Minimizing Constitutional Risk in State Energy Policy: A Survey of the State of the Law

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Summary

Constitutional challenges to new state energy policies have been mounting in state and federal courts. This Article surveys the state of the relevant law, focusing on the dormant Commerce Clause and the Supremacy Clause, and draws five conclusions to guide states in achieving their energy policy goals: (1) locational requirements may be valid if based on reasons other than economic protectionism; (2) locational requirements may be valid if they do not impede interstate commerce or if the benefiting in-state economic interests do not compete with out-of-state businesses; (3) policies should place legal obligations only on in-state entities and may also set standards for entities that voluntarily do business with in-state entities; (4) because wholesale power prices are regulated by FERC, state policies that set a wholesale price may be preempted; and (5) limited incentives for fuel-efficient commercial vehicle fleets are permissible.

I. Introduction

Since 2008, more than one dozen constitutional challenges to state energy policies have been filed in state and federal courts. The challenges have been mounting in response to growing competition on the grid and the creation of new policies to tackle climate change and air pollution. Challengers contend that state energy policies are impermissibly regulating interstate commerce, or discriminating against it in favor of in-state industries. How these cases are resolved has implications for the state and federal roles in energy policy going forward.

This Article surveys the state of constitutional law, focusing on the dormant Commerce Clause and the Supremacy Clause. These provisions have been front and center in current and recent legal disputes over state energy policies. We provide an overview of each of these areas of the law, and present summaries of recently filed claims and court decisions. The resolutions of these disputes suggest ways in which states can act within constitutional bounds to achieve their energy policy goals. We conclude with five recommendations on achieving these policy goals within constitutional limits.

II. Dormant Commerce Clause

The Commerce Clause of the U.S. Constitution grants the U.S. Congress the authority to "regulate commerce . . . among the several states and with the Indian tribes." Into this positive grant of authority, courts have read a constraint on state power to interfere with interstate commerce, in order to "preserv[e] a national market for competition."[1] The judicial doctrine is known as the "dormant Commerce Clause." The precise contours of the dormant Commerce Clause continue to be debated in federal courts.[2]

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1. General Motors Corp. v. Tracy, 519 U.S. 278, 299 (1986). *See also* Philadelphia v. New Jersey, 437 U.S. 617, 623, 8 ELR 20540 (1978); Wyoming v. Oklahoma, 502 U.S. 437, 469 (1992) (noting "our negative Commerce Clause jurisprudence grew out of the notion that the Constitution implicitly established a national free market").
2. *See, e.g.*, Tyler Pipe Indus. v. Washington State Dep't of Revenue, 483 U.S. 232, 260 (1987) (Scalia, J., dissenting) ("our applications of the doctrine have, not to put too fine a point on the matter, made no sense," perhaps because of the "lack of any clear theoretical underpinning for judicial 'enforcement' of the Commerce Clause"); American Beverage Ass'n v. Snyder, 735 F.3d 362, 371 (6th Cir. 2013) (Sutton, J., concurring) (rejecting the extraterritorial doctrine in dormant Commerce Clause case law). Justice

Nonetheless, under the dormant Commerce Clause, a state generally may not: (1) discriminate against out-of-state interests; (2) regulate commerce occurring wholly outside the state's boundaries; or (3) impose a burden on interstate commerce that is "clearly excessive in relation to the putative local benefits."

Discriminatory laws are "virtually per se unconstitutional,"[3] and will not survive unless the state can demonstrate that the law has a nonprotectionist purpose that cannot be achieved by less discriminatory means. A statute "that directly controls commerce occurring wholly outside the boundaries of a state," meanwhile, is invalid regardless of purpose or intent.[4] If the challenged law is neither discriminatory nor extraterritorial, a court will then engage in a fact-based inquiry to balance the local benefits against the indirect burden on interstate commerce.

A. *State Laws That Discriminate Against Out-of-State Interests*

1. Legal Overview

"In all but the narrowest circumstances," courts will strike down a state law that benefits in-state economic interests at the expense of out-of-state competitors.[5] The classic example is a protective tariff that taxes goods imported from other states without taxing similar goods produced in-state. The U.S. Supreme Court has struck down several state energy policies as discriminatory, including an Oklahoma law requiring 10% of electric utilities' coal purchases to be from in-state suppliers,[6] an Ohio law offering a tax credit for selling ethanol produced in-state,[7] and a New Hampshire utility commission order prohibiting a utility from exporting hydropower to another state.[8]

Discrimination need not be so explicit, however; courts also strike down laws that are discriminatory in purpose or effect. For instance, the U.S. Court of Appeals for the Seventh Circuit has voided laws in Illinois and Indiana encouraging utilities to install scrubbers to comply with the federal Clean Air Act (CAA).[9] While suggesting a particular pollution control method is not per se discriminatory, the statutes made clear that their purpose was to drive continued use of local high-sulfur coal,[10] which would not be used at uncontrolled sources after implementation of the federal Acid Rain Program.[11] This discriminatory purpose doomed the legislation.

In theory, a state law can discriminate between in-state and out-of-state economic interests and nonetheless survive. Courts do not strike discriminatory state laws automatically, but subject them to strict scrutiny (also characterized as "rigorous"[12] or "more demanding"[13] scrutiny). As noted, this exacting standard requires a state to demonstrate that the law has a nonprotectionist purpose and that there is no less discriminatory means for achieving that purpose.[14] Shielding in-state businesses from competition is "almost never a legitimate local purpose."[15] On the other hand, a state law that banned the importation of live bait withstood the Supreme Court's dormant Commerce Clause scrutiny: While discriminatory, the law was not protectionist, but served the legitimate public purpose of protecting state waters from invasive parasites.[16] This rationale may not extend beyond quarantine laws.[17]

States may also be able to discriminate between entities that do not compete with each other. For instance, the Supreme Court upheld Ohio's tax exemption for public utility distribution companies selling natural gas to in-state customers, because the utilities did not compete with the interstate independent marketers making bulk sales to commercial and industrial customers.[18]

Clarence Thomas takes a more absolute position, believing that the dormant Commerce Clause "has no basis in the text of the Constitution, makes little sense, and has proved virtually unworkable in application." McBurney v. Young, 133 S. Ct. 1709, 1720-21 (2013) (Thomas, J., concurring).

3. *Philadelphia*, 437 U.S. at 624.
4. Healy v. Beer Inst., 491 U.S. 324, 336 (1989). The U.S. Courts of Appeal for the First, Second, Eighth, and Tenth Circuits appear to differentiate between a discriminatory state law as "virtually per se" unconstitutional and an extraterritorial state law as "per se" unconstitutional. *See, e.g.*, Alliance of Auto. Mfrs. v. Gwadosky, 430 F.3d 30, 35 (1st Cir. 2005). Other circuits do not appear to differentiate. *See, e.g.*, Cloverland-Green Spring Dairies, Inc. v. Pennsylvania Milk Mktg. Bd., 462 F.3d 249, 261 (3d Cir. 2006).
5. Granholm v. Heald, 544 U.S. 460 (2005).
6. Wyoming v. Oklahoma, 502 U.S. 437 (1992).
7. New Energy Co. of Ind. v. Limbach, 486 U.S. 269 (1988).
8. New England Power Co. v. New Hampshire, 455 U.S. 331 (1982).
9. 42 U.S.C. §§7401-7671q, ELR Stat. CAA §§101-618. *See* Alliance for Clean Coal v. Miller, 44 F.3d 591, 25 ELR 20510 (7th Cir. 1995); Alliance for Clean Coal v. Bayh, 72 F.3d 556, 26 ELR 20557 (7th Cir. 1995).
10. *See, e.g.*, *Miller*, 44 F.3d at 595 (calling Illinois' law a "none-too-subtle attempt" to drive the continued use of Illinois coal, based on statutory language advocating "the need to maintain and preserve as a valuable State resource the mining of coal in Illinois").
11. The Acid Rain Program can be found in Title IV of the CAA, 42 U.S.C. §§7651 et seq.
12. United Haulers Assn., Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth., 550 U.S. 330, 343, 37 ELR 20097 (2007) (upholding county ordinance that required solid waste to be processed at a publically owned facility).
13. Maine v. Taylor, 477 U.S. 131, 138 (1986).
14. *See* New Energy Co. of Ind. v. Limbach, 486 U.S. 269, 278 (1988).
15. West Lynn Creamery, Inc. v. Healy, 512 U.S. 186, 205 (1994) ("Preservation of local industry by protecting it from the rigors of interstate competition is the hallmark of the economic protectionism that the Commerce Clause prohibits.").
16. *Taylor*, 477 U.S. at 148.
17. *See also* Oregon-Wash. R. & Nav. Co. v. Washington, 270 U.S. 87, 96 (1926) (upholding a Washington law that blocked shipments of alfalfa, except in sealed containers, from states where fields had been infected by weevils).
18. General Motors Corp. v. Tracy, 519 U.S. 278 (1986); *see also* Alaska v. Arctic Maid, 366 U.S. 199 (1961) (upholding lower Alaska tax rates on salmon frozen in Alaska facilities for domestic consumption than for fish taken to

