THE DORMANT COMMERCE CLAUSE AND STATE CLEAN ENERGY LEGISLATION

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ABSTRACT

This Note analyzes recent litigation concerning the constitutionality of state renewable portfolio standards (RPSs) and similar environmental legislation designed to promote clean energy. It begins with a discussion of the current state of both federal and state responses to climate change. From there, it analyzes several legal challenges to state RPSs and other climate-related laws that focus on potential violations of the dormant Commerce Clause. It concludes with a brief exploration of how these cases fit the history and purpose of the dormant Commerce Clause. The Note argues that a narrow view of the doctrine is consistent with the purpose of the dormant Commerce Clause, will reaffirm principles of federalism, will enable state innovation in the renewable energy field, and will make a positive contribution to efforts to mitigate climate change. By structuring statutes so as to draw a court's attention to the ways in which their legislation fits within the purpose of the dormant Commerce Clause, states can give themselves more space to take aggressive action to promote clean energy and reduce the impacts of climate change.

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INTRODUCTION

Seemingly every week, a new report or event highlights the severity of the slow-rolling climate crisis. In November 2018, thirteen federal agencies issued a report estimating that climate change will reduce economic growth in the United States by ten percent by the turn of the century.[1] Scientists have presented strong evidence that weather extremes such as the severe cold of the "polar vortex," record heat waves across the globe, and extended droughts in California and Australia are connected to our changing climate.[2] An October 2018 report from the Intergovernmental Panel on Climate Change (IPCC) found that limiting warming to two degrees Celsius, long a political target of the United Nations (UN), will likely not be enough to ward off many catastrophic impacts of climate change.[3]

These warnings and real-life impacts stand in stark contrast to the blasé attitude of the federal government toward mitigating the impacts of climate change. Since taking office, President Trump has taken steps to pull the United States out of the Paris climate agreement, rolled back the Clean Power Plan, and moved to prop up struggling coal plants despite their contributions to air pollution and flagging ability to compete in the energy marketplace.[4] While the federal government was more environmentally friendly prior to 2017, critics have argued that even the Obama Administration did not do enough to make the climate a priority.[5]

The shortcomings of the Obama Administration in combating climate change, like the climate negligence of the Trump Administration, highlight the need for

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1. *See* U.S. GLOBAL CHANGE RES. PROGRAM, FOURTH NAT'L CLIMATE ASSESSMENT: SUMMARY FINDINGS (2018), at 26, https://nca2018.globalchange.gov/downloads/NCA4_Ch01_Summary-Findings.pdf; Coral Davenport & Kendra Pierre-Louis, *U.S. Climate Report Warns of Damaged Environment and Shrinking Economy*, N.Y. TIMES (Nov. 23, 2018), https://www.nytimes.com/2018/11/23/climate/us-climate-report.html?module=inline.

2. Somini Sengupta, *U.S. Midwest Freezes, Australia Burns: This is the Age of Weather Extremes*, N.Y. TIMES (Jan. 29, 2019), https://www.nytimes.com/2019/01/29/climate/global-warming-extreme-weather.html.

3. INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, SUMMARY FOR POLICYMAKERS OF IPCC SPECIAL REPORT ON GLOBAL WARMING OF 1.5°C APPROVED BY GOVERNMENTS, (Oct. 8, 2018), https://www.ipcc.ch/2018/10/08/summary-for-policymakers-of-ipcc-special-report-on-global-warming-of-1-5c-approved-by-governments (finding that 2 degrees warming would dramatically increase the chances of an ice-free Artic and lead to significantly higher sea levels relative to 1.5 degrees of warming).

4. Timmons Roberts, *One Year Since Trump's Withdrawal From the Paris Climate Agreement*, BROOKINGS: PLANETPOLICY (June 1, 2018), https://www.brookings.edu/blog/planetpolicy/2018/06/01/one-year-since-trumps-withdrawal-from-the-paris-climate-agreement/; Jeff Brady, *Trump's EPA Plans to Ease Carbon Emissions Rules for New Coal Plants*, NPR (Dec. 6, 2018), https://www.npr.org/2018/12/06/674255402/trumps-epa-plans-to-ease-carbon-emissions-rule-for-new-coal-plants.

5. *See, e.g.*, David Bookbinder, *Obama Had a Chance to Really Fight Climate Change. He Blew It.*, VOX (Apr. 29, 2017), https://www.vox.com/the-big-idea/2017/4/28/15472508/obama-climate-change-legacy-overrated-clean-power; Marianne Lavelle, *Obama's Climate Legacy Marked by Triumphs and Lost Opportunities*, INSIDE CLIMATE NEWS (Dec. 26, 2016), https://insideclimatenews.org/news/23122016/obama-climate-change-legacy-trump-policies.

robust state level action to tackle the issue. Without new legislation, even a President motivated to address climate change will be left attempting to shoehorn climate policy into the Clean Air Act (CAA) and other existing environmental laws. The fate of President Obama's signature climate initiative, the Clean Power Plan, highlights the limits on Executive authority to address climate change under existing legislation. Even before President Trump was elected, the Supreme Court placed a stay on the Plan—which the Obama Administration argued was authorized by the CAA,[6] pending judicial review.[7] This move signaled the Court's apparent concern that the Clean Power Plan went beyond Congress's grant of statutory authority.[8]

Given a narrow judicial view of existing Executive authority in the climate space,[9] a new President could be left to take only modest administrative steps while advocating for major new legislation such as the Green New Deal.[10] Such legislation is certainly possible, but any bill would have a steep hill to overcome,[11] particularly if skepticism of climate change continues to be a prominent position among Republican legislators.[12] Among Democratic legislators, less debate exists on the existence of climate change, but support for aggressive new legislation varies widely among the party's elected officials.[13]

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6. Carbon Pollution Emission Guidelines for Existing Stationary Sources, 80 Fed. Reg. 64662 (2015).

7. Order in Pending Case, Chamber of Commerce v. EPA, 577 U.S. __ (2016) (granting a stay pending review of the Clean Power Plan).

8. *See* Jonathan H. Adler, *Supreme Court Puts the Brakes on EPA's Clean Power Plan*, WASH. POST: THE VOLOKH CONSPIRACY (Feb. 9, 2016), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/02/09/supreme-court-puts-the-brakes-on-the-epas-clean-power-plan/?utm_term=.67eb46aa599d (noting that although the stay order was short and gave no reasoning, it "suggests that a majority of the court has concerns about the EPA's authority to impose the CPP under the Clean Air Act").

9. See *id.*

10. *Green New Deal*, NEW CONSENSUS, https://newconsensus.com/green-new-deal/ (last visited June 14, 2019) (describing the Green New Deal as "a World War II-scale mobilization" designed to "achieve net-zero greenhouse gas emissions").

11. *See Congress Climate History*, CTR. FOR CLIMATE AND ENERGY SOLUTIONS, https://www.c2es.org/content/congress-climate-history/ (last visited Dec. 8, 2018).

12. *See* Mark K. Matthews, *Inside Conservatives' Disarray on Climate*, E&E NEWS (Apr. 15, 2019), https://www.eenews.net/stories/1060162805 (describing the ongoing debate among conservatives as to the existence of climate change, and highlighting Republican resistance as a key obstacle in passing any climate legislation).

13. *See* Mark K. Matthews, *In GOP Senate, a Rare Climate Hearing and Hints of More*, E&E NEWS (Mar. 6, 2019), https://www.eenews.net/climatewire/2019/03/06/stories/1060123255 (quoting Democratic Senator Joe Manchin as acknowledging the existence of climate change, but saying that solutions "[require] the recognition that fossil fuels aren't going anywhere anytime soon"). *See also* Rashaan Ayesh, *Where the 2020 Presidential Candidates Stand on the Green New Deal*, AXIOS (last updated May 23, 2019), https://www.axios.com/2020-presidential-candidates-green-new-deal-22faff60-3fee-45f3-8636-09e437c82431.html (highlighting statements from six Democratic presidential candidates who are cosponsors of the Green New Deal in the Senate).

