiners that produce petroleum to sell to other refiners instead of public consumers).

123. *Id.* at 265.

124. *Id.* at 264–65.

creating a market distortion that prior academic scholarship has termed a "wealth transfer."[125]

ii. Independent refiners

Independent refiners are companies that maintain oil refining operations but do not extend their business to blending and downstream distribution of finished fuels products.[126] Rather, independent refiners sell the fruits of their refining efforts to third-party blenders and distributors.[127] Unlike their vertically integrated counterparts, independent refiners do not blend the fuels they refine, forcing them to purchase RINs to satisfy their RVOs.[128] Independent refiners have absolutely no alternative to purchasing RINs for compliance, short of changing their business model entirely.[129] Moreover, the penalty for noncompliance is steep, with EPA regulations charging obligated parties $32,500 for every day the party remains in violation of its annual RVO.[130] Thus, independent refiners, because of their business model alone, face greater financial exposure under the RFS framework.[131]

Most importantly, independent refiners' inability to generate RINs compels their participation in the statutorily created secondary market

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125. *Id.* at 267 (detailing how the RIN compliance scheme brings about a revenue transfer from independent refiners to vertically integrated refiners).

126. *See, e.g.*, Andrew Maykuth, *Why Philly Oil Refiners Want to Dump Ethanol Mandates*, PHILA. INQUIRER (Nov. 7, 2017, 3:52 PM), http://www.philly.com/philly/business/energy/oil-refiners-want-rfs-waiver-epa-ethanol-mandateners-campaign-to-relax-ethanol-mandates-20171107.html (naming Philadelphia Energy Solutions, Monroe Energy, and PBF Energy as three independent refiners in the northeastern United States that operate refineries but do not blend their fuel products, and thus must purchase RINs on the secondary market to achieve RFS compliance).

127. *See id.* (clarifying that refiners like Philadelphia Energy Solutions sell unblended fuel to distributors, who often blend at remote locations just prior to distribution for retail sale).

128. *See, e.g.*, Cezary Podkul, *The Tally Is In: Ethanol "Blend Wall" Cost Refiners at Least $1.35 Billion*, REUTERS (Mar. 31, 2014, 8:25 AM), https://www.reuters.com/article/us-rins-spike-costs-analysis/the-tally-is-in-ethanol-blend-wall-cost-refiners-at-least-1-35-billion-idUSBREA2U0PT20140331 (evaluating total RIN costs for refiners in 2013 and confirming previously held industry hypotheses that refiners without the means to blend their own fuel are forced to pay much greater sums to meet annual RVOs).

129. *See* 40 C.F.R. § 80.1127(a)(1) (2017) (stipulating that each obligated party must demonstrate that it has acquired ownership of RINs sufficient to satisfy its RVO).

130. *See id.* § 80.1163(a) (citing the Clean Air Act as authority for the imposition of civil penalties).

131. *See* Podkul, *supra* note 128 (reporting that non-blending refiners in 2013 paid $1.35 billion for RINs).

for the compliance credits—a reality that has serious ramifications because of the limitations of Congress's Commerce Clause authority.

C. The Commerce Clause

The Constitution empowers Congress "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."[132] In practice, Congress interprets this grant of authority broadly, including within its scope the power to regulate matters both superficially commercial, like the growing of wheat,[133] as well as activities less intuitively connected to trade, such as the interstate transportation of kidnapping victims.[134]

While the Supreme Court has approved this liberal construction of the Commerce Clause, the Court nevertheless requires that any activity regulated have a "substantial economic effect on interstate commerce."[135] However, even if an activity does not have a direct economic impact on interstate commerce, Congress may nevertheless regulate it if there is a rational basis that the "total incidence" of the activity in the aggregate substantially affects commerce.[136] Thus, while Congress may exert legislative control over the intrastate growing of crops for private use on the justification that the activity ultimately affects interstate trade,[137] the Court has held that activities that bear only a tenuous connection to commerce, like the possession of a firearm in a school zone, cannot be upheld under the Commerce Clause.[138] In distinguishing the two scenarios, the Supreme Court separates inherently economic activity from non-economic activity, with the former justifying Commerce Clause regulation based on its

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132. U.S. CONST. art. I, § 8, cl. 3.

133. *See* Wickard v. Filburn, 317 U.S. 111, 125 (1942) (announcing that Congress may regulate an activity that is local in character and not commercial in isolation under the Commerce Clause "if it exerts a substantial economic effect on interstate commerce").

134. *See* 18 U.S.C. § 1201 (2012) (invoking the Commerce Clause as the constitutional basis for the federal criminalization of kidnapping); *see also* United States v. Ochoa, No. 8-CR-1980 WJ, 2009 WL 3878520, at *1 (D.N.M. Nov. 12, 2009) (upholding 18 U.S.C. § 1201 as a valid extension of Congress's Commerce Clause power).

135. Gonzales v. Raich, 545 U.S. 1, 17 (2005) (citing Perez v. United States, 402 U.S. 146, 151 (1971)).

136. *Id.* (quoting *Perez*, 402 U.S. at 154).

137. *Wickard*, 317 U.S. at 125.

138. *See* United States v. Lopez, 514 U.S. 549, 561 (1995) (invalidating the Gun-Free School Zones Act of 1990 as an impermissible extension of Congress's Commerce Clause power).

aggregate impact[139] and the latter subject to limitation by the principles of federalism, particularly when the regulation involves an area traditionally left to the states.[140] This distinction between the regulation of economic and non-economic activity is blurrier than ever following the Supreme Court's decision in *Sebelius*.

1. Chief Justice Roberts's Sebelius *opinion*

In *Sebelius*, the Supreme Court addressed a constitutional challenge to the ACA.[141] Enacted by Congress in 2010,[142] the ACA was challenged immediately after President Obama signed the bill into law, with an original plaintiff group of thirteen states quickly joined by the National Federation of Independent Business and several individuals.[143] The plaintiff group challenged two key provisions of the ACA, one of which was the individual mandate requiring uninsured individuals to purchase health insurance.[144]

Through the individual mandate of the ACA, Congress attempted to incentivize the purchase of minimum healthcare coverage by essentially forcing every citizen of the United States to make a choice: purchase minimum insurance coverage or pay a penalty.[145] In challenging this requirement, the plaintiffs in *Sebelius* alleged that Congress lacked constitutional power to enact such a mandate.[146]

Chief Justice Roberts, writing alone, opined that the individual mandate could not be justified by Congress's powers under the

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139. *See Wickard*, 317 U.S. at 127–29 (noting that the decision of one individual to abstain from the marketplace in favor of growing his own crops, when considered in the aggregate amid similar decisions by many others so situated, would have a substantial effect on the interstate market for that product).

140. *See, e.g.*, United States v. Morrison, 529 U.S. 598, 613 (2000) (civil remedy for victims of gender-motivated violence); *Lopez*, 514 U.S. at 561 (possession of firearms).

141. *See* 567 U.S. 519, 530–31 (2012) (majority opinion).

142. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified as amended in scattered sections of 42 U.S.C.).

143. *Sebelius*, 567 U.S. at 540.

144. 26 U.S.C. § 5000A(a) (2012) ("An applicable individual shall for each month beginning after 2013 ensure that the individual, and any dependent of that individual who is an applicable individual, is covered under minimum essential coverage for such month."). The plaintiff group also challenged the expansion of Medicaid coverage to adults above the federal poverty level. 42 U.S.C. § 1396a(10)(A)(i)(VIII) (2012) (expanding Medicaid eligibility to adults "whose income . . . does not exceed 133 percent of the poverty line"). However, only the Supreme Court's opinion concerning the individual mandate is relevant to this Comment.

145. *Sebelius*, 567 U.S. at 539–40.

146. *Id.* at 540.