Moreover, the concern about unfair competition between "economic interests" may disappear where the state provides favorable treatment for a public health and safety service. The Supreme Court has "never intended to cut the States off from legislating on all subjects relating to the health, life, and safety of their citizens, though the legislation might indirectly affect the commerce of the country."[19] Therefore, when a public entity provides a "core function" such as garbage collection and waste disposal,[20] rules favoring these services over competing economic interests will not run afoul of the dormant Commerce Clause. Similarly, the Court upheld Ohio's tax exemption in part because state regulation of public utilities "serves important interests in health and safety . . . and [the Court has] consistently recognized the legitimate state pursuit of such interests as compatible with the dormant Commerce Clause."[21]

Discriminatory laws may also be upheld under the limited "market participant" exception. Where the state is acting as a "purchaser, seller, or producer"[22] of products and services, it may choose to patronize in-state businesses over out-of-state competitors. Under this theory, the Supreme Court has upheld a Maryland abandoned car bounty program that required more documentation from out-of-state scrap processors[23]; a South Dakota state-owned cement plant policy that prioritized sales to in-state purchasers[24]; and a local hiring requirement for city-financed construction projects in Boston.[25]

2. Recent Energy Litigation

Some of the latest energy law challenges have sought to strike in-state mandates from renewable portfolio standards (RPS) or other electric utility procurement requirements. In 2013, the Seventh Circuit observed that Michigan's RPS, which directs utilities to purchase all required renewable energy from generators in Michigan, "trips over an insurmountable constitutional objection. A state cannot, without violating the Commerce Clause, discriminate against out-of-state renewable energy."[26] Michigan's RPS was not the focus of the litigation, and remains in effect.

In response to filed lawsuits, some states have modified the allegedly discriminatory provisions. For instance, the Green Communities Act of 2008 required retail electricity providers to meet a portion of Massachusetts' RPS with small-scale distributed generation resources located in the Commonwealth.[27] Separately, it directed large distribution utilities to reach long-term renewable energy contracts with in-state generators where cost-effective.[28] TransCanada sued Massachusetts in federal court over these two provisions. The company, which owns wind-generation facilities in Maine and serves as a retail utility in Massachusetts, argued that the in-state requirements discriminated against interstate commerce.[29] TransCanada agreed to settle after Massachusetts allowed renewable energy generated under existing contracts to count toward the distributed generation obligation.[30]

Massachusetts subsequently issued emergency regulations to suspend the in-state long-term contract requirement.[31] Similarly, following a constitutional challenge in state court, Missouri regulators froze a provision that would have required utilities to meet RPS obligations with in-state renewables.[32] When the American Tradition Institute filed a federal lawsuit in Colorado, that state's legislature removed the phrase "in Colorado" from RPS provisions offering enhanced compliance credit (renewable energy credit (REC) bonuses) and mandating procurement from small generators.[33] (American Tradition Institute has become the Energy & Environment Legal Institute; we refer to it herein as EELI.) Most recently, after a constitutional challenge was appealed to the state's highest court, the Ohio Legislature removed an in-state requirement from that state's RPS.[34]

By contrast, some states have litigated allegations of discrimination in their electricity procurement laws. Mary-

freezer ships and shipped for canning outside the state, because the freezer ships and on-shore facilities served different markets).

19. Huron Portland Cement Co. v. Detroit, 362 U.S. 440, 443-44 (1960) (*quoting* Sherlock v. Alling, 93 U.S. 99, 103 (1876)).
20. *See* United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth., 550 U.S. 330, 344-45, 37 ELR 20097 (2007).
21. *Tracy*, 519 U.S. at 306.
22. Atlantic Coast Demolition & Recycling, Inc. v. Board of Chosen Freeholders of Atlantic Cnty., 48 F.3d 701, 25 ELR 20620 (3d Cir. 1995) (rejecting New Jersey's contention that it was a market participant when it required private market participants to bring waste to designated facilities).
23. Hughes v. Alexandria Scrap Corp., 426 U.S. 794 (1976).
24. Reeves, Inc. v. Stake, 447 U.S. 429 (1980).
25. White v. Massachusetts Council of Constr. Emps., Inc., 460 U.S. 204 (1983).
26. Illinois Commerce Comm'n v. Federal Energy Regulatory Comm'n (FERC), 721 F.3d 764 (7th Cir. 2013) (upholding FERC's approval of a MidContinent ISO tariff amendment).
27. Green Communities Act of 2008, §32(g) (amending Mass. Gen. Laws ch. 25A, §11F(g)).
28. Green Communities Act of 2008, §83. The requirement was for up to 3% of the utility's demand.
29. TransCanada Power Mktg. v. Bowles, Civ. Action No. 4:10-cv-40070 (D. Mass. 2010), Complaint available at http://statepowerproject.files.wordpress.com/2014/03/transcanada-complaint.pdf.
30. *See* TransCanada Power Marketing, Ltd. v. Bowles, Partial Settlement Agreement, No. 4:10-cv-40070-FDS (D. Mass.), http://www.mass.gov/eea/docs/doer/renewables/solar/settlement-agreement.pdf; SREC Trade, *Impact of TransCanada Settlement on Mass SREC Market*, http://www.srectrade.com/blog/srec-markets/massachusetts/transcanada-settlement-mass-srec-market.
31. *See* Commonwealth of Mass. Dep't of Pub. Utils., Order Adopting Final Regulations, D.P.U. 10-58-A (Aug. 20, 2010), *available at* http://web1.env.state.ma.us/DPU/FileRoomAPI/api/Attachments/Get/?path=10-58%2f6910dpuord.pdf. Note that four years later, the Massachusetts Legislature removed the in-state requirement from the statute that directed distribution utilities to enter into long-term contracts.
32. Missouri Energy Dev. Ass'n. v. Public Serv. Comm'n (PSC) of Mo., 386 S.W.3d 165 (Mo. Ct. App. Nov. 20, 2012), *available at* http://statepowerproject.files.wordpress.com/2014/03/mo-decision.pdf, at 13-16 (holding that the Commerce Clause challenge to the in-state requirements were moot because the PSC had stayed those provisions).
33. Colorado S.B. 13-252 (2013) (amending Colo. Rev. Stat. 40-2-124(a)(IX) (formerly VI); (c)(III), (VI); and (f)), *available at* https://statepowerproject.files.wordpress.com/2014/03/sb13252_enr.pdf.
34. Ohio S.B. 310 (2014) (modifying Ohio Rev. Code §4928.64(B)(3)). The same legislation froze state renewable energy and energy-efficiency requirements for at least two years.

land defended its Public Service Commission (PSC) order[35] requiring distribution utilities to purchase power from a new natural gas-fired power plant. The order required the plant to be located in a particular region of the interstate PJM electricity market,[36] 98% of which is in Maryland. When existing generators sued, a federal district court rejected the argument that this order was discriminatory (but as discussed below found that the Federal Power Act preempted the order).[37] Requiring the plant to be built in a particular PJM region rather than "in Maryland" did not save the order from dormant Commerce Clause scrutiny. However, the court concluded that the order did not discriminate because it did not erect barriers to interstate electricity sales or provide any competitive advantages based on location.[38] The new natural gas plant would have to compete in the regional electricity market, and its presence in Maryland would not preclude or limit sales to Maryland customers by out-of-state generators. The U.S. Court of Appeals for the Fourth Circuit affirmed the district court's decision on other grounds [39]; the parties have sought review by the Supreme Court.

New Jersey defended a similar scheme to subsidize construction of a new natural gas-fired power plant.[40] While the statute did not require construction to take place in New Jersey, it allowed regulators to consider proposals for in-state projects more favorably. When existing generators sued, a federal district court held that the law was not discriminatory because the in-state preference was motivated by electric reliability rather than economic protectionism (but as discussed below, found that the Federal Power Act preempted the order). The challengers could not overcome the "persuasive evidence" that "reliability issues could only be resolved in one of two ways—transmission . . . or additional generation *in or near the location where the reliability issue will occur*."[41] Therefore, it "appears reasonable" that New Jersey would "incentivize construction in areas where reliability concerns are in flux."[42] The decision was affirmed by the U.S. Court of Appeals for the Third Circuit, which did not weigh in on the dormant Commerce Clause argument[43]; the parties have sought review by the Supreme Court.

The Maryland district court decision held that a state may be able to set locational requirements so long as they do not give in-state competitors an advantage in the interstate market. Dormant Commerce Clause jurisprudence suggests that states may also be able to benefit in-state market players that do not directly compete with interstate economic interests.[44]

The California Public Utilities Commission (CPUC) recently relied on both justifications for an RPS rulemaking. The state's RPS requires utilities to procure renewable energy from generators that connect to a California balancing authority,[45] which in effect prohibits generators too far from a connection point from serving that portion of the market.[46] The legislature found that "[s]upplying [renewable] electricity to California end-use customers . . . is necessary to improve California's air quality and public health . . . ."[47] The CPUC rejected a dormant Commerce Clause challenge to implementing regulations, finding they contain no preference for in-state generators and enable at least some out-of-state generators (those who can connect to California) to participate.[48] Moreover, the CPUC found that generators that can connect to or supply the California grid are offering a different product—that is, the renewable energy that is associated with the REC—than generators elsewhere in the country. Therefore, they are not competing entities for purposes of the dormant Commerce Clause.[49] The rules were not challenged in court.

