ATI v. Colorado: How the Commerce Clause Provides Guidance at the Confluence of Energy, Environmental, and Constitutional Law

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A Thesis submitted to

The Faculty of
The George Washington University Law School
in partial satisfaction of the requirements
for the degree of Master of Laws
August 31, 2013

Thesis directed by
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Acknowledgements

The author wishes to thank Dean Lee Paddock for his patience and guidance in completion of this Thesis. Without him I would surely be still searching for a topic and questioning whether this would ever get completed. I also wish to thank Professor Brannon Denning for his friendship and inspiration. Finally, I cannot thank more, the future Mrs. Osborne Crosby, for always standing by my side and believing in me.

Abstract

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For nearly two decades now, congressional efforts to pass a viable comprehensive climate change bill have stalled and failed repeatedly. The battle against climate change, however, as a global problem, which has effects upon the global population, does not necessarily have to begin with the federal government. Indeed, as Washington has dragged its feed, states have taken the initiative and passed a variety of legislation seemingly meant to address the environmental impacts economic and technological progress is having upon our environment. However, the question now is: from where does the ultimate solution come? If it begins with the states, is that where it ends?

The most prevalent of the states' efforts so far has been the renewable portfolio standard ("RPS"). Enacted in 30 states and the District of Columbia, RPSs require a certain percentage of total electrical production be derived from renewable energy. Although RPSs are popular and laudable efforts by the states, the evolution of the electrical industry may not be well suited for patchwork, state-by-state regulation. The traditional landscape of electric power generation and, thus, the local interest in such generation, has outgrown the traditional state-centric model.

Through a consideration and analysis of the principles underlying our federalism structure, the impacts the Constitution may have upon state renewable mandates, the current litigation ongoing in the District Court of Colorado, and the emergence of the post-modern electricity industry, will suggest that, in order for U.S. energy to thrive and remain a world leader, the RPS will have to be delivered from the one source capable of

comprehending and addressing this increasingly national interest – the federal government.

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Introduction

"So the point is, if you look at our history, don't bet against American industry...[d]on't tell folks that we have to choose between the health of our children and the health of our economy. [U]ltimately, we will be judged as a people, and as a society, and as a country, on where we go from here."

-President Barack Obama[1]

On June 25, 2013, President Obama stood before a crowded lawn at Georgetown University and announced a "new national climate action plan" (the "Plan") for the United States.[2] The proposal, like others from Congress that have only raised eyebrows in the past[3], begins with a "change in the way we use energy – [by simply] using less dirty energy…[and] using more clean energy…"[4] Although the Plan calls for a number of actions – a market-based climate change solution from Congress, a push for additional approvals from the Interior Department for solar and wind installations on public lands, encouragement for the Environmental Protection Agency ("EPA") to regulate new and

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[1] President Barack Obama, Remarks by the President on Climate Change, Georgetown University, Washington, DC (June 25, 2013, 1:45PM EST) transcript available at http://www.whitehouse.gov/the-press-office/2013/06/25/remarks-president-climate-change (last visited 7/24/13).

[2] *Id.*

[3] *See* Yvonn Gross, Note, *Kyoto, Congress, or Bust: The Constitutional Invalidity of State CO_2 Cap-and-Trade Programs*, 28 T. JEFFERSON L. REV. 205 (2005) (suggesting that "...the United States government has lacked the political will to regulate emissions of GHGs by other means, due in part to a lack of consensus in the scientific community on the exact relationship between GHGs and climate change"); but *see* Mary Bede Russell, Note, *What's it to You?: The Difficulty of Valuing the Benefits of Climate Change Mitigation and the Need for a Public-Goods Test Under the Dormant Commerce Clause Analysis*, 94 IOWA L. REV. 727, 736 (2009) (suggesting "[f]ederal leaders...have not mandated GHG-emissions reductions because of the widespread belief in the United States that the cost of reducing the country's GHG emissions outweigh the benefits of preventing climate change for the United States").

[4] *See supra* note 1.

existing power plants, and an international agreement extending Kyoto to 2020 – the emphasis is on energy and rightly so.

Studies and commentators have suggested that as much as 40% of the United States' greenhouse gas ("GHG") emissions come from traditional fossil fuel-fired electric power plants.[5] Although the debate on the magnitude of anthropogenic impact continues in homes, conference rooms, boardrooms, and congressional chambers across the United States, two things are empirically certain: electricity is a necessity for human health, safety, and survival; and the dominant method of its production poses a threat to the maintenance and promotion of all three.[6]

Here our scientific, technological, and constitutional evolution has met an impasse. It is no longer possible, nor prudent, to consider energy and environmental challenges in isolation. Although the debate will continue at the periphery, our courts are now being asked to stand at the confluence of energy, environmental, and constitutional law and draw the line between health, safety, and welfare of the haves and the have-nots, the environment and post-industrial progress, between the basal welfare and the balance sheet.

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[5] *See* Patricia Weisselberg, Comment, *Shaping the Energy Future in the American West: Can California Curb Greenhouse Gas Emissions From Out-of-State, Coal-Fired Power Plants Without Violating the Dormant Commerce Clause?*, 42 U.S.F. L. REV. 185 (2007) (stating that "[n]ot only are [conventional coal-fired power plants] a leading cause of respiratory illness, they account for more than forty percent of United States carbon dioxide emissions. Over the course of its fifty-year life span, a single 850 megawatt conventional coal-fired plant will spew 400 million tons of carbon dioxide, four tons of mercury, and 189,000 tons of sulfur dioxide into the environment – into the air we breathe, the water we drink, the food we eat, and the atmosphere that sustains life on earth").

[6] *See id.* at 186 (where the author points out that, notwithstanding the burdens involved, "[f]orty percent of the world's electricity is generated by coal-fired power plants").

In American Tradition Institute v. Colorado ("ATI v. Colorado") the court will get its first opportunity to throw the multitude of studies, facts, opinions, and policies orbiting the climate change controversy against the wall of constitutional scrutiny.[7] In so doing, the court will be the 'first-mover' in the progression or digression of the future of U.S. energy and environmental development. For this pursuit, the judgment on the constitutionality of Colorado's Renewable Energy Standard ("RES") is irrelevant. Instead, through an ad hoc contemplation of traditional concerns underlying our federalism experiment, the evidence emerging from an evolving electricity industry, and the proffered constitutional consequences for state renewable energy mandates, this pursuit concludes decisively with the necessary and inevitable relinquishment by the states of their traditional interest in the regulation of the electricity industry and the now obsolete concept of the purely "local" electrical utility.

The Proper Sphere

As with other maxims of economics, necessity and, above all else, efficiency, dictate a balance to be struck somewhere between the costs or burdens involved and the anticipated benefits. Most often, one expects those they elect to public office to make the tough policy choices as the best interest of the public requires them. Generally speaking, in our unique federalist-style governmental structure, these decisions occur on two levels – the interests of the national good lying with the U.S. congressmen and senators sent from each state to represent them in Washington; and the interests of the local good represented and provided for by the governors, senators, congressmen, and mayors of the states and their municipal subdivisions. However, since the genesis of the Constitution –

[7] 876 F. Supp. 2d 1222 (D. Colo. 2012).

and perhaps that, which allows this Country to thrive where others do not – these two spheres have not been mutually exclusive.[8] There are a number of issues that dwell in the purgatory-like regulatory gap between federal and state power.[9] Here too, somewhere among the evasive nexus of federal and state power, there exists a need for balance to be struck between the proper entity, or authority, to address public needs in the most efficient and effective way possible.

Article I, §8, cl.3 of the United States Constitution provides the reader with a deceivingly simple guideline for determining the proper sphere of authority for addressing a particular matter at hand. It states "Congress shall have Power...[t]o regulate Commerce with foreign Nations, and among the several States."[10] Thus, one might surmise that commerce with other countries and between the states ("interstate commerce") is subject to the sole authority of the federal government, while commerce within a state ("intrastate commerce") remains within the regulatory and taxing authority of that state.[11] Further, it would not appear that arriving at such a conclusion would

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[8] *See, e.g.*, S. Pac. Co. v. Arizona, 325 U.S. 761 (1945) ("In the application of these principles some enactments may be found to be plainly within and others plainly without state power. But between these extremes lies the infinite variety of cases in which regulation of local matters may also operate as a regulation of commerce, in which reconciliation of the conflicting claims of state and national power is to be attained only by some appraisal and accommodation of the competing demands of the state and the national interests involved").

[9] *See* Steven Ferrey, *Follow the Money! Article I and Article VI Constitutional Barriers to Renewable Energy in the U.S. Future*, 17 VA. J.L. & TECH. 89, 94 (2012) (stating that "...within the constitutional model of U.S. law, the federalist fabric creates significant legal seams and wrinkles between state and federal authority over energy policy").

[10] U.S. CONST., art. I, § 8, cl. 3.

[11] *See* U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively..."); *see also* New York v. United States, 505 U.S. 144, 155 (1992) ("...the Court has resolved questions of *great importance* and *delicacy* in determining whether particular sovereign

require a law degree, nor perhaps even a high school diploma. However, no other Clause in the Constitution has evoked more consternation, conflict, confusion, and utter frustration among both its admirers and detractors.[12] Indeed, although "[t]he Commerce Clause is one of the most prolific sources of national power…[it has proven to be an] equally prolific source of conflict [and litigation] [among the] legislation [and legislators] of the state[s]" and that of the federal government.[13]

Pursuing a sound determination regarding the proper forum for efficient and effective resolution of the "Hobson's choice"[14] between electricity and health/safety/welfare – or to make any progress on President Obama's "clean energy" Plan – requires an in-depth analysis and review of: (1) the Commerce Clause, (2) its dormant but ever-relevant counterpart, (3) their contemporary application, and, finally, (4) an attempt project whether and how they chart the course for the future of electrical energy regulation.

Bolstering the litigious reputation of the Commerce Clause, the current case pending before the District Court of Colorado, ATI v. Colorado, provides the ideal lens through which to view the vital and exceedingly relevant role the Commerce Clause

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powers have been granted by the Constitution to the Federal Government or have been retained by the States") (emphasis added and internal quotation omitted).

[12] *See, e.g.,* Hughes v. Oklahoma, 441 U.S. 322, 326 (1979) ("The cases defining the scope of permissible state regulation in areas of congressional silence reflect an often controversial *evolution* of rules to accommodate federal and state interests") (emphasis added).

[13] *See* H. P. Hood & Sons v. Du Mond, 336 U.S. 525, 534 (1949).

[14] *See* City of Philadelphia v. New Jersey, 437 U.S. 617, 631 (1978) (Rehnquist, J., dissenting) (stating that "[b]ecause past precedents establish that the Commerce Clause does not present appellees with such a Hobson's choice, I dissent").

plays in today's convergence of energy, environmental, and constitutional law.[15] By engaging in due consideration of the principles underlying and enmeshed in Commerce Clause jurisprudence, along with its implications for the outcome of the Colorado case, one will begin to concede that the only lasting energy solution must come from the federal sphere.[16] For, given the increasingly burdensome and complex regulatory schemes the electricity industry is already bearing state-to-state, the answer must come from that sphere of authority that possesses the capacity to deliver the requisite uniform solution to what has developed into a question of exceptionally national, if not global, interest.[17]

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[15] *See* Ferry, *supra* note 9, at 95 (suggesting "[c]urrent efforts are trying to turn the energy economy on its heels and navigate to a more sustainable future. In this pivot are significant constitutional challenges and barriers").

[16] *See* Robin Kundis Craig, *Constitutional Contours for the Design and Implementation of Multistate Renewable Energy Programs and Projects*, 81 U. COLO. L. REV. 771, 778 (2010) ("...the authoritative spheres of Congress and the states often overlap, especially with respect to resources").

[17] *See* Joseph Allan MacDougald, *Why Climate Change Law Must be Federal: The Clash Between Commerce Clause Jurisprudence and State Greenhouse Gas Trading Systems*, 40 CONN. L. REV. 1431, 1450 (2008) (stating that "[o]ur federalist structure exists to have a national government that solves national problems…[e]ach GHG unit emitted has a national and global impact. Our history and our structure preserve these kind of issues for the federal government"); *see also* Peter Carl Nordberg, Note, *Excuse Me, Sir, But Your Climate's on Fire: California's S.B. 1368 and the Dormant Commerce Clause*, 82 NOTRE DAME L. REV. 2067, 2091 (2007) (stating that "...federal regulation, because of its uniformity, is more likely to effectively deal with a national environmental concern"); Gross, *supra* note 3, at 208 (suggesting that "...any climate change policy to reduce GHGs must apply at the national level in order to avoid constitutional barriers"); Steven Weissman, *Effective Renewable Energy Policy: Leave it to the States?*, 3 SAN DIEGO J. CLIMATE & ENERGY L. 345, 351 (2011-2012) ("A federal standard would offer some degree of consistency from state to state...facilitate the sale of renewable power among the states by setting uniform rules...and would manifest a national commitment to developing and maintaining broader markets for renewable generation and its attendant technologies"); and Benjamin K. Sovacool & Christopher Cooper, *Congress Got it Wrong: The Case for a National Renewable Portfolio Standard and Implications for Policy*, 3 ENVTL. & ENERGY L. & POL'Y J. 85, 89 (2008) (suggesting that "[a] federal

Commerce Clause

A court approaching the complexities of the Commerce Clause (hereinafter, the "Clause"), such as those presented in ATI v. Colorado is likely to begin by determining whether the Clause applies to the scenario presented. Merely stating the case involves, has effects upon, or directly impacts, commerce (much less interstate commerce) accomplishes nothing towards understanding what subjects are covered by the jurisprudence developed under its banner. Rather, perhaps by showing what *is not* "commerce among the several States," or not under the sole authority of Congress, an understanding of what *is* becomes easier to grasp. As forewarned in the seminal case, Gibbons v. Ogden, and a theme that can be traced throughout the jurisprudential evolution of the Commerce Clause: "[a]lmost all the business and intercourse of life may be connected, incidentally, more or less, with commercial regulations."[18] However, the Court has clarified through the years that the separate spheres of state/federal or national/local authorities exist and will be maintained. For, it's well established the Commerce Clause is not, and should not be considered, a general congressional "police power" in which a state's authority is but a façade.[19] To be clear, however, such simultaneity of two discrete yet overlapping spheres of authority was not a foregone conclusion at the inception of the nation.[20]

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mandate is critical to correcting these market distortions and signaling a national commitment to renewable energy generation").

[18] Gibbons v. Ogden, 22 U.S. 1, 9-10 (1824).

[19] *See, e.g.*, United States v. Lopez, 514 U.S. 549, 567 (1995) (declaring that "[t]o uphold the Governments contentions here, we would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States").