Commerce Clause because it "[did] not regulate existing commercial activity."[147] Instead, the individual mandate "compel[led] individuals to *become* active in commerce by purchasing a product, on the ground that their failure to do so affects interstate commerce."[148] Distinguishing the individual mandate from other legislative actions justified by the Commerce Clause, Chief Justice Roberts made clear that "[t]he Framers gave Congress the power to *regulate* commerce, not to *compel* it."[149]

The Court ultimately upheld the individual mandate as within Congress's power to tax and spend,[150] but while that segment of Chief Justice Roberts's opinion commanded a majority of Justices, his Commerce Clause-based invalidation did not.[151] Thus, some controversy exists as to whether Roberts's declaration that Congress may not compel market participation as an extension of its Commerce Clause power is binding precedent or dicta.[152]

*2. Notable post-*Sebelius *Commerce Clause challenges*

In the aftermath of the *Sebelius* decision, several plaintiffs have attempted to extend the logic of Chief Justice Roberts's opinion to challenge various other acts of Congress that allegedly compel market participation. Of these challenges, three sets of cases bear mention.

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147. *Id.* at 552 (Roberts, C.J.).

148. *Id.*

149. *Id.* at 555.

150. *See id.* at 574 (majority opinion) (finding that the individual mandate "may reasonably be characterized as a tax" and that it was not the Court's role "to forbid it, or to pass upon its wisdom or fairness"); *see also supra* notes 16–21 and accompanying text.

151. *See id.* at 589 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part) (recognizing the individual mandate as a valid provision under the Commerce Clause).

152. *See, e.g.*, Jeremy Kreisberg, *Updated: Applying* NFIB v. Sebelius *in the Federal Circuits: Analysis of the Case Law*, HARV. L.: BILL OF HEALTH (Nov. 18, 2013), http://blogs.harvard.edu/billofhealth/2013/11/18/applying-nfib-v-sebelius-in-the-federal-circuits-analysis-of-the-case-law (acknowledging "that it is not clear whether the Court's 'decision' on the Commerce Clause is binding on future courts"); Lawrence B. Solum, *How* NFIB v. Sebelius *Affects the Constitutional Gestalt*, 91 WASH. U. L. REV. 1, 21–23 (2013) (explaining confusion surrounding Justice Roberts's Commerce Clause determination in *Sebelius*); Ilya Somin, *A Simple Solution to the Holding vs. Dictum Mess*, VOLOKH CONSPIRACY (July 2, 2012, 3:47 PM), http://volokh.com/2012/07/02/a-simple-solution-to-the-holding-vs-dictum-mess (arguing that the Supreme Court is the ultimate arbiter of whether something is a holding or dictum; failure to defer to the Court could lead lower courts to simply dismiss holdings they do not agree with).

a. The Sex Offender Registration and Notification Act

Many defendants accused of sex crimes have challenged the constitutionality of the Sex Offender Registration and Notification Act (SORNA),[153] creating a category of cases with the same narrow holding concerning post-*Sebelius* Commerce Clause jurisprudence.[154] The unifying argument in these matters is perhaps best illustrated by *United States v. Lott*,[155] in which the defendant, a sex offender, argued that Chief Justice Roberts's Commerce Clause holding in *Sebelius* prevented Congress from compelling sex offenders to proactively register in a nationwide database.[156] The United States District Court for the District of Vermont acknowledged that Chief Justice Roberts's opinion provided no real guidance for how a lower court might distinguish activity and inactivity or between market regulation and compulsion.[157] Nevertheless, the district court ultimately upheld SORNA by recognizing that *Sebelius* did not affect Congress's "power to regulate intrastate activity when so doing is incidental" to legislation regulating criminal matters incapable of isolation to a single state.[158]

b. Other criminal prohibitions

Like SORNA, other criminal statutes penalize actions on the theory that a lack of sanction will deleteriously affect interstate commerce. One such statute, the Hobbs Act,[159] uses the Commerce Clause as justification for prohibiting robbery, extortion, or attempts to commit either.

Marshalling the logic of *Sebelius*, a defendant convicted for conspiracy under the Hobbs Act challenged the statute's constitutionality in *United States v. McLean*.[160] Reasoning that the government "fabricate[d] a crime in a reverse sting operation,"[161] the

153. *See* 42 U.S.C. §§ 16911–16962 (2012) (requiring all convicted sex offenders to register in a national database and to notify select parties of their presence in certain areas).

154. *See, e.g.*, United States v. Kiste, No. 3:12-CR-113 JD, 2013 WL 587556, at *1 (N.D. Ind. Feb. 13, 2013); United States v. Stager, No. A-12-CR-350-SS, 2013 WL 12099883, at *1 (W.D. Tex. Feb. 4, 2013); United States v. Loudner, No. CR 12-30144-RAL, 2013 WL 357494, at *1 (D.S.D. Jan. 29, 2013), *aff'd*, 552 F. App'x 377 (5th Cir. 2014).

155. 912 F. Supp. 2d 146 (D. Vt. 2012), *aff'd*, 750 F.3d 214 (2d Cir. 2014).

156. *See id.* at 149 (asserting that the Commerce Clause opinion in *Sebelius* overruled United States v. Guzman, 591 F.3d 83, 86 (2d Cir. 2010), which upheld SORNA as a valid exercise of Congress's authority under the Commerce Clause).

157. *Id.* at 154.

158. *Id.* at 155–56.

159. 18 U.S.C. § 1951 (2012).

160. 702 F. App'x 81 (3rd Cir. 2017).

161. *Id.* at 88.

defendant argued that *Sebelius* precluded federal authorities from constructing conspiracies "that would have never occurred in the absence of federal intervention."[162] The Third Circuit Court of Appeals disagreed and upheld the conviction, reasoning that the defendant took "affirmative acts toward conduct which, if carried out as envisioned, would affect or potentially affect interstate commerce."[163] Thus, the Third Circuit distinguished the Hobbs Act from the ACA provision at issue in *Sebelius*, which proscribed the compulsion of commercial activity, not Congress's authority to criminalize actions either planned or already undertaken.[164]

The United States District Court for the Northern District of Texas addressed a factually similar case involving a constitutional challenge to a federal firearm prohibition statute in *United States v. Spann*.[165] Ruling that Chief Justice Roberts's Commerce Clause holding was unavailable to a convicted felon seeking to purchase a firearm, the district court held that *Sebelius* was inapposite because the statute did "not *compel* individuals to act—let alone purchase a product—but rather *prohibit[ed]* individuals from acting."[166]

c. *The Magnuson-Stevens Fishery Conservation and Management Act*

In *Goethel v. Pritzker*,[167] commercial fishermen challenged the constitutionality of the actions of a regional extension of the National Marine Fisheries Service.[168] The regional agency, authorized by the Magnuson-Stevens Fishery Conservation and Management Act of 1976 (MSA),[169] required that third-party monitors accompany all commercial fishermen in the Northeast United States.[170] The provision required the fishermen to pay for the costs of these monitors, whose job it was to "collect certain data related to the particular fishing trip and the fishing

162. *Id.* at 87.
163. *Id.* at 88.
164. *Id.*
165. *See* United States v. Spann, No. 3:12-CR-126-L, 2012 WL 4341799, at *3 (N.D. Tex. Sept. 24, 2012) (assessing the validity of defendant's post-*Sebelius* Commerce Clause challenge to 18 U.S.C. § 922(g)(1)), *aff'd*, 562 F. App'x 237 (5th Cir. 2014).
166. *Id.*
167. No. 15-cv-497-JL, 2016 WL 4076831, at *1 (D.N.H. July 29, 2016), *aff'd*, 854 F.3d 106 (1st Cir. 2017).
168. *Id.* at *1–2.
169. *See* 16 U.S.C. § 1801(b)(5) (2012) (empowering regional offshoots of the National Marine Fisheries Service to carry out monitoring activities).
170. *Goethel*, 2016 WL 4076831, at *2.

vessels' catch."[171] The plaintiffs argued that this "industry-funding requirement" violated the Commerce Clause because "it compel[led] sectors to enter contracts with private companies," in contravention of the Supreme Court's holding in *Sebelius*."[172]

The United States District Court for the District of New Hampshire held that the *Sebelius* ban did not apply because the MSA required compulsory at-sea monitoring only for those vessels which engaged in fishing activities in select sectors.[173] Thus, because commercial fishermen had the choice not to participate in the sector system and instead "fish in the 'common pool,'"[174] the court held that "the costs of monitors [were] part of the permissible regulation of plaintiffs' commercial fishing activities."[175]

Of course, most applications of Chief Justice Roberts's *Sebelius* holding have focused solely on federal statutes. The RFS, by comparison, delegates to a federal agency the enforcement of its provisions,[176] bringing into play the trappings of administrative law.