The New Jersey district court decision, meanwhile, suggests that locational requirements may withstand scrutiny when they are necessary to meet a valid nonprotectionist purpose, such as alleviating transmission congestion and improving the reliability of the high-voltage transmission grid. The Supreme Court has warned that the nonprotectionist purpose may not be "merely a sham or a '*post hoc* rationalization.'"[50]

Colorado defended a provision in its RPS on these grounds. EELI also argued that the requirement to meet part of the RPS obligation through retail (behind

35. Maryland PSC Case No. 9214, Order No. 84815, Apr. 12, 2012.
36. PJM's website states that it was founded by utilities in Pennsylvania. New Jersey, and Maryland in 1927, and is the world's oldest, continually existing power pool. *See* http://www.pjm.com/about-pjm/who-we-are/pjm-history.aspx. A power pool is an agreement among electric utilities and generators to share resources so that the regional electric system can be operated more efficiently. Spurred by a change in FERC regulations, beginning in the late 1990s, some power pools voluntarily became FERC-regulated Independent System Operators (ISOs). These entities operate the transmission grid, dispatch generators, and organize wholesale energy markets according to tariffs that are approved by FERC. There are six FERC-regulated ISOs that cover most of the country, except for the Southeast and the West, excluding California. Texas' ISO is not regulated by FERC because its grid is not connected to other states. PJM's territory now extends from Washington, D.C., to Chicago.
37. *See* PPL EnergyPlus, LLC v. Nazarian, 974 F. Supp. 2d 790 (D. Md. 2013); *aff'd on other grounds*, PPL EnergyPlus, LLC v. Nazarian, 753 F.3d 467 (4th Cir. 2014); PPL EnergyPlus, LLC v. Hanna, 977 F. Supp. 2d 372 (D.N.J. 2013).
38. *Nazarian*, 974 F. Supp. 2d at 851.
39. *PPL EnergyPlus, LLC*, 753 F.3d 467.
40. N.J. Pub. L. 2011, ch. 9, S.B. No. 2381, approved Jan. 28, 2011.
41. *Hanna*, 977 F. Supp. 2d 372, 411-12.
42. *Id*.
43. PPL EnergyPlus, LLC v. Solomon, 766 F.3d 241, 44 ELR 20207 (3d Cir. 2014).
44. General Motors Corp. v. Tracy, 519 U.S. 278 (1986); Alaska v. Arctic Maid, 366 U.S. 199 (1961).
45. A balancing authority is an entity responsible for operating the high-voltage transmission system in a particular area. *See* California ISO website, The ISO Grid, http://www.caiso.com/about/Pages/OurBusiness/Understand-ingtheISO/The-ISO-grid.aspx.
46. California Public Utilities Commission (CPUC), Order Denying Application for Rehearing of Decision D.11-12-052 (May 5, 2011), *available at* https://statepowerproject.files.wordpress.com/2014/03/2011-cpuc-rps.pdf. Decision 13-10-074, Denying Applications for Rehearing of Decision 11-12-052 (Oct. 31, 2013), *available at* http://statepowerproject.files.wordpress.com/2014/03/order-denying-applications-for-rehearing-110113.pdf.
47. Cal. Pub. Util. Code §399.11, subd. (e)(1)).
48. CPUC Decision 13-10-074, *supra* note 46.
49. CPUC Decision 11-12-052, *supra* note 46 (*citing* General Motors Corp. v. Tracy, 519 U.S. 278, 298-99 (1986)).
50. Maine v. Taylor, 477 U.S. 131, 149 (1986) (*quoting* Hughes v. Oklahoma, 441 U.S. 322, 338, 9 ELR 20360 (1979)).

the meter) distributed generation[51] was discriminatory, amounting to a de facto "in Colorado" requirement. In response, Colorado pointed to several nonprotectionist purposes served by retail-distributed generation: reducing transmission line losses; improving reliability; and reducing peak demand.[52] The court did not reach this issue, holding that plaintiffs did not have standing to challenge this requirement.[53]

States may also design policies so they are acting as a "market participant" in the electricity procurement space.[54] For instance, the New York State Energy Research and Development Authority (NYSERDA) implements the state's RPS.[55] The public benefit corporation procures RECs using funds collected from utility ratepayers to meet the state's annual target. In 2013, the New York Public Service Commission (PSC) limited RPS eligibility to in-state renewable generation and off-shore wind connected to New York's grid.[56] On a petition for rehearing, the PSC found that New York acts through NYSERDA as a market participant and that the RPS "represents a permissible discretion of the State to favor its own citizens over others."[57] No one challenged this final order in court.

B. *State Laws That Regulate Wholly Out-of-State Activities or Actors*

1. Legal Overview

Courts will strike down a state law that regulates commerce occurring wholly outside the boundaries of the state. The inquiry turns on whether the statute directly controls conduct in another state.[58] The Supreme Court does not often invoke extraterritoriality to void a state law.[59] In 1935, the Court ruled that "New York has no power to project its legislation into Vermont by regulating the price to be paid in that state for milk acquired there."[60] Decades later, the Court struck down an Illinois securities law, holding that the law "purports to regulate directly and to interdict interstate commerce, including commerce wholly outside the State.[61] Shortly thereafter, the Court struck down two state laws that had the effect of regulating alcohol prices in other states.[62] Most recently, in 1994, the Court voided a New York town's waste-flow rules because they "attach[ed] restrictions to exports or imports in order to control commerce in other states."[63]

While the Supreme Court has applied this doctrine only sparingly, all but one federal circuit considers extraterritoriality in its dormant Commerce Clause analysis.[64] A pair of non-energy cases from the U.S. Court of Appeals for the Sixth Circuit illustrates the application of this doctrine. In 2010, the court upheld an Ohio rule setting labeling requirements for hormone-free claims on dairy products sold in that state.[65] The court found that the labeling requirements did not dictate to out-of-state producers how to label products sold outside of Ohio; therefore, they did not "impede or control the flow of milk products across the country."[66]

In contrast, three years later, the court voided a Michigan law requiring a "unique-to-Michigan" label on returnable bottles and cans sold in that state.[67] The law was intended to prevent people from importing bottles and cans to benefit from Michigan's generous deposit law. The court found that Michigan's law "not only requires beverage companies to package a product unique to Michigan but also allows Michigan to dictate where the resulting product can be sold."[68] These cases suggest that a state may not place legally binding obligations on an out-of-state company for activities occurring wholly outside that state, but may impose production requirements on the same companies for in-state sales if drafted so as not to impede the flow of interstate commerce.

2. Recent Energy Litigation

Recent energy cases have alleged that states are setting legally binding requirements on actors conducting business wholly outside their borders. For instance, California's Low Carbon Fuel Standard (LCFS)[69] requires in-state

51. Similarly, as noted above, Massachusetts made changes to its renewable energy law without eliminating the in-state requirement for small-scale distributed-generation resources.
52. Energy & Env't Legal Inst. v. Epel, Civ. Action No. 11-cv-00859 (D. Colo. Oct. 1, 2013), Response to Plaintiffs' Early Motion for Partial Summary Judgment, *available at* https://statepowerproject.files.wordpress.com/2014/03/defendants-response-to-plaintiffs-early-motion-for-summary-judgment.pdf.
53. Energy & Env't Legal Inst. v. Epel, 2014 WL 1715209 (D. Colo. 2014).
54. *Hughes*, 426 U.S. 794; Reeves, Inc. v. Stake, 447 U.S. 429 (1980).
55. New York Public Service Comm'n (PSC), Case No. 03-E-0188, Order Approving Renewable Portfolio Standard Policy (Sept. 24, 2004).
56. New York PSC, Case No. 03-E-0188, Order Modifying RPS Program Eligibility Requirements (May 22, 2013).
57. New York PSC, Case No. 03-E-0188, Order Granting in Part and Denying in Part a Petition for Rehearing (Dec. 23, 2013) (*citing* Hughes v. Alexandria Scrap Corp., 426 U.S. 794, 810 (1976)).
58. Brown-Forman Distillers Corp. v. New York State Liquor Auth., 476 U.S. 573, 581 (1986) (striking down a New York law that required liquor distillers to affirm that the prices they charged in New York were no higher than the lowest prices charged to wholesalers anywhere in the United States that month).
59. Rocky Mtn. Farmers Union v. Corey, 730 F.3d 1070, 1101, 43 ELR 20216 (9th Cir. 2013) ("In the modern era, the Supreme Court has rarely held that statutes violate the extraterritoriality doctrine."); *see also* American Beverage Ass'n v. Snyder, 735 F.3d 362, 381 (6th Cir. 2013) (Sutton, J., concurring) ("I am not aware of a single Supreme Court dormant Commerce Clause holding that relied exclusively on the extraterritoriality doctrine to invalidate a state law.").
60. Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511, 521 (1935) (holding that under the dormant Commerce Clause, New York's price control law may not regulate prices of milk produced in Vermont).
61. Edgar v. MITE Corp., 457 U.S. 624, 642 (1982).
62. *Brown-Forman Distillers*, 476 U.S. 573; Healy v. Beer Inst., 491 U.S. 324 (1989).
63. C&A Carbone, Inc. v. Town of Clarkstown, 511 U.S. 383, 393, 24 ELR 20815 (1994).
64. International Dairy Foods Ass'n v. Boggs, 622 F.3d 628, 645-46 (6th Cir. 2010) (citing cases from all circuits except the Fifth).
65. *Id*. Part of the rule was struck down, but on other grounds.
66. *Id.* at 647.
67. American Beverage Ass'n v. Snyder, 735 F.3d 362 (6th Cir. 2013).
68. *Id.* at 376.
69. Cal. Code Regs. tit. 17, §§95480-95490.