In the absence of significant federal action, several states have taken the lead on advancing US climate policy. California, in particular, has taken significant steps to reduce its carbon pollution. The state first set greenhouse gas (GHG) emissions standards for motor vehicles in 2002.[14] California has since committed to reduce GHG emissions to 80% below 1990 levels by 2050, and has implemented a Low Carbon Fuel Standard (LCFS) designed to reduce life cycle emissions of fuels consumed in state.[15] However, the state is far from alone in advancing a positive climate agenda. Nine northeastern states have created a cap and trade market, the Regional Greenhouse Gas Initiative (RGGI).[16] Numerous governors and local leaders across the country have pledged that their state or city will still work to meet the targets of the Paris climate agreement.[17] In all, current policies adopted by cities, states, and businesses are projected to reduce total US emissions to 17% below 2005 levels by 2025.[18]

One key policy adopted by many states is the Renewable Portfolio Standard (RPS). As of Spring 2019, twenty nine states and Washington D.C. had adopted a mandatory RPS.[19] Under these policies, states mandate that a set percentage of the electricity sold by in-state utilities comes from renewable sources.[20] RPSs have been a driver of growth in the U.S. renewable energy market, particularly in the first decade of the 21st century.[21] As states continue to raise the percentage of en-

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14. Vicki Arroyo, *State and Local Climate Leadership in the Trumpocene*, 2017 CARBON & CLIMATE L. REV. 303, 304 (2017).

15. *Id.*; *Low Carbon Fuel Standard*, CAL. AIR RES. BD., https://www.arb.ca.gov/fuels/lcfs/lcfs.htm (last reviewed July 18, 2019) (Life cycle emissions are calculated by examining the "greenhouse gas emissions associated with the production, transportation, and use of a given fuel. The life cycle assessment includes direct emissions associated with producing, transporting, and using the fuels, as well as significant indirect effects on greenhouse gas emissions, such as changes in land use for some biofuels.").

16. Arroyo, *supra* note 14.

17. *Id.* at 305-06. *See also Who's In*, WE ARE STILL IN, https://www.wearestillin.com/signatories (last visited Aug. 12, 2019) (listing 10 states and 287 cities and counties among over 2,800 entities around the country that have pledged to continue working toward the goals laid out in the Paris Agreement).

18. ROCKY MOUNTAIN INSTITUTE, ET AL., FULFILLING AMERICA'S PLEDGE: EXECUTIVE SUMMARY 5 (2018), https://www.bbhub.io/dotorg/sites/28/2018/09/Fulfilling-Americas-Pledge_Executive-Summary_2018.pdf.

19. *See State Renewable Portfolio Standards and Goals*, NAT'L CONF. OF STATE LEGISLATURES (Feb. 1, 2019), http://www.ncsl.org/research/energy/renewable-portfolio-standards.aspx (including a map showing every state with an RPS).

20. *Project Overview*, STATE POWER PROJECT, https://statepowerproject.org/ (last visited June 16, 2019).

21. GALEN BARBOSE, U.S. RENEWABLE PORTFOLIO STANDARDS: 2017 ANNUAL STATUS REPORT 12 (July 2017) (showing that from 2000 until roughly 2007 nationwide renewable energy growth tightly tracked RPS requirements); *see also* Herman K. Trabish, *Modernizing Renewables Mandates is No Longer About the Megawatts*, UTILITY DIVE (Aug. 16, 2018), https://www.utilitydive.com/news/modernizing-renewables-mandates-is-no-longer-about-the-megawatts/529895/.

ergy that must come from renewable sources—Hawaii and Washington have set the goal of obtaining 100% of their electricity from renewable sources by 2045[22]—RPSs are likely to continue playing a vital role in driving energy innovation.

Alongside their admirable environmental goals, state legislatures also frequently hope to "wring economic development benefits" from RPSs by bolstering their local renewable energy industry.[23] States have typically sought to capture this localized benefit in a handful of ways. In some instances, policymakers argue that increased local investment may naturally be expected to flow into the state as a result of a firm commitment to green energy.[24] Sometimes however, as will be discussed further in Section II, policymakers' attempts to capture economic benefit through an RPS may impermissibly discriminate against out-of-state commerce. A state legislature's presumed or actual intent to capture economic development benefits through such discrimination has led to constitutional challenges under the dormant Commerce Clause.[25]

Across a series of cases, constitutional challenges to state RPSs have generally had the same thrust—allegations that an RPS, either through facial operation or practical effect, serves a primarily protectionist function. To date, these challenges have focused on one of two arguments. First, that the program is designed in such a way as to effectively regulate commerce that takes place entirely outside of the state.[26] Second, that the RPS is structured to capture the local or regional economic benefits of renewable energy development while shielding local industry from outside competition.[27] While the elimination of an RPS is likely to primarily benefit traditional energy interests,[28] court battles have not been limited to fossil fuel companies suing states as they attempt to go green. In some instances, out-of-state renewable energy companies have argued that states are attempting to limit competition to local producers.[29]

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22. *Securing the Renewable Future*, HAW. ST. ENERGY OFF., http://energy.hawaii.gov/renewable-energy (last visited Dec. 9, 2018); Catherine Morehouse, *Inslee Signs 100% Clean Energy Bill in Midst of 2020 White House Bid*, UTILITY DIVE (May 8, 2019), https://www.utilitydive.com/news/washington-100-clean-energy-law-only-a-signature-from-inslee-away/552627/.

23. Thomas P. Lyon & Haitao Yin, *Why Do States Adopt Renewable Portfolio Standards?: An Empirical Investigation*, 31 ENERGY J. 133, 135 (2010).

24. TRAVIS MADSEN ET AL., ENV'T MICH. RESEARCH & POLICY CTR., ENERGIZING MICHIGAN'S ECONOMY 43-44 (Feb. 2007) (arguing that increased energy investment will flow into Michigan should the state adopt an RPS).

25. *See infra* Section II.

26. *See infra* Section II.A.

27. *See infra* Section II.B.

28. *See* Lyon & Yin, *supra* note 23, at 140 ("Fossil-fuel based electricity generation and fossil fuel producers stand to lose from an RPS."). *See also* KAREN PALMER & DALLAS BURTRAW, RESOURCES FOR THE FUTURE, COST-EFFECTIVENESS OF RENEWABLE ENERGY POLICIES 2 (Jan. 2005) ("The RPS tends to encourage renewables largely at the expense of natural gas.").

29. *See infra* Section II.B for a discussion of the case *Allco Fin. Ltd. v. Klee*, in which out-of-state renewable energy producers sued Connecticut over the structure of its RPS.

The remainder of this Note is broken into three sections. Section I will provide a brief overview of dormant Commerce Clause jurisprudence and the current debates over its scope. This analysis demonstrates that the judiciary has become increasingly skeptical of a broad dormant Commerce Clause in recent years. Section II will analyze a series of dormant Commerce Clause challenges to state RPS. This portion shows that most constitutional challenges to RPS-like laws have failed, while also examining why a Minnesota clean energy statute was struck down. Section III will explore the merits of the approach to the dormant Commerce Clause advanced by each circuit, and extract lessons for how state RPSs could be drafted to withstand a constitutional challenge. This section argues that the judiciary has largely demonstrated an intent to limit the scope of the dormant Commerce Clause, which will enable states to move aggressively in the promotion of renewable energy.