D. The Chevron *Roadblock*

While the RFS is a work of Congress, most of the authority guiding the regulatory scheme of RINs derives not from the statute, but from regulations promulgated by the EPA.[177] Thus, whereas a litigant may challenge the constitutionality of the RFS, the EPA's interpretation of the RFS mandate may warrant judicial deference per *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*[178]

At its core, *Chevron* deference stands for the proposition that courts will defer to agency interpretations of statutory ambiguity when those

171. *Id.*

172. *Id.* at *7 (quoting Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 551 (2012) (Roberts, C.J.)).

173. *Id.*

174. *Id.*

175. *Id.*

176. 42 U.S.C. § 7545(o)(2)(A)(i) (2012) ("[T]he Administrator shall promulgate regulations to ensure that gasoline sold or introduced into commerce in the United States . . . contains the applicable volume of renewable fuel . . . .").

177. *See Overview for Renewable Fuel Standard: Program Structure*, EPA: RENEWABLE FUEL STANDARD PROGRAM, https://www.epa.gov/renewable-fuel-standard-program/overview-renewable-fuel-standard (last visited Dec. 3, 2018) (explaining that the EPA, Department of Agriculture, and Department of Energy are responsible for implementing the RFS).

178. 467 U.S. 837 (1984).

interpretations are reasonable.[179] In matters of agency interpretation of a statute, courts follow the two-step test set forth in *Chevron*. First, courts must determine whether the statute at issue is indeed ambiguous; if it is not, the analysis ends.[180] However, if the statute is ambiguous, courts move to the second step and consider whether the agency interpretation is reasonable.[181]

This standard is permissive rather than restrictive; matters of *Chevron* deference typically turn on a question of whether an agency has strayed beyond the confines of its statutory authority.[182] Accordingly, a challenge to any part of the RINs scheme rooted in EPA rulemaking, and not the RFS itself, faces the tall order of overcoming *Chevron*; a regime that accords deference to agency interpretation unless it is "arbitrary, capricious, or manifestly contrary" to the governing statute.[183]

II. ANALYSIS

This Comment brings together two disparate products of legislation and judicial interpretation: the dysfunctional RFS and modern Commerce Clause jurisprudence. In merging these topics, this Comment first summarizes how, despite numerous attempts at revision, the issues plaguing the RFS remain unresolved. Next, this Comment discusses previously suggested means of challenging or avoiding the RFS to solidify that a constitutional challenge to the governing statute is the best-possible solution. Finally, this Comment concludes by arguing that, as a work of Congress, the RFS faces invalidation on constitutional grounds because it violates Chief Justice Roberts's Commerce Clause holding in *Sebelius*, which, as binding precedent, expressly prohibits the legislature from using the Commerce Clause as justification for the compulsion of market activity. Thus, because the RFS forces oil refiners with no fuel blending exposure to enter a market for compliance credits, the regulatory scheme is uniquely exposed to constitutional challenge on *Sebelius* grounds.

179. *See id.* at 844 (acknowledging that "a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency").

180. *Id.* at 842–43.

181. *Id.*

182. *See* City of Arlington v. FCC, 569 U.S. 290, 297–98 (2013) ("[T]he question . . . is always whether the agency has gone beyond what Congress has permitted it to do . . . .").

183. *Chevron*, 467 U.S. at 844.

A. An Unresolved Problem

This Comment is hardly the first to recognize the shortcomings of the RINs scheme and the RFS overall.[184] However, while the program has consistently attracted the ire of oil refiners,[185] until 2018 no major industry player had been able to cite RINs as anything more than an added financial annoyance.[186] However, with the financial collapse of Philadelphia Energy Solutions, the RFS has entered a new era in which its future no longer seems certain. Now that one of the largest oil refiners in the United States has succumbed to financial burdens imposed by the RFS, it seems increasingly unlikely that the RINs compliance scheme will remain the status quo. Indeed, in the aftermath of Philadelphia Energy Solutions's demise, there has been a new wave of calls for revision of the RFS.[187]

However, just how revision might take place is another question entirely. Various methods of reworking, or dismantling, the RFS are available, but the path of least resistance is a constitutional challenge based on Chief Justice Roberts's Commerce Clause holding in *Sebelius*.

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184. *E.g.*, Shannon S. Broome & Paul R. Esformes, *Food v. Fuel: Are Legal Attacks on the Renewable Fuel Standard Just a Bunch of Empty Calories?*, 28 NAT. RESOURCES & ENV'T 33, 33 (2013) (summarizing RFS criticisms by meat producers that the shift in energy focus from fossil fuels to corn-based ethanol indirectly causes an increase in food prices); Neufeld & Fey, *supra* note 91, at 267 (analyzing the "wealth transfer" between independent and vertically integrated oil refiners and competition distortion in the industry as negative consequences of the RFS).

185. *See Renewable Fuel Standard Facts*, AM. PETROLEUM INST., www.api.org/oil-and-natural-gas/energy-primers/renewable-fuel-standards (last visited Dec. 3, 2018) [hereinafter *Renewable Fuel Standard Facts*] (maintaining that the continued existence of the RFS has "dire consequences for the broader economy, as well as negative impacts on consumers").

186. *See* Tim Fitzgibbon et al., *Decoding the US Refiner's Exposure to RINs*, MCKINSEY & CO. (Sep. 7, 2018), https://www.mckinsey.com/industries/oil-and-gas/our-insights/decoding-the-us-refiners-exposure-to-rins (explaining that a RIN cost of $1 per gallon amounts to an additional cost of $3 or $4 per barrel).

187. *See, e.g.*, Nick Snow, *API Official Sees Major Questions After White House Meeting*, OIL & GAS J. (May 14, 2018), https://www.ogj.com/articles/2018/05/api-official-sees-major-questions-after-white-house-ethanol-meeting (detailing the oil industry's response to a 2018 meeting with White House officials, in which the Trump Administration "did not offer adequate solutions to the [RFS's] problems"); David Holt, *Time for Congress to Reform the Renewable Fuel Standard*, REAL CLEAR ENERGY (Apr. 11, 2018), https://www.realclearenergy.org/articles/2018/04/11/time_for_congress_to_make_meaningful_fuel_standard_reform_110286.html (calling for a full reform of the RFS); Merrill Matthews, *Time to Rethink the Renewable Fuel Standard*, THE HILL (Feb. 15, 2018, 10:00 AM), http://thehill.com/opinion/energy-environment/373912-time-to-rethink-the-renewable-fuel-standard (arguing that the RFS is overdue for revision).

B. Distinguishing Alternative Solutions

Certainly, a constitutional challenge is not the only avenue to revising the RFS. To the contrary, arguing against a statute's constitutionality would seem a rather extreme response. However, while other, more traditional remedial approaches are available, the unique circumstances of the RFS—and the rare opportunity to utilize a piece of Supreme Court jurisprudence that remains unsettled—make a constitutional challenge the best option.

1. Full legislative repeal of the RFS

Like any act of Congress, the RFS and its regulatory progeny are subject to repeal at the whim of the legislature.[188] This solution would certainly cure the inefficiencies and flaws of the RINs scheme, but a wholesale repeal is both highly unlikely and extreme.