[20] *See Gibbons*, 22 U.S. at 13 ("We do not find, in the history of the formation and adoption of the constitution, that any man speaks of a general concurrent power, in the

In our first attempt at an independent unified country, under the Articles of Confederation, the "union" of 13 founding states wholly lacked coherence. The states functioned primarily under a distinct sense of self-interest, legislating and acting solely for the economic interest of the state and with disregard for the greater good of the confederation.[21] So jealous and covetous were the states during the time that, as one author described, "something disastrous happened to the American economy between 1775 and 1790."[22] Further, so ominous was the economic hindrance resulting from discriminatory and retaliatory legislation it was "eventually concluded that only a general grant of power to Congress, coupled with explicit restrictions on the states, would secure the financial and commercial future of the United States."[23] Although some historians have questioned the severity of the situation[24], they appear to be in the minority, for it is generally understood that the survival of the union required the states be restrained from reigning over certain subjects.[25]

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regulation of foreign and domestic trade, as still residing in the States. The very object intended, more than any other, was to take away such power. If it had not so provided, the constitution would not have been worth accepting").

[21] *See* Brannon P. Denning, *Confederation-Era Discrimination Against Interstate Commerce and the Legitimacy of the Dormant Commerce Clause*, 94 KY. L.J. 37 45-50 (2005) ("Friction between the states arose as...protective laws raised the costs of importing, shipping, and selling goods...[and] [t]he letters and writings of prominent advocates of constitutional reform, like Hamilton and Madison, constantly commented upon the inability of the Confederation government to stop commercial predation among the states").

[22] *Id.* at 45 ("The performance of the economy during the period...fell by 46 percent. To offer a modern comparison, the gross national product during the Great Depression fell by forty-eight percent").

[23] *Id.* at 50;

[24] *Id.* at 38-39.

[25] See *id.* at 90 ("[T]he power to regulate commerce, and even to significantly restrain the states in their regulation of interstate or foreign commerce, was not controversial because most interested parties understood those limitations to be necessary for the continued survival of the union").

Upon gathering in Philadelphia, "[t]he men who drafted the Constitution were [motivated and] interested in arresting [the] extant abuses of state commercial powers that the Articles were powerless to stop."[26] Given that one of the primary reasons for calling the Convention was to adopt a more formidable compact of government with centralized power to prevent states from obstructing the commercial and economic growth of the country, it is no surprise that the basic purpose of the Commerce Clause is touted generally as to prevent discriminatory regulations by the states on or over interstate commerce which purposefully, facially, or effectively subvert the fabric of the union.[27] Accordingly, for nearly a century after the definitive recognition and enunciation of Congress' dominion over commerce by the Marshall Court, the progress of the Commerce Clause can commonly be described as a ratcheting down of federal power, hemming states into their proper place in the "new-federalism" structure provided by the Constitution[28]

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[26] *Id.* at 92.

[27] *See, e.g.*, S. Michael Gray, *Can State Regulation of Renewable Electricity Achieve Discriminatory Effects on Interstate Trade Without Triggering the Dormant Commerce Clause?*, 44 S. TEX. L. REV. 783, 787-88 (2003) (stating "[t]he Commerce Clause is designed to protect against discriminatory state regulation. The Federal Government is free to preempt state law. As stated, once Congress exercises its power to regulate an aspect of interstate commerce, that aspect of interstate trade ceases to be 'dormant'").

[28] *See Lopez*, 514 U.S at 553 (Following Chief Justice Marshall's enumeration of the nature of Congress' commerce power in *Gibbons* and "[f]or nearly a century thereafter, the Court's Commerce Clause decisions dealt but rarely with the extent of Congress' power, and almost entirely with the Commerce Clause as a limit on state legislation that discriminated against interstate commerce"); *see also* Jonathan H. Adler, *Judicial Federalism and the Future of Federal Environmental Regulation*, 90 IOWA L. REV. 377, 390-91 (2005) (suggesting during the latter half of the 20th Century, "[i]n the name of regulating commerce, Congress could regulate just about anything"); *but see Gibbons*, 22 U.S. at 17 (Where Chief Justice Marshall, while establishing the groundwork for interpreting federalism's function in the courts, recognized the balancing that might be required by the Court later: "The general government should not seek to operate where the States can operate with more advantage to the community; nor should the States

As with other areas of jurisprudence, the Court has allowed the Clause, purposefully and not, to evolve and grow contemporarily with the country – as its progression and needs dictated. In the wake of Jacksonian Democracy, as the country's political ideals morphed, so too did the Court's decision rules and opinions.[29] Importantly, in upholding the 'piloting' fee in Cooley v. Board of Wardens, the Court declared "that Congress' power was not exclusive over subjects local in character; rather, only when regulation demands national uniformity is Congress' power exclusive."[30] The balancing and weighing between that which is local, and subject to state or municipal control, or national, and requiring uniform federal regulation, carried the Court through a maze of evolving jurisprudence and continues to endure today in the *Pike* balancing tier of the dormant Commerce Clause.

Notwithstanding a more thorough historical examination of the development of the Commerce Clause, which is merited but outside the scope here, this pursuit's preface can be summed up as:

> Whatever subjects of this power are in their nature national, or admit only of one uniform system, or plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by Congress…On the other hand, if the nature of the subject is such that it is local and not national; that it is likely to be best provided for, not by one system, or plan of regulations, but by as many as the legislative discretion of the several states should deem applicable to the local peculiarities of the ports within

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encroach on ground, which the public good, as well as the constitution, refers to the exclusive control of Congress").

[29] Sam Kalen, *Reawakening the Dormant Commerce Clause in its First Century*, 13 U. DAYTON L. REV. 417, 429 (1988) ("With new emphasis on public participation in government, the Court was sent searching for a way to distinguish local vs. national subjects of regulation").

[30] *Id.* at 438-39 (quoting Cooley v. Bd. of Wardens of Phila., 53 U.S. 229, 316-17 (1951))

> their limits,' then it may be left to the state to regulate, unless Congress preempted them.[31]

Additionally, though a chronological delineation of the Court's emphasis upon "local/national," to "direct/indirect," to "discrimination" would be useful for a global understanding of the Clause's development, it suffices here to say that the Commerce Clause, as it was penned into the Constitution, was intended to secure political union and prevent the cycles of discrimination and retaliation that threatened to defray the bonds of that union. In pursuit of this goal, the Framers gave the power over commerce among the states and foreign nations to Congress. To safeguard its stability, the rule was built upon the edifice of the federal courts to maintain the proper balance between state and federal interests. In so doing, courts have erected, altered, renovated, and rebuilt decision rules intended, some better than others, to capture the principal purposes of the Clause.

Regardless of any decision rule one may prescribe to or evoke in argument, or that which is invoked to address the question at hand, some unwavering considerations remain: Congress, through the Commerce Clause, may regulate channels, instrumentalities, and things in interstate commerce, as well as actions that have a substantial effect on interstate commerce.[32] Additionally, even where Congress has not acted to regulate, there are those subjects, like electricity and the regulation of the modern electric industry, that are still so vital to the national interest they require uniform regulation. Thus, even though not explicitly granted to Congress, and – as suggested here

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[31] Brannon P. Denning, *Reconstructing the Dormant Commerce Clause*, 50 Wm. & Mary L. Rev. 417, 435 (quoting *Cooley*, 53 U.S. at 319).
[32] *See gen.* United States v. Lopez 514 U.S. 549 (1995).

– even in an area originally of traditional local concern – certain interests should remain off limits to the residuum of power that remains with the states.[33]

Dormant Commerce Clause

The Constitution explicitly and affirmatively grants to Congress the power and authority to regulate those things that constitute "interstate commerce." However, there is an unwritten yet equally irrefutable counterpart to this explicit grant, which complements and otherwise "fills the gap" between the national interests governed by the federal sphere and the traditional local interests reserved to the states in exercising their police powers. Although, "in the absence of conflicting legislation by Congress, there is a residuum of power in the state to make law governing matters of local concern which nevertheless in some measure affect interstate commerce or event to some extent, regulate it," state and local legislatures should remain scrupulous. For within the words "in some measure" and "to some extent" lies a formidable limitation which remains dormant until aroused by unsuspecting legislative efforts which wander beyond its authorized bounds.[34] Moreover, there is strong evidence that, even in its infancy, the

[33] *See* Craig, *supra* note 16, at 777 (stating that "[i]n particular, according to the Supreme Court, Commerce Clause jurisprudence attempts to balance the states' 'reasonable exercise of [their] police powers over local affairs' and 'matters of local concern' with the federal government's authority to oversee matters of 'national interest'"); *see also id.* at 780-81 ("Given [the] clear connections between interstate commerce, on the one hand, and energy production and regulation, on the other, successful Commerce Clause challenges to Congress' energy statutes – existing or future – are unlikely. Indeed, it is difficult to imagine that Congress could violate the Commerce Clause by regulating energy, whether conventional or renewable").

[34] *S. Pac. Co. v. Ariz.*, 325 U.S. at 766-67 (citing Cooley v. Bd. of Wardens, 53 U.S. 299 (1851); S.C. State Highway Dep't v. Barnwell Bros., Inc., 303 U.S. 177 (1938); *see also S. Pac. Co.,* at 770 (stating that "[t]here has thus been left to the states wide open scope for regulation of matters of local state concern, even though it in some measure affects the commerce, *provided it does not materially restrict* the free flow of commerce across

Framers intended and understood that implicit within the affirmative grant of power to Congress, was this curtailment of State authority.[35]

The so-called "dormant Commerce Clause" is the "counterpart" or "negative" aspect to the Commerce Clause, which, in contemporary application, functions to protect against state and local regulations which on their face, purpose, or effect discriminate against interstate commerce or excessively burden it.[36] Although embodied by a distinctive but interrelated two tier test, which indisputably functions to prevent states from exacting "economic protectionism" and reverting to the Balkanization that threatened the union's existence in its beginnings,[37] the dormant Commerce Clause, like its explicit counterpart, can be understood and described as the courts' attempt to preserve the delicate constitutional balance that must be struck amongst our unique federalism structure.[38]

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state lines, or *interfere with it* in matters with respect to which uniformity of regulation is of predominant national concern") (emphasis added).

[35] *See* Denning *supra* note 31, at 486 (stating that "evidence from Philadelphia and from the ratification debates – as well as from early Supreme Court opinions – suggest that the Framers understood that limits upon state power were implicit in the positive grant to Congress"); *see also H.P. Hood & Sons*, 336 U.S. at 533-34 ("The desire of our Forefathers to federalize regulation of foreign and interstate commerce stands in sharp contrast to their jealous preservation of power over their internal affairs. No other federal power was so universally assumed to be necessary, no other state power was so readily relinquished").

[36] *See, e.g.*, *supra* note 12.

[37] *See Hughes v. Okla.*, 441 U.S. at 325 (stating that within the words of the Commerce Clause was "the conviction that in order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation").

[38] *See* James D. Fox, Note, *State Benefits Under the Pike Balancing Test of the Dormant Commerce Clause: Putative or Actual?*, 1 AVE MARIA L. REV. 175, 181-82 (2003) (suggesting that "[t]here is a delicate constitutional balance between the interests of the states and the national economy...[and] [t]he Supreme Court's dormant Commerce Clause jurisprudence attempts to preserve this delicate balance").

Although it is the domain of Congress to regulate interstate commerce and for the states to regulate those matters of local concern, it is the courts' prerogative to draw the line and make the difficult choices on subjects which lay in the vast expanse between these two independent yet intersecting spheres of authority. Part of that endeavor involves identifying areas that, even though Congress has not acted, are still proscribed by the Commerce Clause from regulation by the states.[39] For this pursuit, and in consideration the principles offered, the more a regulation is found to be local in character, focus, and effect, and having little impact upon a national interest, the more likely such regulation is found to be nondiscriminatory and, thus, a valid regulatory exercise of a state or municipality's legitimate police power.[40] Alternatively, the more a local regulation impacts, burdens, or obstructs a national interest, the more likely it will be found to discriminate or excessively burden interstate commerce and, therefore, an

[39] *See* Steven Ferrey, *Goblets of Fire: Potential Constitutional Impediments to the Regulation of Global Warming*, 35 Ecology L. Q. 835, 867 (2008) (stating "...the U.S. Supreme Court has consistently held that the Commerce Clause exerts a prohibitive force limiting states' powers to regulate interstate commerce in certain situations, even where Congress has not regulated"); *see also S. Pac. Co.*, at 769 (stating that "...where Congress has not acted, this Court, and not the state legislature, is under the commerce clause the final arbiter of the competing demands of state and national interests") (citing Kan. City Ry. v. Kaw Valley Drainage Dist., 233 U.S. 75 (1914)); *and H. P. Hood & Sons*, 336 U.S. at 33 ("This distinction between the power of the State to shelter its people from menaces to their health or safety and from fraud, even when those dangers emanate from interstate commerce, and its lack of power to retard, burden or constrict the flow of such commerce for their economic advantage, is one deeply rooted in both our history and our law").

[40] *S. Pac. Co.*, 325 U.S. at 767 (stating "[w]hen the regulation of matters of local concern is local in character and effect, and its impact on the national commerce does not seriously interfere with its operation, and the consequent incentive to deal with the nationally is slight, such regulation has been generally held to be within the state authority") (citing S.C. Highway Dep't v. Barnwell Bros., Inc., 303 U.S. 177 (1938))

illegitimate exercise of the police power and invalid under the Commerce Clause of the United States Constitution.[41]

Utility Regulation & the Growth of "Interstate Commerce"

An abridged introduction to the Clause is justified here due to the inherent interstate character of the subject in question.[42] No matter how it may be described, or otherwise biased by legalese, if the subject is energy ("clean" or "dirty"), then the issue at hand is electricity generation and determining the proper forum of authority for regulating its production. As it has been stated and concluded by courts and commentators alike, electricity is clearly in interstate commerce and, therefore, afforded protection under the Commerce Clause.[43] However, this simple conclusion is but a mere

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[41] McBurney v. Young, 133 S. Ct. 1709, 1720 (2013) (stating "[t]he 'common thread' among cases in which the Court has found a dormant Commerce Clause violation is that 'the State interfered with the natural functioning of the interstate market either through prohibition or through burdensome regulation'") (quoting Hughes v. Alexandria Scrap Corp., 426 U.S. 794, 806 (1976); *see also* New Energy Co. of Ind. v. Limbach, 486 U.S. 269, 273-74 (1988) (declaring that "[i]t has long been accepted that the Commerce Clause not only grants Congress the authority to regulate commerce among the States, but also directly limits the power of the States to discriminate against interstate commerce") (citing *Hughes v. Okla.*, 441 U.S. at 326).

[42] *See* Trevor D. Stiles, *Regulatory Barriers to Clean Energy*, 41 U. TOL. L. REV. 923, 928 (2010) (citing the "unique nature of electricity – namely, that the electrons commingle, move very quickly, flows along the path of least resistance, and ignore state boundaries" as the reason the U.S. Supreme Court has held that "all wholesale sales on the interconnected transmission grid are 'interstate,' even if they only occur within state boundaries") (quoting Fed. Power Comm'n v. Fla. Power & Light Co., 404 U.S. 453, 460-64 (1972)); *See* Ferrey *supra* note 39, at 891 ("Power is the quintessential commodity or service flowing in interstate commerce, faster than every other commodity – moving at the speed of light across state boundaries on copper cable throughout the United States"); Fed. Energy Regulatory Comm'n v. Mississippi, 456 U.S. 742, 757 (1982) ("We agree with appellants that it is difficult to conceive of a more basic element of interstate commerce than electric energy, a product used in virtually every home and every commercial manufacturing facility").

