FACT OR DOCTRINE? INCONSISTENCIES IN THE APPLICATION OF THE DORMANT COMMERCE CLAUSE'S EXTRATERRITORIALITY PRINCIPLE TO CHALLENGES TO STATE CLIMATE CHANGE PREVENTION POLICIES

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Abstract

The "dormant" Commerce Clause's prohibition on extraterritorial regulation has tested state efforts to battle greenhouse gas-induced climate change through clean energy policies. This is partly a result of the structure of the North American power grid. Simply put, the electricity generated by an in-state power facility may be consumed by any other state connected to that same interconnection. This cross-border flow, sale, and consumption of electricity placed the grid within the regulatory grasp of the United States Constitution's Commerce Clause. Congress therefore has authority to regulate the interstate electricity market. The Supreme Court has also interpreted an implicit but "dormant" limitation in the Commerce Clause, prohibiting state legislation that regulates interstate commerce. As a result, the Federal Energy Regulatory Commission (FERC) has been granted authority by Congress over the transmission and wholesale sales of electricity in interstate commerce, leaving the regulation of local electricity generators and utility rates (retail) to the states.

Another reality states face is the uniform mixing of greenhouse gases in the atmosphere. Because of this, state regulations promoting renewable energy and targeting emissions reductions run the risk of being ineffective if they do not take into account the true measure of the emissions causing local harm. In other words, states' climate change prevention policies chance falling short of reducing actual in-state emissions if they do not take into account out-of-state emitters that contribute to emissions felt in-state. Thus, the structure of the grid and the properties of greenhouse gases have left states' efforts to battle climate change through clean energy regulation that promotes greenhouse gas reductions particularly vulnerable to challenges under the dormant Commerce Clause's prohibition against extraterritorial regulation.

This paper analyzes the judicial application of the dormant Commerce Clause's prohibition on extraterritorial regulation to challenges to states' clean energy legislation. The

Eighth, Ninth, and Tenth Circuits have each taken up the issue of whether such regulations have an improper extraterritorial reach, but their analyses and holdings on the issue appear to have muddied the waters with inconsistent interpretations of an already convoluted principle. However, climate change prevention policies target a broad range of industries, and the fact patterns before each of the circuits varied not only in the energy sector being regulated, but in scope. Thus, the question is whether the inconsistent holdings among the circuits were due solely to the differences in the particular facts of the case before it, solely as a result of differences in doctrinal interpretation, or some combination of the two.

The answer to that question could have important implications for states moving forward with aggressive policies seeking to reduce emissions. The paucity of federal involvement has prompted state governments to take the lead in enacting progressive legislation to mitigate the local harms of climate change. However, as it stands, states are left uncertain of whether their legitimate climate change goals and resulting legislation are vulnerable to dormant Commerce Clause challenges.

I. Introduction

A. Background on the Dormant Commerce Clause and the Extraterritoriality Principle

Article I of the U.S. Constitution grants the authority "[t]o regulate Commerce . . . among the several States" to Congress.[1] The Commerce Clause has also been interpreted by courts to "have a 'negative' aspect that denies the States power to unjustifiably discriminate against or burden the interstate flow of articles of commerce."[2] The rationale behind the dormant Commerce Clause is that the U.S. Constitution was meant to "prohibit state or municipal laws whose object is local economic protectionism, laws that would excite those jealousies and retaliatory measures . . . ."[3] In practice, the Commerce Clause limits state interference with interstate commerce.

A state statute runs afoul of the dormant Commerce Clause when (1) it discriminates against interstate commerce for the benefit of in-state commerce, (2) regulates commerce wholly outside of the state, or (3) if it excessively burdens interstate commerce relative to the local benefits produced.[4] Statutes that discriminate against interstate commerce or regulate commerce entirely outside state borders are subject to strict scrutiny, almost guaranteeing the law will be invalidated.[5] To survive strict scrutiny a state must show the regulation protects a legitimate state interest, and achieving that interest could not be accomplished by "available nondiscriminatory means."[6] On the other hand, a state regulation that burdens, but does not discriminate against,

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[1] U.S. Const. art. I § 8, cl. 3.

[2] Rocky Mt. Farmers Union, 730 F.3d 1070, 1087 (9th Cir. 2013), *cert. denied*, 134 S. Ct. 2884 (2014) (quoting Or. Waste Sys., Inc. v. Dep't of Envtl. Quality of State of Or., 511 U.S. 93, 98 (1994)).

[3] Energy & Env't Legal Inst. v. Epel, 43 F. Supp. 3d 1171, 1176 (D. Col. 2014) (quoting C & A Carbone, Inc. v. Town of Clarkstown, 511 U.S. 383, 390 (1994).

[4] DANIEL A. FARBER & CINNAMON CARLARNE, CLIMATE CHANGE LAW 190 (Foundation Press 1st ed. 2018) (quoting Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970)).

[5] *See* 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.R. 295, 301 (2013).