To start, while the RFS has become a politically divisive program, its authorizing statute resulted from bipartisan support in both houses of the legislature.[189] Admittedly, political headwinds have shifted considerably since 2007,[190] but opposition to the RFS is not consistent across party lines,[191] making it very difficult to expect any coalition vote for repeal. Furthermore, while pressure from anti-RFS oil interests is real,[192] the RFS has been a boon for the corn industry,[193] complicating

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188. *See* Steven R. Pottle, *Repeal the RFS*, THE HILL (Feb. 17, 2015, 5:00 PM), http://thehill.com/blogs/congress-blog/energy-environment/232980-repeal-the-rfs (discussing the congressional appetite to repeal the RFS).

189. *See* 153 CONG. REC. S15,432 (daily ed. Dec. 13, 2007) (showing that H.R. 6, the Energy Independence and Security Act of 2007, passed the Senate with eighty-six yeas and just eight nays); 153 CONG. REC. H16,752 (daily ed. Dec. 18, 2007) (showing that H.R. 6 passed the House of Representatives on a vote of 314 yeas to 100 nays).

190. *Compare* MILDRED AMER, CONG. RESEARCH SERV., RS22555, MEMBERSHIP OF THE 110TH CONGRESS: A PROFILE 1 (2008) (cataloging, for the 110th Congress, 239 Democrats and 200 Republicans in the House of Representatives and 49 Democrats and 49 Republicans in the Senate), *with* JENNIFER E. MANNING, CONG. RESEARCH SERV., R44762, MEMBERSHIP OF THE 115TH CONGRESS: A PROFILE 1 (2018) (listing, for the 115th Congress, 197 Democrats and 240 Republicans in the House of Representatives and 51 Republicans and 47 Democrats in the Senate).

191. *See* Erin Voegele, *Grassley: RFS Has Minimal Impact on Success of Refineries*, ETHANOL PRODUCER MAG. (Feb. 6, 2018), http://ethanolproducer.com/articles/15022/grassley-rfs-has-minimal-impact-on-success-of-refineries (reporting on Senator Chuck Grassley's (R-Iowa) apprehension at blaming refinery losses on the RFS).

192. *See Renewable Fuel Standard Facts*, *supra* note 185 (referring to the RFS as a "broken policy").

193. *See* Communications in News, *Celebrating a Decade of Success: The RFS Turns 10!*, RENEWABLE FUELS ASS'N (Aug. 6, 2015, 11:00 AM), http://www.ethanolrfa.org/2015/08/celebrating-a-decade-of-success-the-rfs-turns-10 (noting that the number of corn

a political calculus that, for some representatives, may have been simpler prior to the adoption of the scheme. Admittedly, recent developments suggest that Congress may be preparing to reopen the RFS debate,[194] but even if the legislature embraces revision, political auguring suggests a complete reworking of the RINs compliance system is unlikely.

Thus, legislative repeal, though clearly a potential remedy for impacted parties under the RFS, is both highly improbable and extremely susceptible to shifts in the political climate. Considering the likelihood of political tumult in the next few years—not to mention the need for sustained legislative effort to affect such a large redirect in energy policy—congressional revision of the RFS is simply unworkable. Furthermore, the Trump Administration's recent EPA directives concerning RIN market transparency[195] suggest that, despite considerable pressure from the oil industry,[196] any change will come not from Congress but from the Executive Branch.

2. The death of independent refining as a legitimate business model

On the other extreme lies a simple solution for independent refiners struggling under the financial weight of the RFS compliance regime: abandon the business altogether. Theoretically speaking, it may be that the regulatory hurdles embodied in the RFS reflect legislative intent to dissuade oil producers from maintaining outdated business models. Indeed, among the supporters of the RFS, this argument remains popular.[197] Such an argument, which in many ways contemplates a "natural death" for the independent refining industry, would also seem justified by data showing slumping gasoline consumption in the United

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ethanol plants in the U.S. has doubled and the average price of corn has nearly doubled since 2005).

194. *See* Miranda Green, *Trump Signals Support for Changing Summer Ethanol Policy*, THE HILL (Apr. 12, 2018, 2:45 PM), http://thehill.com/policy/energy-environment/382891-trump-signals-support-for-changing-policy-on-summer-ethanol-use (detailing congressional discussions with the President to come to an agreement for changing the current ethanol policy).

195. *See supra* note 112 (summarizing the Trump Administration's proposed modifications to the RIN market).

196. *See supra* note 187.

197. *See* RENEWABLE FUELS ASS'N, BIG OIL'S SELF-INFLICTED BLEND WALL AND ITS IMPACT ON RIN PRICING 1–2 (2015), http://www.ethanolrfa.org/wp-content/uploads/2015/11/RIN-Prices-Blend-Wall_July-update.pdf (arguing that RIN price volatility and stiflingly high RFS compliance costs are fictions fabricated by the oil industry to excuse the industry's refusal to embrace the production of "higher-level ethanol blends").

States.[198] Projections for a continued decline in gasoline demand,[199] coupled with a growing shift in the makeup of the transportation sector[200] and expectations for a steady increase in energy efficient vehicles,[201] could suggest that the demise of independent refining is inevitable.

It is not unprecedented for Congress to enact regulations that catalyze the demise of an industry or subindustry, either directly or indirectly.[202] However, whether the independent refining business model faces extinction is irrelevant considering how long it would take for the oil industry to embrace and carry out such a shift in the organizational paradigm. Moreover, simply concluding that independent refiners—and perhaps the petroleum fuel industry altogether—will inevitably become obsolete would be to ignore the very real socioeconomic impacts of such an extinction. For example, when Philadelphia Energy Solutions filed for bankruptcy in January 2018, debt-restructuring signaled that the approximately one-thousand jobs created by the refiner were in jeopardy.[203] As political response to the decline of the coal industry attests[204] that while creating winners and losers in the

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198. *See Renewable Fuel Standard Facts*, *supra* note 185 (showing the slight decrease in motor gasoline consumption over time).

199. *See* ENERGY INFORMATION ADMIN., ANNUAL ENERGY OUTLOOK 2018: WITH PROJECTIONS TO 2050 4, 108 (2018), https://www.eia.gov/outlooks/aeo/pdf/AEO2018.pdf [hereinafter ENERGY OUTLOOK 2018] (predicting a sharp drop in commercial use of motor gasoline between 2018 and 2022 and general downtrend in consumption from 2022 to 2050).

200. *See* Giovanni Bruno, *Uber and Lyft Have Run Over the Car Industry*, THE STREET (Sept. 2, 2017, 11:03 AM), https://www.thestreet.com/story/14290318/1/how-uber-and-lyft-are-rapidly-changing-the-transportation-industry (discussing growing concerns in the automotive industry that the rise of rideshare businesses may reduce demand for consumer automobiles).

201. *See* ENERGY OUTLOOK 2018, *supra* note 199, at 112–16 (charting expectations for increased energy efficiency for all vehicles through 2025).

202. *See, e.g.*, Justin Worland, *Coal's Last Kick: As Clean Energy Rises, West Virginia Looks past Trump's Embrace of Coal to What Comes Next*, TIME, http://time.com/coals-last-kick (last visited Dec. 3, 2018) (attributing the coal industry's decline in energy market share to its "environmental problem" and the rise of renewable power sources like wind and solar).

203. *See* Miranda Green, *Largest East Coast Oil Refiner Owner Files for Bankruptcy: Report*, THE HILL (Jan. 22, 2018, 4:56 PM), http://thehill.com/policy/energy-environment/370170-largest-east-coast-oil-refinery-owner-files-for-bankruptcy-report (detailing an internal memo from Philadelphia Energy Solution stating the bankruptcy would not immediately affect its employees).

204. *See* Eric Lipton & Barry Meier, *Under Trump, Coal Mining Gets New Life on U.S. Lands*, N.Y. TIMES (Aug. 6, 2017), https://www.nytimes.com/2017/08/06/us/politics/under-trump-coal-mining-gets-new-life-on-us-lands.html (discussing the Trump Administration's supportive responses to coal industry groups, which one coal

name of progress may be palatable, simply abandoning an industry entirely is an altogether different proposition.

Overall, while allowing the RFS to accelerate what may be the inevitable demise of independent oil refining would erase the need for regulatory reform, it is, quite literally, no solution at all.