[43] Jeffery S. Dennis, Student Writing, *Federalism, Electric Industry Restructuring, and the Dormant Commerce Clause:* Tampa Electric Co. Garcia *and State Restrictions on the Development of Merchant Power Plants*, 43 NAT. RESOURCES J. 615, 640 (2003); *see e.g.*

primer to an otherwise multifarious dormant Commerce Clause analysis and tenuous conclusion.

The electricity industry traces its history back to the 1882 New York financial district, where Thomas Edison's steam engines and generators provided this essential product to light shops and restaurants.[44] Perhaps the term "essential" is an embellishment of what was then more likely described as a luxury. However, electricity as a luxury in 1882 expanded rapidly into the "critical backbone infrastructure for [what today is not just intrastate, nor interstate, nor national, but a truly] global economy."[45]

Without doubt, today most would struggle to even imagine life without electricity. Removing electricity from the everyday life of typical U.S. citizens would cause a fundamental shift in quality of life. Further, it's even more difficult to comprehend the consequences of even a slight interruption of electricity generation and transmission upon schools, businesses, hospitals, airports, and restaurants. These considerations, alone,

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Conn. Light & Power Co. v. Fed. Power Comm'n, 324 U.S. 515, 529 (1945); *FERC v. Miss.*, 456 U.S. at 757; and Steven Ferrey, *State Wars – The Empire Strikes Back: The Federal/State Constitutional Power Confrontation*, 65 BAYLOR L. REV. 1, 54 (2013) ("The scope of commerce among the states for purposes of a dormant Commerce Clause analysis is broadly defined, and all objects of interstate trade merit Commerce Clause protection, which includes the transmission of electric energy in interstate commerce") (citing *City of Philadelphia*, 437 U.S. at 621-22; New York v. Fed. Energy Regulatory Comm'n, 535 U.S. 1, 16 (2002)).

[44] Alexandra B. Klass & Elizabeth J. Wilson, *Interstate Transmission Challenges for Renewable Energy: A Federalism Mismatch*, 65 VAND. L. REV. 1801, 1805 (2012).

[45] *Id.*; *see also* Steven Ferrey, *Sustainable Energy, Environmental Policy, and States' Rights: Discerning the Energy Future Through the Eye of the Dormant Commerce Clause*, 12 N.Y.U. ENVTL. L.J. 507 (2004) ("Electric energy...is the critical resource underwriting the modern post-industrial economy").

reveal the increasingly justifiable rationale behind treating electricity as a national interest warranting uniformity of regulation through a single federal authority.[46]

Electricity is produced in large part, as it always has, through the combustion of fossil fuels. A study conducted in 2009 revealed that conventional coal-fired plants provided 45% of electricity generation, natural gas provided 23%, nuclear power 20%, and hydroelectric generation from dams provided 7%.[47] This left other sources, such as renewable "clean energy," accounting for a mere 5% of all electric generation throughout an entire year.[48] Recent numbers show that, even with a White House and Senate controlled by the Party thought to have the more 'environmental friendly' members, little has changed in four years. The Energy Information Agency indicates that in 2012 fossil fuels (coal, natural gas, and crude oil) accounted for 62.2% of total energy production in the U.S., while nuclear power and renewables accounted for a mere 8% each.[49]

In terms of the scope, it is likely that even Mr. Edison would fail to comprehend the contemporary electric industry's complexity and size. Where sales alone are concerned: "electricity is a multitrillion dollar business with investor-owned utilities selling 65% of generated electricity, public municipal facilities selling 16%, rural electric

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[46] *See* Klass & Wilson, *supra* note 44 ("This country's electricity framework thus grew from a small and isolated independent system into the large and interconnected network of electricity transmission that today connects electricity generators to consumers").
[47] Dennis L. Arfmann, Tiffany Joy & Eric Lashner, *The Regulatory Future of Clean, Reliable Energy: Increasing Distributed Generation*, 40 COLO. LAW. 31 (2011).
[48] *Id.*; *see also* Elizabeth Harball, "Report says states and cities need more private investors to scale up clean energy," ClimateWire, August 9, 2013, available at www.enews.net/climatewire/2013/08/09/stories/1059985813 (last visited 8/9/13) (on file with author) (stating "renewable energy made up 12 percent of the nation's total electricity generation in 2012, and most of this came from hydroelectric dams").
[49] Energy Information Association, *2012 Percentage Energy Production*, Primary Energy Overview, Table 1.1, available at www.eia.gov/totalenergy/data/monthly/pdf/secl_3.pdf (last visited 8/16/13).

cooperatives selling 11% and independent power producers selling 6%."[50] In addition, technology has provided for a generator in a distant region, located close to fuel but quite a distance from consumers, to transmit its product across hundreds of miles of transmission lines to potentially any point in the country.[51] As such, what was admittedly an original and traditional local interest in managing small, local generators, distributers, and consumers has evolved into a wide-ranging interdependent and interconnected grid(s) spanning the entire United States.[52]

More than one commentator has characterized this evolution as an erosion of the customary concept of the traditional local interest in electricity regulation. A senior analyst at the National Renewable Energy Laboratory described it as the "'public interest' in the electric utility sector" as having "outgrown its numerous state-centric cradles."[53] He admits that, although "[s]tate interests still exists...they are no longer separable from broader issues that reach across state lines."[54] Consistent with commentators and scholars on the subject, the Supreme Court has also recognized this 'maturation' of the electricity industry:

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[50] Klass & Wilson, *supra* note 45, at 1806.
[51] *See N.Y. v. FERC*, 535 U.S. at 7-8 ("[E]lectricity is now delivered over three major networks, or 'grids,'...[and generally,] any electricity that enters the grid immediately becomes part of a vast pool of energy that is constantly moving in interstate commerce. As a result, it is now possible for power companies to transmit energy over long distances at low cost").
[52] *See* Max Hensley, Note, *Power to the People: Why We Need Full Federal Preemption of Electrical Transmission Regulation*, 46 U. MICH. J.L. REFORM 1361, 1366-67 (2013) (claiming "[o]ver the past century, as populations grew, generation capabilities increased, and our economy became more national, the electrical grid became more interconnected").
[53] David J. Hurlbut, *Multistate Decision making for Renewable Energy and Transmission: An Overview*, 81 U. COLO. L. REV. 677, 679 (2010).
[54] *Id.*

> Maintaining the proper balance between federal and state authority in the regulation of electric and other energy utilities has long been a serious challenge to both judicial and congressional wisdom. On the one hand, the regulation of utilities is one of the most important of the functions traditionally associated with the police power of the States. On the other hand, *the production and transmission of energy is an activity particularly likely to affect more than one State,* and *its effect on interstate commerce is often significant enough that uncontrolled regulation by the* States *can patently interfere with broader national interests.*[55]

Furthermore, the demand for energy and electricity throughout the United States is abundant, as it is elsewhere across the globe. As populations continue to grow, so too does the demand for electricity – at least proportionally, if not exponentially, so.[56] As population and demand grows, so too must generation and transmission[57] and, thus, the potential for local utilities to affect more than local interests. "[P]reviously, due to the *limited scope* of the issues, state and local-decision-makers had the capacity to make adequate decisions regarding the appropriate management of the utilities."[58] However, "[n]ow, with the wide-reaching nature of these networks, state and local governments cannot be expected to make decisions that consider the interests of all who are affected by these networks."[59]

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[55] Ark. Elec. Coop. Corp. v. Ark. Pub. Serv. Comm'n, 461 U.S. 375 (1983) (citing Munn v. Illinois, 94 U.S. 113 (1877); *FERC v. Miss.*, 456 U.S. 742 (1982).

[56] Vance Little, Note, *Using the Commerce Clause to Short-Circuit States' Abilities to Pass Power Costs onto Neighbors*, 2008 U. ILL. J.L. TECH. & POL'Y 149, 158(2008) (suggesting "[p]rojections of future electricity demands indicate that it will only grow, therefore effects will also continue to grow, as will the need for interstate regulation").

[57] For the most recent predictions *see i.e.*, Energy Information Agency, *Short-Term Energy Outlook*, August 6, 2013, available at www.eia.gov/forecasts/steo/report/electricity.cfm%20?src=Electricity-f1 (last visited 8/16/13) ("EIA expects total U.S. electricity generation will grow by .5 percent in 2013 and by .4 percent in 2014").

[58] Little, *supra* note 56, at 150 (emphasis added).

[59] *Id.*; *see also* Paul S. Weiland, *Federal and State Preemption of Environmental Law: A Critical Analysis*, 24 HARV. ENVTL. L. REV. 237, 240 (2000) (identifying centralization of power in the federal sphere as a solution to problems such as "lack of capacity" and

At this juncture, it need not be suggested that the continued traditional regulation by state and municipally run utilities is completely foreclosed. Rather, by taking the evidence thus far presented, the pendulum of authority is swinging in favor of national interest. Furthermore, as the traditional landscape is changing, there is a coinciding encroachment by the executive branch into areas of traditionally local concern. One need only look to the legislative and regulatory efforts contained in the EPAct of 2005, FERC Order 888/890, and FERC Order 1000 to see the "[incremental shift in] energy policy toward the consolidation of authority in the federal government."[60] As noted, the President has expressly encouraged Gina McCarthy's EPA to begin their regulatory command and control over both new *and* existing power plants under the Clean Air Act.[61] As such, it should be acknowledged that, given the regulatory expansion of the federal sphere, coupled with persistent growth in the electrical industry, its technology,

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suggesting that "[f]iscal, institutional, and technical capacity may be greater at higher levels of government").

[60] *See* Hensley, *supra* note 52, at 1369-71; *see also Fla. Power & Light*, 404 U.S. 453 (1972) (where the Supreme Court upholds the Federal Power Commission's ("FPC"), the precursor to FERC, jurisdiction even when the company's facilities and transmission lines were located entirely in-state); *see also* Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities, Order 1000 Final Rule, 136 F.E.R.C. P 61,051, 2011 WL 2956837, at *24-25 (July 21, 2011) (concluding that "it is necessary to have an affirmative obligation in these transmission planning regions to evaluate alternatives that may meet the needs of the region more efficiently or cost effectively," and espousing the concern that "public utility transmission providers may not adequately assess the potential benefits of alternative transmission solutions at the regional level that may meet the needs of a transmission planning regions more efficiently or cost-effectively than solutions identified by individual public utility transmission providers in their local transmission planning process").

[61] Tiffany Stecker, 'EPA's pending CO_2 rules will need flexibility to deal with uneven state actions," ClimateWire, August 19, 2013, available at www.eenews.net/climatewire/2013/08/19/stories/1059986135, on file with author (last visited 8/20/13) ("In March 2012, the [EPA] released a proposed rule for new power plants under Section 111(b) that capped emissions at 1,000 pounds per megawatt-hour. This would be an easy standard for units that run on natural gas, but coal-fired plants would be required to slash their emissions rate by about half").

and its mounting demand, the fundamental landscape of the traditional interest has, and continues, to evolve[62] – further displaying the need for a uniform national regulatory scheme to provide the certainty necessary for a prolific future for U.S. energy.[63]

"Green Energy" vs. "Dirty Energy"

Though conventional fossil fuel-fired generation plants provide an essential service in the production of nearly half of all electricity in the United States each year, it is suggested that, in so doing, they are responsible for virtually half of all greenhouse gas ("GHG") emissions in the U.S. every year.[64] Although the extent and immediacy of the threat continues to be debated, it is well settled that the emissions from fossil fuel fired generators present tangible and definite threats to our health, safety, and welfare.[65] However, as President Obama has asserted, "there is no need to choose between health

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[62] *See* Dennis, *supra* note 43, at 651 (suggesting "[t]he evolution of the electric industry, to the point today where a national wholesale market for electricity has developed, leads to a strong argument that, in the nature of the suggestion in *Cooley*, that regulation of electricity is now a subject that is more national than local in character").

[63] *See gen.* Amy L. Stein, *The Tipping Point of Federalism*, 45 CONN. L. REV. 217, 227 (2012) (outlining the five traditional justifications for federal control: "(1) transboundary issues across state lines that create externalities; (2) the need for uniformity or harmonization; (3) under-regulation that can result in a race to the bottom between the states, threatening public safety and welfare; (4) over-regulation that can result from NIMBY scenarios threatening national public safety and welfare; and (5) the provision of public goods that require resource planning") (citing Robert Glicksman & Richard E. Levy, *A Collective Action Perspective on Ceiling Preemption by Federal Environmental Regulation: The Case of Global Climate Change*, 102 NW. U. L. REV. 579, 594-600 (2008)); *see also* Robin J Lunt, Comment, *Recharging U.S. Energy Policy: Advocating for a National Renewable Portfolio Standard*, 25 UCLA J. ENVTL. L. & POL'Y 371, 400 (2006-2007) (declaring "[a] national RPS does not just make environmental sense; it makes sense economically").

[64] *See* Weisselberg, *supra* note 5.

[65] *See, e.g.*, Gray, *supra* note 27, at 797 (suggesting "[c]oal combustion emissions result in acid rainfall, smog, reduced visibility, and global warming. The airborne coal particles increase the likelihood of asthma, respiratory and cardiovascular disease, and mortality for affected individuals"); *see also* Sovacool & Cooper, *supra* note 17, at 128-29 (stating "[r]esearchers at Harvard School of Public Health estimated that the air pollution from conventional energy sources kills between 50,000 and 70,000 Americans every year").