[6] Rocky Mt. Farmers Union, 730 F.3d at 1087 (quoting *Maine v. Taylor*, 477 U.S. 131, 138 (1986)); Energy & Env't Legal Inst. v. Epel, 793 F.3d 1169, 1176 (10th Cir. 2016) (explaining that such discriminatory or extraterritorial

interstate commerce is subject to the balancing test of *Pike v. Bruce Church, Inc.*, and such a regulation shall be invalidated only "if it imposes a burden on interstate commerce which is not commensurate with the local benefits secured."[7]

The dormant Commerce Clause's prohibition on state regulations that "ha[ve] the 'practical effect' of regulat[ing] commerce occurring wholly outside that State's borders" is the extraterritoriality principle.[8] The *Healy* Court held that the dormant Commerce Clause's prohibition on extraterritorial regulation proscribed "the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State."[9] Moreover, a statute directly controlling "wholly" out-of-state commerce is invalid, regardless of the legislative intent.[10] Courts evaluate the "practical effect" of the statute by considering its direct consequences, its "interact[ion] with the legitimate regulatory regimes of other States," and the possible effects if many (or all) states "adopted similar legislation."[11]

B. Applying the Extraterritoriality Principle to State Climate Change Legislation

The extraterritoriality principle has not been applied uniformly across the courts. The Supreme Court has not provided a clear test to determine whether a state statute has the "practical effect" of controlling commerce outside state jurisdiction, and has only applied the principle in a limited number of cases.[12] In the context of certain state climate change prevention

statutes must be "demonstrably justified by a valid factor unrelated to economic protectionism," or they will be struck down).

[7] 397 U.S. 137 (1970).; Energy & Env't Legal Inst., 793 F.3d at 1171.

[8] Healy v. Beer Institute, Inc., 491 U.S. 324, 331 (1989); *see* North Dakota v. Heydinger, 825 F.3d 912, 919 (8th Cir. 2016) (regardless of the effect on in-state commerce, a statute that "control[s] conduct beyond the boundaries of the State" is likely invalid *per se*).

[9] Healy, 491 U.S. at 336 (quoting Edgar v. MITE Corp., 457 U.S. 624, 642-43 (1982)(plurality opinion)).

[10] *Id.*

[11] *Id.* at 336, 337 ("the Commerce Clause protects against inconsistent legislation arising from the projection of one state regulatory regime into the jurisdiction of another State").

[12] Heydinger, 825 F.3d at 919; Farber & Carlarne, *supra* note 9, at 195.

policies, extraterritoriality is potentially ill-suited to address climate change legislation that legitimately takes into account out-of-state greenhouse gases (GHGs) emitted by out-of-state generators. This is partially due to the interconnectedness of a regional electricity grid across multiple states, whereby state regulation of local electricity markets may impact out-of-state generators connected to that region's electricity grid.[13] Furthermore, because GHGs mix uniformly in the atmosphere, state emissions reduction programs may inadvertently amplify emissions through "leakage,"[14] working against the goal of reducing overall GHGs associated with meeting the State's consumption.[15]

Although the federal government has attempted to promote renewable energy and carbon-reduction initiatives, it has so far failed to enact comprehensive legislation that would direct states to develop renewable energy initiatives.[16] As the localized effects of GHG-driven climate change are felt more acutely, and as federal inaction continues, state governments have taken up the task of developing energy policies that reduce GHG emissions in their territory.[17] An example of one mechanism employed by states is the Renewable Portfolio Standards (RPSs),

[13] The line between federal and state electricity market control is murky due to the interconnectedness of the grid and overlapping areas of wholesale and retail electricity; and federal and state attempts at regulating the wholesale and retail markets, respectively, have been subject to litigation. *See e.g.*, Hughes v. Talen Energy Mktg., LLC, 136 S. Ct 1288 (2016) (holding that Maryland's power program, setting the rate a power company received for interstate wholesale electricity capacity, intruded on FERC's authority to regulate wholesale sales of electricity); *see also* FERC v. Elec. Power Supply Ass'n, 136 S. Ct. 760 (2016) (holding a FERC rule aimed at reducing energy prices and pressure on the grid, although influencing the retail electricity market, did not intruded on State authority to regulate the retail market). *See also*, Alexandra B. Klass & Elizabeth Henley, *Energy Policy, Extraterritoriality, and the Dormant Commerce Claus*, 5 San Diego J. Climate & Energy L. 127, 129 (2014).

[14] Carbon "leakage" refers to a situation where the costs related to a jurisdiction's climate policies shift industry out of that jurisdiction to one with less stringent controls, and thus amplifying emissions elsewhere. Farber & Carlarne, *supra* note 9, at 13. Another carbon leakage mechanism is the "rebound effect," which generally refers to the scenario where energy efficiency measures, and any related decrease in energy costs associated with those measures, cause consumers to increase their energy use, potentially negating the benefit gained through efficiency measures. *Id.*

[15] *See* Rocky Mt. Farmers Union, 730 F.3d at 1080 ("[b]ecause GHGs mix in the atmosphere, all emissions related to transportation fuels used in California pose the same local risk to California citizens").

[16] *See* Lee & Duane, *supra* note 10, at 297; Klass & Henley, *supra* note 5, at 154.