fuel blenders to purchase ethanol that on average does not exceed annual carbon intensity limits. California's system uses the federal government's life-cycle analysis to calculate carbon intensity for different ethanol producers.[70] In 2011, on a challenge from oil companies and out-of-state ethanol producers, a federal district court ruled that the LCFS violated the dormant Commerce Clause in part because it "impermissibly attempts to 'control conduct beyond the boundary of the state.'"[71] The court found that because the carbon-intensity calculations consider how ethanol was produced and transported to the point of sale in California, the LCFS seeks to regulate wholly out-of-state activities.[72] The court also found that the LCFS could balkanize national ethanol markets and lead to inconsistent regulation.[73]

The U.S. Court of Appeals for the Ninth Circuit reversed, noting the important distinction between "laws 'that regulate out-of-state actors directly' from those that 'regulate[ ] contractual relationships in which at least one party is located in [the regulating state].'"[74] The court also concluded that California did not control ethanol production in other states, but merely considered the out-of-state activities in its life-cycle analysis.[75] Finally, rejecting the district court's balkanization concern, the Ninth Circuit noted, "[i]f we were to invalidate regulation every time another state considered a complementary statute, we would destroy the states' ability to experiment with regulation."[76]

A federal district court in Colorado adopted a similar understanding of the extraterritoriality doctrine and upheld the state's RPS. EELI alleged that Colorado's RPS[77] is per se unconstitutional because it has the "practical effect of regulating extraterritorially."[78] EELI claimed the law forces out-of-state generators to use Colorado-approved production methods, and reserves a portion of the Colorado market exclusively for those generators. The court disagreed, holding that the RPS does not regulate a transaction between two out-of-state entities, but affects only those out-of-state generators that freely choose to sell to a Colorado utility. Moreover, the RPS establishes no legal obligations for out-of-state generators, but merely determines whether energy purchased by a Colorado utility qualifies as RPS-compliant. These types of incentives, even where they induce out-of-state companies to conduct business in a particular way, do not offend the Constitution. The challengers have appealed the decision to the U.S. Court of Appeals for the Tenth Circuit.

Minnesota's Next Generation Energy Act[79] prohibits any "person" from: (1) constructing a new coal-fired power plant; (2) "import[ing] or commit[ting] to import" power from a new coal-fired power plant; or (3) entering into a new long-term power purchase agreement with a coal-fired power plant, unless the project developer offsets its emissions to the satisfaction of the Public Utility Commission. North Dakota and industry representatives challenged that law in federal district court in Minnesota, arguing that it regulates coal-fired electricity production occurring outside Minnesota's boundaries.

The court agreed, holding that provisions (2) and (3) of the Minnesota law regulate extraterritorially and are therefore invalid under the dormant Commerce Clause for two reasons.[80] First, both prohibitions apply to any "person," which could include an out-of-state generator. Because energy flows freely through the interstate transmission grid, the court reasoned that an out-of-state coal-fired generator selling energy into the regional grid could unintentionally import energy into Minnesota in violation of the law. Minnesota's law, therefore, could control out-of-state production. Second, provision (3) allows for long-term contracts that increase Minnesota's emissions only if the project proponent offsets the emissions to the satisfaction of Minnesota regulators. The court found that the law could be read to require non-Minnesota generators to seek Minnesota's approval before entering into any transaction for power on the regional grid. The challengers have appealed to the U.S. Court of Appeals for the Eighth Circuit.

The different outcomes for the laws in Minnesota and Colorado turned on whether the law could be read to place mandatory obligations on out-of-state entities. Minnesota's requirements apply to a "person," an unrestricted term that the court understood could allow Minnesota regulators to control any entity's out-of-state conduct. The Colorado statute places legal obligations on Colorado utilities and out-of-state generators that "freely choose[ ] to do business with a Colorado utility."[81] In sum, "states may not mandate compliance with their preferred policies in wholly out-of-state transactions, but they are free to regulate commerce and contracts within their boundaries with the goal of influencing the out-of-state choices of market participants."[82]

70. Rocky Mtn. Farmers Union v. Corey, 730 F.3d 1070, 1081-82, 43 ELR 20216 (9th Cir. 2013).
71. Rocky Mtn. Farmers Union v. Goldstene, 843 F. Supp. 2d 1071, 1091, 42 ELR 20013 (E.D. Cal. 2011) (quoting Healy v. Beer Inst., 491 U.S. 324, 336-37 (1989)), *rev'd sub nom.* Rocky Mtn. Farmers Union v. Corey, 730 F.3d 1070, 43 ELR 20216 (9th Cir. 2013).
72. *Id.* at 1092.
73. *Id.* at 1092-93.
74. *Id.* at 1103 (*quoting* Gravquick A/S v. Trimble Navigation Int'l Ltd., 323 F.3d 1219, 1224 (9th Cir. 2003)).
75. *Corey*, 730 F.3d at 1102-03.
76. *Id.* at 1105.
77. Colorado law denotes the state's RPS as the Renewable Energy Standard, commonly referred to as RES. *See* Colo. Rev. Stat. §40-2-124. Energy & Env't Legal Inst. v. Epel., 43 F. Supp. 3d 1171 (D. Colo. 2014).
78. Plaintiffs' Reply Brief at 9, Energy & Env't Legal Inst. v. Epel, No. 11-cv-00859 (D. Colo. Oct. 21, 2013), *available at* https://statepowerproject.files.wordpress.com/2014/03/plaintiffs-reply-to-defendants-response-to-early-motion-for-partial-summary-judgment.pdf.
79. 2007 Minn. Laws ch. 136, art. 5, §3. Minn. Stat. §216H.03, subd. 3.
80. North Dakota v. Heydinger, 15 F. Supp. 3d 891, 44 ELR 20092 (D. Minn. 2014).
81. Energy & Env't Legal Inst. v. Epel, 43 F. Supp. 3d 1171, 1179 (D. Colo. 2014).
82. Rocky Mtn.Farmers Union v. Corey, 730 F.3d 1070, 1103, 43 ELR 20216 (9th Cir. 2013) (*citing* Pharmaceutical Research & Mfrs. of Am. v. Walsh, 538 U.S. 644, 669 (2003) (upholding a Maine prescription drug rebate program under which enrollees could purchase certain discounted drugs, and the discounts would be funded by payments made by out-of-state generators)).

C. *State Laws That Unduly Burden Interstate Commerce*

1. Legal Overview

A law that does not discriminate or regulate extraterritorially and is "directed to legitimate local concerns" will frequently survive dormant Commerce Clause scrutiny despite "incidental"[83] effects on interstate commerce. A court will only void such a law if it finds that "the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits."[84] The Supreme Court established this test in *Pike v. Bruce Church*, when it struck down an Arizona law requiring in-state processing of Arizona cantaloupes. The challenger in that case, a company that shipped its fruit out of state for processing, alleged that the state law would require it to invest in new processing facilities. The Court concluded that the burden on the company outweighed the purported benefit of the Arizona law, which was to enhance the reputation of Arizona growers.

When evaluating the burden on interstate commerce, courts will consider "the nature of the local interest involved, and . . . whether it could be promoted as well with a lesser impact on interstate activities."[85] A "nondiscriminatory regulation serving substantial state purposes is not invalid simply because it causes some business to shift from a predominantly out-of-state industry to a predominantly in-state industry."[86]

Applying the *Pike* analysis in the energy context, the Supreme Court upheld an Arkansas PSC order regulating wholesale rates charged by an electric cooperative to its members.[87] While the state's regulation of wholesale energy prices may have some effect on interstate prices, that incidental effect did not outweigh the state's interest in regulating prices for in-state electric cooperative ratepayers.[88]

The Supreme Court has signaled a discomfort with the judiciary's ability to engage in the fact-based inquiry required under *Pike*. In a 2008 decision upholding tax preferences for income from state municipal bonds, the Court noted that "the current record and scholarly material convince us that the Judicial Branch is not institutionally suited to draw reliable conclusions of the kind that would be necessary . . . to satisfy a *Pike* burden in this particular case."[89] A year earlier, the Court warned that it would not "rigorously scrutinize economic legislation passed under the auspices of the police power" for the purpose of judging the wisdom of such legislation.[90] In a concurrence, Justice Antonin Scalia rejected the *Pike* test outright.[91] The *Pike* test, however, remains valid, and courts continue to apply it to evaluate nondiscriminatory state laws.

2. Recent Energy Litigation

While contending that the target laws are discriminatory and regulate extraterritorial conduct, many of the recent challenges also argue in the alternative that the burdens posed by state energy laws outweigh any possible benefit to the state. For instance, EELI argued that Colorado's RPS burdens interstate commerce by making the electric grid less reliable and electricity more expensive. In the challengers' view, the law provides no local benefits; they contest whether the installation of renewable energy generators reduces air emissions and local water use. In addition, they argued that the RPS burdens interstate markets by reducing the demand for energy generated by hydrocarbons and establishing inconsistent, state-by-state requirements for renewable energy.