I. DORMANT COMMERCE CLAUSE OVERVIEW

The dormant Commerce Clause is an implied extension of the Commerce Clause with "deep roots" in American jurisprudence.[30] While its application has varied somewhat over time, the general thrust of the doctrine is perhaps best summed up as a prohibition on "discriminat[ion] between transactions on the basis of some interstate element."[31] The modern Court has identified three broad strands of dormant Commerce Clause jurisprudence.

First, the Court subjects any law that facially discriminates against out-of-state commerce to strict scrutiny, which has been described in practice as virtually a per se bar.[32] In order for a state law that facially discriminates against out-of-state commerce to be upheld, it must be "demonstrably justified by a valid factor unrelated to economic protectionism."[33] Second, if a law's burden on interstate commerce is only incidental, it is subject to review under a more lenient balancing test. Often called "*Pike* balancing,"[34] laws are only struck down under this standard if the burden on interstate commerce substantially outweighs the local benefit of the law.[35] Third, the Court has occasionally struck down statutes when they act to reg-

30. Comptroller of the Treasury v. Wynne, 135 S. Ct. 1787, 1794 (2015) (citing Gibbons v. Ogden, 22 U.S. 1 (1824); Cooley v. Bd. of Wardens, 53 U.S. 299 (1852); and Case of the State Freight Tax, 82 U.S. 232 (1873) as foundational cases in the development of the dormant Commerce Clause).

31. Bos. Stock Exch. v. State Tax Comm'n, 429 U.S. 318, 332 n.12 (1977).

32. *See* City of Philadelphia v. New Jersey, 437 U.S. 617, 624 (1978) (describing a "virtually per se rule of invalidity" for state legislation clearly motivated by economic protectionism).

33. Wyoming v. Oklahoma, 502 U.S. 437, 454 (1992). *See also* Maine v. Taylor, 477 U.S. 131 (1986) for an example of a statute that was upheld despite facial discrimination against out-of-state commerce.

34. *See* Pike v. Bruce Church, Inc., 397 U.S. 137, 146 (1970).

35. *See, e.g.*, Heffner v. Murphy, 745 F.3d 56, 71 (3d Cir. 2014).

ulate transactions taking place entirely outside the state.[36] Under this "extraterritoriality doctrine," the key question is whether the statute has the "practical effect" of controlling conduct "beyond the boundaries of the state."[37] As described below, RPSs or similar statutes have been challenged under each of these three prongs of dormant Commerce Clause jurisprudence.[38] The only successful suit to date has relied on the extraterritoriality doctrine.[39]

While these three strands of dormant Commerce Clause jurisprudence are well established, there is an ongoing debate about whether the provision exists at all.[40] The Court has slowly narrowed the scope of the dormant Commerce Clause over the past several decades.[41] Justices Scalia and Thomas have gone further still, arguing both that the dormant—or negative—Commerce Clause lacks a foundation in the text of the Constitution, and that the Court's application of the doctrine is hopelessly confused.[42] During his tenure as a circuit judge, Justice Gorsuch suggested potential agreement with Justices Thomas and Scalia's critiques. In a key case, Gorsuch cited to their criticisms of the dormant Commerce Clause before concluding that, "as an inferior court we take Supreme Court precedent as we find it."[43] As a member of the Supreme Court, he may be unlikely to apply strict dormant Commerce Clause jurisprudence to state laws. While many of the Court's dormant Commerce Clause opinions are fractured, reflecting a diverse array of views on the doctrine, at least six Justices on the current Court have affirmed the clause's existence.[44] The debate over the existence and scope of the dormant

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36. *See* Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511 (1935) (striking down a New York law for "establish[ing] a wage scale or a scale of prices for use in other states").

37. Healy v. Beer Inst., 491 U.S. 324, 336 (1989).

38. *See infra* Section II.

39. *See* North Dakota v. Heydinger, 825 F.3d 912 (8th Cir. 2016).

40. *See, e.g.*, Martin H. Redish & Shane V. Nugent, *The Dormant Commerce Clause and the Constitutional Balance of Federalism*, 1987 DUKE L. J. 569, 569 (1987) (arguing that the Constitution provides "no textual basis for" the exercise of the dormant Commerce Clause, and that the doctrine undermines the balance of federalism embodied in the text).

41. *See* Daniel Francis, *The Decline of the Dormant Commerce Clause*, 94 DENVER L. REV. 255, 255 (2017).

42. *See, e.g.*, Comptroller of the Treasury v. Wynne, 135 S. Ct. 1787, 1808 (2015) (Scalia, J., dissenting) ("The fundamental problem with our negative Commerce Clause cases is that the Constitution does not contain a negative Commerce Clause."); Hillside Dairy v. Lyons, 539 U.S. 59, 68 (2003) (Thomas, J., concurring in part and dissenting in part) ("The negative Commerce Clause has no basis in the text of the Constitution, makes little sense, and has proved virtually unworkable in application.").

43. Energy & Env't Legal Inst. v. Epel, 793 F.3d 1169, 1171 (2015).

44. *See, e.g.,* South Dakota v. Wayfair, Inc., 138 S. Ct. 2080 (2018) (In this case, four dissenters—Chief Justice Roberts, along with Justices Breyer, Sotomayor, and Kagan—voted to strike down a state law under the dormant Commerce Clause. Justice Kennedy's majority opinion, joined by Justices Ginsburg, Alito, Thomas and Gorsuch analyzed the statute under the dormant Commerce Clause before concluding that the law did not run afoul of the Constitution. Justices Thomas and Gorsuch each concurred. Justice Thomas reasserted his disagreement with the Court's entire dormant Commerce Clause jurisprudence despite believing the majority reached the right outcome in this case, while Justice

Commerce Clause will be a key one to watch if a case involving an RPS or similar state-level clean energy law makes its way to the Court.

II. DORMANT COMMERCE CLAUSE CHALLENGES TO STATE RENEWABLE PORTFOLIO STANDARDS

State RPSs and other similar state-level environmental statutes have been challenged on dormant Commerce Clause grounds in several jurisdictions.[45] Typically, plaintiffs have been out-of-state fossil fuel companies alleging that, under the new policy, they are unable to sell their goods into the state on a level playing field.[46] In at least one instance the policy was challenged by an out of state renewable energy producer.[47] This indicates that the policy divide does not always cut cleanly across green energy/fossil fuel lines. To date, four federal circuits have ruled on a state RPS or similar policy[48] and a fifth, the Seventh Circuit, has weighed in.[49]

In *Illinois Commerce Commission v. FERC*, Judge Posner addressed the constitutionality of Michigan's RPS in a line of dicta.[50] Writing for a Seventh Circuit panel on a case involving transmission line financing, Posner briefly noted that in his view, "Michigan cannot, without violating the commerce clause of Article I of the Constitution, discriminate against out-of-state renewable energy."[51] Although this opinion only briefly touched on Michigan's RPS, it was still a notable moment in the development of RPS litigation. Judge Posner's opinion led to a surge in activity and speculation about the future of state clean energy standards among environmental and energy lawyers.[52]

Gorsuch wrote to note that his joining the opinion did not signal support for the Court's history of dormant Commerce Clause case law).

45. *See infra* Sections II.A & II.B.

46. *See, e.g.*, Energy & Env't Legal Inst. v. Epel, 793 F.3d 1169, 1077 (10th Cir. 2015) (noting that many Energy & Environment Legal Institute members are "out-of-state coal producers"); Rocky Mtn. Farmers Union v. Corey, 730 F.3d 1070, 1077 (9th Cir. 2013) (showing that one plaintiff challenging California's Low Carbon Fuel Standard was the American Fuel and Petrochemical Manufacturers Association); North Dakota v. Heydinger, 15 F. Supp. 3d 891, 899 (D. Minn. 2014) (naming plaintiffs including the Industrial Commission of North Dakota, the Lignite Energy Council, and North American Coal Corporation).