[17] *See e.g.*, Klass & Henley, *supra* note 5, at 155 (discussing state "energy policy legislation governing fuels, renewable electricity, and programs to more significantly promote new energy technologies").

which generally require electricity suppliers to provide consumers with a certain percentage of electricity generated from renewable sources.[18] A few states have also developed policies—e.g., Zero-emissions Credit (ZEC) programs—that compensate nuclear power plants for the carbon-free electricity they produce.[19] Additionally, states have developed regulations targeting emissions from transportation fuels, and from new coal-fired power plants.[20] As a result, the state climate change prevention policies that have implicated extraterritorial regulation cover a diverse range of energy sectors, complicating the courts' application of extraterritoriality in those cases.

1. Overview of State Climate Change Initiatives Challenged Under Extraterritoriality

Part II discusses the Ninth Circuit's upholding of California's Low Carbon Fuels Standard (LCFS) after it was challenged by Midwest ethanol producers as violating the extraterritoriality principle by penalizing outside emitters for the benefit of California ethanol producers.[21] The court formed its opinion from the central rationale that "California is entitled to proceed on the understanding that global warming is being induced by rising carbon emissions and [California can] attempt to change that trend."[22] Thus, California may regulate to address local harms from carbon emissions, and incentivize out-of-state conduct to help meet in-state clean energy goals by taking into account any relevant harmful property of that out-of-state product.[23] Those "incidental effects on interstate commerce" are not *per se* invalid.[24] The court

[18] Farber & Carlarne, *supra* note 9, at 117.
[19] NUCLEAR ENERGY INST., ZERO-EMISSION CREDITS 3 (2018), https://www.nei.org/CorporateSite/media/filefolder/resources/reports-and-briefs/zero-emission-credits-201804.pdf.
[20] *See* Rocky Mt. Farmers Union, 730 F.3d at 1070; Heydinger, 825 F.3d at 912.
[21] Rocky Mt. Farmers Union, 730 F.3d at 1080, 1101.
[22] *Id.* at 1090.
[23] *Id.* at 1104 (explaining that some relevant physical properties of ethanol include those related to location.).
[24] *Id.* at 1106.

was patently protecting California's "role as a leader in developing air-quality standards" and the serious threat to California's public health and environment due to climate change.[25]

Part III discusses the case that followed a couple years later in the Tenth Circuit involving a Colorado Renewable Energy Standard (RES) Statute's provisions (referred to as the "Renewables Quota"), requiring utility companies to provide Colorado electricity consumers with a certain percentage of electricity from renewable sources. The court limited extraterritoriality challenges to price-control regulations, "linking in-state prices to those charged elsewhere," resulting in "raising costs for out-of-state consumers or rival businesses." [26] Using this rationale, it was easy for the court to distinguish the Renewables Quota because it simply regulated the "*quality* of a good sold to in-state residents."[27] The effect of the ruling is that climate change prevention policies subject to Tenth Circuit jurisdiction will violate the extraterritoriality principle only if it is a transparent *price control or affirmation* not *quality control* law. [28]

Part IV discusses a case decided a year later in the Eighth Circuit on a Commerce Clause and preemption challenge to Minnesota's Next Generation Energy Act (NGEA) provisions prohibiting regulated parties from meeting in-state electrical demand with imports of electricity produced by new fossil fuel generation, and new long-term power purchase agreements that would contribute to statewide power sector carbon dioxide emissions.[29] The statute provided an exception for natural gas electricity producers, and limited the size of the facilities covered; thus, the statute had the practical effect of regulating mostly new coal-powered generators.[30] Judge

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[25] *Id.* at 1079.
[26] Energy & Envt'l Legal Inst., 793 F.3d at 1172.
[27] *Id.* at 1173. (emphasis added).
[28] *Id.* at 1175 (the court cited the "serious problems of overinclusion" that might cause well-grounded health and safety regulations be invalidated just because they have the effect of controlling conduct outside the state).
[29] North Dakota v. Heydinger, 15 F. Supp. 3d 891, 897-98 (D. Minn. 2014).
[30] Minn. Stat. § 216H.03, subd. 3; *see* Klass & Henley, *supra* note 5, at 170.

Loken, writing the opinion, found the provisions were an impermissible extraterritorial reach of Minnesota's authority because the "broad prohibitions" of the statute "plainly encompass[ed] non-Minnesota entities and transactions," forcing out-of-staters to comply with Minnesota's law even when transacting business entirely outside of Minnesota.[31] The other two panel members agreed the statute was unconstitutional, but relied on preemption, not Commerce Clause, grounds.[32]