3. Challenging EPA rulemaking

Because the Clean Air Act and the EISA deputize the EPA for the enforcement of the RFS, the option exists to challenge EPA rulemaking as arbitrary and capricious.[205] After all, the regulations providing compliance protocols for obligated parties derive mostly from EPA rulemaking.

This solution is best illustrated in the model proposed by commentators Bob Neufeld and Rebecca Lynne Fey,[206] in which independent refiners challenge the EPA's definition of "obligated parties" as an unreasonable interpretation of the authority conferred by the EISA.[207] Neufeld and Fey reason that because the EISA explicitly directs the EPA to enact a program that "ensure[s] that transportation fuel . . . contains at least the applicable volume of renewable fuel,"[208] the EPA's creation of a regulatory program that rewards voluntary blenders that blend below targets[209] is inherently unreasonable.

While inarguably sound, challenging the RINs scheme by attacking the EPA's final rules exposes the argument to the legal quagmires of the Administrative Procedure Act[210] and *Chevron* deference.[211] However persuasive, any rule-based challenge to the RINs program is comparatively ineffective, as it is well-settled that agency rules are insulated by an

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mining company described as "meant to correct wrongs of the past"); *see also* Katie Fehrenbacher, *This is How Political the Decline of Coal Has Become*, FORTUNE (Oct. 5, 2016), http://fortune.com/2016/10/ 05/don-blankenship-political-prisoner (noting then-candidate Donald Trump's campaign promises to bring back coal jobs).

205. *See* 5 U.S.C. § 706(2)(A) (2012) (permitting a reviewing court to set aside an agency action if "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law").

206. *See* Neufeld & Fey, *supra* note 91, at 298 (illustrating a hypothetical RFS challenge focused on disputing the validity of the EPA's interpretation of its statutory mandate).

207. *See id.* at 299.

208. *See id.* at 300 (quoting 42 U.S.C. § 7545(o)(2)(A)(iii)).

209. Because voluntary blenders have no RVOs, their RINs increase in value when obligated parties are unable to meet their compliance requirements and the demand for separated RINs increases. *See id.* at 298. Accordingly, the EPA's RIN program creates a "perverse incentive" for voluntary blenders to resist renewable volume targets. *See id.*

210. 5 U.S.C. §§ 551–59.

211. *See supra* notes 179–183 and accompanying text.

"exceedingly deferential"[212] standard of review. Furthermore, while challenges to tangentially similar EPA interpretations of the EISA in *American Petroleum Institute v. EPA*[213] and *Utility Air Regulatory Group v. EPA*[214] may have succeeded,[215] they are easily distinguishable.

First, *American Petroleum* concerned the EPA's methodology for calculating volume targets for cellulosic biofuel,[216] an extremely small piece of the regulatory scheme. Whereas cellulosic biofuel volumes made up just 1.2 percent of the total renewable fuel target in 2017,[217] challenging the reasonableness of the EPA's definition of "obligated party" involves the entire regulatory framework.[218] Second, *Utility Air* involved an EPA decision that had nationwide ramifications; the agency's interpretation effectively rendered every source of particle emissions, mobile or stationary, subject to EPA permitting requirements.[219] The EPA's imposition of its RINs scheme, by comparison, is industry-specific and not controlling over the nationwide economy;[220] a factor the Supreme Court found highly persuasive in *Utility Air*.[221] Thus, while the RINs scheme may indeed involve an agency rule involving "vast 'economic and political

212. Defs. of Wildlife v. U.S. Dep't of Navy, 733 F.3d 1106, 1115 (11th Cir. 2013) (quoting Fund for Animals, Inc. v. Rice, 85 F.3d 535, 541 (11th Cir. 1996)) (referring specifically to the deference used when an agency action is challenged as arbitrary and capricious).

213. 706 F.3d 474 (D.C. Cir. 2013).

214. 134 S. Ct. 2427 (2014).

215. *See, e.g.*, *id.* at 2444 (ruling that the EPA's interpretation of the Clean Air Act's greenhouse gas permitting thresholds was unreasonable because it impermissibly expanded the EPA's regulatory authority without express congressional approval); *Am. Petroleum*, 706 F.3d at 476 (holding unreasonable the EPA's methodology for setting annual cellulosic biofuel volume targets).

216. *See Am. Petroleum*, 706 F.3d at 475–76.

217. *See Final Renewable Fuel Standards for 2017, and the Biomass-Based Diesel Volume for 2018*, EPA: RENEWABLE FUEL STANDARD PROGRAM, https://www.epa.gov/renewable-fuel-standard-program/final-renewable-fuel-standards-2017-and-biomass-based-diesel-volume (last visited Dec. 3, 2018) (showing that the EPA in 2017 required total blending of just 311 million gallons of cellulosic biofuel as part of a total annual renewable volume target of 25.871 billion gallons).

218. *Am. Petroleum*, 706 F.3d at 480 (emphasizing the permissive pursuit of a regulatory objective).

219. *See Util. Air*, 134 S. Ct. at 2436 (noting that the EPA itself recognized that the application of the proposed threshold would "have a profound effect on virtually every sector of the economy and touch every household in the land").

220. *Id.*

221. *See id.* at 2444 (acknowledging that the EPA rulemaking under review involved "an agency laying claim to extravagant statutory power over the national economy").

significance,'"[222] the scope of the regime falls short of the "extravagant statutory power"[223] at issue in *Utility Air*.

Straying into the jurisprudential thicket inherent in an arbitrary-and-capricious-based agency decision challenge represents a less-effective means of contesting the legality of the EPA's RINs program.

C. A Novel Approach: Applying Chief Justice Roberts's Commerce Clause Holding from Sebelius

While previous solutions have proposed various administrative challenges to the RFS and its RINs scheme, no theory has called into question the constitutionality of the scheme. To do so, a challenger must first tie the RINs scheme to the enabling statutes of the RFS to avoid a likely unwinnable skirmish with *Chevron*.[224] This requires demonstrating that Congress, not the EPA, forces independent refiners to participate in a secondary compliance market.

1. A threshold matter: the RINs scheme is a work of Congress, not the EPA

First, Congress expressly contemplated a credit-based compliance system in the Clean Air Act, making RINs a statutory creation, not the product of agency rulemaking. Consider that the original RFS established by the Clean Air Act references a "credit program"[225] as the mechanism for demonstrating compliance with the renewable fuel volume requirements.[226] Illustrative here is Congress's use of the word "shall"[227] in the language of the statute, demonstrating that RINs have their origins not in agency rulemaking, but in legislative action.

Similarly, the Clean Air Act also explicitly authorizes the transfer of compliance credits, making clear that Congress, not the EPA, created the secondary market for RINs. Here, the statutory language is unambiguous—the generation and transfer of RINs exists "for the

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222. *Id.*
223. *Id.*
224. Philadelphia Energy Solutions's bankruptcy and its alleged origins in the RFS compliance regime provides a useful assemblage of circumstances that might produce an eligible plaintiff, but this Comment does not analyze the important constitutional issue of standing. While Philadelphia Energy Solutions likely has standing to challenge the RFS on constitutional grounds, the various arguments for and against a federal court's acknowledgement of standing in this matter is beyond the scope of this Comment.
225. 42 U.S.C. § 7545(o)(5) (2012).
226. *See id.* §§ 7545(o)(2), (5) (connecting the credit program to compliance with the renewable fuel volume obligation at the core of the RFS).
227. *Id.* § 7545(o)(5)(A).

purpose of complying with [renewable fuel obligations]."[228] Thus, although EPA regulations provide added specificity as to the characteristics and fungibility of RINs,[229] they owe their existence not to the EPA, but to a federal statute.