[of citizens] and the health of our economy." Furthermore, there is no need to choose between citizens' health, safety, and welfare and electricity.[66]

Here, the states have choices. When regulating for the health, safety, and welfare of its citizens, the states possess wide discretion and have a medley of tax and regulatory tools at their disposal. Specifically, in the electrical energy arena, the federal government has for many years recognized the state's latitude in requiring their utilities to generate electricity from choice sources.[67] However, notwithstanding the states' vast authority to regulate such matters of local interest, such as those utilities under state or a local municipal authority that supply electricity to local citizens, "[i]t is also [equally] clear that regulation in one state cannot affect the actual flow of power from or in another state" – for that is where the dormant Commerce Clause lies waiting.[68]

The Renewable Portfolio Standard

With the prospects of a socially and politically palatable comprehensive climate change bill far from fruition[69], the states have been the laboratories and on the front lines of efforts to reduce GHG emissions in the United States. The most popular regulatory effort, so called renewable portfolio standards ("RPSs"), enacted by 30 states and the District of Columbia[70], require a certain percentage of a state's electrical utilities total

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[66] *See supra* note 1.
[67] *See* Ferrey, *supra* note 39, at 876 ("FERC expressly acknowledged a state's ability to use regulation to favor particular generation technologies over others, in holding that a 'state may choose to require a utility to construct generation capacity of a preferred technology or to purchase power from a supplier of a particular type of resource") (quoting S. Cal. Edison Co., 70 F.E.R.C. 61,215, 61,676 (1995)).
[68] *Id.* at 877.
[69] *See* Hurlbut, *supra* note 53, at 681 ("Congressional efforts to establish a federal renewable portfolio standard have failed repeatedly since the late 1990s").
[70] See, e.g., COLO. REV. STAT. § 40-2-124 (2010); CONN GEN. STAT. § 16-245a (2011); HAW. REV. STAT. § 269-91 (2011); IOWA CODE § 476.41 (2003); MD. CODE ANN., PUB.

production be derived from a renewable energy source on site or purchased from a facility capable of doing so. Renewable energies, described by one writer "as popular as mom's apple pie,"[71] which qualify for compliance with RPSs are distinctly different from state-to-state, with each promoting its preferred source. However, most RPSs recognize photovoltaic power ("solar power" or "PV"), wind power, biomass, landfill gas, and hydroelectric power (with certain, specific, limitations) as "qualifying sources" of renewable energy.[72]

Along with variations from state-to-state regarding qualifying sources, are the diversity of means by which states provide for and encourage renewable energy generation, compliance, and benefits to their citizens.[73] However, due to the pervasive

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UTIL. COS. § 7-701 (2012); MICH. COMP. LAWS § 460.1001 (2008); MINN. STAT. § 216B.1691 (2007); MO. REV. STAT. § 393.1020 (2008); NEV. REV. STAT. § 704.7801 (2009); N.J. STAT. ANN. § 48:3-49 (2012); N.C. GEN. STAT. § 62-133.8 (2011); OHIO REV. CODE ANN. § 4928.64 (2012); TEX. UTIL. CODE ANN. § 39.904 (2007); D.C. CODE § 34-1431 (2010).

[71] *See* RL Miller, "Renewable Energy Standards Face Challenges From Fossil Fuel Interests," The Huffington Post, May 4, 2013, www.huffingtonpost.com/2013/05/04/renewable-energy-standards_n_3211017.html (last visited 7/31/13); *see also* Ashira Pelman Ostrow, *Land Law Federalism*, 61 EMORY L.J. 1397, 1417 (2012) (stating "...renewable energy consistently receives overwhelming bipartisan support in national polls").

[72] *See e.g.*, ARIZ. ADMIN. CODE § R14-2-1801 and 1802 (2011) (Arizona's "Renewable Energy Standard and Tariff ("REST"): Defining "renewable energy resource" in such a way which specifically excludes nuclear and fossil fuels, and limits hydroelectric power to those facilities built before 1997 and either (a) have new increased capacity or (b) is back up to other eligible, intermittent sources (also contains a limited exception for small hydro facilities – 10 megawatts ("MW") or less – that don't require new dams or result in waterway diversion)).

[73] *See* Richard Lehfeldt, Woody N. Peterson, & David T. Schur, *Commerce Clause Conflict*, 148 FORT. 38, 40 (2010) ("The 30 pieces of this regulatory puzzle have only one thing in common: a legal requirement that jurisdictional utilities within the state have a certain percentage of renewable power within their generation portfolios by a date or dates certain. Everything else in the programs differs dramatically, and *in every conceivable way*") (emphasis added); *see also* Gross, *supra* note 3, at 221 n.75 (suggesting that the adoption of state RPSs causes "extreme Balkanization").

and fluid nature of air, wind, and the pollutants they carry, "the benefits of a state's RPS do not perfectly match the boundaries of that state."[74] This fact is attributable to the intrinsic character of the RPS as a local "solution" to a national and global problem. States face a distinct local problem of ensuring that benefits produced by the RPSs remain in state because, after all, why would a state pour ratepayer dollars into supporting renewable power that doesn't benefit that state?[75] Indeed, most statutory proposals are accompanied by the promise of increased employment, new business and technology investments, fostering energy security, improving the environment, and protecting citizens of the state. While Professor Engel suggests that state support would wane without such benefits, here it is further contended that without such benefits, promised or delivered, such statutes would never be passed – and if passed, soon rendered insignificant by amendment, or repealed.[76] Still, legislators are confronted with the fundamental problem of at least attempting to deliver on these promises.

In trying to exact the benefits promised to their rate paying citizens, "[j]ust about every state impose[s] either a geographical location restriction or a location incentive to steer utilities toward the purchase of renewable power generated within the state."[77] The mechanisms state legislatures have employed since the birth of RPSs include: in-state renewable energy credit ("REC") multipliers, in-state REC generation preferences, in-region geographic preferences, absolute geographic preferences, and geographic

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[74] Kirsten H. Engel, *Why Not a Regional Approach to State Renewable Power Mandates?*, 3 SAN DIEGO J. CLIMATE & ENERGY L. 79, 91 (2011-2012).
[75] *See id.* at 83 (stating "...state restrictions upon the generation location of renewable energy exist to ensure that the state reaps economic development benefits associated with the state's subsidy of renewable power through the RPS...[and], [w]ithout this incentive, it is possible that state support for a RPS would diminish").
[76] *Id.*
[77] *Id.*

preferences for in-state facilities, components, labor, and/or a combination of each.[78] Perhaps it is only through these geographically oriented restrictions, requirements, and incentives that make it possible for legislatures to capture, and ratepayers to realize, the benefits of the "investment."[79] At the same time, however, these restrictive schemes raise significant and troubling constitutional questions.

At a minimum, the fallibility of placing state-centric restrictions, geographical and not, on RPSs is fundamentally contrarian. The primary appeal underlying the operation of an RPS is its flexibility in allowing a covered utility to satisfy its portfolio requirements through a variety of qualifying sources. Thereby, allowing the utility to meet its renewable percentage in the most cost effective means available. However, by placing restrictions on the place, time, type, or variety of renewables, the state effectively limits market liquidity and availability while driving up the price of renewables and cost of compliance. When considered in context of electricity generation and transmission on the whole, it is possible to envision the disruptive potential of these barriers upon a utility's objective to provide cheap, efficient, and reliable electricity. Besides, and of particular concern for state legislators, it is here where the Commerce Clause lies not so dormant and, thus, where the continued viability of RPSs hang in the balance.

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[78] *See* Steven Ferrey, *Threading the Constitutional Needle with Care: The Commerce Clause Threat to the New Infrastructure of Renewable Power*, 7 TEX. J. OIL GAS & ENERGY L. 59, 72 & 80 (2011-12) (stating that three-fourths of RPS states geographically discriminate in one or more of these ways; and that, "[i]n all, 22 of the 29 RPS states have one or more of the geographical preferences").

[79] *See* Kirsten H. Engel, *The Dormant Commerce Clause Threat to Market-Based Environmental Regulation: The Case of Electricity Deregulation*, 26 ECOLOGY L. Q. 243, 271 (1999) (concluding that "a state's willingness to implement a renewable portfolio standard...is likely to hinge upon the state's ability to capture the available environmental and economic benefits associated with renewable power production").

In the outcome of ATI v. Colorado we are likely to see that the mechanisms by which state legislatures have attempted to effectuate the purposes and capture the, mostly economic[80], benefits of renewable energy mandates, though covetous and exposing their statutes to dangerous levels of Commerce Clause scrutiny, result in mostly increased litigation costs for other states and further entanglement of regulatory hurdles for the electrical energy industry.

In any event, it is through the consideration of the principles driving the dormant Commerce Clause analysis, its emerging contemporary role, and impact upon the case, which provides the strongest evidence that, to make any progress towards the first step in the President's Plan, and to implement an effective renewable energy regulatory scheme like an RPS, it must be delivered by a single, federal, uniform, source.

ATI v. Colorado

Although "[t]he Commerce Clause does not expressly impose any constraints on 'the several States'...[n]onetheless, the [United States Supreme] Court has long inferred that the Commerce Clause itself imposes certain implicit limitations on state power."[81] Again, these limitations, broadly put, prevent states from regulating in ways that discriminate against, or otherwise excessively burden interstate commerce.

The American Tradition Institute ("ATI") is not the first group, nor the first plaintiff, to challenge a state mandated renewable energy regulatory scheme. Within the

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[80] *See* Barry Rabe, *Race to the Top: The Expanding Role of U.S. State Renewable Portfolio Standards*, 7 SUSTAINABLE DEV. L. & POL'Y 10, 14 (2007) (although apologetics cheer the passage of Colorado's RES through popular referendum, it is suggested here that though "[a] number of anticipated environmental benefits were raised during the campaign...the most important driver behind the passage of Proposition 37 was projected economic development from expanding renewable capacity").

[81] *McBurney*, 133 S. Ct. at 1719.

past twenty years, several states' RPSs have been challenged under the dormant Commerce Clause and, as one commentator forecasts, these "appear to be just the opening shots."[82] However, what is significant about ATI v. Colorado is that, for the first time, a state's RPS is being put on trial in its entirety. In other words, ATI seeks a determination that, not just the alleged discriminatory elements of Colorado's Renewable Energy Standard ("RES") are unconstitutional, but that the RES's overall function of differentiating and favoring renewable energy over nonrenewable energy is unconstitutional.[83] Thus, ATI is challenging the RES at its core in claiming its essential purpose – the abatement in the use of conventional "dirty energy" and promotion of "green energy" – is unconstitutional. If successful, ATI would be building the "model that [could] be used in attacks on RPSs across the country."[84] Given the setting, the issue is likely destined for courts beyond the District of Colorado, and perhaps the docket of the U.S. Supreme Court, where it will ultimately be laid to rest.[85]

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[82] *See* Ferrey, *supra* note 9, at 90-92 (commenting on the challenges in California, Massachusetts, New York, New Jersey, and Missouri, and how "[t]hese states' renewable energy programs have failed against constitutional challenges...").

[83] Amended Complaint for Injunctive and Declaratory Relief at 2, Am. Tradition Inst. v. Colorado, 876 F. Supp. 2d 1222, No. 1:11-cd-00859-WJM-KLM (D. Colo. filed April 22, 2011) (alleging that "[t]he Colorado RES discriminates on its face against legal, safer, less costly, less polluting and more reliable in-state and out-of-state generators of electricity sold in interstate commerce..."); *see also* Ferrey, *supra* note 78, at 95 ("ATI's complaint argues that because the state mandate provides economic benefits to Colorado's renewable electricity generators that are not available to out-of-state power generators, and because the state imposes burdens on interstate electricity generators that are not balanced by the benefits to Colorado and its citizens, that the program violates the dormant Commerce Clause").

[84] Daniel K. Lee & Timothy P. Duane, *Putting the Dormant Commerce Clause Back to Sleep: Adapting the Doctrine to Support State Renewable Portfolio Standards*, 43 ENVTL. L. 295, 299 (2013).

[85] *See* Dep't of Revenue of Ky. v. Davis, 553 U.S. 328, 337 (2008) ("We granted certiorari owing to the conflict this raised on an *important question of constitutional law*,

The RES, as codified at Colo. Stat. Ann. § 40-2-124 et seq., and as it stood when ATI filed suit, required "each provider of retail electric service in the state of Colorado" to "generate, or cause to be generated" electricity from renewable sources in the following minimum amounts: 3% by 2007, 5% by 2008, 12% by 2011, 20% by 2015, and 30% by 2020 and thereafter.[86] Of particular importance are the "multiplier" sections, which provided that "[e]ach kilowatt-hour of electricity generated from renewable sources *in Colorado* "shall be counted as one and one-quarter kilowatt-hours for purposes of compliance with this standard;"[87] "[e]ach kilowatt-hour of electricity "generated from renewable sources at "community-based projects" *in Colorado* "shall be counted as one and one-half kilowatt hours;"[88] and "each kilowatt-hour of renewable energy from solar" technology at electric cooperatives and municipally owned utilities installed and operating before July 1, 2015 to be "counted as three kilowatt-hours."[89] The statute also provides for a "system of tradable renewable energy credits" in which the Colorado Public Utilities Commission "shall not restrict the...ownership of renewable energy credits" if the utility or its system "uses definitions of eligible energy that are limited to those" under the RES.[90]

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and because the result reached casts constitutional doubt on a tax regime *adopted by a majority of the States*") (emphasis added).

[86] Colo. Stat. Ann. §§ 40-2-124(1)(c)(I)(A)-(1)(c)(I)(E); the RES was passed by popular referendum in 2004.

[87] Colo. Stat. Ann. § 40-2-124(1)(c)(III) (emphasis added).

[88] Colo. Stat. Ann. § 40-2-124(1)(c)(VI) (emphasis added).

[89] Colo. Stat. Ann. § 40-2-124(1)(c)(VII); as per the Energy Information Agency, Colorado's photovoltaic capacity of 91 megawatts was the fifth largest in the United States in 2011, available at www.eia.gov/state/?sid=CO (last visited 6/13/13).

[90] Colo. Stat. Ann. § 40-2-124(1)(d); this is, in essence, a requirement that Colorado will only recognize other REC systems if they are elementally identical to Colorado's.

ATI sued on April 4, 2011 seeking declaratory judgment that the RES violates the Commerce Clause by: excluding nonrenewable interstate electricity from competing with the "renewable set-aside portion of the interstate retail electricity market in Colorado," by "discriminat[ing] in favor of Colorado renewable sources," and by "favor[ing] renewable energy generators located within" Colorado.[91] Additionally, ATI alleges that the REC program, in effect, violates the Commerce Clause by excluding out-of-state trading systems and users because such systems or users do not define "renewable in the identical manner as the Colorado statute."[92]

The Defendants answered on July 12, 2011 denying ATI's allegations and claiming the RES is "constitutional on its face and as applied."[93] Defendants assert they "are obligated and allowed by law to act in the public good and utilize their police power to safeguard the health and safety of Colorado and its citizens,"[94] and that the RES is a "proper, reasonable, and necessary exercise of Colorado's legislative authority enacted for...the legitimate purpose of diversifying, securing, stabilizing and otherwise safeguarding Colorado's energy supply."[95]

Legislating, Safer Than Litigating – Amending § 40-2-124

Prior to beginning this analysis, it bears mentioning that, in adherence with what some scholars have recommended – draft or amend RPS implementing legislation

[91] Amended Complaint for Injunctive and Declaratory Relief at 157-59, Am. Tradition Inst. v. Colorado, 876 F. Supp. 2d 1222, No. 1:11-cv-00859-WJM-KLM (D. Colo. filed April 22, 2011).
[92] Id. at 170; *see also supra* note 90.
[93] Answer at 11, Am. Tradition Inst. v. Colo., 876 F. Supp. 2d 1222, No. 1:11-cv-00859-WJM-KLM (D. Colo. filed July 12, 2011).
[94] Id. at 8.