2. <u>Do the Circuit Court Rulings Create Confusion on Extraterritoriality?</u>

Part V analyzes the resulting discrepancies created by the courts' application of extraterritoriality to state climate change prevention policies. Each of the three statutes at issue in the Eighth, Ninth, and Tenth Circuit regulated either a discrete energy sector, or was distinct in its scope. California's LCFS regulated transportation fuels blended and sold in California. Colorado's RES regulated utility companies purchasing electricity for Colorado electricity consumers. Minnesota's NGEA prohibited the importation of certain new fossil fuel-powered electricity, and prohibited certain power-purchase agreements that would contribute to statewide emissions. The shared attribute of the three statutes was their purpose—i.e., all were state climate change initiatives promoting renewable energy and targeting the reduction of related GHGs. Yet, California's LCFS, and Colorado's RES were upheld as constitutional, while Minnesota's NGEA prohibitions were struck down. Thus, the question is whether the different outcomes in each of the circuits was due to a difference of circumstance, or a difference of doctrinal interpretation. This paper attempts to: (1) draw out the specific facts that each court relied upon in determining whether or not the statute was an impermissible extraterritorial reach of the

[31] Heydinger, 825 F.3d at 921.
[32] *Id.* at 923-29.

State's authority, and (2) look at the differences in each court's interpretation and ultimate application of extraterritoriality to the statute at issue before it.

II. *Rocky Mt. Farmers Union v. Corey.*

A. California's Low Carbon Fuel Standard (LCFS)

California's Air Resource Board (CARB) promulgated regulations pursuant to California's Global Warming Solutions Act of 2006 (also referred to as "AB 32"), which recognized the palpable threat global warming posed to the State's economy, environment, and public health.[33] The CARB regulation at issue in *Rocky Mt. Farmers Union* was the Low Carbon Fuel Standard (LCFS), addressing GHGs emitted in the production and transportation of transportation fuels ("embedded" GHGs).[34] CARB used a lifecycle analysis to determine the embedded GHGs of ethanol destined to be blended, sold, and consumed in California.[35] The lifecycle analysis took into account emissions associated with all aspects of ethanol production including crop growth (typically corn or sugar), the electricity type and efficiency used during processing (e.g., coal, hydroelectricity, or natural gas), and all transportation.[36] California also imports certain feedstock for local ethanol refining and blending.[37] Regulated entities could comply with the LCFS either by relying on a "default pathway"—a known pathway with a predesignated carbon intensity—or by registering an individualized pathway, which would calculate the pathway's carbon intensity using listed formulas.[38]

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[33] Rocky Mt. Farmers Union, 730 F.3d at 1079.
[34] Rocky Mt. Farmers Union v. Goldstene (*Rocky Mountain II*), 843 F. Supp. 2d 1071, 1079-81 (E.D. Cal. 2011), *rev'd sub nom.* Rocky Mt. Farmers Union v. Corey, 730 F.3d 1070 (9th Cir. 2013), *cert. denied*, 134 S. Ct. 2884 (2014) (specifically at issue were the ethanol and crude oil (and its derivatives) provisions).
[35] Rocky Mt. Farmers Union, 730 F.3d at 1080-81 (lifecycle values were assigned using a carbon intensity value).
[36] *Id.* at Appx. 2; see *Id.* at 1081-82 (the lifecycle analysis is built upon the Greenhouse Gases, Regulated Emissions, and Energy Use in Transportation Model (GREET)). The result is that ethanol produced and shipped from the Midwest to a California blender will have a carbon intensity value associated with the entirety of the process.
[37] *Id.* at 1082.
[38] *Id.*

The LCFS also created a cap and trade system, with a declining annual carbon intensity cap on transportation fuels sold and consumed in California.[39] This market-based system was intended to "stimulate and [sic] the production and use of alternative, low-carbon fuels in California," with the advantage that it would decrease California's dependence on petroleum.[40]

Both the ethanol and crude oil provisions were challenged by a collective of industry groups, arguing that the LCFS impermissibly discriminated against out-of-state corn ethanol, regulated extraterritorially, and excessively burdened interstate commerce without producing any local benefit.[41] Only the ethanol provisions were challenged as regulating extraterritorially.

B. District Court Holds the LCFS is an Impermissible Extraterritorial Reach

The district court found that California's LCFS had an impermissible extraterritorial reach because the method of assigning carbon intensity values based upon different geographic areas—or factors which depended upon location—penalized regulated parties for outside conduct, having the "practical effect" of controlling conduct beyond the borders of California.[42]

After finding the lifecycle analysis approach to GHGs amounted to an impermissible extraterritorial reach, the court applied strict scrutiny and struck down the statute.[43]

1. <u>The Consequences of the LCFS on Out-of-State Ethanol Producers</u>

CARB admitted that the purpose of assigning carbon intensity values to ethanol pathways using the lifecycle analysis was to give an "incentive for regulated parties to adopt production methods which result in lower emissions."[44] Meaning, both in-state and out-of-state pathways

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[39] *Id.* at 1080 (regulated parties selling ethanol in California generated credits or deficits depending on whether its carbon intensity was less than or above the cap).
[40] *Rocky Mountain II*, 843 F. Supp. 2d at 1079.
[41] *Id.* at 1079. (the LCFS was also challenged on the grounds that it is preempted by the EISA).
[42] *Id.* at 1091-92 (regulating "wholly" out-of-state conduct refers to regulating conduct between out-of-state producers in transactions to which California was not a party).
[43] *Id.* at 1093-1094.
[44] *Id.* at 1091.