Additionally, this understanding of the legal authority for RINs is consistent with the EPA's own understanding of the RFS mandate. In 2015, Janet McCabe, the Acting Assistant Administrator of the Office of Air and Radiation of the EPA, acknowledged that RINs owe their existence not to agency rulemaking, but to the will of Congress.[230] In a hearing before the Senate Subcommittee on Regulatory Affairs and Federal Management, McCabe explicitly referenced RINs as a congressional invention,[231] referring to the compliance credit regime as a system that "Congress set up."[232]

Accepting that RINs originate in federal law, the authority on which Congress based the RFS is of vital importance. Obviously, if Congress did not invoke its Commerce Clause power in enacting the RFS, the regime itself is not exposed to a challenge on those grounds. Helpfully, Congress included in its empowerment of the EPA an explicit reference to enabling authority, notably introducing the RFS with the following:

> The Administrator may by regulation designate any fuel or fuel additive . . . and, after such date or dates as may be prescribed by him, no manufacturer or processor of any such fuel or additive *may sell, offer for sale, or introduce into commerce* such fuel or additive unless the Administrator has registered such fuel or additive . . . .[233]

Thus, while one Congress's other enumerated powers might insulate the statute from constitutional challenge, its express invocation of the Commerce Clause places the RFS within the bounds of Commerce Clause authority. Accordingly, if Chief Justice Roberts's holding in *Sebelius* indeed reflects binding precedent, Congress's compulsion that oil refiners participate in a secondary market for RINs places the RFS

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228. *Id.* § 7545(o)(5)(B).

229. *See generally* 40 C.F.R. §§ 80.1400–80.1474 (2017) (outlining the EPA's rulemaking enforcing the RFS and detailing the creation and permissible uses of RINs).

230. *See Re-Examining EPA's Management of the Renewable Fuel Standard Program: Hearing Before the Subcomm. on Regulatory Affairs and Federal Management of the S. Comm. on Homeland Security and Governmental Affairs*, 114th Cong. 71 (2015) (statement of Janet McCabe, Acting Assistant Administrator, Office of Air and Radiation, EPA).

231. *Id.*

232. *Id.*

233. 42 U.S.C. § 7545(a) (emphasis added).

within the scope of what *Sebelius* suggests is an impermissible use of the Commerce Clause power.

2. *Chief Justice Roberts's Commerce Clause holding in* Sebelius *is binding precedent*

While some legal scholars, and even some district and circuit courts, argue otherwise, the most logical and jurisprudentially meaningful interpretation of the *Sebelius* decision is that Chief Justice Roberts's Commerce Clause holding reflects binding precedent. Arguments to the contrary generally note that none of the dissenters in *Sebelius* joined any portion of the Chief Justice's opinion, nor did they agree to the judgment of the Court overall.[234] The opposing view thus concludes that the Chief Justice's opinion was merely a concurrence, robbing the portion of the opinion concerning the ban on compelled market participation of any precedential value.[235]

Opposing arguments ignore that the *Sebelius* dissenters agreed that the individual mandate could be upheld under Congress's power to tax and spend, which is vital to interpreting which pieces of the Chief Justice's opinion command the support of the majority of the Court. Importantly, Chief Justice Roberts's opinion expressly rejected any contention that the Court could reach the question of whether the mandate could be upheld under the taxing and spending power without first "deciding the Commerce Clause" question.[236] Here, the structure of Chief Justice Roberts's opinion, and the dissent's acknowledgement of its logical progression, makes clear that a majority of the Court affirmed the Chief Justice's Commerce Clause holding.

In terms of structure, Chief Justice Roberts's *Sebelius* opinion addresses each potential justification for the ACA in turn, exhausting each proposed extension of congressional power before proceeding to the next. To this end, the Chief Justice does not address whether the individual mandate of the ACA may be upheld as an extension of Congress's taxing and

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234. *See* United States v. Spann, No. 3:12-CR-126-L, 2012 WL 4341799, at *2 (N.D. Tex. Sept. 24, 2012) (arguing that while the "joint dissent" of Justices Scalia, Kennedy, Thomas, and Alito also stated that the Commerce Clause did not justify the individual mandate, they did not join any portion of the Chief Justice's opinion, which contained the reasoning against market compulsion), *aff'd*, 562 F. App'x 237 (5th Cir. 2014).

235. *See* United States v. Moore, No. CR-12-6023-RMP, 2012 WL 3780343, at *3 (E.D. Wash. Aug. 31, 2012) (applying the narrowest-ground doctrine to conclude that the "conglomeration" of the four dissenting justices with the "concurring opinion" of Chief Justice John Roberts does not reflect binding precedent).

236. Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 574–75 (2012) (Roberts, C.J.) (refusing to address whether the individual mandate might survive under a "saving construction" as a tax without first addressing the Commerce Clause issue).

spending power without first concluding, without equivocation, that "the Commerce Clause does not support the individual mandate."[237] This is key for the dissenters—comprised of Justices Scalia, Kennedy, Thomas, and Alito—who structured their reasoning in the same fashion, proceeding to alternative justifications for the individual mandate only *after* grappling with the Commerce Clause issue.[238] Logically, this parallelism invites the interpretation that the dissenters, like the Chief Justice, only reach the issue of whether the individual mandate is a valid extension of Congress's taxing and spending power by first recognizing that the Commerce Clause does not apply.

Of course, it is not by argument structure alone that suggests the dissenters joined Chief Justice Roberts's Commerce Clause conclusions. To the contrary, the dissenters state that Congress's attempt to regulate inactivity is precisely why the individual mandate extends beyond the scope of Commerce Clause authority. Consider first that in addressing Justice Ginsburg's opinion, which accepted the individual mandate as within Congress's Commerce Clause authority, the dissenters explicitly state that a failure to purchase health insurance is not an activity that Congress may regulate because it, by nature, does not represent activity at all.[239] In so reacting to Justice Ginsburg's challenges, the dissenters thus lend precedential weight to Chief Justice Roberts's Commerce Clause holding, as the opinions marshal the same logic in reaching their legal conclusions.

Furthermore, in grappling with the limits of the Commerce Clause power, the dissenters take steps to distinguish both *Wickard v. Filburn*[240] and *Perez v. United States*[241] by drawing limits to the Commerce Clause power that mirrors the reasoning of Chief Justice Roberts.[242] Acknowledging that *Wickard* and *Perez* represent "the most expansive assertion of the commerce power in our history,"[243] the dissenters nevertheless clarify that both cases involved some affirmative activity, not inactivity. To the dissenters' argument, whereas *Wickard* involved the decision to grow wheat for personal use[244] and *Perez* concerned local practices of dishonest money

237. *Id.* at 561.
238. *Id.* at 562–63.
239. *See id.* at 660 (Scalia, J., dissenting).
240. 317 U.S. 111 (1942).
241. 402 U.S. 146 (1971).
242. *See id.* at 158; *Wickard*, 317 U.S. at 118.
243. *Sebelius*, 567 U.S. at 657–58 (Scalia, J., dissenting).
244. *Wickard*, 317 U.S. at 113.

lending,[245] each circumstance involved commercial action. By contrast, had Congress attempted to regulate by compelling the defendants in *Wickard* and *Perez* to grow wheat and make loans, respectively, such an action would mark an impermissible extension of federal power.[246] Thus, the dissenters concluded, compelling individuals to engage in a commercial action—purchasing healthcare—was beyond the scope of Congress's Commerce Clause power.[247]

Accordingly, in explicitly mirroring the Chief Justice's Commerce Clause reasoning[248] and then proceeding to analyze whether the individual mandate might be justified as a tax,[249] the four dissenters rendered the Chief Justice's Commerce Clause discussion binding precedent by a five-to-four majority.[250] Furthermore, the dissenters own words make clear their views on whether the Commerce Clause may be so construed when they stated that Congress may not justify the regulation of commercial action under the mere guise of "compelling its existence."[251]

Moreover, while controversy persists and the Supreme Court has yet to clarify what portions of its *Sebelius* decision hold precedential weight, the dominant interpretation in lower federal courts and among legal scholars is clearly that the Chief Justice's opinion is part of the Court's holding.[252] Thus, even in the absence of jurisprudential clarity, or even

245. *Perez*, 402 U.S. at 147.

246. *See Sebelius*, 567 U.S. at 657 (Scalia, J., dissenting) (rejecting the idea that federal power includes the right to compel affirmative commercial activity).