[95] Id. at 10.

without reference to loci and thereby safeguarding the RPS from Commerce Clause scrutiny[96] – on June 5, 2013, the day before it was set to expire, Governor Hickenlooper signed Colorado Senate Bill 13-252 ("SB 13-252").[97] SB 13-252 removes all in-state preferences from the RES, and any mention of "Colorado." Besides doubling the requirements for rural cooperatives, the amendment would appear to have, at least, lessened the vulnerability of the statute – particularly regarding a facial attack. However, while the action by the legislature in direct response to the ongoing litigation may well render any pursuit of invalidation based on antidiscrimination futile, the discussion that follows will address both the statute as it was enacted when ATI first filed suit, as well as amended. This pursuit is necessary for two reasons: 1) to illustrate and emphasize the implications for statues in other states that contain language similar to that of the Colorado law[98]; and 2) ATI will likely continue pursuing the litigation with the purpose of showing discrimination, notwithstanding the removal of potentially fatal facially discriminatory, geographic-oriented language.

The Dormant Commerce Clause as Applied

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[96] *See, e.g.*, Patrick R. Jacobi, Note, *Renewable Portfolio Standard Generator Applicability Requirements: How States Can Stop Worrying and Learn to Love the Dormant Commerce Clause*, 30 VT. L. REV. 1079 (2006); *but cf.,* Denning, *supra* note 31, at 500 ("What we want to avoid is the elevation of form over substance: permitting a clever state or local legislative body simply to omit explicit geographic distinctions from a law which otherwise operates to disadvantage only out-of-state goods or economic actors as effectively as if it were facially discriminatory").

[97] *See* Mark Jaffe, "Hickenlooper signs bill to double rural renewable-energy requirement," The Denver Post, June 6, 2013, www.denverpost.com/breakingnews/ci_23394636/bill-double-rural-renewable-energy-floor-signed-into (last visited 6/7/13) (although the bill has been signed, it still allows multipliers until 2015 for instate generation, solar, and community-based projects, and leaves the REC program intact).

[98] *See* Ferrey, *supra* note 78, at 80 (pointing out that 75 percent of RPS states have "one or more" geographical preferences in their RPS implementing legislation).

Courts have initiated the multitude of opinions comprising the thoroughly litigated Commerce Clause jurisprudence with: "Congress shall have Power...[t]o regulate Commerce with foreign Nations, and among the several States."[99] Again, although the Constitution does not explicitly limit the power of the States to regulate commerce, the Court has long interpreted the Commerce Clause as an "implicit restraint on state authority, even in the absence of a conflicting federal statute."[100] This "implicit restraint," known as the "dormant Commerce Clause," is the negative "implication of the Commerce Clause [that] prohibits state taxation, or regulation, that discriminates or unduly burdens interstate commerce and thereby 'imped[es] free private trade in the national marketplace.'"[101] This, however, is not to imply that the Court attempts or intends to thrust laissez-faire economics upon the states.[102] Free trade may often be a byproduct of striking down legislation that erects barriers to commerce at the state borders or otherwise creates the type of economic protectionism that the Commerce clause forbids. However, free trade should only have limited recognition as an ancillary result of the actual purpose of the Clause – preventing those laws, which, by their purpose or effect, threaten to undermine the union.[103]

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[99] U.S. CONST. art. I, § 8, cl. 3.
[100] E.g., United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt., 550 U.S. 330, 338 (2007).
[101] Gen. Motors Corp. v. Tracy, 519 U.S. 278, 287 (1997) (quoting Reeves, Inc. v. Stake, 477 U.S. 429, 437 (1980)).
[102] *See United Haulers*, 550 U.S. at 344 (stating that "[t]he Commerce Clause significantly limits the ability of the States and localities to regulate or otherwise burden the flow of interstate commerce but it does not elevate free trade above all other values").
[103] *See* Denning, *supra* note 31, at 420 ("I specifically reject any attempt to impute a free-trade ideology to the Framers. Decision rules enforcing the DCCD should, therefore, go no further than addressing the sorts of 'discrimination' that produces this union-undermining effect").

Akin to its counterpart, the backbone of the dormant Commerce Clause lies in the balance that must be struck within our unique federalism structure. Though the states are in their right and their duty to provide and regulate for the health, safety and welfare of their citizens, this power is limited.[104] Even though acting under its police power, a State's regulation resulting in economic isolation or otherwise espousing the "tendencies toward economic Balkanization that plagued relations among the Colonies and later among the States under the Articles of Confederation" will be invalidated.[105]

I. The Tests

Under contemporary dormant Commerce Clause protocol, courts proceed against a challenge by using one of the two tests established by Pike v. Bruce Church, Inc.[106] and Hughes v. Oklahoma.[107]

A court will begin its analysis by first asking and establishing "whether [the] challenged law discriminates against interstate commerce."[108] Discrimination here "simply means differential treatment of in-state and out-of-state economic interests that

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[104] *See, e.g., H. P. Hood & Sons*, 336 U.S. at 531-32 (commenting on Justice Cardozo's opinion for the majority in Baldwin v. G. A. F. Seelig, Inc., 294 U.S. 511 (1935): "It recognized, as do we, broad power in the State to protect its inhabitants against perils to health or safety, fraudulent traders and highway hazards even by use of measures which bear adversely upon interstate commerce. But it laid repeated emphasis upon the principle that the State may not promote its own economic advantages by curtailment or burdening of interstate commerce").

[105] *Hughes v. Okla.*, 441 U.S. 322, 325 (1979).

[106] 397 U.S. 137 (1970).

[107] 441 U.S. 322 (1979); though, admittedly, the "strict scrutiny" tier of the dormant Commerce Clause was first enunciated a year earlier in City of Philadelphia v. New Jersey, its reaffirmation of the test in *Hughes*, is more thorough and, thus, more appropriate to apply here.

[108] See, e.g., *Davis*, 553 U.S. at 338 (citing Oregon Waste Sys., Inc. v. Dep't of Envtl. Quality of Or., 511 U.S. 93, 99 (1994)).

benefits the former and burdens the latter."[109] Further, the antidiscrimination principle's protection is as broad as it is formidable. "For over 150 years, [the Court's] cases have rightly concluded that the imposition of a differential burden on *any* part of the stream of commerce from wholesaler to retail consumer is invalid, because a burden placed at any point will result in a disadvantage to the out-of-state producer."[110]

A finding of discrimination is more often than not determinative because "[a] discriminatory law is 'virtually *per se* invalid.'"[111] If a statute is found to be motivated by a discriminatory purpose, discriminates on its face, or in practical effect, the court applies the *Hughes* test, and the law will only be upheld if (1) the statute serves a legitimate local purpose and (2) there are no less discriminatory means to adequately promote the purpose.[112] This "strictest of scrutiny" has proven to be nearly insurmountable for a state seeking to defend its statute. In the history of the Court, only one statute has withstood its demands.[113]

If a statute is not discriminatory on its face, purpose, or effect, and its burden upon interstate commerce is only "incidental," a court will apply the *Pike* test. Under *Pike*, "[w]here the statute regulates even-handedly to effect a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive to the putative local

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[109] *United Haulers*, 550 U.S. at 338-39 (citing Oregon Waste Sys., Inc. v. Dep't of Envtl. Quality of Or., 511 U.S. 93, 99 (1994)).
[110] West Lynn Creamery, Inc. v. Healy, 512 U.S. 186, 202 (1994) (emphasis added).
[111] E.g. *Davis*, 553 U.S. at 338 (citing Or. Waste Sys., Inc. v. Dep't of Envtl. Quality of Or., 511 U.S. 93, 99 (1994) (emphasis in original)); see also *City of Phila. v. N.J.*, 437 U.S. at 624.
[112] *See Hughes v. Okla.*, 441 U.S. 322, 336 (1979); *Davis*, 553 U.S. at 338; *Or. Waste Sys., Inc.*, 511 U.S. at 101; and Maine v. Taylor, 477 U.S. 131, 138 (1986).
[113] See gen. Maine v. Taylor, 477 U.S. 131 (1986) (where the Court upheld a statutory blockade by Maine to all importation of all live baitfish into the State).

benefits."[114] The *Pike* test has proven to be a far easier burden to carry, with the courts often giving much deference to a state's stated motives and, therefore, laws often survive *Pike*.[115] However, if ATI and Colorado enter the *Pike* realm, they will find it is a far more unwieldy and unpredictable test than under *Hughes*.[116] Often courts are reduced to making subjective determinations and are treading upon the domain of the legislature in considering "whether the statute is sufficiently instrumental to avoid invalidation."[117]

Adding further to the uncertainty found in *Pike* is the Court's own admission that "there is no clear line separating the category of state regulation that is virtually per se invalid under the Commerce Clause, and the category subject to the *Pike* balancing approach. In either situation the critical consideration is the *overall effect* of the statute *on both the local and interstate activity*."[118] Notwithstanding the criticism, subjectivity, and lack of a bright line separating *Hughes* from *Pike*, the *Pike* test and its progeny remain good law and will be utilized if the RES is found to be nondiscriminatory and to regulate even-handedly with only incidental burdens on interstate commerce.

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[114] Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970).
[115] *Cf. Davis*, 553 U.S. at 339 ("States frequently survive this *Pike* scrutiny, though not always, as in *Pike* itself"); *see also* Baude v. Heath, 538 F.3d 608, 611 (7th Cir. 2008) ("State laws regularly pass this test for the Justices are wary of reviewing the wisdom of legislation (as during the *Lochner*-era) under the aegis of the commerce clause").
[116] *See* Fox, *supra* note 38, at 188, 206 (stating that "[t]he balancing test expressed in Pike is neither well understood, nor very clear" and it "garners much criticism...best described as squishy, impossibly imprecise, often economically unsound, and even 'all wrong'").
[117] Lee & Duane, *supra* note 84, at 357; see also *United Haulers*, 550 U.S. at 349 (Thomas, J., concurring) (stating that "[a]s the debate between the majority and dissent shows, application of the negative Commerce Clause turns solely on policy considerations, not on the Constitution. Because this Court has no policy role in regulating interstate commerce, I would discard this Court's negative Commerce Clause jurisprudence").
[118] *See, e.g.*, Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth., 476 U.S. 573, 579 (1986) (citing Raymond Motor Trans., Inc. v. Rice, 434 U.S. 429 (1978)) (emphasis added).

II. The Analysis

As suggested, the District Court of Colorado will begin its analysis by determining whether the RES discriminates by its purpose, terms *or* its effects on interstate commerce.[119] To prevail here, ATI must show differential treatment by the RES to in-state and out-of-state entities, favoring the former and burdening the latter.[120] In addition, the Tenth Circuit follows the First Circuit in requiring that the "party claiming discrimination has the burden to put on evidence of a discriminatory effect on commerce that is 'significantly probative, not merely colorable.'"[121]

A. *Hughes* and Antidiscrimination

From the start, the RES draws immediate suspicion with its forthright favorable treatment of renewable energy generated in-state.[122] In providing generous treatment to in-state utilities generating renewable energy in Colorado, it attempts to retain and attract capable businesses by allowing in-state generators to comply with the RES at a lower cost. Here, it is arguable that the RES "'alters the competitive balance between in-state

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[119] See Kleinsmith v. Shurtleff, 571 F.3d 1033, 1040 (10th Cir. 2009) (recognizing that "[a] statue may be neutral in its terms and still discriminate against interstate commerce").
[120] *Id.* (citing *Hughes v. Okla.*, 441 U.S. 322, 336 (1979) ("The burden to show discrimination rests on the party challenging the validity of the statute").
[121] *Id.* at 1040-41 (citing Alliance of Auto Mfrs. v. Gwadosky, 430 F.3d 30, 40 (1st Cir. 2005)).
[122] *See, e.g., Pike*, 397 U.S. at 145 ("For the Court has viewed with particular suspicion state statutes requiring business operations to be performed in the home State that could more efficiently be performed elsewhere"); *see also* New England Power Co. v. New Hampshire, 455 U.S. 331, 338 (1982) ("Our cases have held that the Commerce Clause…precludes a state from mandating that its residents be given a preferred right of access, over out-of-state consumers, to natural resources located within its borders or to the products derived therefrom").

and out-of-state firms'" by making in-state generation more attractive to consumers than out-of-state generation.[123] Effectively, the RES erects a barrier to out-of-state competitors (renewable and nonrenewable) wishing to compete in the renewable energy market in Colorado. Furthermore, the credit-multipliers can be said to discriminate against out-of-state generators on its face, by explicitly favoring Colorado renewable energy at the expense of out-of-state generators who, until the enactment of the statute, may have enjoyed an advantage in an unregulated, openly competitive market.[124] The RES also arguably has the effect of preventing competition from out-of-state renewable energy generators by erecting a barrier at the state line – favoring all of those entities who remain inside while keeping out all those who lack the capital or will to move a facility within.[125]

Not only has the Court historically found fault with statutes that attempt to retain business or require that a certain good be produced or service be performed in-state when it can more efficiently be done elsewhere[126], but, generally speaking, statutes motivated

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[123] *Kleinsmith*, 571 F.3d at 1040-41 (citing Cherry Hill Vineyard, LLC v. Baldacci, 505 F.3d 28, 36 (1st Cir. 2007)); *see also West Lynn*, 512 U.S. at 196 (where the Court found that "a state law that caus[es] local goods to constitute a larger share, and goods with an out-of-state source to constitute a smaller share, of the total sales in the market is unconstitutional because it, like a tariff, neutralizes advantages belonging to the place of origin").

[124] *See supra* note 118.

[125] *See* Ill. Commerce Comm'n v. Fed. Energy Regulatory Comm'n, No. 11-3421, 2013 WL 2451766, at *6 (7th Cir. June 7, 2013) (stating "Michigan cannot, without violating the commerce clause of Article I of the Constitution, discriminate against out-of-state renewable energy"); although the case did not involve a challenge to Michigan's RPS, called the "Clean, Renewable, and Efficient Energy Act (MICH. COMP. LAWS § 460.1001 et seq. (2008)), Judge Posner, writing for the Court, was directing his comment squarely at Michigan's RPS and, specifically, Michigan's defense that its statute forbids Michigan utilities to count renewable energy generated outside the state toward compliance with the State's mandate.