with high carbon intensity practices (e.g., long transportation routes, high-emissions power sources such as coal, and inefficient land use) were more likely to fall above the LCFS market cap, incurring deficits that must be made up for with credits.[45]

The court held that California could not take "legal and political responsibility" for commerce occurring wholly outside its borders, regardless of whether those products were consumed in California.[46] The LCFS "impermissibly regulate[d] the channels of interstate commerce" because the method of generating credits, requiring a regulated party to get approval by the CARB, forced parties to "seek regulatory approval in [California] before undertaking a transaction in another."[47]

2. <u>The LCFS Risks the Economic Balkanization of the Electricity Market</u>

The court considered the interaction of the LCFS with the regulatory regimes of other states, and the possible effects of the adoption of similar legislation by many other states.[48] The court held that the LCFS was an impermissible reach of California's regulatory authority because the possible inconsistent legislation from state to state arising from a wide-spread adoption of similar LCFS regulations would cause significant hardships to producers attempting to satisfy multiple different GHG reduction levels in many different markets.[49] Also, different regulatory regimes risked fragmenting the national ethanol market into competing state-run markets.[50]

After finding the LCFS in violation of the Commerce Clause's prohibition on extraterritorial regulation (as well as finding facial discrimination), the statute could not survive

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[45] *Id.* at 1091 (the court determined that this amounted to penalizing out-of-state ethanol production practices).
[46] *Id.* at 1902.
[47] *Id.* at 1079, 1902.
[48] *Id.* at 1090.
[49] *Id.* at 1093.
[50] *Id.* at 1092 (explaining the Commerce Clause is meant to prevent this sort of economic balkanization).

strict scrutiny because California had failed to prove that its legitimate purpose of reducing GHG emissions could not be served through alternative, nondiscriminatory means.[51]

In its discrimination analysis, the court focused on the LCFS lifecycle analysis' differentiation of ethanol pathways, assigning carbon intensity values based on geographical regions, transportation distances, and factors tied to location.[52] Regardless of origin-related lifecycle factors that *benefit out-of-state* ethanol producers, the price difference of chemically-identical ethanol in the California market would be based upon origin—and that amounted to discrimination. Piggy-backing on this, the court turned to the issue of extraterritorially.[53] The court held that the lifecycle analysis, as described, "attempt[ed] to account for-and reduce-emissions from the entire pathway," amounted to "penalizing" the practices of other states.[54]

C. Ninth Circuit Overturns District Court Application of the Extraterritoriality Principle

The Ninth Circuit began its analysis with the standard, recognized in *Massachusetts v. EPA*, that climate change poses a legitimate local threat to states.[55] The court determined that because California's legislature determined California was at "tremendous risk" from climate change, and GHG emissions from transportation fuels were contributing to that risk, not only was it permissible for California to regulate to reduce that risk using a "market-based solution," it was appropriate that the lifecycle analysis take into account the "real extent of GHG

[51] *Id.* at 1093 (the court agreed that California's LCFS served a "legitimate and local" interest).
[52] *Id.* at 1086-88. Regardless of origin, ethanol sold in California has the same physical and chemical properties; thus, the carbon intensity values for producers with the same feedstock and processing can only be distinguished by origin-specific factors. *Id.* Despite the fact that the lifecycle analysis is a scientific formula uniformly applied to all ethanol pathways, the court confusingly separated the lifecycle factors into those based on origin, and those not (like feedstock and production process), and then determined the only relevant comparison was pathways with identical feedstock and production processes, and to ask why those two pathways produce identical ethanol with different carbon intensities (and price) by the time they enter the California ethanol market—of course, the only comparison left is origin-based differences. *Id.* Under this reasoning, Brazilian ethanol—with a lower carbon intensity than some California pathways—was entirely removed from the court's analysis since it is made from sugarcane, vice corn. *Id.*
[53] *Id.* at 1091 ("[o]stensibly, the LCFS regulates only fuel-providers in California").
[54] *Id.* (explaining that this "penalizing" had the practical effect of controlling wholly out-of-state conduct).
[55] Rocky Mt. Farmers Union, 730 F.3d at 1080; *See* Massachusetts v. EPA, 549 U.S. 497, 522 (2007).

emissions."[56] The court stressed that the principles of federalism should protect states serving as "laborator[ies] for innovation."[57] Any incidental effects on interstate commerce arising from that constitutional exercise should be analyzed under *Pike*, a standard of scrutiny a state statute is more likely to survive.[58]

1. <u>Discrimination Based on Origin, with a Sense of Extraterritorial Reach</u>

Discrimination under the dormant Commerce Clause "simply means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter."[59] This analysis assumes the "comparison of substantially similar entities."[60]

The court emphasized the importance of examining ethanol pathways for discrimination using the carbon intensity values which take into account *all* lifecycle factors.[61] Meaning, that if California "assign[ed] different carbon intensities to ethanol from different regions, there must be some reason, apart from their origin, to treat them differently."[62] California assigned higher carbon intensities to certain pathways, but the "treatment [was not based] on a fuel's origin but on its carbon intensity," considering location "only to the extent" it affected lifecycle factors.[63] In other words, California did not discriminate against out-of-state ethanol producers by assigning pathways different carbon intensity values for the purpose of conducting the lifecycle analysis.