247. *Id.* at 657–58.

248. *Compare id.* at 553 (Roberts, C.J.) ("The farmer in *Wickard* was at least actively engaged in the production of wheat . . . . The Government's theory here would effectively override that limitation, by establishing that individuals may be regulated under the Commerce Clause whenever enough of them are not doing something the Government would have them do."), *with id.* at 657 (Scalia, J., dissenting) ("[T]o say that the failure to grow wheat . . . affects commerce, so that growing . . . can be federally compelled, is to extend federal power to virtually everything.").

249. *See id.* at 661 (Scalia, J., dissenting) (agreeing that "Congress has attempted to regulate beyond the scope of its Commerce Clause authority," before proceeding to a Taxing Power analysis).

250. Justices Ginsburg, Sotomayor, Breyer, and Kagan argued that the individual mandate was within Congress's powers under the Commerce Clause. *See id.* at 589 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part).

251. *Id.* at 649 (Scalia, J., dissenting).

252. Many circuits seem to clearly interpret Chief Justice Roberts's discussion on the limitations of the Commerce Clause power as binding. *See, e.g.*, United States v. McLean, 702 F. App'x 81, 87–88 (3rd Cir. 2017) ("[T]he Supreme Court held that the Affordable Care Act's requirement that individuals purchase health insurance or suffer a penalty was not a valid exercise of Congress's Commerce power."); United States v. Robbins, 729 F.3d 131, 135–36 (2d Cir. 2013) (assuming for the purposes of

consistent treatment amongst circuits, the application of the Chief Justice's opinion in cases throughout the lower federal courts strongly suggests that the Commerce Clause reasoning is already accepted. Many legal commentators draw similar conclusions, finding that the Roberts's holding likely functions as a "holding in practice,"[253] if not one explicitly recognized.[254]

3. *The RFS is uniquely exposed to a post-*Sebelius *Commerce Clause challenge*

As discussed above,[255] many litigants have attempted to use *Sebelius* to challenge other forms of legislation as an impermissible extension of Congress's Commerce Clause power. Although each has failed, they

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analysis that the Commerce Clause commentary was controlling); United States v. Rose, 714 F.3d 362, 371 (6th Cir. 2013) (interpreting Chief Justice Robert's opinion as a holding); United States v. Henry, 688 F.3d 637, 641 n.5 (9th Cir. 2012) (declining to address the issue of holding versus dicta but distinguishing the case at hand using Chief Justice Roberts's opinion). Many district courts seem similarly inclined. *See, e.g.*, United States v. Stacey, No. 2:12-15, 2013 WL 1891342, at *3 (W.D. Pa. May 6, 2013) (applying Chief Justice Robert's Commerce Clause discussion as binding precedent and acknowledging that other district courts have done the same when addressing the exact argument at issue), *aff'd*, 570 F. App'x 213 (3d Cir. 2014); McElveen v. Mike Reichenbach Ford Lincoln, Inc., No. 4:12-874-RBH-KDW, 2012 WL 3964973, at *3 (D.S.C. Aug. 22, 2012) (accepting that "because the Commerce Clause permits power over 'activity,' it does not support the individual mandate in the Affordable Care Act because it would permit Congress to regulate inactivity rather than existing commercial activity" (citing *Sebelius*, 567 U.S. at 551 (C.J., Roberts)); United States v. Williams, No. 12-60116-CR-RNS, 2012 WL 3242043, at *3 (S.D. Fla. Aug. 7, 2012) (stating that "the Court [in *Sebelius*] found Congress's attempt to require everyone buy health insurance exceeded its power under the commerce clause").

253. *See* Bradley W. Joondeph, *The Affordable Care Act and the Commerce Power: Much Ado About (Nearly) Nothing*, 6 J. HEALTH & LIFE SCI. L. 1, 23 (Feb. 2013).

254. *See, e.g.*, Joseph Fiskin, *The Dignity of the South*, 123 YALE L.J. ONLINE 175, 186 n.54 (referring to Chief Justice Roberts's Commerce Clause opinion as a holding in *Sebelius*); Pamela S. Karlan, *The Supreme Court 2011 Term–Foreword: Democracy and Disdain*, 126 HARV. L. REV. 1, 43–44 (2012); Elizabeth Weeks Leonard, et al., *Employers United: An Empirical Analysis of Corporate Political Speech in the Wake of the Affordable Care Act*, 38 J. CORP. L. 217, 253 (2013) (noting as a "holding" in *Sebelius* "that the ACA's minimum essential coverage requirement is unconstitutional under the Commerce Clause"); David L. Sloss, Kiobel *and Extraterritoriality: A Rule Without a Rationale*, 28 MD. J. INTL'L L. 241, 253 n.75 (2013) ("In *Sebelius*, the Court created a new, unprecedented constitutional limitation on Congress' Commerce Power."); Solum, *supra* note 24, at 2 ("The strongest argument for a Commerce Clause holding postulates that NFIB has stare decisis effects in cases in which another individual mandate (relatively similar to the mandate in the ACA) is enforced by a criminal penalty—or other penalty that could not be fairly characterized as a tax via a saving construction.").

255. *See supra* Section I.C.2 (describing notable post-*Sebelius* Commerce Clause challenges to other federal statutes).

do not stand for the proposition that Chief Justice Roberts's Commerce Clause holding has been isolated to the facts of *Sebelius* alone. To the contrary, while previous cases invoking *Sebelius* involve challenges based on similar logic, they do not represent the unique circumstances at hand with the RFS and RINs.

First, although *Lott* and its sibling cases seem to justify compelled market participation by claiming that *Sebelius* can be read harmoniously with Congress's need to regulate interstate activity, the activity at issue in *Lott* was notably noneconomic.[256] Furthermore, the court in *Lott* was concerned primarily with a challenge to uniquely intrastate activity and thus availed itself of precedent from *Gonzales v. Raich*,[257] which Chief Justice Roberts's holding in *Sebelius* notably left intact.[258] Conversely, the activity at hand in the RFS challenge—the purchase of RINs—is both inherently economic and interstate in nature, clearly distinguishing the challenge from that in *Lott* and its brethren.

Similarly, unlike the challenges at issue in *McLean* and *Spann*,[259] the RFS does not seek to enforce criminal sanctions; a matter that was dispositive on the Commerce Clause challenge in both cases.[260] Instead, Congress in the RFS legislated that compliance violations

256. United States v. Lott, 912 F. Supp. 2d 146, 149 (D. Vt. 2012), *aff'd*, 750 F.3d 214 (2d Cir. 2014); *see also supra* Sections I.C.2.a and I.C.2.b (examining *Lott* and its companion cases).

257. 545 U.S. 1 (2005). In *Gonzales*, the Supreme Court upheld provisions of the Controlled Substances Act that criminalized the manufacture, distribution, and possession of marijuana as a permissible extension of Congress's Commerce Clause power despite the inherently intrastate nature of the underlying conduct. *Id.* at 17. Justice Stevens, writing for the Court, acknowledged that the defendants' use of marijuana within California was unquestionably intrastate in nature, but nonetheless recognized that the prohibition of a "quintessentially economic" activity like intrastate drug use was within Congress's Commerce Clause power. *Id.* at 25–26.

258. *See* Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 561 (2012) (Roberts, C.J.) ("Congress's attempt to regulate the interstate market for marijuana would therefore have been substantially undercut if it could not also regulate intrastate possession and consumption." (citing *Raich*, 545 U.S. at 19)).

259. *See supra* notes 161–166 and accompanying text (summarizing the facts at issue in *McLean* and *Spann*).