The district court found the plaintiffs' evidence and arguments irrelevant and unpersuasive, holding that the key inquiry is whether the law puts a greater burden on interstate commerce than on intrastate commerce. Although Colorado had reduced its reliance on fossil fuels and increased its use of renewable sources, the court held that "interstate commerce is not subjected to an impermissible burden simply because an otherwise valid regulation causes some business to shift from one interstate supplier to another."[92]

In the Maryland case, the trial court rejected a *Pike* burden allegation, finding no evidence the power plant location requirement imposes any burden on interstate commerce. Moreover, even if there were any such burden, the court concluded that the benefits of the locational requirement (the "legitimate interest in ensuring that Maryland residents have available to them an adequate and reliable supply of electric energy"[93]) would outweigh any potential de minimis burden on interstate commerce.[94]

In California, the district court originally found that the state's LCFS discriminated against out-of-state ethanol producers and directly controlled the manner of production in

83. United Haulers Ass'n, Inc., v. Oneida-Herkimer Solid Waste Mgmt. Auth., 550 U.S. 330, 346, 37 ELR 20097 (2007) (*quoting* Philadelphia v. New Jersey, 437 U.S. 617, 624, 8 ELR 20540 (1978)).
84. Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970).
85. *Id.* The test is similar to strict scrutiny, which requires a state to demonstrate both that the law has a nonprotectionist purpose and that there is no less discriminatory means for achieving that purpose. However, *Pike* is more deferential to the state.
86. Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 474, 11 ELR 20070 (1981) (upholding Minnesota's ban on the retail sale of milk in plastic nonreturnable containers because the environmental benefits outweighed any burden on interstate commerce).
87. Arkansas Elec. Coop. Corp., v. Arkansas Pub. Serv. Comm'n, 461 U.S. 375 (1983).
88. Arkansas' regulation of wholesale rates was not preempted by the Federal Power Act (FPA) because the Act does not provide FERC with jurisdiction over rates charged by cooperatives.
89. Department of Revenue of Ky. v. Davis, 553 U.S. 328, 353 (2008). *See also* Colon Health Ctr. of Am., LLC v. Hazel, 733 F.3d 535, 546 (4th Cir. 2013) ("The *Pike* test is often too soggy to properly cabin the judicial inquiry or effectively prevent the district court from assuming a super-legislative role," *citing Davis*).
90. United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth., 550 U.S. 330, 346, 37 ELR 20097 (2007).
91. *Id.* at 348-499 (Scalia, J., concurring).
92. Energy & Env't Legal Inst. v. Epel, 43 F. Supp. 3d 1171, 1183 (D. Colo. 2014) (*quoting* Exxon Corp. v. Maryland, 437 U.S. 117, 127 (1978)).
93. PPL EnergyPlus, LLC. v. Nazarian, 974 F. Supp. 2d 790, 854 (D. Md. 2013).
94. *Id.* at 854-55.

other states. Now that the Ninth Circuit has rejected these contentions, the case has been remanded for *Pike* balancing. If state energy laws overcome charges that they are discriminatory or extraterritorial, they are much more likely to withstand scrutiny.[95] However, while the level of review is more deferential to the state, the *Pike* inquiry is quite similar to review of an allegedly discriminatory law. State energy laws that have nonprotectionist local benefits and are narrowly tailored to avoid unduly burdening interstate actors will more likely prevail in the *Pike* balancing test.[96]

III. Preemption by Federal Law

The Constitution's Supremacy Clause, Article VI, §2, empowers federal action to preempt or supersede state law. Congress can preempt state action either expressly or by implication, such as when a federal law occupies the same field as or conflicts with state law. To determine whether a state law is preempted, courts first "focus on the plain wording of the [federal law], which necessarily contains the best evidence of Congress' pre-emptive intent."[97] If the federal law expressly preempts state action, the state law cannot stand.

If there is no express preemption, courts then determine whether there is implicit preemption. A state acting on its "historic police power"[98] or in an area "traditionally occupied" by the states[99] enjoys a presumption against preemption of those state laws. Traditional police powers involve matters relating to public health and safety, including utility regulation.[100] When the presumption against preemption applies, it can be overcome by a court finding that the state law is "field"-preempted or "conflict"-preempted by federal law. No such presumption exists if a state is regulating in an area "where there has been a history of significant federal presence."[101]

The Supreme Court recently explained that "[f]ield preemption reflects a congressional decision to foreclose any state regulation in the area, even if it is parallel to federal standards,"[102] and that "[s]tates are precluded from regulating conduct in a field that Congress . . . has determined must be regulated by its exclusive governance."[103] Courts can glean Congress' intent to occupy a given field of regulation from a law's "structure and purpose."[104] Courts can infer field preemption where a scheme of federal regulation is "so pervasive as to make reasonable the inference that Congress left no room for the states to supplement it,"[105] or if Congress' act relates to a field where the "Federal interest is so dominant that the Federal system can be assumed to preclude enforcement of state laws on the same subject."[106]

Conflict preemption may be found where a state law conflicts with a federal statute or regulation; that is, it "stands as an obstacle to the accomplishment and execution of the [Congress'] full purposes and objectives."[107] For example, upon review of four provisions in Arizona's legislation concerning undocumented aliens, the Supreme Court held that the provision making it a misdemeanor for "an authorized alien to knowingly apply for work" conflicted with federal immigration law because "Congress made a deliberate choice not to impose criminal penalties."[108] Arizona's conflicting method of enforcement "would interfere with the careful balance struck by Congress with respect to unauthorized employment of aliens."[109]

A state law is also preempted if it would be impossible for a party to comply with both state and federal law.[110] When a court determines that there is a conflict, the relative importance of the state's interest is immaterial; state law must always yield to federal interests.[111]

If Congress explicitly preempts state regulation, a court's inquiry into whether the specific state policy at issue is preempted may turn on the "plain wording" of the federal statute.[112] Where field or conflict preemption is alleged, a court must begin its inquiry by understanding the scope

95. Pike v. Bruce Church, Inc., 397 U.S. 137 (1970).
96. Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 11 ELR 20070 (1981).
97. CSX Transp., Inc., v. Easterwood, 507 U.S. 658, 664 (1993); *see also* Medtronic, Inc. v. Lohr, 518 U.S. 470, 485-86 (1996) ("The purpose of Congress is the ultimate touchstone in every preemption case.") (*citing* Retail Clerks v. Schermerhorn, 375 U.S. 96, 103 (1963)).
98. *Medtronic, Inc.,* 518 U.S. at 485-86 (upholding application of state common law to recover damages for a defective pacemaker); Cippoline v. Liggett Group, Inc., 505 U.S. 504, 516 (1992) (upholding application of state common law to recover damages for smoking-related death, notwithstanding the federal Cigarette Labelling and Advertising Act).
99. Hillsborough Cnty., Fla. v. Automated Med. Labs, 471 U.S. 707, 715 (1985) (upholding local regulation of plasma collection centers despite existence of federal plasma collection regulation).
100. New State Ice Co. v. Liebmann, 285 U.S. 262, 304 (1932) ("It is settled that the police power commonly invoked in aid of health, safety, and morals extends equally to the promotion of the public welfare."); *see also* Arkansas Elec. Coop. Corp. v. Arkansas PSC, 461 U.S. 375, 377 (1983); FERC v. Mississippi, 456 U.S. 742, 747 n.7, 12 ELR 20896 (1982) ("The Court has not explored fully the extent of 'traditional' state functions. Utility regulation, however, should fall within any definition of that term.").
101. United States v. Locke, 529 U.S. 89, 108, 30 ELR 20438 (2000) (stating that the federal Ports and Waterways Safety Act preempted Washington's tanker regulations because "Congress has legislated in the field [of navigation] from the earliest days of the Republic").
102. Arizona v. United States, 132 S. Ct. 2492, 2502 (2012).
103. *Id.* at 2501 (holding that a provision of Arizona law that made it a misdemeanor to fail to carry an alien registration document was field-preempted because Congress left no room for states to legislate in the field of alien registration. Two other provisions of the law, concerning employment of unlawful aliens and warrantless arrests of unlawful aliens, were held conflict-preempted.).
104. Gade v. National Solid Wastes Mgmt. Ass'n, 505 U.S. 88, 98, 22 ELR 21073 (1992) (stating that the federal Occupational Safety and Health Act preempts any "state law requirement that directly, substantially, and specifically regulates occupational safety and health").
105. Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947) (holding that the United States Warehouse Act preempted certain aspects of Illinois' regulation of grain elevators).
106. *Id*. While the Court in *Rice* presents pervasive regulation and dominant interest as two rationales for federal supremacy, other Supreme Court cases do not appear to make this distinction. *See, e.g.*, *Gade*, 505 U.S. at 98.
107. Hines v. Davidowitz, 312 U.S. 52, 66-68 (1941) (voiding a Pennsylvania law that required registration of certain aliens because it conflicted with the federal Alien Registration Act).
108. Arizona v. United States, 132 S. Ct. 2492, 2504 (2012).
109. *Id.*
110. Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-43 (1963) (upholding a California law setting maturity standards for avocados that differed from standards set under the federal Agricultural Adjustment Act, because the differences did not give rise to a conflict).
111. Felder v. Casey, 487 U.S. 131, 138 (1988) (*quoting* Free v. Bland, 369 U.S. 663, 666 (1962)).
112. CSX Transp., Inc., v. Easterwood, 507 U.S. 658, 664 (1993).