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[56] *Id.* at 1106 (explaining that the "real extent" necessarily included emissions by out-of-state producers).
[57] *Id.* at 1079.
[58] *Id.* at 1106.
[59] *Id.* at 1087 (quoting Or. Waste Sys., Inc. v. Dep't of Envtl. Quality of State of Or., 511 U.S. 93, 99 (1994)).
[60] *Id.* (explaining that entities are substantially similar for constitutional purposes "if their products compete against each other in a single market.") (quoting Gen. Motors Corp. v. Tracy, 519 U.S. 278, 298-99 (1997)).
[61] *Id.* at 1088 (explaining that a full understanding of the carbon intensity value of each pathway is crucial to determining whether the LCFS discriminates against out-of-state ethanol pathways).
[62] *Id.* at 1089 (quoting *Philadelphia v.* New Jersey, 437 U.S. 617, 627 (1978)) (internal quotations omitted) (explaining that assigning different carbon intensity values to ethanol pathways from different regions does not automatically equate to discrimination.).
[63] *Id.* at 1089-90.

The court found that the lower court erred when it held that lifecycle factors correlated with origin, like transportation and electricity type, were "impermissible under the dormant Commerce Clause."[64] The district court also erred in concluding that Brazilian ethanol pathways were unsuitable for comparison with other Midwest and California ethanol pathways.[65] The court reasoned that all ethanol pathways to California result in chemically-identical ethanol being "blended" in California; thus, in close competition with each other in a single ethanol market.[66]

2. The LCFS is not an Impermissible Extraterritorial Reach and Incidental Effects on Interstate Commerce Should be Examined under *Pike* Balancing

The court rejected the district court's application of the extraterritoriality principle and disagreed that the LCFS was an attempt by California to "regulate[] the channels of interstate commerce," or to control wholly out-of-state conduct.[67] The court held that the LCFS was not an impermissible extraterritorial reach because it had only incidental effects on interstate commerce, and sought only to influence, not control, out-of-state behavior.[68] The Court reasoned that the LCFS does not require any out-of-state producer to adopt any regulation before selling ethanol in California.[69] Additionally, the market-based system of credits and caps set up by the LCFS applied "only to the portfolios of [California] fuel blenders" and "the producers who contract

[64] *Id.* at 1090.
[65] *Id.*
[66] *Id.* at 1089-90 (explaining that by excluding origin-specific lifecycle factors from comparison, the district court essentially labeled those factors "ungrounded presumption[s] that unfairly prejudice out-of-state ethanol," when, in reality, each origin-specific factor is "an average based on scientific data").
[67] *Id.* at 1101.
[68] *Id.* at 1100 (reasoning that the LCFS regulated only the California market, providing incentives to producers wishing to do business in the California ethanol market—without requiring any certain conduct.).
[69] *Id.* at 1103 (explaining that the LCFS imposes no fines or penalties for any out-of-state behavior, but rather incentivizes producers to voluntarily adopt low-carbon intensity methods in order to be competitive in the California ethanol market).

with them."[70] Essentially, states may address local harms by encouraging certain behavior within its borders using market incentives without running afoul of the extraterritoriality principle.

The court addressed the balkanizing effects of the LCFS as an "alternative basis" to extraterritorial regulation.[71] As the court points out previously in the opinion, this analysis is actually part of determining the "practical effect" of a statute under the extraterritoriality principle.[72] Since the balkanization effects of the LCFS are relevant to a discussion of whether it is impermissible extraterritorial regulation, the court's reasoning is addressed here. The court dismissed the district court's concern that widespread adoption would cause hardships for out-of-state ethanol producers by forcing them to move to the "State of largest use," sell only locally, or by creating inconsistent regulations impossible for individual producers to satisfy.[73] If every state regulated only fuels consumed within its borders, it "would not create the interlocking problems of cross-border price setting or out-of-state approval" the extraterritorially principle prohibits.[74]

III. *Energy & Envt'l Legal Inst. v. Epel.*

A. Colorado's Renewable Energy Standard (RES) Statute

Colorado's Renewable Energy Standard (RES) Statute and its implementing regulations were challenged by a non-profit energy and environmental organization (EELI) and others for violating the Commerce Clause.[75] The RES Statute was the result of a 2004 vote by Colorado

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[70] *Id.* (explaining that an impermissible extraterritorial reach of a state's authority must be an attempt to control wholly out-of-state behavior, such as a state's mandating "compliance with their preferred policies in wholly out-of-state transactions").
[71] *Id.* at 1104.
[72] *Id.* at 1101
[73] *Id.* at 1104 (explaining that the widespread adoption of similar LCFS statutes by other states would harmonize states' goals of promoting low-carbon intensity fuels.).
[74] *Id.* at 1105 (explaining that the concerns were unfounded because the LCFS did not exclude any fuel from entering the in-state market, charge out-of-state producers inappropriate fees to enter the in-state market, attempt to control other states fuel markets, and did not cause other states to "peg [their] fuel prices or regulatory standards to those of another").
[75] Energy & Env't Legal Inst., 43 F. Supp. 3d at 1174.