47. Allco Fin. Ltd. v. Klee, 861 F.3d 82 (2nd Cir. 2017).

48. *See infra* Sections II.A & II.B (discussing recent cases from the Second, Eighth, Ninth, and Tenth circuits).

49. *See* Ill. Commerce Comm'n v. Fed. Energy Reg. Comm'n, 721 F.3d 764 (7th Cir. 2013).

50. *See id.*

51. *Id.* at 776.

52. *E.g.*, Justin Graham, *Judge Posner Suggests Some Renewable Portfolio Standards are Unconstitutional*, THE ENERGY & NAT. RES. BLOG (July 3, 2013) https://blog.lrrc.com/energy/2013/07/03/judge-posner-suggests-some-renewable-portfolio-standards-are-unconstitutional/; Hannah Northey & Jeremy

A. *Extraterritoriality Challenges to Renewable Portfolio Standards*

Judge Posner's opinion has since been followed by a series of RPS cases across the country. The first opinion to rule directly on the constitutionality of an RPS was authored by then-Judge Gorsuch in the Tenth Circuit.[53] Plaintiffs in that case, the Energy and Environment Legal Institute (EELI), argued that Colorado's RPS violated the extraterritoriality doctrine of the dormant Commerce Clause.[54] The three judge panel unanimously upheld Colorado's law, finding that EELI had offered no explanation for how out-of-state fossil-fuel producers would be hurt worse than in-state fossil fuel producers.[55] EELI's extraterritoriality argument hinged on the idea that Colorado's RPS places an improper control on how out-of-state energy may be generated.[56] Both the district court and appellate courts dismissed this theory out of hand. The district court found that even under the plaintiff's telling, the statute only limited out-of-state producers in their transactions with in-state Colorado utilities.[57] This type of interaction is, by definition, not wholly out of state.[58]

At the appellate level, Judge Gorsuch did not revisit this particular finding of the district court. He did, however, take the opportunity to advance a narrow reading of the extraterritoriality doctrine that could prove influential in future RPS cases. Describing extraterritoriality as "the most dormant doctrine in dormant commerce clause jurisprudence,"[59] Judge Gorsuch wrote that extraterritoriality is properly applied—to the extent that it is a valid doctrine at all—only in the context of direct price control statutes.[60] The opinion contrasted such direct regulation of prices with more typical state regulation of product safety, quality, or health, which should be reviewed under the more relaxed *Pike* balancing test.[61] As will be discussed further below, if this narrow view of extraterritoriality prevails nationwide, states will have much more flexibility to adopt environmental statutes such as RPSs. A more robust view of extraterritoriality by contrast would endanger not only RPS statutes, but a whole range of health and safety laws that are a traditional province of state government.[62]

P. Jacobs, *Key Judge's Take on Clean-Power Mandates Sparks Legal Debate*, E&E NEWS (June 21, 2013), https://www.eenews.net/stories/1059983289.

53. *See* Energy & Env't Legal Inst. v. Epel, 793 F.3d 1169 (10th Cir. 2015).

54. *Id.* at 1172. Colorado required 20% of the electricity sold in the state to come from renewable sources. *Id.* at 1170.

55. *Id.* at 1173-74.

56. Energy & Env't Legal Inst. v. Epel, 43 F. Supp. 3d 1171, 1179 (D. Colo. 2014).

57. *Id.*

58. *Id.*

59. 793 F.3d at 1170.

60. *Id.* at 1171.

61. *Id.* at 1173.

62. *See infra* Section III.A.

Roughly a year after *EELI*, a panel of the Eighth Circuit took a contrary position on the extraterritoriality doctrine in *North Dakota v. Heydinger* (*Heydinger*).[63] North Dakota's challenge here did not involve an RPS, but instead attacked the constitutionality of Minnesota's Next Generation Energy Act (NGEA).[64] Under the NGEA, Minnesota barred in-state utilities from using electricity produced by a "new large energy facility" that would contribute to "statewide power sector carbon dioxide emissions."[65] In essence, the NGEA barred the importation or use of electricity from new fossil fuel driven power plants.[66] While not an RPS, this statute operates in a similar fashion by regulating the type of energy source an in-state utility can rely on.[67] As such, the court could have upheld the statute following the same logic as the Tenth Circuit, relying on Judge Gorsuch's opinion as persuasive precedent. Judge Loken's lead opinion seemed to acknowledge as much, suggesting that under the Tenth Circuit's analysis, Minnesota's statute would likely survive.[68] Instead of following that persuasive precedent however, he struck down the relevant NGEA provisions as an impermissible regulation of extraterritorial activity.[69]

Part of the reason for this shift may be the new argument advanced by North Dakota. North Dakota alleged that the NGEA improperly regulated transactions between North Dakota utilities and *other* states, not just Minnesota.[70] In contrast, EELI argued that Colorado's RPS influenced their businesses by restricting transactions between out-of-state power plants and Colorado in-state utilities, Judge Loken found merit in North Dakota's argument, focusing in particular on the unpredictability of electron flows within the power grid.[71] Since electrons do not follow a direct path from producer to utility to end user, the court agreed that any energy producer selling electricity onto the regional power grid would, intentionally or not, send some of that power into Minnesota and be subject to potential action under the NGEA.[72] Minnesota, like Colorado, is part of a regional electric

63. North Dakota v. Heydinger, 825 F.3d 912 (8th Cir. 2016).

64. *Id.* at 915.

65. *Id.* at 915-16.

66. *See* Minn. Stat. § 216H.03, subd. 3(2) (2017) (quoted in 825 F.3d at 913) (later amended after *Heydinger* case).

67. *See* Tessa Gellerson, Note, *Extraterritoriality and the Electric Grid:* North Dakota v. Heydinger, *A Case Study for State Energy Regulation*, HARV. ENVTL. L. REV. 563, 590-94 (2017) (analogizing Minnesota's NGEA to Hawaii's 100% RPS mandate).

68. *See Heydinger*, 825 F.3d at 920 (acknowledging the "somewhat contrary position" on extraterritoriality taken by Judge Gorsuch's Tenth Circuit opinion).

69. *Id.* at 913-14.

70. *See id.* at 916 (noting declarations by a North Dakota-based utility that they are "apprehensive" about entering into agreements to serve non-Minnesota load due to the NGEA).

71. *Id.* at 921.

72. *Id.*

power grid that includes numerous other states.[73] As such, many transactions on the regional grid take place entirely outside of Minnesota.[74] Because of that unpredictability the judge held that out-of-state power generators were justified in their hesitation, and thus that the NGEA had an impermissible extraterritorial effect.[75]

In reaching this conclusion, Judge Loken took notice of and dismissed Judge Gorsuch's view of extraterritoriality.[76] Rather than limiting the doctrine to cases of price control statutes, he argued that, "the Supreme Court has never so limited the doctrine, and indeed has applied it more broadly."[77] Judge Loken found that the key question is not whether a statute explicitly regulates out-of-state conduct through price controls, but more broadly whether, under *Healy v. Beer Institute*, "the practical effect" of the law is to regulate conduct entirely beyond the boundaries of the state.[78]

If this view of extraterritoriality prevails before the Supreme Court, the effect could be to strike down nearly every RPS in states across the country. Nearly every state is part of a regional transmission grid that includes multiple other states.[79] Because the actual flow of electrons on the grid is unpredictable, as noted in *Heydinger*,[80] the only real way to ensure that a certain percentage of power consumed in a specific state comes from renewable sources would be to mandate that the same percentage of power across the full regional grid is produced by renewable sources. Such an assurance would necessarily involve regulation of conduct occurring wholly outside the state, and thus would be subject to a dormant Commerce Clause challenge.