of federal authority granted by Congress. Federal laws implicated in recent preemption challenges to state energy policies include the Federal Power Act (FPA),[113] the Public Utility Regulatory Policies Act (PURPA),[114] the CAA, and the Energy Policy and Conservation Act (EPCA).[115]

A. The FPA and PURPA

1. Legal Background

The FPA grants authority to the Federal Energy Regulatory Commission (FERC) while preserving states' historic regulatory roles over retail transactions and generation facilities. The Supreme Court has consistently held that FERC has "*exclusive*" authority to "regulate the transmission and sale at wholesale of electric energy in interstate commerce, without regard to the source of production."[116] FERC's exclusive authority includes "the authority to determine the reasonableness of wholesale rates."[117] (As discussed below, PURPA carves out a limited state role for regulation of wholesale rates.) The statute reserves state jurisdiction over "any other sale of electric energy," such as retail sales to end users,[118] and over facilities used for generation, local distribution, or intrastate transmission.[119]

While "Congress meant to draw a bright line easily ascertained between state and federal jurisdiction,"[120] the "landscape of the electric industry has changed since the enactment of the FPA [in 1935]."[121] Some changes have been technological; others are regulatory, such as the breakup of vertically integrated utilities by some states.[122] As a result, the jurisdictional boundaries set by the FPA nearly 80 years ago can be difficult to apply.

For example, the FPA also grants FERC authority to "regulate practices *affecting* the wholesale market . . . provided the Commission is not directly regulating a matter subject to state control, such as the retail market."[123] There is no bright-line rule to apply. Although state regulation, such as resource planning and generation siting, clearly "affects" wholesale markets and interstate transmission,[124] the Supreme Court has declined to find field preemption in areas explicitly reserved to the states by the FPA.[125] However, the Court has limited states' jurisdiction under the "affecting" provision, holding that states may not regulate where FERC has properly exercised its jurisdiction to ensure that agreements affecting wholesale rates are reasonable.[126] In the absence of a clear demarcating line between federal and state jurisdiction, the "affecting" provision will continue to be the subject of litigation.[127]

PURPA, enacted in 1978, provides a limited exception to the prohibition on wholesale rates set by a state. At the time, all utilities were vertically integrated, owning generation and selling electricity to end users. To encourage deployment of innovative technologies and enable new market entrants, PURPA directed FERC to promulgate rules requiring utilities to offer to sell electricity to, and purchase electricity from, "qualifying cogeneration and small power production facilities."[128] A qualifying facility (QF) is either a co-generator that meets certain efficiency requirements or a renewable generator smaller than 80 megawatts (MW).[129] PURPA requires states to set prices at which each utility must purchase from qualifying facilities, while not allowing that price to "exceed . . . the cost to the electric utility of the electric energy which, but for the purchase from such [QF] such utility would generate or purchase from another source."[130] This is known as a utility's "avoided cost."

PURPA thus expanded state jurisdiction under the FPA by requiring limited wholesale ratemaking. However, the FPA still prohibits state regulation of wholesale rates that stray outside the boundaries of PURPA, either by regulating rates paid to generators that have not been certified by FERC as QFs or by setting rates that are higher than the utility's "avoided cost."

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113. 16 U.S.C. §§791a-828c.
114. Pub. L. No. 95-617, 92 Stat. 3117.
115. Pub. L. No. 94-163, 89 Stat. 871.
116. New England Power Co. v. New Hampshire, 455 U.S. 331, 340 (1982) (*citing* United States v. Public Utils. Comm'n of Cal., 345 U.S. 295, 311 (1953)); *see also* Nantahala Power & Light Co. v. Thornburg, 476 U.S. 953, 956 (1986) (stating that FERC "has exclusive jurisdiction over interstate wholesale power rates"); Pennsylvania Water & Power Co. v. Federal Power Comm'n (FPC), 193 F.2d 230, 239 (D.C. Cir. 1951) ("Congress conferred authority upon the Federal Power Commission [FERC's predecessor] to occupy the entire field of regulation of interstate wholesale rates.").
117. Mississippi Power & Light Co. v. Mississippi ex rel. Moore, 487 U.S. 354, 371 (1988).
118. *Id.*
119. *Id.*
120. FPC v. Southern Cal. Edison Co., 376 U.S. 205, 215 (1964); *see also* Connecticut Light & Power Co. v. FPC, 324 U.S. 515, 531 (1945) (Congress "plainly was trying to reconcile the claims of federal and of local authorities and to apportion federal and state jurisdiction over the industry").
121. New York v. FERC, 535 U.S. 1, 17 (2002), *citing* Transmission Access Pol'y Study Grp. v. FERC, 225 F.3d 667, 691 (D.C. Cir. 2000) (observing that the electric industry is no longer "neatly divided into spheres of retail versus wholesale sales").
122. *Id.*
123. Electric Power Supply Ass'n v. FERC, 753 F.3d 216, 222, 44 ELR 20118 (D.C. Cir. 2014) (emphasis added) (*citing* 16 U.S.C. §824(d)).
124. *See* PPL Energyplus LLC v. Solomon, 2014 WL 4454999 (3d Cir. 2014):

> Nor do we endorse the argument that LCAPP has been field preempted because it affects the market clearing price by increasing the supply of electric capacity. . . . Accordingly, we do not view LCAPP's incidental effects on the interstate wholesale price of electric capacity as the basis of its preemption problem. Indeed, were we to determine otherwise, the states might be left with no authority whatsoever to regulate power plants because every conceivable regulation would have some effect on operating costs or available supply. That is not the law.

125. *See* Northwest Cent. Pipeline v. Kansas Corp. Comm'n, 489 U.S. 493, 514 (1993):

> To find field pre-emption of Kansas' regulation merely because purchasers' costs and hence rates might be affected would be largely to nullify that part of NGA §1(b) that leaves to the States control over production, for there can be little if any regulation of production that might not have at least an incremental effect on the costs of purchasers in some market and contractual situations.

126. Mississippi Power & Light Co. v. Mississippi ex rel. Moore, 487 U.S. 354, 374 (1988).
127. *See, e.g.*, South Carolina Pub. Serv. Auth. v. FERC, 762 F.3d 41, 44 ELR 20197 (D.C. Cir. 2014).
128. 16 U.S.C. §824a-3. These provisions of PURPA are codified in the *U.S. Code* as part of the FPA.
129. 18 C.F.R. §§292.203-205.
130. 16 U.S.C. §824a-3(b), (d).

States have adopted several different methodologies for calculating avoided cost rates,[131] and FERC is "reluctant to second guess the state commission's determinations"[132] of avoided costs. States have exclusive jurisdiction to dictate utility production and purchasing decisions, such as whether to generate or procure energy from fossil fuels or renewable sources. According to FERC, a state therefore may determine what sources of energy a utility "avoids" by purchasing from a QF.[133] For example, if a state has an RPS, purchases from a renewable QF may avoid purchases from other RPS-eligible renewable sources.

FERC has explained that a state is not bound to a single avoided cost rate. PURPA permits (but does not require) multiple avoided cost rates to address states' procurement mandates.[134] For example, a state with an RPS might require utilities to pay separate rates for energy from QFs that are RPS-eligible versus other QFs.[135] Any avoided cost rate may also include avoided environmental, transmission, or other costs, provided those costs are "real costs that would be incurred by utilities."[136] While FERC has endorsed this approach, a court hearing a challenge to a state's avoided-cost rates would not be required to agree with FERC's legal conclusions.[137]

In 2005, Congress terminated the requirement that utilities purchase energy from QFs' generators in regions where there are competitive markets for wholesale energy.[138] A utility can apply to FERC for this exemption from PURPA. FERC issues decisions on a case-by-case basis, but has established a rebuttable presumption that utilities operating in a competitive market should be relieved of the obligation to purchase energy from all but the smallest QFs (under 20 MW).[139]

2. Recent FPA and PURPA Litigation

A number of recent cases challenge state energy policies as overstepping the role allocated to states under the FPA. For instance, in the Maryland PSC case discussed above, generators in the PJM market argued that the FPA preempted the PSC order requiring each of the state's distribution utilities to enter into a "contract for differences" with a new natural gas-fired generator.[140] Under the terms of this contract, for each sale of energy or capacity made in the PJM market, the developer would receive the market's auction price *and* the difference between the PJM price and the relevant contract rate. This rate structure guaranteed that the developer would recover its costs despite uncertain revenues from FERC-regulated auctions.

The Fourth Circuit panel concluded that the federal regulatory scheme, as carried out through FERC's regulation of PJM auction markets, is "carefully calibrated," "comprehensive," and "quite sensitive to external tampering."[141] Therefore, the Maryland PSC's order was field-preempted because it "functionally sets the rate" that the developer receives for its sales in the PJM auction markets, and thus "compromises the integrity of the federal scheme and intrudes on FERC's jurisdiction." While holding that conflict preemption should be applied "sensitively" to "prevent the diminution of the role Congress reserved to the states,"[142] the panel nonetheless concluded that the order was also conflict-preempted because it "substitut[es] the state's preferred incentive structure for that approved by FERC," and had the "potential to seriously distort the PJM auction's price signals."