Citizens "intend[ing] to promote the development and utilization of renewable energy resources."[76] The provisions at issue were collectively referred to as the "Renewables Quota" that required, as amended, "each retail utility to generate, or cause to be generated, renewable energy resources in specified minimum amounts."[77] Regulated utilities could meet their quota by generating electricity using renewable sources, purchasing electricity generated by renewable energy, or purchasing renewable energy credits.[78] Regulated utilities had to seek approval from Colorado's Public Utility Commission (PUC) to use renewable energy and energy credits towards their quota. Certain utilities were required to submit to the PUC, and receive approval of, detailed compliance plans.[79]

The basis of the challenge was that the Renewables Quota would cause out-of-state, coal-fired electricity generators to lose business with other out-of-state utilities that provide electricity to the regional grid.[80] This was due to the interconnectedness of the regional grid of which Colorado is member state, and the fact that Colorado is a net importer of electricity.[81]

B. District Court Holds the Renewables Quota is not an Impermissible Extraterritorial Reach

The Renewables Quota was challenged under the theory that it restricted the manufacturing of out-of-state goods and required "out-of-state electricity to be generated

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[76] *Id.*
[77] *Id.* (The Renewables Quota required investor-owned utilities to purchase 30% of its retail electricity from renewables, certain cooperative electric associations to purchase 20% of its electricity from renewables, and other cooperative electric associations and large municipal utilities to purchase 10% of their retail electricity from renewables, by 2020.).
[78] *Id.* at 1175 (renewable sources that could be credited to the quota included re-captured energy generated by the "heat from exhaust stacks or pipes", solar, wind, geothermal, biomass, and "hydroelectricity with certain restrictions.").
[79] *Id.*
[80] Energy & Env't Legal Inst., 793 F.3d at 1170.
[81] *Id.* (explaining that the interconnected grid serves seven states and portions of Canada and Mexico). It is important that Colorado is a net importer of electricity to understand that Colorado utilities necessarily purchase a large percentage of electricity from out-of-state.

according to Colorado's terms."[82] The court disagreed, finding that the Renewables Quota governed only Colorado utilities in Colorado transactions.[83] The court, like the Ninth Circuit's decision in *Rocky Mt. Farmers Union*, addressed federalism concerns, and was unwilling to invalidate a state statute simply because it differed from other states or incentivized certain out-of-state behavior.[84] The Renewables Quota survived the *Pike* balancing test because it likely burdened in-state and out-of-state entities equally, if at all.[85]

1. <u>The Renewables Quota Does not have the Practical Effect of Controlling Wholly Out-of-state Commerce</u>

The district court narrowly construed conduct that amounted to controlling "wholly" out-of-state commerce.[86] Specifically, when Colorado regulated both in-state electricity generators *and also* transactions between out-of-state and in-state entities, it did not regulate "wholly" extraterritorial commerce.[87] The court took a similar stance to the Ninth Circuit, finding incidental effects on interstate commerce arising from legitimate in-state regulatory schemes meant to incentivize out-of-state behavior not invalid *per se*.[88]

The court's reasoning is straightforward. The RES did not impact transactions conducted entirely out of state.[89] It regulated Colorado electricity generators and out-of-state generators entering into transactions with Colorado utilities. Interstate commerce was not affected "unless and until an out-of-state electricity generator freely [chose] to do business" with Colorado.[90] Out-

[82] Energy & Env't Legal Inst., 43 F. Supp. 3d at 1179. ("Plaintiffs contend that the Renewables Quota is a 'mandate' which requires energy produced wholly out-of-state to comply with Colorado-approved methods for renewable energy").
[83] *Id.* at 1181.
[84] *Id.* at 1180 ("the fact that the RES may provide an incentive for out-of-state companies to conduct their business in a manner that complies with Colorado's renewable energy standards also does not make the statute improper").
[85] *Id.* 1184.
[86] *Id.* at 1178-79.
[87] *Id.* 1181 (explaining that the "RES does not control any aspect of a transaction between two out-of-state entities").
[88] *Id.* at 1180 ("the fact that [the Renewable Quota's] incentive structure may negatively impact the profits of out-of-state generators whose electricity cannot be used to fulfil the Quota does not make the Renewables Quota invalid.").
[89] *Id.* at 1179.
[90] *Id.*

of-state generators were not required to change any conduct because of the statute.[91] The RES did not place conditions on electricity imported into Colorado, affecting out-of-state generators only to the extent Colorado utilities could count the electricity towards its Renewables Quota.[92] The RES may negatively impact both in-state and out-of-state non-renewable electrical generators—but such an impact does not violate the dormant Commerce Clause.[93] The RES did not interfere with other state's regulatory regimes, nor disrupt any perceived need for uniformity in the market.[94]