[126] *See, e.g., Pike v. Bruce Church*, 397 U.S. at 145.

by or have the effect of setting up barriers to the interstate flow of commerce are routinely invalidated.[127]

B. *Wyoming v. Oklahoma*

In Wyoming v. Oklahoma, the State of Wyoming filed a complaint against an Oklahoma statute that required "Oklahoma coal-fired electric generating plants producing power for sale in Oklahoma to burn a mixture of coal containing at least 10% Oklahoma-mined coal."[128] Oklahoma's 10% set-aside requirement is similar to Colorado's 12% set-aside for renewables in that out-of-state coal suppliers are immediately prevented from competing with 10% of the Oklahoma market for coal, regardless of what the market-demand for out-of-state coal may be. Arguably, and as ATI alleges, Colorado is excluding out-of-state generators from 12% of the electricity market in Colorado notwithstanding a Coloradoan utility or customer's demand.[129]

In conducting its analysis, the Court emphasized that "Wyoming coal is a natural resource of great value primarily carried into other States for use, and Wyoming derives significant revenue from this interstate movement."[130] Going further in describing the burdens that the Oklahoma set-aside rendered upon commerce, it was noted that "unrebutted evidence [showed] since the effective date of the Act, Wyoming [had] lost

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[127] *Id.*
[128] 502 U.S. 437, 440 (1992).
[129] *See* Ky. Power Co. v. Huelsmann, 352 F. Supp. 2d 777, 785 (E.D. Ky. 2005) (declaring "[i]t is clear that transmission, and thus curtailment of electric energy effects interstate commerce") (citing *N.Y. v. FERC*, 1, 16 (2002)).
[130] *Id.* at 453-54 (the Court also observed that "the practical effect of [Oklahoma's] statute must be evaluated not only by considering the consequences of the statute itself, but also by considering how the challenged statute may interact with the legitimate regulatory regimes of the other States and what effect would arise if not one, but many or every, State adopted similar legislation") (quoting Healy v. The Beer Inst., 491 U.S. 324, 336 (1989)).

severance taxes in the amounts of $535,886 in 1987, $542,352 in 1988, and $87,130 in the first four months of 1989."[131] Significant here, beyond the clear factual and analytical parallels to ATI v. Colorado, was the ability of Wyoming to prove, and the willingness of the Court to find, the type of concrete damages caused by a statute that, in application and effect, burdens interstate commerce.

The Court concluded ultimately that the statute impermissibly discriminated against interstate commerce because it "*expressly reserv[ed] a segment* of the Oklahoma coal market for Oklahoma-mined coal, to the exclusion of coal mined in other States."[132] As to the arguably trivial percentage of interstate commerce affected by a 10% exclusion, the Court unequivocally stated "*[t]he volume of commerce affected* measures only the extent of the discrimination [and] *is of no relevance* to the determination whether a State has discriminated against interstate commerce."[133]

C. Extraterritoriality Principle & *Rocky Mountain Farmers*[134]

The extraterritorial principle is a rule that generally prohibits a state from enacting statutes that control conduct outside of that state, or using its sovereign power in a way that encroaches upon the sovereignty its neighbors. The principle is grounded in the concern for "how a challenged statute may interact with the legitimate regulatory regimes

[131] *Wy. v. Colo.*, 502 U.S. at 445.
[132] *Id.* at 455.
[133] *Id.*; *see also* Lee & Duane, *supra* note 84, at 304 (warning that "[i]f taken at face value, Wyoming v. Colorado poses a worst-case scenario for RPSs. Potentially, any disparate impact, however small, could constitute discrimination").
[134] Rocky Mountain Farmers Union v. Goldstene, 843 F. Supp. 2d 1071 (E.D. Cal. 2011)

of other States and what effect would arise if not one, but many or every, State adopted similar legislation."[135]

Although the Supreme Court appears to be straying from its use, or at least reining in its broadest potential evinced in Healy v. The Beer Institute,[136] extraterritoriality remains active in the arsenal of the dormant Commerce Clause jurisprudence and continues to be wielded in lower courts' striking down of discriminatory statutes.[137] As such, at least at the Federal District and Circuit Court levels, strict scrutiny could apply if it is found that the RES attempts to impermissibly "control the conduct beyond the boundary of the state" in violation of the extraterritoriality principle.[138]

Recently, in Rocky Mountain Farmers Union v. Goldstene, a California District Court found impermissible the State of California's attempt to incentivize the adoption of favored production methods of corn ethanol occurring wholly outside of the State.[139] The offending statute did so by assigning higher carbon intensity scores to methods used in the Midwest, making their ethanol less competitive than ethanol with origins inside

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[135] *See* Daniel A. Farber, *Climate Change, Federalism, and the Constitution*, 50 ARIZ. L. REV. 879, 892 (2008) (suggesting "[i]n a unified national economy, the existence of a multitude of differing state environmental laws can impede the flow of commerce, imposing costs not only on consumers in the regulating jurisdiction but on consumers and firms elsewhere").

[136] *See* Brannon P. Denning, *Extraterritoriality and the Dormant Commerce Clause: A Doctrinal Post-Mortem*, 73 LA. L. REV. 979 (2013) ("In 2003, [in Pharmaceutical Research and Manufacturers of America v. Walsh,] the Court retreated from *Healy*'s broad pronouncements and largely restricted earlier cases to their facts").

[137] *E.g.*, *supra* note 134.

[138] *See Healy v. Beer Inst*., 491 U.S. at 336-37.

[139] *See supra* note 134, at 1090-91 (stating explicitly "California [was] attempting to stop leakage of GHG emissions by treating electricity generated outside of the state differently than the electricity generated inside its border. This discriminates against commerce").

California.[140] Colorado, likewise, can be said to be incentivizing certain renewable energy production methods by recognizing only those RECs created pursuant to the RES.

Importantly, the *Goldstene* Court also considered the cumulative effect the statute might have upon other states in enacting similar statutes – the possible adoption of 50 competing regulations in 50 different states, rendering compliance nearly impossible.[141] Likewise, the cumulative effect of 50 different REC requirements – or even, perhaps, 50 different RPS schemes – in 50 different states would undoubtedly interfere with the "maintenance of a national economic union unfettered by state-imposed limitations on interstate commerce."[142]

In striking down that element of the LCFS, the District Court found that "the aim of the LCFS [was] to change these practices to reduce GHG emissions. But in penalizing these practices to 'incentivize regulated parties to change their conduct…the LCFS impermissibly attempts to 'control conduct beyond the boundary of the state." Finally, with particularly serious implications for ATI v. Colorado, the Court drew attention to the fact that the Midwest ethanol, California ethanol, and even Brazilian ethanol all had identical chemical compositions –thus, there was nothing inherently different about Midwest ethanol, besides its origins, to justify treating it any differently.[143]

If the RES's practical effect is to regulate "extraterritorially," then the statute "exceeds the inherent limits of [Colorado's] authority and is invalid regardless of whether

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[140] *Id.*
[141] *Id.* at 1092-93
[142] *Id.* at 1092 (citing *Healy v. Beer Inst.*, 491 U.S. at 336).
[143] *See Rocky Mountain Farmers*, 843 F. Supp. 2d at 1080-81; *see also* Lee & Duane *supra* note 84, at 349 ("Although the court did not seem to base its ultimate invalidation of the LCFS on this consideration, the court's emphasis on the identical chemical composition of the regulated products creates [obvious] concerns for renewable energy regulation").

the state's extraterritorial reach was intended by the legislature."[144] It could be argued that the RES's preference for in-state generation, escalating renewable "set-aside" portions, and requirements of the REC program all at least attempt to regulate actions outside of the state. For one, the REC program only allows or recognizes those out-of-state programs with definitions identical to Colorado's, incentivizing production of renewables solely from those sources preferred by Colorado.

In addition, and similar to the ethanol in *Rocky Mountain Farmers*, electricity from Colorado, or Wyoming, or Tennessee, will all have the exact same chemical or atomic composition.[145] As such, Colorado will need to justify treating electricity from out-of-state differently from in state on grounds other than the physical or elemental composition of the electricity to avoid the appearance of regulating solely due to its origin.

D. Inherent Discrimination?

ATI's challenge to the RES is unique as well as significant because it attacks the statute at its core. Its essential position is that the discrimination against nonrenewable interstate energy in favor of in-state renewable energy with an escalating "set-aside" that restricts nonrenewable generators from competing with a certain portion of the energy market in Colorado each year is unconstitutional under the dormant Commerce Clause. As of this writing, a nonrenewable electricity generator is excluded from competing for 12% of the electrical energy market in Colorado this year. Although the prohibition prevents both in-state and out-of-state generators from competing for this portion of the

[144] *Id.* at 336.
[145] *See* Ferrey *supra* note 39, at 899 (suggesting that "[f]rom every type of source, moving electrons are power. There is no engineering difference in the end product").

market, the Court has said it matters not that some in-state parties are affected by the discriminatory practice – as such evidence of effects on both in-state and out-of-state entities renders the statute no less discriminatory.[146]

III. The Defenses

Alternatively, evidence of even "more than colorable" discrimination is not the end for the RES.[147] For this alone will not render the RES invalid. As the Court has noted, "[t]he limitation imposed by the Commerce Clause on State regulatory power is by no means absolute, and the States retain authority under their general police powers to regulate matters of legitimate concern even though interstate commerce may be affected."[148]

A. *Maine v. Taylor* – the "Quarantine Principle"

Maine v. Taylor still stands as the sole exemplar that the State may still regulate in a way that discriminates against interstate commerce if a legitimate public purpose that cannot be achieved through less discriminatory means.[149]

The origins of the exception established in *Maine* can be traced back to the late nineteenth century and early twentieth century where the "Court treated dangerous, noxious, and harmful subject as not merchantable and, therefore, not articles of

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[146] *See, e.g.,* C & A Carbone, Inc. v. Town of Clarkstown, N.Y., 511 U.S. 383, 391 (1994) and Dean Milk Co. v. City of Madison, 340 U.S. 349, 354 (1951); a successfully argued claim here would mean complete victory for ATI and the end of state-run RPS programs because they all "set-aside" a certain portion of their electricity market where only renewable energy producers can compete.

[147] *See supra* note 113.

[148] *Maine*, 477 U.S. at 137-38 (citing Lewis v. BT Inv. Managers, Inc., 447 U.S. 27, 35-36 (1980)).

[149] *See New Energy Co*., 486 U.S. at 278 (stating that "[t]his is perhaps just another way of saying that what may appear to be a 'discriminatory' provision in the constitutionally prohibited sense – that is, a protectionist enactment – may on closer analysis not be so").

commerce."[150] Since then, the "quarantine principle" has been called upon to defend state and local statutes seeking, or purporting, to protect the health and safety of citizens and the environment.[151] The principle, however, has proven to be more elusive than it appears and, given its track record throughout the history of dormant Commerce Clause jurisprudence, this may be an understatement.

The importance of the District Court's finding in *Rocky Mountain* regarding identical composition of the articles in question resurfaces here – for any similarity in the articles receiving differential treatment is recurrently decisive under this exception. In *Maine*, there was something inherent in the article of commerce that made it different and more harmful than other similarly situated articles. It was *the* article of commerce – the out-of-state golden shiner – that carried a parasite that could decimate in-state species. It was the inherent harmful nature of the out-of-state article, its "differentness," which justified differential treatment by the State. But, as seen in other cases, such a scenario is rare.

In City of Philadelphia v. New Jersey, the State of New Jersey offed a similar "quarantine" defense for excluding out-of-state wastes.[152] The State sought to justify its statutory barrier through the potential safety and health impacts that further overfilling of its landfills would pose for its citizens.[153] However, the Court found this defense baseless because there was nothing innately different, in terms of harmfulness, about in-state

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[150] Kalen, *supra* note 29, at 464 (citing City Dairy Co. v. Ohio, 183 U.S. 238 (1902)).
[151] *See, e.g.*, *City of Phila. v. N.J.,* 437 U.S. 617 (1978); *West Lynn*, 512 U.S. 186, 202 (1994).
[152] *City of Phila.*, 437 U.S. at 628-29.
[153] *Id.* at 625.

waste and out-of-state waste.[154] "Crucial" to the Court's holding was the forbidden "*attempt by one State to isolate itself from a problem common to many* by erecting a barrier against the movement of interstate trade."[155]

Colorado's attempt to successfully arouse the "quarantine principle" likely depends on how the subject of regulation is framed for the court. In arguing this point, Colorado will be walking on thin ice if the subject of regulation and arguments are focused upon electricity, alone, as the article of commerce. On the one hand, there is nothing inherently more dangerous about the electricity generated out-of-state as opposed to domestically generated electricity. If deemed harmful at all, they are most certainly equally harmful like the waste in *City of Philadelphia*, since both are moving electrons and, therefore, atomically identical. On the other hand, if Colorado can frame the matter more broadly as regulating renewable energy vs. nonrenewable energy, the State may have a more viable argument. In the very least it's arguable that there is something innately more dangerous about the production processes of nonrenewable energy and, therefore, a justifiable reason for differential treatment of electricity produced therefrom. However, this too would involve treading a dubious path – often found illustrated in cases before FERC. In many such cases the untraceable nature of electricity is often

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[154] *See id.* at 629 (stating "...there is no basis to distinguish out-of-state waste from domestic waste. If one is inherently harmful, so is the other").

[155] *Id.* at 628 (emphasis added); *but cf.* Massachusetts v. EPA, 549 U.S. 497, 499 (2007) ("The harms associate with climate change are serious and well recognized. The Government's own objective assessment of the relevant science and a strong consensus among qualified experts indicate that global warming threatens, *inter alia*, a precipitate rise in sea levels, severe and irreversible changes to natural ecosystems, a significant reduction in winter snowpack with direct and important economic consequences, and increases in the spread of disease and the ferocity of weather events. *That these changes are widely shared does not minimize Massachusetts' interests* in the outcome of the litigation") (emphasis added).

discussed.[156] As such, once electricity enters the grid it becomes impossible to differentiate between power generated from photovoltaic arrays in Tempe, Arizona versus that generated by TVA's Wolf Creek dam in Russell County, Kentucky.[157]

B. Dissimilar Entities

All hope is not lost absent a workable "quarantine" defense. Other exceptions are available, even under a finding of discrimination, for Colorado's renewable mandate. In what, for this pursuit, can be called the "dissimilar entities exception," the State may attempt to avoid scrutiny under *Hughes* by arguing the RES does not regulate nonrenewable energy, but only renewable energy, and by eliminating the RES the court would not be advancing the principle purposes of the Commerce Clause.[158]

In General Motors Corp. v. Tracy the Court faced a dormant Commerce Clause challenge to an Ohio statute, which provided a tax exemption to retail natural gas sellers ("natural gas companies" or local distribution companies ("LDCs")) it did not afford to interstate independent marketers and producers.[159] Critical to the Court's analysis was whether the parties, natural gas companies and independent marketers, "[were] indeed similarly situated for constitutional purposes."[160] This determination proved essential because of "the simple reason that the difference in products may mean that the different

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[156] *See, e.g.*, Conn. Light & Power Co. 70 F.E.R.C. 61,012 (1995); *see also Fla. Power & Light Co.*, 404 U.S. 453 (1972).
[157] *See* Stiles, *supra* note 42, at 928 (quoting *Fla. Power & Light*); Gross, *supra* note 3, at 217 ("Due to the interconnection of the transmission grid...states will encounter unique problems when attempting to limit imports of energy to low-or non-emitting CO_2 sources").
[158] *See, e.g., Gen. Motors v. Tracy*, 519 U.S. 278 (1997) and *United Haulers*, 550 U.S. 330 (2007).
[159] *See Gen. Motors v. Tracy*, 519 U.S. at 281-82.
[160] *Id.* at 298-99 (stating the fact that the claimed discrimination was occurring against, as well as favoring, "competing entities," was a "central assumption [that] has more often than not itself remained dormant in [the] Courts opinions on state discrimination")

entities serve different markets, and would continue to do so even if the supposedly discriminatory burden were removed."[161]

Ohio's favoritism towards LDCs, all located in Ohio, is comparable to Colorado's favoritism in the RES.[162] If Colorado can structure its alleged discriminatory statute in terms of regulating only the renewable energy market and not the electrical energy market as a whole, avoiding *Hughes* is possible. This is so because nonrenewable energy continues to generate and supply electricity both with and without the presence of regulations upon the renewable market.[163]

Similar to the crux of the State's prospect for success under the "quarantine principle," Defendants' success with the dissimilar entities exception hinges upon its ability to characterize two distinct markets – renewable and nonrenewable. Of course, ATI will seek to posit the issue in terms of *the* interstate electrical energy market – electricity in the absolute. This is vital because, as opposed to the Court in *General Motors* that found the exception applicable because the opposing entities served different markets with different products, renewable and nonrenewable energy generators arguably create and provide the same product and serve the same, increasingly interstate, market.