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73. *Electric Power Markets: Midcontinent (MISO)*, FED. ENERGY REG. COMM'N, https://www.ferc.gov/market-oversight/mkt-electric/midwest.asp (last visited Dec. 18, 2018) (map showing regional power grid encompassing Minnesota along with several other states in the upper Midwest).

74. *See Heydinger,* 825 F.3d at 916.

75. *Id.* at 922.

76. *Id.* at 920 ("A panel of the Tenth Circuit recently took a somewhat contrary position . . . The court ruled that non-price standards for products sold in-state may be amenable to commerce clause scrutiny under the *Pike* balancing test." (internal citations omitted)).

77. *Id.*

78. *Id.* (quoting Healy v. Beer Inst., 491 U.S. 324, 336 (1989)).

79. *Electric Power Markets: National Overview*, FED. ENERGY REG. COMM'N, https://www.ferc.gov/market-oversight/mkt-electric/overview.asp?csrt=3378524401904867453 (last visited Dec. 18, 2018) (showing that the vast majority of regional transmission grids encompass several states).

80. 825 F.3d at 924.

B. *Facial Discrimination Challenges to Renewable Portfolio Standards*

The Second Circuit became the most recent appellate court to uphold a state RPS in the face of a dormant Commerce Clause challenge in the 2017 case *Allco Fin. Ltd. v. Klee* (*Allco*). The challenge to Connecticut's RPS took a somewhat different tack than either *EELI* or *Heydinger*, focusing on facial discrimination as opposed to extraterritoriality.[81] Connecticut's RPS allows utilities to meet its renewable energy requirement either through their own production of energy or through the purchase of Renewable Energy Credits (RECs).[82] The challenge, brought by renewable energy producers in Georgia and New York, focused on the structure of the RECs.

Connecticut structured its RECs in such a way as to limit a utility's use of out of region generation to meet their mandated proportion of renewable energy. The state legislature defined two tiers of RECs.[83] The first could be generated only by renewable energy sources located within the regional transmission grid ISO-NE, which includes Connecticut, Massachusetts, Vermont, New Hampshire, Rhode Island, and part of Maine.[84] The second could be generated by sources on adjacent regional transmission grids and imported into the state pursuant to rules issued by the New England Power Pool General Information System (NEPOOL-GIS).[85] In order for a REC from an adjacent transmission grid to count towards the RPS however, the generator is required by NEPOOL-GIS rules to pay a fee to transmit their power onto the ISO-NE grid that includes Connecticut.[86] According to Allco Finance, the owner of the relevant renewable power producers, this structure of RECs excludes renewable energy produced throughout most of the country and amounts to unconstitutional "regional protectionism."[87]

The Second Circuit rejected this argument. The court agreed with Connecticut that RECs are creations of state property law, and as such, Connecticut is free to define them as it wishes.[88] Because Connecticut defines a REC as a specific product that only encompasses renewable generation from a particular region and not from other regions, any REC produced in Georgia is a fundamentally different

81. Allco Fin. Ltd. v. Klee, 861 F.3d 82 (2d Cir. 2017).

82. *Id.* at 86. A renewable energy credit is a "tradable commodity that represents a specific amount of energy generated from a renewable resource." *Renewable Portfolio Standards*, STATE POWER PROJECT, https://statepowerproject.org/renewable-portfolio-standard/ (last visited June 16, 2019).

83. 861 F.3d at 93.

84. *Id.*

85. *Id.* NEPOOL-GIS "issues and tracks certificates for all MWh of generation and load produced in the ISO New England control area, as well as imported MWh from adjacent control areas. NEPOOL GENERAL INFORMATION SYSTEM, https://www.nepoolgis.com/ (last visited June 16, 2019).

86. 861 F.3d at 94.

87. *Id.* at 93.

88. *Id.* at 103.

product.[89] Therefore, Connecticut's program amounts to no more than "treat[ing] different products differently in a nondiscriminatory fashion."[90] Because of this determination, the panel found that any discrimination against out-of-state commerce was merely incidental, and therefore applied the more permissive *Pike* balancing test.[91]

Under the *Pike* test, the court gave weight to Connecticut's professed need for its consumers to have a more diversified and renewable energy supply.[92] They found that, because Connecticut can only access such a supply if the electricity is produced in a region where it can be transmitted into the state,[93] its need can only be met through this type of program.[94] Given that local benefit, and the fact that Connecticut has no option to change the boundaries of the electric grid to which it has access, the court found this incidental discrimination permissible under the dormant Commerce Clause.[95] After analyzing the challenge posed by the Georgia RECs, the panel quickly disposed of the challenge brought by the New York producers. The judges analogized the transmission fees charged to make New York-produced RECs qualify for Connecticut's program to a road toll, which "regularly pass[es] constitutional muster."[96]

While *Allco* is the first case to uphold an RPS using this logic regarding RECs, the Second Circuit found strong support for its holding in Supreme Court precedent. The Court has stated that discrimination against an out-of-state, or in this case out-of-region, product "assumes a comparison of substantially similar entities."[97] In most scenarios, products that appear similar are in fact similar, but the Court found that this is not always the case. Instead, "difference in products may mean that the different entities serve different markets, and would continue to do so even if the supposedly discriminatory burden were removed."[98] The Second Circuit found that this was exactly the case with the Connecticut program. Although RECs produced in Georgia appear similar to those produced in New England, the regional structure of the electric grid meant that in practice, the credits (and renewable energy) produced in Georgia and in Connecticut were isolated from each other regardless of how Connecticut chose to structure its REC mar-

89. *Id.* at 105.

90. *Id.* at 103.

91. *Id.*; *see also* Pike v. Bruce Church, Inc., 397 U.S. 137 (1970).

92. 861 F.3d at 105.

93. *See id.* at 106 (deciding that Connecticut could give preference to power generators that had the ability to connect to their local grid).

94. *Id.*

95. *Id.* at 105.

96. *Id.* at 108.

97. Gen. Motors Corp. v. Tracy, 519 U.S. 278, 298 (1997).

98. *Id.* at 299.

ket.[99] Because the products were considered dissimilar due to their isolation, the court found that a state preference for one over the other was not facially discriminatory.[100]

The Second Circuit has been the only appellate court to date to consider the claim that an RPS facially discriminates against interstate commerce. However, the Ninth Circuit has addressed similar claims in relation to a California policy resembling an RPS.[101] In the 2013 case *Rocky Mountain Farmers Union v. Corey* (*Corey*), a three-judge panel upheld California's Low Carbon Fuel Standard (LCFS) against a constitutional challenge. The LCFS is distinct from California's RPS. Rather than mandating the use of renewable energy for electricity, the regulatory package seeks to reduce the carbon intensity of transportation fuels used in the state.[102] To do so, the California Air Resources Board (CARB) developed a life cycle "carbon intensity rating" for each transportation fuel source used within the state.[103] Based on this determination of life cycle carbon emissions, which includes emissions that occur during transport from the production location to point of use, the program gives each fuel a carbon intensity score.[104] By reducing the allowable average carbon intensity score for fuels used across the state, California incentivizes producers to either alter their mix of transportation fuel in a less carbon-intensive direction, or buy and sell credits to offset their most emissions-intensive fuels.[105]

California's LCFS is not an RPS, but the litigation over the LCFS is relevant for analyzing the viability of some RPS lawsuits. Plaintiffs argued that the life cycle emissions analysis, in particular the fact that such analysis accounted for emissions that occur during transportation of fuel from the production site to the end user, amounted to facial discrimination against out-of-state commerce.[106] While no RPS lawsuits have taken on this structure to date, the Ninth Circuit's logic here highlights another path going forward for states to promote environmental values while capturing some economic benefit for themselves.