The Third Circuit held that the similar scheme in New Jersey was field-preempted but declined to decide whether the law was also conflict-preempted.[143] The states and the developer of the natural gas plants, Competitive Power Venture Holdings, LLC, have filed petitions for writs of certiorari to the Supreme Court seeking review of both decisions.

A renewable energy project developer, Allco Finance, filed a federal lawsuit arguing that Connecticut's state-mandated RFP process is also field-preempted. There, state law required regulators to conduct an RFP for new renewable generation and select the winning bids. The plaintiff alleged that by requiring the state's distribution utilities to sign contracts with price terms that were offered by the successful bidders and selected by regulators, the state effectively set the wholesale rate of a contract.[144]

The Connecticut federal district court rejected the plaintiff's contention that the state fixed the contract prices,

131. *See* Carolyn Elefant, *Reviving PURPA's Purpose: The Limits of Existing State Avoided Cost Ratemaking Methodologies in Supporting Alternative Energy Development and a Proposed Path for Reform*, http://www.recycled-energy.com/images/uploads/Reviving-PURPA.pdf.

132. California Public Utilities Commission (CPUC), 133 FERC ¶ 61059 at P 24 (2010).

133. CPUC, Order Denying Rehearing, 134 FERC ¶ 61044 at P 30 (2011).

134. *Id.* at P 32.

135. *Id.* at P 30.

136. CPUC, 133 FERC ¶ 61059 at P 31 (2010) (*citing* SoCal Edison, 71 FERC ¶ 61269 at 62080 (1995)).

137. *See* Niagara Mohawk Power Corp. v. FERC, 117 F.3d 1485, 1488 (D.C. Cir. 1997) (explaining that FERC's order is "of no legal moment unless and until a district court adopts that interpretation when called upon to enforce PURPA"); *see also* Xcel Energy Servs., Inc. v. FERC, 407 F.3d 1242, 1244 (D.C. Cir. 2005) ("An order that does no more than announce [FERC's] interpretation of the PURPA or one of the agency's implementing regulations is of no legal moment unless and until a district court adopts that interpretation when called upon to enforce the PURPA.").

138. 16 U.S.C. §824a-3(m).

139. 18 C.F.R. §292.309; PSC of New Hampshire, 131 FERC ¶ 61027 at P 18 (2010). Prior to PURPA's enactment in 1978, nonutility generators would have had to negotiate with utilities to connect to the grid and sell power. Utilities would have been unlikely to welcome to the competition and generally could have refused to deal with new entrants into the market. By 2005, open access transmission and regional wholesale markets made it far easier for new entrants to connect and sell power. Congress therefore allowed utilities to petition for exemptions from PURPA, which would be granted if new entrants had sufficient access to the market.

140. PPL EnergyPlus, LLC v. Nazarian, 753 F.3d 467 (4th Cir. 2014). The petitions for and opposing certiorari are in Supreme Court Docket Nos. 14-614 and 14-623.

141. *Id.*

142. *Id.*

143. PPL Energyplus LLC v. Solomon, 766 F.3d 241, 44 ELR 20207 (3d Cir. 2014). The petitions for and opposing certiorari are in Supreme Court Docket Nos. 14-634 and 14-694.

144. Allco Fin. Ltd. v. Klee, No. cv-01874 (D. Conn. 2013).

and instead concluded that the state "play[ed] no role in determining the price offered by bidders" in response to the RFP.[145] Although utilities were "compelled to accept the prices in bidders' offers," which were selected by the state, the sellers' offer prices were not constrained by state law. The court therefore held that the state's scheme fell within the state's traditional authority to regulate its utilities and was not field-preempted. The plaintiffs have filed an appeal in the U.S. Court of Appeals for the Second Circuit.

The district court's key holding is that so long as a seller voluntarily sets its own price, a state may compel a utility to purchase the offered power. On the other hand, a state may not compel a generator to sell at a particular price. FERC recently restated that it has exclusive jurisdiction to regulate the rates, terms, and conditions of wholesale power sales.[146] Within the bounds of PURPA, however, states are clearly authorized to set wholesale rates. FERC has stated that "Congress has not authorized other opportunities for States to set rates for wholesale sales in interstate commerce by public utilities."[147]

A state feed-in-tariff (FIT) program, which sets a wholesale rate for specified types of generators, would therefore likely be field-preempted unless implemented within PURPA's framework. Two recent controversies illustrate the allowable parameters of state ratemaking under PURPA.

Under California law, each of the state's investor-owned utilities must offer what is called a renewable market adjusting tariff (ReMAT) to QFs smaller than 3 MW. The tariff rate was based initially on the results of an auction for new renewable capacity, and may be adjusted every two months based on market prices. Each utility offers the adjusted rate to project developers in its queue, who choose whether or not to accept the rate.

Allco Finance, which is seeking to develop a small solar facility in California, alleged in federal court that ReMAT is inconsistent with PURPA, primarily because the rate is not based on an avoided cost determination by the PUC, and is therefore preempted by the FPA. A federal district court in the Northern District of California dismissed the complaint twice for lack of standing, but has allowed the plaintiff to amend the complaint and refile.[148] Allco made similar arguments to FERC about Vermont's Sustainably Priced Energy Enterprise Development (SPEED) program, which sets a wholesale rate for QFs smaller than 2.2 MW. FERC declined to exercise its enforcement authority because it found that Allco had suffered no harm from the optional SPEED program: At any point, Allco could take Vermont's avoided cost rate instead of participating in SPEED.[149]

Two 2014 U.S. Court of Appeals for the District of Columbia (D.C.) Circuit decisions illustrate the other side of the jurisdictional coin: disputes over the extent of federal power in regional markets and transmission planning. In one case, a divided panel held that FERC may not regulate the price of demand response in wholesale energy markets.[150] The court reasoned that demand response payments in wholesale markets "lure" retail customers to reduce their consumption. FERC's regulation therefore overstepped its boundaries under the FPA beyond regulation of wholesale energy sales. Three months later, the D.C. Circuit upheld FERC's Order No. 1000, determining that FERC's mandate for regional transmission planning does not interfere with state authority that is preserved under the FPA.[151] In that case, the court concluded that FERC properly exercised its "affecting" jurisdiction, which it premised on findings that there were underlying problems with existing transmission planning processes and that those problems had a direct effect on wholesale rates.

B. The CAA

1. Legal Background

The CAA assigns states a large role in regulating pollution from stationary sources such as fossil fuel-fired power plants. For instance, all states set source emission limits that help the state achieve federal air quality[152] and visibility targets.[153] Moreover, CAA §116 explicitly authorizes states to set more-stringent pollution limits for stationary sources than the CAA requires.[154] Litigation has arisen in this area when challengers to a state air pollution standard argue that a source is not "stationary."[155]

By contrast, the CAA prohibits state regulation of motor vehicle fuels,[156] motor vehicles,[157] nonroad engines and vehicles,[158] and aircraft.[159] Specifically, with regard to fuels, §211(c) prohibits a state from adopting any "control or prohibition respecting any characteristic or component

145. Allco Fin. Ltd. v. Klee, 2014 WL 7004024 (D. Conn. 2014).
146. CPUC, 132 FERC ¶ 61047 at P 64 (2010) (*citing* 16 U.S.C. §§824, 824d, 824e).
147. *Id.*
148. Winding Creek Solar LLC v. CPUC, 2014 WL 558673 (N.D. Cal. Feb. 10, 2014); Winding Creek Solar LLC v. Peevey, 2014 WL 2735015 (N.D. Cal. June 11, 2014).
149. Otter Creek Solar, 143 FERC ¶ 61282 (2013); *reh'g denied*, 146 FERC ¶ 61192 (2014).
150. Electric Power Supply Ass'n v. FERC, 753 F.2d 216, 44 ELR 20118 (D.C. Cir. 2014). FERC and a group of demand-response providers have petitioned the Supreme Court for certiorari. Their petitions are in Supreme Court Docket Nos. 14-840 and 14-841.
151. South Carolina PSA v. FERC, 762 F.3d 41, 44 ELR 20197 (D.C. Cir. 2014).
152. 42 U.S.C. §7410; 40 C.F.R. pt. 51.
153. 42 U.S.C. §7491(b); 40 C.F.R. §§51.300 et seq.
154. 42 U.S.C. §7416.
155. Jensen Family Farms v. Monterey Bay Unified Air Pollution Control Dist., 644 F.3d 934, 942, 41 ELR 20194 (9th Cir. 2011) (holding that off-the-grid or backup generators that remain in place for at least 12 months are stationary sources and may be regulated by California).
156. 42 U.S.C. §7545(c)(4).
157. 42 U.S.C. §7543(a). Because California had a comprehensive air pollution statute before enactment of the CAA, federal law allows California to seek a waiver from the prohibition on state regulation of motor vehicles. 42 U.S.C. §7543(b).
158. 42 U.S.C. §7543(e)(1). The CAA empowers the U.S. Environmental Protection Agency to authorize California's regulation of larger non-road engines or vehicles (those larger than 175 horsepower). 42 U.S.C. §7543(e)(2).
159. 42 U.S.C. §7573.

of a fuel or fuel additive in a motor vehicle."[160] Notably for litigation discussed below, the CAA provides a waiver from this prohibition for California.[161]

2. Recent CAA Energy Litigation

California argued that its CAA §211(c) waiver protected the LCFS from preemption and dormant Commerce Clause challenges. The challengers argued that the waiver did not apply because much of the carbon intensity value assigned to motor fuels related to the manufacture and transport of the fuel rather than being a "characteristic or component" of the fuel.[162] A California federal district court held that the LCFS properly fell within the §211(c) waiver, but that the rule could be preempted by another federal air pollution control rule, the Renewable Fuel Standard (RFS).[163] However, the court declined to rule on the preemption challenge, citing a need for additional briefing.[164] The appeal focused on the dormant Commerce Clause issues, and on appeal, the Ninth Circuit "express[ed] no opinion" on the preemption issues.[165] Preemption of California fuel standards by the federal RFS remains an open question.