C. Market Participant

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[161] *Id.* at 299.

[162] *See Gen. Motors v. Tracy*, 519 U.S. at 310-11 (the Court appeared more likely to find discrimination had plaintiffs been out-of-state natural gas companies instead of out-of-state marketers or producers. They took comfort, when questioned by plaintiffs in the case about such treatment, in an Ohio Board of Tax Appeals opinion that accepted the argument of a Pennsylvania public utility that insofar as the out-of-state utility sold natural gas to Ohio consumers it qualified as a utility under the statute and would, therefore, qualify for the exemption).

[163] With regard to electrical production that cannot be sold into the Colorado market due to the renewable energy percentage "set-aside," such energy can be marketed to other states' markets; *see gen.* Exxon v. Governor of Md., 437 U.S. 117 (1978).

The "market participant" exception, reflected in cases such as Hughes v. Alexandria Scrap Corp., could provide Colorado's statute another outlet.[164] In *Alexandria Scrap*, the Maryland legislature enacted a program that offered bounties for the collection, removal, and processing of "hulks" and other abandoned automobiles that had become a growing aesthetic problem for the State.[165] Out-of-state processors received a share in the bounties if they complied with the requirements imposed on *all* processors, which included licensing and various levels of "proof" depending upon the origin and age of the vehicle.[166] Initially, the program proved ineffective, so Maryland amended their statute, eliminating the "hulk" exception and requiring out-of-state processors to provide title documentation.[167] However, the same was not required of in-state processors.[168] Plaintiffs sued, alleging discrimination against out-of-state processors and asserting the amendment placed an undue burden upon the interstate flow of "hulks." Although the statute was similar to others struck down because they prohibited or erected barriers to the flow of interstate goods across state lines, the Court held that "Maryland [had] not sought to prohibit the flow of hulks, or to regulate the conditions under which it may occur."[169] Instead, the State had "entered into the market itself" and any impact on interstate commerce caused by the amendment was because Maryland had created and

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[164] 426 U.S. 794 (1976); *see also* Reeves, Inc. v. Stake, 447 U.S. 429 (1980).
[165] *Alexandria Scrap Corp.*, 426 U.S. at 797-800; "hulks," so named due to their age and lack of identifying characteristics, initially required no documentation to receive a bounty.
[166] *Id.* (in fact, 7 out of the 16 processors that participated in the program were in Virginia and Pennsylvania).
[167] *Id.* (one may only assume that most processors were collecting bounties on "hulks" with origins outside of Maryland, which would do nothing to aid in the aesthetic problems the statute was enacted to address).
[168] *Id.* at 800-01.
[169] *Id.* at 806.

stimulated the market in the first place. "Nothing in the purposes animating the Commerce Clause," the Court said, "prohibits a State, in the absence of congressional action, from participating in the market and exercising the right to favor its own citizens over others."[170]

Under the RES, however, the State is not itself participating in the renewable energy market, nor the electricity market as a whole. Instead, the State stands separate from the market as a regulator.[171] While Maryland encouraged the market for "hulks" and other abandoned vehicles, which only became lucrative because of its participation, the same cannot be said for Colorado and its participation in the market. The market for electrical energy was established and functioned long before the enactment of the RES in 2004. Thus, Colorado only stands as a regulator of the market, by which it is attempting to steer the energy market towards renewables through the RES.

D. Public Entities

A final exception Colorado may pursue is the relatively newly minted "public entities" exception contained in United Haulers v. Oneida-Herkimer Solid Waste Management Authority.[172] In *United Haulers*, the counties mandated all solid waste be delivered to the Solid Waste Management Authority's processing facility.[173] Although similar "flow control ordinances" were struck down in the past because the ordinances discriminated against interstate commerce and favored a single local entity, the

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[170] *Id.* at 810.
[171] *See* Ferrey, *supra* note 9, at 102 ("Under legal precedent, states control all aspects of an RPS renewable energy program associated with power generation. In this regard they do not act as market participants but as regulators and thus are subject to jurisdictional and constitutional limitations").
[172] *United Haulers*, 550 U.S. 330 (2007); *see also Alexandria Scrap*, 426 U.S. at 806.
[173] *United Haulers*, 550 U.S. at 335-37.

redeeming virtue in *United Haulers* was that the benefitted facility was public.[174] The Court reasoned, "[I]t does not make sense to regard laws favoring local government and laws favoring private industry with equal skepticism."[175] Furthermore, the Court feared that "treating public and private entities the same under the dormant Commerce Clause would lead to unprecedented and unbounded interference by the courts with State and local government."[176]

The *United Haulers* Court found it convincing that "the most palpable harm imposed by the ordinances – more expensive trash removal – [was] likely to fall upon the very people who voted for the laws."[177] Similarly, the RES and the resulting increase in cost of electricity due to renewable energy production falls on the voters who enacted it. However, similarities end there. The RES statute doesn't regulate solely in favor of public facilities, but all public and private energy producing facilities inside and, arguably, outside of Colorado. Therefore, Defendants are unlikely to avoid *Hughes* scrutiny under the public entities exception.

Ultimately if Defendants are unpersuasive in their arguments and cannot articulate an exception for the statute's discriminatory treatment, the RES will be subjected to the *Hughes* test and the State will have to justify their differential treatment with a legitimate local purpose and the lack of any less discriminatory means to achieve it. Here, the State

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[174] *See generally C & A Carbone*, 511 U.S. 383 (1994) (the town hired a private contractor to build and operate a solid waste transfer station and enacted a flow control ordinance to guarantee recoupment of cost. The Court found that the "flow control ordinance discriminate[d], for it allow[ed] only the favored operator to process waste that is within the limits of the town").
[175] *United Haulers*, 550 U.S. at 343.
[176] *Id.* at 343-44 (declaring that "[i]t is not the office of the Commerce Clause to control the decision of voters on whether government or the private sector should provide waste management").
[177] *Id.* at 345.

is likely to fail, as many less discriminatory means exist to promote such purposes – like, perhaps, removing any and all reference to in-state preferential treatment from the statute.[178]

IV. Making it to and Down the *Pike*

It is not suggested here that striking the language mentioned from the statute is necessary to advance ATI v. Colorado into *Pike*, nor does it guarantee it. However, SB 13-252 removes all in-state preferences from the RES and, therefore, appears to remedy the alleged discriminatory faults. Although removal of the language, alone, is unlikely to, ipso facto, force ATI down the *Pike*, it will set the tone.

To reiterate, however, ATI's claim is unique in that it calls into question the very nature of all RPSs – the mandated use of renewable energy for a certain portion of total electricity produced. Therefore, ATI is likely to continue pursuing the case under *Hughes* by arguing that the statute still purposefully and effectively discriminates by denying nonrenewable energy producers' access to that percentage isolated from the electricity market during any given year. However, with the facially discriminatory language removed, it can be argued that the RES regulates evenhandedly and imposes only incidental burdens upon interstate commerce. Therefore, down the *Pike* we go.

A. *Pike* Balancing and "Evenhandedness"

Pike v. Bruce Church provides a court with the second, more deferential, tier under current dormant Commerce Clause analysis.[179] At its core, *Pike* is considered by

[178] *See* Megan Schrader, "Renewable energy bill gets attention in advertising, court," The Gazette, May 23, 2013, available at www.gazette.com/renewable-energy-bill-gets-attention-in-advertising-court/article/1501102 (last visited 8/3/13) (quoting David Schnare, lead counsel for ATI, stating "[i]t was clear that everyone knew that those were facial violations – those that are unconstitutional on their face – and the state of Colorado would lose those").

some scholars as "a useful check on burdensome, yet ostensibly nondiscriminatory regulations, *especially* of nationwide networks where the possibility exists of interstate actors being subjected to multiple, conflicting regulatory regimes."[180] As such, if one accepts this characterization, it is manifestly clear the *Pike* test was destined for just the scenario ATI v. Colorado presents for resolution. Further, it is likely here where the case will meet its end with the scales inevitably tipping in favor of the State.[181]

Before this conclusion, however, it's necessary to understand that the *Pike* test generally entails weighing the *costs* of the burdens against the value of the benefits – predominantly a decision turning upon whether the court can find a legitimate local purpose is advanced or promoted. Without such a finding, the court may determine that the "purported local purpose" is a mere sham or illusory, in which case the statute will be struck down.[182]

Again, under the *Pike* test, "where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits."[183] When "a legitimate local purpose

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[179] 397 U.S. 137 (1970).
[180] Brannon P. Denning & Norman R. Williams, *The "New Protectionism" and the American Common Market*, 85 NOTRE DAME L. REV. 247, 304 (2009).
[181] *See* Denning, *supra* note 31, at 494 ("A majority of the Court has not struck down a state or local law using *Pike* balancing in over twenty-five years"); interestingly, as Professor Denning points out, this time frame corresponds with Justice Scalia's, a well-known critic of the dormant Commerce Clause (along with Justices Thomas and Alito), appointment to the Court.
[182] *See* Denning, *supra* note 31, at 453 ("The more cost to interstate commerce, relative to the local benefit, the more likely Congress should be the body to regulate the subject, if it was to be regulated at all") (citing Stephen Gardbaum, *New Deal Constitutionalism and the Unshackling of the States*, 64 U. CHI. L. REV. 483, 530 (1997))
[183] *Id.* at 142.

is found, the question [for the court] then becomes one of degree."[184] How much of a burden will be tolerated is contingent upon "the nature of the local interest involved and on whether it could be promoted as well with a lesser impact on interstate activities."[185]

Here too the Tenth Circuit will require that ATI carry the burden of proof, which will require a showing that the statute's burden upon interstate commerce is "clearly excessive in relation to the putative local benefits."[186]

B. Burden of Proof on "Burdens" on Interstate Commerce

ATI's premise at this stage is that the State of Colorado is imposing burdens on interstate electricity generators not balanced by *any* benefits to Colorado.[187] The essence of Plaintiffs' argument flows from what has been deemed ATI's "war on wind" – the contention that wind energy is intrinsically unreliable and, because of its need for backup generation due to its intermittency[188], as "dirty" as conventional electricity generation.[189]

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[184] *Id.*
[185] *Id.*
[186] *See* Blue Circle Cement, Inc. v. Bd. Of County Cmm'nrs of Rogers County, 27 F.3d 1499, 1511 (10th Cir. 1994); *see also* Dorrance v. McCarthy, 957 F.2d 761, 763 (10th Cir. 1992) (holding that "[t]he person challenging the statute bears the burden of establishing a *Pike* violation").
[187] *See* Ferrey, *supra* note 9, at 95 (emphasis added).
[188] *See* Suzanne Albright, "Wind power is not worth it," Democrat and Chronicle, Section A, May 23, 2013, available at www.wind-watch.org/news/2013/05/26/wind-power-is-not-worth-it/ (last visited 8/3/13) (stating "[b]ecause [industrial wind energy, or] IWE is only available when the wind blows within a narrow range for sustained periods of time, back-up sources can never shut down").
[189] ATI's lead counsel in the case, Dr. David Schnare, has been referred to on occasion as having declared "war on wind"; *see also* David Schnare, *Putting Wind on Trial*, The Jefferson Journal, April 4, 2011, www.thomasjeffersoninst.org/files/3/Schnare_Windontrial.pdf (last visited 7/31/13); Lee & Duane *supra* note 84, at 326 ("At the core of this argument is plaintiffs' contention that wind energy – one of the types of renewable energy permitted to satisfy the Colorado RES – is inherently unreliable"); *see also* Katherine Ling, "Wind's banner 2012 is followed by woes in 2013 amid policy uncertainty – DOE," Greenwire, August 6, 2013, available at www.eenews.net/greenwire/2013/08/06/stories/1059985679 (last visited

However, ATI will need more than mere allegations in pleadings and declarations in affidavits to satisfy its burden under *Pike*.[190] To illustrate, in Kleinsmith v. Shurtleff the plaintiff sought the invalidation of a Utah statute that required all "attorneys who act as trustees of real property trust deeds in Utah to 'maintain a place within the state.'"[191] Mr. Kleinsmith was licensed to practice law in Utah but resided in Colorado.[192] He alleged that the statute impermissibly discriminated against and burdened nonresident attorneys.[193]

In the end, Mr. Kleinsmith was found to have failed to make the "necessary showing." When the Utah Attorney General put on evidence that the statute made lawyers more accessible to Utahans going through non-judicial foreclosure, Mr. Kleinsmith failed to present any challenge to this benefit or evidence of any burden that the challenged law imposed on interstate commerce.[194] The lesson to be gleaned from *Kleinsmith* is that "[a]ny balancing approach...requires evidence...[for] [i]t is impossible to tell whether a burden on interstate commerce is clearly excessive in relation to the putative local benefits without understanding the magnitude of burdens and benefits."[195]

As such, carrying their burden under the *Pike* test will require ATI to put on fact-laden and statistically heavy evidence showing how the RES burdens the interstate

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8/6/13) (citing a DOE wind market report which suggested that wind energy "accounted for 43 percent of all new U.S. electric generation capacity and $25 billion in new investment in 2012...[as well as] estimated to [now] employ about 80,000 people").
[190] *See Baude*, 538 F.3d at 612 (emphasizing "...it takes more than lawyers' talk to condemn a statute under *Pike*").
[191] 571 F.3d 1033, 1035-36 (10th Cir. 2009).
[192] *Id.*
[193] *Id.*
[194] *Kleinsmith*, 571 F.3d at 1043 (mentioning that Mr. Kleinsmith didn't even attempt to show, for instance, how many out-of-state attorneys were burdened by the statute).
[195] *Id.* (citing *Baude*, 538 F.3d at 612).

electrical energy market in a way that can both rebut any and all of the proposed local benefits and adequately present the costs and energy burdens created and imposed by the RES.