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99. *See* 861 F.3d at 104-05. (explaining the case's connection to *Tracy* and noting that power producers in Georgia serve a distinct market from those in the Northeast).

100. *Id.* at 106-07.

101. Rocky Mtn. Farmers Union v. Corey, 730 F.3d 1070 (9th Cir. 2013).

102. CAL. AIR RES. BD., REGULATORY ADVISORY: LOW CARBON FUEL STANDARD SUPPLEMENTAL ADVISORY 10-04A 1 (July 2011), https://www.arb.ca.gov/fuels/lcfs/070111lcfs-rep-adv.pdf.

103. *See supra* note 15 for a description of the life cycle emissions analysis. *See also* Kathryn Abbott, Note, *The Dormant Commerce Clause and California's Low Carbon Fuel Standard*, 3 MICH. J. OF ENVTL. & ADMIN. LAW 179, 185 (2013) for a more in-depth overview of California's LCFS and the constitutional challenge to it.

104. *See Low Carbon Fuel Standard*, CAL. AIR RES. BD. (Nov. 26, 2018), https://www.arb.ca.gov/Fuels/Lcfs/Lcfs.htm.

105. Debra Kahn, *California to Extend Low-Carbon Fuel Standard Through 2030*, SCI. AM. (Apr. 30, 2018), https://www.scientificamerican.com/article/california-to-extend-low-carbon-fuel-standard-through-2030/.

106. Rocky Mtn. Farmers Union, 730 F.3d at 1077.

Corey contains two key holdings that are particularly relevant for both the RPS policy discussion and future litigation over RPS laws. First, the Court held that because California's law does not simply draw a hard boundary at the state line and raise the carbon intensity score for any fuel that crosses it, the LCFS did not facially discriminate against out-of-state commerce.[107] CARB did, for ease of administration, group fuel sources into three broad categories—fuels originating from within California, from the Midwestern United States, and from Brazil.[108] However, the court found this to be a reasonable distinction given the purpose of the program.[109] While not explicitly stated in the case, California's ability to draw one source region entirely in state may be due to their not receiving ethanol from neighboring states.[110] Rather than receiving ethanol from Nevada or Oregon, California received almost the entire remainder of its transportation fuel from the corn-belt in the Midwest or from sugar producers in Brazil.[111] Transportation from those regions, unlike perhaps from neighboring states, could be thought to present enough of a unique transportation challenge that they were justified in being grouped and scored separately.[112] In drawing this distinction, the court did note that California "must treat ethanol from all sources evenhandedly."[113] However, it concluded that the LCFS' regional categories—including the region containing only in-state fuels—"show every sign that they were chosen to accurately measure and control GHGs and were not an attempt to protect California ethanol producers."[114]

Because the panel found that California's program did not facially discriminate, it applied the *Pike* balancing test to the incidental discrimination caused by regional groupings.[115] The court's second key holding was that, under *Pike*, avoidance of climate change is a significant local benefit that offsets at least some of the incidental protectionist impact of the LCFS.[116] This conclusion largely relied on the Supreme Court's landmark decision in *Massachusetts v. EPA*.[117] There, the Su-

107. *Id.* at 1097.

108. *Id.* at 1093.

109. *Id.* at 1094 (explaining that while fuels produced within California's borders cannot all be expected to have the same carbon intensity, the state does not need to create individualized scores for every fuel from every source. Instead, for purposes of accounting for transportation emissions, CARB may group fuels by region of origin, including one region drawn at the state line).

110. *Id.* at 1096 ("There were no registered producers of corn ethanol from any state neighboring California.").

111. *Id.* (noting that outside of one registered producer in Idaho, all ethanol producers that sold to California were located either east of the Rocky Mountains or in Brazil).

112. *Id.*

113. *Id.* at 1094.

114. *Id.* at 1097.

115. Pike v. Bruce Church, Inc. 397 U.S. 137, 142 (1970).

116. *See* Rocky Mtn. Farmers Union, 730 F.3d at 1106-07.

117. Massachusetts v. Envtl. Prot. Agency, 549 U.S. 497 (2007).

preme Court found that expected future harm caused by climate change was enough of an injury to grant a state standing to sue.[118] The Ninth Circuit reasoned that if future climate change is a sufficient injury to merit standing, avoidance of that injury is a significant local interest for purposes of dormant Commerce Clause balancing.[119]

If the Ninth Circuit's reasoning on this issue is taken up by other courts, it could have significant implications for the fate of RPS and other state climate initiatives. Even if an RPS incidentally places some burden on interstate commerce, climate change avoidance would be considered a significant local benefit to counterbalance that burden. As such, any RPS that survives a challenge based on facial discrimination or extraterritoriality, and is instead analyzed under *Pike* balancing, is likely to be upheld.

III. IMPLICATIONS FOR THE DORMANT COMMERCE CLAUSE AND THE FUTURE DESIGN OF RENEWABLE PORTFOLIO STANDARDS

This section explores the implications of the four primary cases discussed above: *EELI*, *Heydinger*, *Allco*, and *Corey*. These cases are analyzed with regard to future litigation consequences and implications for state legislative action. States can create more room to pass aggressive renewable energy laws through careful drafting of their statutes to shift courts' focus away from the complexities of the electric grid, and through consideration of how such statutes map onto the underlying structure of the national economy and congressional action. The section will then examine the history and purpose of the dormant Commerce Clause to explore how courts should analyze cases that arguably present questions of extraterritorial impact or facial discrimination. Within each subsection, it will also consider ways states might craft renewable energy programs in order to maintain positive environmental and economic effects while minimizing the danger of a constitutional challenge.

A. *Extraterritoriality*

In *EELI* and *Heydinger*, the Tenth and Eighth Circuits advanced two distinct views of the extraterritoriality doctrine. Under Judge Loken's view on the Eighth Circuit, a combination of the unpredictable flow of electrons on the multi-state grid and the professed hesitance of out-of-state producers to enter into agreements

118. *See id.* at 522-23 ("Because the Commonwealth owns a substantial portion of the state's coastal property, it has alleged a particularized injury in its capacity as a landowner. The severity of that injury will only increase over the course of the next century.") (internal citations omitted).

119. *See* Rocky Mtn. Farmers Union, 730 F.3d at 1106 (comparing California's interest in avoidance of climate change as comparable to that recognized by the Supreme Court in the case of Massachusetts).

to sell power onto the grid constitutes an impermissible extraterritorial effect.[120] While the statute at issue in *Heydinger* was not an RPS, adoption of this robust policing of extraterritorial effects would endanger virtually every state RPS in the country. As I described above, nearly every state is part of a multi-state transmission grid, within which the actual flow of electricity is unpredictable.[121] In *Heydinger*, the court could have avoided the particular holding it came to by assuming that Minnesota's statute restricted only contracts to import energy into the state, rather than attempting to restrict actual flow of electrons into the state.[122] The fact that it did not accept such a view likely indicates that the court would view virtually all state limitations on the energy market, including RPSs, as an impermissible infringement on entirely extraterritorial conduct.

The view of extraterritoriality set forth in *Heydinger* would not only endanger RPS laws, but potentially any state health and safety regulation. In modern commercial practice, goods flow worldwide. One product may be designed in one location, have parts manufactured in another, warehoused in another, and be assembled from parts built on supply chains that stretch around the world. Due to this complexity, the function of the global supply chain for a given product is little different than the electric grid as the Eighth Circuit conceives it.[123] Just as a unit of energy generated at a power plant in North Dakota could end up anywhere on the regional transmission grid, a car part made in Texas could be shipped to an assembly line in Detroit before going to its final sales lot in California. The business relationship between the manufacturer and assembler would naturally be affected by a new auto safety or emissions standard enacted in California. If the logic of *Heydinger* were applied to such a scenario, then California's health or safety regulation may be found to have an impermissible extraterritorial effect. Making these potential broader implications clear in future cases could be a key for states looking to halt its adoption in other circuits.