260. *See* United States v. McLean, 702 F. App'x 81, 88 (3rd Cir. 2017) (clarifying that *Sebelius* did not concern Congress's ability to proscribe criminal acts); United States v. Spann, No. 3:12-CR-126-L, 2012 WL 4341799, at *3 (N.D. Tex. Sept. 24, 2012) (distinguishing compelled action from the prohibition of criminal activity), *aff'd*, 562 F. App'x 237 (5th Cir. 2014).

carry civil penalties.[261] Cases like *McLean* and *Spann* are thus distinguishable because, unlike the RFS, they seek to prohibit criminal action. By comparison, what the RFS seeks to do is achieve policy goals by compelling participation in statutorily created secondary market.[262]

Finally, although *Goethel* is perhaps the clearest factual parallel to a challenge to the RINs scheme,[263] it too is distinguishable. Unlike the commercial fishermen in *Goethel*, independent refiners are not faced with avoidable regulation. Whereas the commercial fishermen had the option of simply changing the areas in which they fished,[264] independent refiners have no such option. Their choice, if one exists at all, is illusory: they either comply by entering a market they otherwise would not, or they face penalties from the EPA. Key to the District of New Hampshire's justification in *Goethel* was that nothing Congress required "taxe[d], assesse[d] fees, or otherwise penalize[d] [fishermen] for choosing a course of action . . . that did not require at-sea monitoring."[265] Independent refiners, by comparison, are subject to penalty unless they participate in the market for RINs.[266] Instead, they are plainly "compelled" within the definition contemplated by Chief Justice Roberts in *Sebelius*.

4. *The RFS forces independent refiners to participate in specified commercial action, exposing it to a* Sebelius *challenge*

Independent refiners are in a unique position to challenge the RINs scheme because they do not blend fuel and thus do not actively engage in the RINs market. Here, the circumstances cited by Philadelphia Energy Solutions in its bankruptcy filing are illustrative.[267]

Because Philadelphia Energy Solutions does not have the infrastructure necessary to blend fuel itself, it cannot generate RINs on its own.[268] Instead, the refiner must purchase separated RINs from

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261. *See* 42 U.S.C. § 7545(d)(1) (2012) (establishing that any party found in violation of the RFS "shall be liable to the United States for a civil penalty of not more than the sum of $25,000" for each day not in conformance with the compliance regime).
262. *See supra* Section I.B.1.
263. *See generally supra* notes 167–175 and accompanying text.
264. Goethel v. Prtizker, No. 15-cv-497-JL, 2016 WL 4076831, at *2–5 (D.N.H. July 29, 2016), *aff'd*, 854 F.3d 106 (1st Cir. 2017).
265. *Id.* at *7 (fourth alteration in original).
266. *See* 40 C.F.R. §§ 80.1358–80.1361 (2017) (describing the penalties for violating the RIN program).
267. *See* Egan, *supra* note 26.
268. *Id.*

those parties who blend more than their volume obligation.[269] Key here is Chief Justice Roberts's classification of "active" and "inactive" parties in commerce, which lends itself quite clearly to vertically integrated and independent refiners. Vertically integrated refiners, who blend fuel as a part of their business model, are voluntary participants in fuel blending and thus qualify as "active" parties in commerce. Following Chief Justice Roberts's *Sebelius* logic, requiring vertically integrated refiners to participate in a compliance scheme grounded in an extension of their business is clearly within Congress's Commerce Clause power. Conversely, independent refiners like Philadelphia Energy Solutions would never participate in the market for RINs were it not for Congress's RFS mandate.

Additionally, recall that, like the penalty facing individuals who did not secure insurance coverage in *Sebelius*, obligated parties who do not secure sufficient RINs to meet their RVO are subject to civil penalties under the RFS. Refiners like Philadelphia Energy Solutions really have no choice at all; instead, they are compelled "to *become* active in commerce by purchasing a product, on the ground that their failure to do so affects interstate commerce."[270]

Admittedly, one distinction between the ACA and the RFS is that the individual mandate found unconstitutional in the former applied to all citizens of the United States, whereas the RINs scheme in the RFS concerns only "obligated parties" as defined by the statute. However, Chief Justice Roberts did not limit his restriction on the Commerce Clause to only those statutes compelling all citizens to engage in commercial activity. Rather, the Chief Justice connected his reasoning to the Supreme Court's earlier holdings in *Raich* and *Perez* by drawing a distinction between permissible congressional regulation of "class[es] of *activities*"[271] and of impermissible compulsion of "classes of *individuals*."[272] The fatal flaw of the individual mandate, according to the Chief Justice, was that Congress attempted to regulate uninsured individuals on the basis that their decision not to engage in the healthcare market constituted a legitimate basis for classification based on activity.[273] Instead, Chief Justice Roberts held impermissible simply

269. *Id.*; *see also* Maykuth, *supra* note 126.
270. Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 552 (2012) (Roberts, C.J.).
271. *Id.* at 556 (alteration in original) (quoting Gonzales v. Raich, 545 U.S. 1, 17 (2005)).
272. *Id.* (citing United States v. Perez, 402 U.S. 146, 153 (1971)).
273. *Id.*

classifying a group for regulation solely because its members "elected to refrain from commercial activity."[274]

This line of reasoning is relevant for two reasons. First, it suggests that *Sebelius* is not limited to situations involving attempts to regulate all citizens; it instead establishes that the Commerce Clause does not authorize the regulation of individuals based on identifying characteristics separate from "any activity in which they are engaged."[275] Second, and perhaps most importantly, Chief Justice Roberts's reasoning makes clear that permissible regulation strays into unjustifiable compulsion when the qualifying criterion for compulsory participation in a federal scheme is commercial inactivity rather than activity.[276]

The RFS's treatment of independent refiners runs afoul of these principles. Unlike the classification in *Perez*, which concerned an affirmative commercial action, the RFS's compulsory RINs scheme, like the ACA's individual mandate, compels market participation based solely on a decision not to engage in certain commercial behavior. As Philadelphia Energy Solutions made clear, independent oil refiners make a choice not to participate in fuel blending, reflecting a decision to avoid a specific commercial action. In forcing Philadelphia Energy Solutions and other independent refiners to participate in a secondary market for compliance credits generated only through fuel blending, Congress has effectively "force[d] individuals into commerce precisely because they elected to refrain from commercial activity."[277] Any law so operating, per *Sebelius*, cannot be justified under the Commerce Clause.[278]

CONCLUSION

The effects of the RFS are far-reaching, impacting everything from the cost of public transit to employment statistics to the price of groceries. However, the recent bankruptcy of Philadelphia Energy Solutions signals that, despite the EPA's best efforts, the shortcomings of the RFS that felled the likes of Jeff Gunselman and OceanConnect six years ago are not curable through patchwork means or stop-gap measures. For at the heart of the program lies a fatal flaw: a credit-

274. *Id.* at 558.
275. *Id.*
276. *See id.* at 557 (declining to recognize the uninsured as a class defined by any activity because their identifying feature was uniquely uneconomic).
277. *Id.* at 558.
278. *Id.* at 556.

based compliance scheme that unfairly burdens some oil producers simply because they do not engage in fuel-blending.

Nevertheless, in this flaw lies a rare opportunity for a prospective challenger like Philadelphia Energy Solutions to circumvent the political and procedurals thickets of legislative revision and administrative law by pursuing RFS revision or repeal through constitutional means. Namely, by utilizing Chief Justice Roberts's Commerce Clause holding in *Sebelius*, an RFS challenger may invoke the core constitutional principle embraced in that case by a majority of Supreme Court Justices: Congress may regulate commercial activity but may not compel it.

This principle has already clearly taken root in lower federal courts, even without definitive clarification on the state of Commerce Clause jurisprudence from the Supreme Court itself. In mounting a *Sebelius*-based challenge to the RFS as an unconstitutional extension of Congress's Commerce Clause powers, a plaintiff like Philadelphia Energy Solutions not only strikes at the real failing of the program overall, but also provides the Supreme Court with the opportunity to more firmly delineate the bounds of an integral congressional power. Such a challenge presents the rare opportunity for a challenger to expedite a needed shift in truly impactful legislation as well as push the judiciary to harmonize its constitutional jurisprudence.

The RFS is indeed broken, despite its lofty aspirations and undeniably good intentions. Although the system may have indeed proven to be a train wreck, the clearest legal avenue for cleanup could bring clarity to an unsettled question on the constitutional limits of congressional power.