In Texas, the U.S. Court of Appeals for the Fifth Circuit upheld a Dallas ordinance that granted taxis running on compressed natural gas (CNG) queue-jumping privileges at the city's airport. Taxicab association plaintiffs argued that the ordinance was preempted by the CAA's prohibition on a state or local government enacting "any standard relating to the control of emissions from new motor vehicles or new motor vehicle engines."[166] The Fifth Circuit panel concluded that the ordinance provides an incentive and does not set a standard or "effectively compel" taxi owners to switch to CNG vehicles.[167] The panel declined to "parse precisely when an incentive program might turn sufficiently coercive to qualify as a *de facto* standard," leaving that question for future cases. (Other taxi efficiency rules have been challenged under the EPCA, described below.)

C. *The EPCA*

1. Legal Background

The EPCA, passed in 1975, authorizes two federal agencies to establish efficiency standards. The U.S. Department of Transportation (DOT) must establish average fuel economy standards for automobiles.[168] These corporate average fuel economy (CAFE) standards preempt any state or local standard "related to fuel economy standards or average fuel economy standards for automobiles."[169] Recent CAFE standards have been issued as joint rulemakings between DOT, acting pursuant to its authority under the EPCA, and the U.S. Environmental Protection Agency, which has authority under CAA §202 to establish emission standards for air pollutants from automobiles.[170]

The EPCA also sets efficiency standards for a range of consumer products and requires the U.S. Department of Energy (DOE) to amend the standards, if necessary.[171] Those federal standards preempt state standards for the appliances, unless DOE grants the state a waiver.[172] The EPCA explicitly provides that state or local building codes are not preempted by federal law if those codes meet several conditions.[173]

2. Recent EPCA Energy Litigation

In Washington State, industry groups argued that the state's building code was preempted because the code's alternatives to installing more efficient appliances were so costly that builders were economically coerced into selecting the high-efficiency appliances. In 2012, the Ninth Circuit held that Washington's economic incentive to install an appliance that exceeds federal standards is not a requirement. According to the panel, "the fact that certain options may end up being less costly to builders than others does not mean the state is, expressly or effectively, requiring those options."[174] The panel also concluded that a building code may not include a penalty for failing to install high-efficiency appliances.[175]

In 2008, a federal district court barred New York City from implementing a miles-per-gallon standard for new taxis. According to the court, the city's rule was likely preempted by federal law.[176] The city did not appeal, but instead issued a new rule that raised the maximum price

160. 42 U.S.C. §7545(c)(11).
161. 42 U.S.C. §7545 (c)(4)(B).
162. Rocky Mtn. Farmers Union v. Goldstene, 843 F. Supp. 2d 1042, 1056 (E.D. Cal. 2011), *rev'd sub nom*. Rocky Mtn. Farmers Union v. Corey, 730 F.3d 1070, 43 ELR 20216 (9th Cir. 2013).
163. Renewable Fuel Standard, 42 U.S.C. §7545(o). *Rocky Mtn.*, 843 F. Supp. 2d at 1047.
164. 843 F. Supp. 2d at 1103.
165. *Corey*, 730 F.3d at 1107.
166. 42 U.S.C. §7543(a).
167. Association of Taxicab Operators USA v. City of Dallas, 720 F.3d 534, 540-42 (5th Cir. 2013) (*citing* Engine Mfrs. Ass'n v. South Coast Air Quality Mgmt. Dist., 541 U.S. 124, 34 ELR 20028 (2004) (noting that incentive programs are "significantly different from [the CAA's] command-and-control regulation")).
168. 49 U.S.C. §32902.
169. 49 U.S.C. §32919.
170. *See, e.g.*, 2017 and Later Model Year Light-Duty Vehicle Greenhouse Gas Emissions and Corporate Average Fuel Economy Standards; Final Rule. 77 Fed. Reg. 62624, 62784 (Oct. 15, 2012).
171. 42 U.S.C. §§6292, 6295.
172. 42 U.S.C. §6297(c).
173. 42 U.S.C. §6297(f)(3).
174. Building Indus. Ass'n of Am. v. Washington State Bldg. Code Council, 683 F.3d 1144 (9th Cir. 2012).
175. *Id.* (*citing* Air Conditioning, Heating & Refrigeration Inst. v. City of Albuquerque, 2008 WL 5586316 (D.N.M. 2008).
176. Metropolitan Taxicab Bd. of Trade v. City of New York, 2008 WL 4866021 (S.D.N.Y. 2008); *see also* Ophir v. City of Boston, 647 F. Supp. 2d 86 (D. Mass. 2009), Engine Mfrs. Ass'n v. South Coast Air Quality Mgmt. Dist.,

a taxi owner can charge a driver to lease a hybrid or clean-diesel taxi while lowering the cap for other vehicles. The effect of the new caps was to incentivize ownership of hybrid and clean-diesel taxis. A district court prevented the rules from going into effect, concluding that the rules "constitute[d] an offer which cannot, in practical effect, be refused."[177] The Second Circuit upheld the district court's injunction, agreeing with the lower court that the city's rules are "based expressly on the fuel economy of a leased vehicle, [and] plainly fall within the scope of the EPCA preemption provision."[178]

According to a district court in Washington State, while a "mandate" is preempted by the EPCA, a "voluntary incentive program" is not. King County issued an RFP for new taxi licenses and required winning applicants to use hybrid vehicles. The court distinguished the New York rules, which subjected all taxis to fuel efficiency requirements, from King County's voluntary incentive program, which affected only 10% of taxis and did not require anything of existing taxi owners.[179]

Under the CAA and EPCA, states have very limited authority to regulate vehicle efficiency. States may craft limited incentives for fuel efficiency, but courts have not yet provided guidance on when an incentive effectively becomes an impermissible mandate. With respect to appliances and building codes, federal law is much clearer. In general, states can set appliance standards only for those appliances without a federal standard, and states must follow the EPCA's explicit guidance on building codes.

IV. Conclusion: Recommendations for Minimizing Constitutional Risk

The lawsuits summarized in this Article argue that states are overstepping the limits of their authority and wading into regulatory space that is exclusively the purview of the federal government. Although courts will continue to disagree about the precise contours of some jurisdictional lines, these recent lawsuits suggest ways in which states can craft policies that meet important state goals while minimizing the risk of a constitutional challenge.

First, while in-state mandates are vulnerable to legal challenge, locational requirements may be valid if they are based on reasons other than economic protectionism. For example, two federal courts have indicated that electric reliability is a legitimate state concern that could justify a locational requirement.

Second, locational requirements may be valid if they do not impede the flow of interstate commerce or if the benefiting in-state economic interests do not compete with out-of-state businesses. For example, a mandate for behind-the-meter distributed generation would not provide any obstacle to interstate commerce and could be viewed as a distinct product from power purchased from large-scale generators delivering energy over the high-voltage interstate transmission grid.

Third, policies should place legal obligations only on in-state entities and may also set standards for entities that voluntarily do business with in-state entities. Recent decisions about extraterritoriality indicate that state laws that place mandates only on in-state entities are valid, even if requirements induce out-of-state entities to change their behavior. However, unless the Supreme Court provides clear guidance on extraterritoriality, plaintiffs may continue to attempt to extend extraterritoriality's application to further limit state authority.

Fourth, wholesale power prices are regulated exclusively by FERC; state policies that set a wholesale price may be preempted. States may set wholesale rates only for generators that are certified by FERC as QFs. Policies that supplement or alter a wholesale price for other generators are vulnerable to legal challenge. However, state policies about matters that the FPA explicitly reserves to states are not invalid merely because they may "affect" a FERC-jurisdictional rate.

Lastly, limited incentives for fuel-efficient commercial fleets, such as taxis, are permissible. A state may set fuel-efficiency standards for its own fleet, but may not require third parties to use vehicles with certain emissions or efficiency profiles.

541 U.S. 246 (2004) (holding that CAA preemption applies to state and local laws and regulations that set emission standards for purchased vehicles).

177. Metropolitan Taxicab Bd. of Trade v. City of New York, 633 F. Supp. 83, 99 (S.D.N.Y. 2009).

178. Metropolitan Taxicab Bd. of Trade v. City of New York, 615 F.3d 152, 158 (2d Cir. 2010).

179. Green Alliance Taxi Cab Ass'n, Inc. v. King Cnty., Wash., 2010 WL 2643369 (W.D. Wash. 2010).