Since the *Lochner* era, the courts have been wary of interpreting any portion of the Constitution in a way that would significantly infringe on the core state function of health and safety regulation.[124] Judge Loken's view of extraterritoriality es-

120. *See supra* Section II.A.

121. *Id.*

122. North Dakota v. Heydinger, 825 F.3d 912, 924-25 (8th Cir. 2016) (Murphy, J., concurring in part) (arguing that because electrons do not "flow" in the way the majority describes, a sounder reading of the statute would show that it applies only to bilateral contracts between Minnesota utilities and out-of-state energy generators).

123. To be sure, the analogy between the electric grid and a global supply chain is not perfect. Unlike the path of a given unit of electrical charge on the grid, the path of one component in an automobile would be easily tracked from designer to manufacturer to assembly to final sale. However, the point about extraterritorial effect would be the same, as a regulation in the state where a final sale takes place could impact arrangements between entities in entirely different states in either case.

124. *See generally* Lochner v. New York, 198 U.S. 45 (1905). Since being overturned, dissenting judges in a variety of cases have accused the majority of using a strained view of the Constitution to go

poused in *Heydinger* would be a step toward *Lochner*, quashing state regulation and innovation rather than allowing states to function as laboratories of democracy.[125] Given extraterritoriality's potentially expansive and disruptive effect on a host of state laws, it is unsurprising that there have been calls for the diminishment, or even the discarding, of the doctrine.[126]

The view adopted by then-Judge Gorsuch in *EELI*, under which extraterritoriality is a narrow doctrine that applies only to price control statutes, is a position more in line with the goal of state flexibility.[127] It provides states with the space to pursue RPSs and other innovative policies to push the development of renewable energy, along with maintaining the states' traditional authority over a broad scope of health and safety regulation. Justice Gorsuch's elevation to the Supreme Court indicates that this narrow view of extraterritoriality, and possibly a narrow view of the dormant Commerce Clause more generally, could be taking hold on the highest court in the land.

Should the expansive extraterritoriality doctrine advanced in *Heydinger* gain steam across the judiciary though, there may be some steps a state legislature could take to bolster its RPS against constitutional attack. In *Heydinger* itself, a portion of the court's reasoning appeared to rely on a misguided assumption about how electricity moves on the grid, and how the statute could realistically be enforced. In *Heydinger,* Judge Loken's lead opinion argued that the statutory command that "no person" shall "import or commit to import" meant that Minnesota intended to regulate not only the "contract path" of energy—the agreement between buyer and seller—but each individual electron that happened to make its way onto the state's portion of the grid.[128] A concurring judge did note the practical impossibilities of tracking one specific unit of energy from an individual producer to an end consumer.[129] However, complexities of the grid combined with unclear statutory language

back to the *Lochner* era. *See, e.g.*, Obergefell v. Hodges, 135 S. Ct. 2584, 2616 (2015) (Roberts, C.J., dissenting) ("The majority's approach has no basis in principle or tradition, except for the unprincipled tradition of judicial policymaking that characterized discredited decisions such as *Lochner*."); Alden v. Maine, 527 U.S. 706, 814 (1999) (Souter, J., dissenting) ("The resemblance of today's state sovereign immunity to the *Lochner* era's industrial due process is striking . . . I expect the Court's late essay into immunity doctrine will prove the equal of its earlier experiment in laissez-faire, the one being as unrealistic as the other, as indefensible, and probably as fleeting.").

125. *See* New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("[A] single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.).

126. *See* Brandon P. Denning, *Extraterritoriality and the Dormant Commerce Clause: A Doctrinal Post-Mortem*, 73 LA. L. REV. 979, 1006 (2013); Tessa Gellerson, Note, *Extraterritoriality and the Electric Grid: North Dakota v. Heydinger, A Case Study for State Energy Regulation*, 41 HARV. ENVTL. L. REV. 563 (2017).

127. *See* Energy & Env't Legal Inst. v. Epel, 793 F.3d 1169, 1173 (10th Cir. 2015).

128. North Dakota v. Heydinger, 825 F.3d 912, 921 (8th Cir. 2016).

129. *Id.* at 92425 (Murphy, J., concurring).

may have nudged Judge Loken toward a more expansive reading of extraterritoriality than he otherwise would have taken.[130]

To bolster their statutes, states may be advised to explicitly focus only on the financial transaction in power markets. This could be easily done by dropping the "import or commit to import" language from Minnesota's NGEA. A legislature could sub in language barring any person from "entering into a contract to import" fossil fuel energy or, in the case of an RPS, more than a certain percentage of their energy from non-renewable sources. This would not necessarily dispose of any constitutional attack. A court determined to take a strong view of extraterritoriality, as described above, could still strike it down. By forcing a court to focus on specific transactions rather than the complex working of the electric grid though, a legislature would push the court to either uphold their statute or take a much more explicitly expansive view of extraterritoriality.[131] Given the strength of traditional state authority over general public health and welfare regulations,[132] courts may be unwilling to so expand the doctrine. By forcing the court to choose between a permissive attitude towards state regulation or a more explicitly Lochnerian view of the dormant Commerce Clause, states may be able to more aggressively pursue RPSs and similar clean energy legislation.

B. *Facial Discrimination*

The Ninth and Second Circuits, in the *Corey* and *Allco* cases, respectively, addressed challenges to state environmental legislation that alleged facial discrimination. In both cases, the plaintiffs appeared to have strong cases. In *Corey*, California's LCFS explicitly created three groups of fuels based on origin, one of which included only those ethanol sources within the state.[133] In *Allco*, the Connecticut provision at issue allowed only RECs from within a specified region to count towards fulfillment of a utility's obligation under the RPS.[134] In both cases however, the courts agreed with the state that the seemingly protectionist lines were in fact consistent with the overall purpose of the statute, and thus did not constitute facial discrimination.[135]

These cases each strike a balance; they remain consistent with the purpose of the dormant Commerce Clause while maintaining states' ability to experiment

130. *See id.* (suggesting that Judge Loken's primary opinion in the case misunderstood the complexities of the grid, leading him to read the import provision of the statute in a way that is "absurd, impossible of execution, or unreasonable").

131. *See supra* notes 120-23 and accompanying text for a discussion of the potential consequences of this broader view of extraterritoriality.

132. *See, e.g.*, Bond v. United States, 572 U.S. 844, 854 (2014) ("The States have broad authority to enact legislation for the public good—what we have often called a 'police power.'").

133. Rocky Mtn. Farmers Union v. Corey, 730 F.3d 1070, 1094 (9th Cir. 2013).

134. Allco Fin. Ltd. v. Klee, 861 F.3d 82, 86 (2d Cir. 2017).

135. *Supra* Section II.B.

within our federal system of governance. The dormant Commerce Clause is not explicit within the text of the Constitution. It operates on the theory that while the founders wanted to maintain the core powers of the states, they were also concerned about the dangers of a fragmented national economy.[136] In the years prior to the enactment of the Constitution, James Madison specifically called out "the practice of many States in restricting the commercial intercourse with other States, and putting their productions and manufactures on the same footing with those of foreign nations."[137] Our economy today is far more interconnected, both among states and among nations, than it was in the late 1700s. As such, it is even more important today for the courts to find ways to police protectionist activity while maintaining the states' ability to regulate in their core fields of public health and safety.