C. Burdens of Proof on "Benefits"

Although it is declared by the courts that the challenger must show how the scale tips heavily towards the burdens in the balancing test under *Pike*, how the court views the final element of *Pike*, and particularly how the court interprets or scrutinizes the putative benefits at issue, will ultimately tip the scale.[196] Therefore, it is prudent for Colorado to show the court definite, calculable, and recognizable benefits. In fact, it may be required for the State to prevail even though court opinions and case law indicate that plaintiffs bear such burden.[197]

The unpredictable nature of the *Pike* test, and the uncertainty underlying the considerations that go into *Pike* balancing, can be best seen in cases like Raymond Motor Transportation, Inc. v. Rice.[198] In *Raymond Motor*, plaintiffs challenged a Wisconsin law requiring two-vehicle trailer trucks, or "doubles", and trucks longer than 55 feet to have a permit to operate on the highways of the State.[199] The gist of the plaintiffs' claim was that the statute violated the Commerce Clause because 65-foot doubles were as safe as, if not safer than, the 55-foot singles allowed to operate in the State without a permit.[200] The

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[196] Fox, *supra* note 38, at 178.
[197] *See Blue Circle Cement*, 27 F.3d at 1512 (reversing and remanding defendant's summary judgment motion because "the mere incantation of a purpose to promote the public health or safety does not insulate a state law from Commerce Clause attack"); *New Energy Co*. 486 U.S. at 280 ("In sum, appellees' health and commerce justifications amount to no more than implausible speculation...").
[198] 434 U.S. 429 (1978).
[199] *Id.* at 434-35.
[200] *Id.* at 435.

State answered simply by arguing that the statute "advanced highway safety."[201] Although the Court admitted it often gives "strong and special" deference to state highway safety statutes, it found that "[t]he State of Wisconsin [had] failed to make even a colorable showing that its regulations contribute to highway safety."[202] However, it should be noted that plaintiffs did put forth overwhelming and uncontested evidence that the 65-foot doubles were, statistically speaking, safer than 55-foot singles and the State Chairman of the Highway Safety Commission, while testifying for defendants, admitted he was not prepared to comment on the safety of such vehicles.[203] Nevertheless, although the burden is on the challenger to prove *Pike*, the defenders should be prepared with more than just a statement or claim they are regulating in accordance with their valid police power.[204]

D. Balancing Burdens and Benefits

This has the potential to prove somewhat troublesome for Colorado. Although it seems likely that ATI can quantify economic loss by electricity generators excluded from 12% of the market this year, how does the State show the benefit from lower emissions resulting from renewable energy use? Although the goal of reducing emissions and

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[201] *Id.* at 436.
[202] *Id.* at 447-48; *see also* Kassel v. Consol. Freightways Corp. of Del., 450 U.S. 662, 670 (1981) ("we declined [in our unanimous decision in *Raymond Motors*] to 'accept the State's contention that the inquiry under the Commerce Clause is ended without a weighing of the asserted safety purpose against the degree of interference with interstate commerce").
[203] *Id.* at 436 (citing a 5 year study by the Bureau of Motor Carrier Safety that showed that doubles were safer than singles in terms of number of accidents, injuries, and fatalities per 100,000 miles).
[204] *See, i.e.*, *Kassel*, 450 U.S. at 670 ("...a State's power to regulate commerce is never greater than in matters traditionally of local concern...[b]ut the incantation of a purpose to promote the public health or safety does not insulate a state law from Commerce Clause attack").

promoting a healthy environment is a legitimate purpose, how does the State prove *local* benefits, if so required?[205] Moreover, if, because of the Commerce Clause, states are prohibited from employing geographical restrictions, how can a state ensure that benefits, if any, remain local?[206] From the perspective of *Pike* balancing alone, if the challenger puts on evidence of burdens and the defense cannot show proof of any benefit, this perhaps gives a court no choice and certainly nothing to balance.

Given that RPSs are local solutions to the global problem of climate change, the local benefits may dissipate and diffuse beyond the State's boundaries before any benefit can be realized. This concern could be why Colorado, instead of stopping short with standard police power justifications, also proposed taking advantage of the State's renewable energy sources and enhancing energy security.[207] However, ATI allegations challenge both of these points. If ATI is able to put facts on the record, proving renewable energy projects are not accomplishing the goals and justifications set forth by the State, Colorado may be left standing with a benefit, like that in *Raymond Motors*, which is illusory.[208] Additionally, if, as Plaintiffs allege, renewables are less reliable and

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[205] *Cf.* Anne Havermann, Comment, *Surviving the Commerce Clause: How Maryland Can Square its Renewable Energy Laws with the Federal Constitution*, 71 MD. L. REV. 848, 871-73 (2012) (suggesting that a court would find Maryland's RPS advances a legitimate local purpose and that the benefits could be proven through decreases in emissions in Maryland and the regional area).

[206] *See* Engel, *supra* note 74, at 90 ("Nor are a state's political boundaries a good proxy for climate change. Reductions in carbon emissions anywhere in the world will have an equivalent impact in mitigating climate change impacts within a state and not simply reductions taken by the state").

[207] *See* Answer at 10, Am. Tradition Inst. v. Colo., 876 F. Supp. 2d 1222, No. 1:11-cv-00859-WJM-KLM (D. Colo. filed July 12, 2011).

[208] *See* Engel, *supra* note 74, at 104 ("Here it may be important that the state contend that a motivation of its RPS law is the reduction of conventional pollutants, such as particulates, sulfur dioxide and nitrous oxides generated by fossil-fuel burning sources of energy, and not just reductions in greenhouse gas emissions. Because, as global

as "dirty" as the more reliable and more efficient nonrenewables, then what benefit does Colorado have a "colorable" claim to?

One would not expect the Attorney General of Colorado to commit near, if not clear, malpractice like the lawyers for the State in *Raymond Motors*, but Colorado should be prepared to put on more proof than the law on burden shifting in *Pike* would suggest to a reader. This uncertainty must be appreciated by the State in anticipation of confronting *Pike*. If ATI puts on overwhelming amounts of evidence with favorable statistics and studies, the State should be prepared to counter with a showing of more than colorable benefits. Although it's impossible to predict, the State should be prepared to exceed at least a "rational basis" justification for its regulations.[209]

Notwithstanding the above, there are still many factors weighing heavily in favor of Colorado when and if the case reaches *Pike*.[210] For even if the State relies solely upon a "purpose" of addressing climate change and produces evidence of air quality improvement in correlation with the reduction of fossil fuel-fired generation, the Supreme Court is likely to be disinclined to choose the "free market" over citizens' health, safety,

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pollutants, greenhouse gas reductions cannot be limited to any particular location, much less a region, reliance upon the greenhouse gas reduction benefits is a less persuasive justification...").

[209] *See Raymond Motors*, 434 U.S. at 442-43 (where the State argued that *Pike* balancing should not be applied, but that a finding of "rational relation to highway safety" should be sufficient).

[210] *See, e.g.*, Bibb v. Navajo Freight Lines, Inc., 359 U.S. 520, 524 (1959) ("These safety measures carry a strong presumption of validity when challenge in court...we do not sit to determine which of them is best suited to achieve a valid state objective...[u]nless we can conclude on the whole record that 'the total effect of the law as a safety measure in reducing accidents and casualties is so slight or problematical as not to outweigh the national interest in keeping interstate commerce free from interferences which seriously impede it' we must uphold the statute"); *see also* Kassel, *supra* note 185, at 670 ("The extent of permissible state regulation is not always easy to measure. It may be said with confidence, however, that a State's power to regulate commerce is never greater than in matters traditionally of local concern").

and welfare.[211] For argument's sake, there are several fundamental questions that arise when conducting a balancing test under these circumstances: who is willing, by what authority, how, and by what standard is weighing of potential profits against the peoples' livelihood going to occur? Though the question regarding the proof of actual and definite local benefits is a concern, it can just as easily be countered by asking: How can a line be drawn between health or life and a return on investment? Furthermore, is anyone willing to put a price on the health or life of a human being? The metaphysical and philosophical considerations required to answer such questions are extraordinarily beyond the scope of this pursuit and, even more categorically, inappropriate for adjudication by the courts.

Even so, while the Court has not struck down a state or local statute under the *Pike* test since Justice Scalia joined the Court, it should not be assumed some strange combination of the Bench is incapable or unwilling to do so given the right facts. As "Commerce Clause adjudication must depend in large part upon the thoroughness with which the lawyers perform their task in the conduct of constitutional litigation[,]...[as] to the lawyers the courts are entitled to look for garnering and presenting the facts."[212]

E. Diminishing *Pike*'s Stature

The most recent decisions involving dormant Commerce Clause challenges have sounded a general retreat from the invalidation of state and local statutes under *Pike* and even provided a hint that the balancing test may soon find it no longer has a place in the future of dormant Commerce Clause jurisprudence. Professor Denning suggests it is of

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[211] *See, e.g., Mass. v. EPA*, 549 U.S. at 498 ("Given EPA's failure to dispute the existence of a causal connection between manmade greenhouse gas emissions and global warming, its refusal to regulate such emissions, *at a minimum*, 'contributes' to Massachusetts' injuries") (emphasis added).
[212] *Raymond Motors*, 434 U.S. at 447-48 n.25.

no coincidence that the twenty-five years in which a *Pike* invalidation has not occurred corresponds directly with Justice Scalia's arrival on the Court.[213] Justice Scalia has not been shy about his displeasure with the evolution of the *Pike* test, and the same can be said for Justices Thomas and Alito. Though it can't be definitively be said that Justice Scalia has single handedly swayed the court, it is plausible that he (along with his anti-*Pike* cohorts) are having at least some impact on the thoughts and opinions of even the most liberal members of the Court.

Symbolic of the attrition and retreat from *Pike* invalidation, as well as foretelling where the Court could be venturing in future dormant Commerce Clause challenges, is Dep't of Revenue of Ky. v. Davis.[214] Although, for the most part, the Court's opinion is purely reiterating, emboldening, and arguably broadening the "public entities" exception announced in *United Haulers*, the Court does a lot more in *Davis* by literally doing less. Following the finding in *United Haulers* that the "discriminatory" statute was excepted due to the public nature of the favored entity, the Court then upheld the statute following a lackadaisical application (but, an application nonetheless) of *Pike* balancing. However, in *Davis*, after finding *United Haulers* controlling and applicable to Kentucky's statute providing favorable tax treatment to state issued bonds, the Court refused to apply *Pike* and stated:

> "What is most significant about these cost-benefit questions is not even the difficulty of answering them or the inevitable uncertainty of the predictions that might be made in trying to come up with answers, but the

[213] Denning, *supra* note 31, at 456 ("While Justice Scalia has not been able to persuade his colleagues to discard Pike balancing completely, it is perhaps no accident that the Court has not invalidated a state or local law under balancing since Justice Scalia has been on the Court").
[214] 553 U.S. 328, 338 (2008).

> unsuitably of the judicial process and judicial forums for making whatever predictions and reaching whatever answers are possible at all."[215]

Though the holding in *Davis* does not sound the death knell for the *Pike* balancing tier of the dormant Commerce Clause Doctrine, it calls into question its stature and potential application in the future. Although it is not suggested here that the *Pike* test no longer has a place in the Court's dormant Commerce Clause jurisprudence, nor is it necessarily prime for the Court's abandonment, but its diminution in prominence will likely be a significant factor in the minds of shrewd litigators and legislators alike.[216] To prevent the obvious abuse that *Davis* appears to invite through ingenious discrimination, it is urged here that, as another scholar suggests, "courts should hesitate to apply the principles of *United Haulers* and *Davis* to validate discriminatory state programs absent powerful indications that the principle should control."[217]

V. Predicting the Outcome and Suggestion for the Future

The constitutionality of Colorado's RES is likely to follow the course outlined under the *Pike* test – making a prediction of the outcome all but conjecture at the moment. However, as inept as it may be, it is more likely that, once in *Pike*, the lawyers defending the Colorado RES will sleep more soundly. Given the extreme deference state's are given in legislating, particularly for the health, safety, and welfare of their

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[215] *Davis*, 553 U.S. at 355 (citing *Gen. Motors v. Tracy*, 519 at 308 ("[T]he Court is institutionally unsuited to gather the facts upon which economic predictions can be made, and professionally untrained to make them").

[216] *See* Denning & Williams, *supra* note 180, at 250-51 (stating "...in *Davis*, the Court refused to apply even [*Pike*] on the ground that such review was inappropriate for the judicial branch to perform, thereby leaving public protectionism exempt from *all* Commerce Clause review") (emphasis added).

[217] Dan T. Coenen, *Where United Haulers Might Take Us: The Future of State-Self-Promotion Exception to the Dormant Commerce Clause Rule*, 95 IOWA L. REV. 541, 545-46 (2010).

citizenry and environment,[218] the Court's movement away from *Pike* in the last quarter-century, the penchant for the Court to eschew strict scrutiny by creating new exceptions, and, finally, the Court's own recognition in Massachusetts v. EPA of climate change as a legitimate local concern,[219] the Colorado RES will likely be upheld.

Ultimate success, however, does not end with a ruling from a court, or even the U.S. Supreme Court, on ATI v. Colorado. Success is an efficient, economic, and thriving coexistent renewable and electrical industry. For this is to be realized, a victory for ATI might be the more direct and favorable route – early invalidation of piecemeal and patchwork state-by-state regulation of electrical energy. As suggested, if a well established renewable energy industry is to arise in hand with an already overburdened and overregulated electricity industry – a result in the best interest of the nation – a single federal authority, providing uniform and predictable regulation, devoid of self-serving interests and offering a level playing field for competitive business enterprises, is our best option. This, admittedly, may be overly idealistic and asking too much from a government that rarely seems to get much right or even accomplished, election year to election year. Nevertheless, given the overall success we've had as a country thus far, we must give due consideration to our unique federalism structure, along with Clauses of the Constitution that guide it, to determine the next best step forward.

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[218] *See Maine*, 477 U.S. at 151 ("As long as a State does not needlessly obstruct interstate trade or attempt to 'place itself in a position of economic isolation,' it retains broad regulatory authority to protect the health and safety of its citizens and the integrity of its natural resources") (quoting *G. A. F. Seelig*, 294 U.S. at 527).

[219] *See* Farber, *supra* note 135, at 923 ("If nothing else, Massachusetts v. EPA makes it clear that climate change is very much the legitimate concern of state governments, rather than being exclusively in the national or international domain"); *but see Rocky Mountain Farmers*, 843 F. Supp. 2d at 1088-89 ("Although CARB's goal to combat global warming may be 'legitimate,' however it cannot 'be achieved by an illegitimate means of isolating the State from the national economy") (quoting *City of Phila.*, 437 U.S. at 626).

As suggested here, the principles underlying and thriving in the Commerce Clause, its potential implications upon state renewable mandates, and the evolution and growth of the electricity industry overall: what once was a traditional matter of local concern has long since outgrown its bounds. Now, for the future of our electric industry to thrive in concert with an emerging renewable energy industry, the states must disband with their covetousness and allow the federal sphere to act on the matters for which it was intended and for which it is, at the confluence of energy, environmental, and constitutional law, our best option.