In *Allco*, the court recognized that the state alone was not responsible for the arguably protectionist boundaries it had drawn. While the Connecticut RPS only allowed RECs from within its regional transmission grid or a directly adjacent grid, the court reasoned that the primary purpose for this was not discriminatory, but was in response to FERC's decision at the federal level to design and support regional transmission grids.[138] This view of the dormant Commerce Clause, in which state regulations that have some discriminatory impact—and arguably even facial discrimination—are judged with the underlying federal system in mind, is the most consistent with the purposes of the doctrine. The dormant Commerce Clause is a background presumption that operates in the absence of Congressional action.[139] Through FERC, Congress has granted its approval to the regional transmission grid that makes it virtually impossible for Connecticut to receive energy generated on the other side of the country.[140] The court correctly read this

136. *See, e.g.*, Barry Friedman & Daniel T. Deacon, *A Course Unbroken: The Constitutional Legitimacy of the Dormant Commerce Clause*, 97 VA. L. REV. 1877, 1890 (2011) ("Many people in the [founding] period, including but not limited to some of the most influential Framers, believed interstate discrimination to be an extremely serious problem meriting a profound response.").

137. *Id.* at 1885 (quoting James Madison, Vices of the Political System of the United States, in James Madison: Writings 69, 70-71 (Jack N. Rakove ed., 1999)).

138. 861 F.3d at 107 ("Significantly, we note that Connecticut's RPS program makes geographic distinctions between RECs only insofar as it piggybacks on top of geographic lines drawn by ISO-NE and the NEPOOL-GIS, both of which are supervised by FERC—not the state of Connecticut.").

139. *See, e.g.*, Friedman & Deacon, *supra* note 136, at 1897 (describing dormant Commerce Clause questions as those that arise in cases where Congress has not moved to either approve or bar the state action).

140. 861 F.3d at 105 ("Connecticut consumers' need for a more diversified and renewable energy supply, accessible to them directly through their regional grid or indirectly through adjacent control areas, would not be served by RECs produced by Allco's facility in Georgia—which is unable to transmit its electricity into ISO-NE."); *see also* David C. Wagman, *It's Time to Tie the U.S. Electric Grid Together, Says NREL Study*, IEEE SPECTRUM (Aug. 8, 2018), https://spectrum.ieee.org/energywise/energy/the-smarter-grid/after-almost-100-years-of-talk-time-might-be-right-to-strengthen-the-interconnect ("The U.S. electrical grid is really made up of three largely separate grids with puny transmission connections at the seams.").

action by the federal government to set up a fragmented energy system as blessing the development of state level energy regulations that track those regional lines.[141]

Although California did not map its LCFS regions onto preexisting, federally approved lines, the Ninth Circuit correctly held in *Corey* that the distinction did not facially discriminate against out-of-state commerce.[142] To arrive at that conclusion, the court rejected a rigidly formalistic approach to application of the doctrine, and instead ruled with its purpose in mind.[143] The dormant Commerce Clause is designed to prevent states from erecting artificial barriers for the purpose of protecting interstate commerce from competition.[144] While California did create one ethanol source region entirely within the state, that distinction fell squarely within the purpose of the LCFS rather than for some extraneous protectionist purpose.[145] Rather than being principally motivated by economic protectionism, California was primarily attempting to force fuel producers to pay for the externalities of fuel production that are not adequately captured in the bare cost of the fuel – namely, the environmental cost that climate change will inflict on California and its citizens.[146] That core justification suggests that the state had primarily non-protective reasons for their action, and thus that the LCFS should not be subject to the virtually per se bar that comes with a finding of facial discrimination. Recognizing that any potential discriminatory impact of the LCFS was tangential to the primary purpose of the law, the court properly analyzed it under the *Pike* balancing framework.[147]

The dormant Commerce Clause analyses in *Allco* and *Corey* provide important signposts for states hoping to enact an RPS or bolster it against constitutional challenge. A state can capture some of the economic benefits of renewable energy de-

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141. *See id.* at 106 ("The RPS program's definition of qualifying RECs appears to be a response to, rather than a cause of, the fact that Connecticut has direct access only to electricity on the ISO-NE grid, and indirect access only to electricity imported from adjacent control areas."); *see also* Felix Mormann, *Market Segmentation vs. Subsidization: Clean Energy Credits and the Commerce Clause's Economic Wisdom*, 93 WASH. L. REV. 1854, 1872-73 (2018) (making the case that even if the Second Circuit's treatment of state property law under the dormant Commerce Clause was incorrect, the court was on stronger footing in its argument that FERC had segregated the energy market such that Connecticut could not receive energy from Georgia).

142. Rocky Mtn. Farmers Union v. Corey, 730 F.3d 1070, 1107 (9th Cir. 2013).

143. *See id.* (criticizing plaintiff's reliance on "archaic formalism" in their attempt to strike down California's law using the dormant Commerce Clause).

144. *See* Donald H. Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 MICH. L. REV. 1091, 1092 (1986).

145. *See supra* Section II.B.

146. *See* Lisa Grow Sun & Brigham Daniels, *Externality Entrepreneurism*, 50 U.C. DAVIS L. REV. 321, 371-73 (2016) (exploring how identification of policy solutions to address externalities can lead to political breakthroughs in fields as such as climate change and vaccination).

147. *See* Rocky Mtn. Farmers Union, 730 F.3d at 1105-06 (recognizing that while California's LCFS did have differential effects across state lines, this was merely incidental to the state's policy decision to "pay for environmental protection").

velopment, as long as its statutes have a primary purpose unrelated to economic protectionism. The two cases present contrasting ways states may be able to capture this benefit.

First, under the *Allco* analysis, if a state can point to a preexisting federal law that is outside its control and serves to segment the market, it can validly claim that a law tracking that dividing line is not protectionist. The clearest way to do this is outlined in *Allco*, where the state REC boundaries tracked the federally supported regional transmission grid.

Second, as California did with its LCFS, a state might validly link a distance-based distinction to the primary purpose of the law. There, transporting ethanol over great distances increased overall emissions, so a fee could be charged to account for those emissions. The fact that with minimal exceptions, ethanol sold in California was produced either in state, in the Midwest, or in Brazil was a background national condition that also likely bolstered the law against an attack on dormant Commerce Clause grounds.[148] In the case of an RPS, a state's primary purpose for passing the law is likely some combination of avoiding climate change and bolstering the reliability and diversity of generation sources on the electric grid.[149] The state may validly be able to argue that avoided emissions or increased reliability brought about by rooftop solar and other localized projects are consistent with that purpose.[150] If that case is adequately made, a state could argue that under *Corey*, modestly favoring local projects is not protectionist, but is a natural consequence of the statute's purpose. At that point the statute would be analyzed under the more permissive *Pike* balancing test.

CONCLUSION

In the coming decades, state level innovations such as RPSs will likely be a key driver of U.S. environmental and energy policy. This Note has highlighted the ways in which the dormant Commerce Clause could serve as a stumbling block for these laws. An expansive reading of dormant Commerce Clause doctrine not only bodes ill for state environmental laws, it is inconsistent with the purpose of the Clause to balance promotion of a unified national economy with allowance of sufficient space for state experimentation. This Note argues for a slightly narrower view of the dormant Commerce Clause, and of the extraterritoriality doctrine in particular. It also highlights a few key steps states can take to bolster their policies against constitutional attacks. Without significantly fragmenting the national

148. *See supra* notes 107-11 and accompanying text.

149. *State Renewable Portfolio Standards and Goals, supra* note 19 (RPS "can play an integral role in state efforts to diversify their energy mix, promote economic development and reduce emissions.").

150. Peter Fairley, *How Rooftop Solar Can Stabilize the Grid*, IEEE SPECTRUM (Jan. 21, 2015), https://spectrum.ieee.org/green-tech/solar/how-rooftop-solar-can-stabilize-the-grid.

economy, these small shifts would clear the way for continued state innovation to drive our nation forward into a green energy future.