2. <u>The Renewables Quota Burdens All Generators Equally, or Not at All</u>

Using the *Pike* balancing test, the court turned to the issue of whether the impact that the Renewables Quota *did* have on interstate commerce nevertheless invalidated the statute.[95] The Renewables Quota satisfied the *Pike* balancing test because the challengers "failed to show that the RES burdens interstate commerce at all, much less that any such burden is clearly excessive in relation to the benefits conferred on the state by the RES. . . ."[96]

The court used four factors to determine whether the Renewables Quota failed the *Pike* balancing test: (1) the burden on interstate commerce; (2) the nature of the statute's local benefits; (3) whether the burden is "clearly excessive in relation to" local interests; and (4) whether local interests could be promoted as well with a lesser impact on interstate commerce.[97] The Renewables Quota did not make it more difficult for electricity to be produced and transmitted to and from states interconnected through the grid.[98] The fact that the Renewables

[91] *Id.*
[92] *Id.* at 1180.
[93] *Id.*
[94] *Id.* at 1181.
[95] *Id.*
[96] *Id.* at 1183.
[97] *Id.* at 1182 (quoting Blue Circle Cement, Inc. v. Bd. Of Cty. Comm'rs, 27 F.3d 1499, 1512 (10th Cir. 1994)).
[98] *Id.* (explaining that any burden that the Renewables Quota might have on non-renewable electricity producers would be felt the same by in-state and out-of-state generators.).

Quota caused Colorado utilities to shift to purchasing renewable energy did not invalidate an "otherwise valid regulation."[99]

The scope of the *Pike* balancing test is not the focus of this paper. But the factors that the Tenth Circuit took into account when conducting its analysis under *Pike* read as a continuum of the analysis done under the extraterritoriality principle. In other words, the rationales for upholding the Renewables Quota under extraterritoriality and *Pike*, overlapped. For example, applying *Pike*, the court reasoned that the lack of uniformity in state regulation of the electricity market did not excessively burden interstate commerce.[100] This same reasoning was also used in the court's application of the extraterritoriality principle in determining that the Renewables Quota did not have the "practical effect" of controlling conduct wholly out of state because the Plaintiffs hadn't "demonstrate[ed] that there exists such a compelling need for uniformity in the market for renewable energy credits that having a system of different or even inconsistent state regulations is unworkable."[101]

C. The Tenth Circuit Limits the Extraterritoriality Principle to Price-control Statutes

The only issue before the Tenth Circuit was whether the Renewables Quota, requiring in-state utilities to purchase a percentage of electricity meant for in-state sales from renewable energy generators, violated the dormant Commerce Clause's prohibition against extraterritorial regulation.[102] The opinion, written by Justice Gorsuch while he served on the Tenth Circuit, took up the issue of whether the Renewables Quota, requiring in-state utilities to purchase a

[99] *Id.* at 1183.
[100] *Id.* at 1182.
[101] *Id.* at 1181-82.
[102] The Plaintiffs did not appeal the lower courts determination that the Renewables Quota did not discriminate against interstate commerce or excessively burden interstate commerce. Energy & Env't Legal Inst., 793 F.3d at 1172.

percentage of the electricity meant for in-state sales from renewable energy generators violated "the most dormant doctrine in dormant Commerce Clause jurisprudence."[103]

The court, citing the three Supreme Court cases where a state statute was struct down using the extraterritorial principle, determined that those cases involved only price-control or price-affirmation statutes linking in-state and out-of-state prices, and had the effect of "raising costs for out-of-state consumers or rival businesses." [104] The court distinguished the RES, determining it was more akin to a "quality of good[s]" mandate than a price-control statute because it required utilities to purchase a certain *type* of product.[105] The court accepted that even quality control regulations might ultimately affect prices in-state and out-of-state. Thus, while the effect of a statute might be to link in-state and out-of-state prices, or raise prices for out-of-staters, "without a regulation more blatantly regulating price and discriminating against out-of-state consumers or producers," those effects are not sufficient to trigger *per se* invalidation."[106]

In its extraterritoriality analysis, the Tenth Circuit reasoned that the Renewables Quota did not discriminate against out-of-staters.[107] This exemplifies the blurry distinction between a statute that discriminates, and one that impermissibly regulates extraterritorially—i.e., whether a law discriminates against out-of-staters is arguably a separate test from extraterritoriality. But, the issues of whether the Renewables Quota discriminated against interstate commerce, or excessively burdened interstate commerce under *Pike*, were not appealed, and so the Tenth Circuit never reached either issue. However, the court did say that state statutes regulating "non-price standards for products sold in-state," such as Colorado's RES, "may be amenable to

[103] *Id.* at 1170.
[104] *Id.* at 1172-73 (citing Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511 (1935), Brown-Forman Distillers Corp. v. New York State Liquor Authority, 476 U.S. 573 (1986), and Healy v. Beer Institute, Inc., 491 U.S. 324 (1989).
[105] *Id.* at 1173 (explaining further that the Renewables Quota did not link the price paid for electricity by Colorado consumer to prices paid for electricity by out-of-state consumers.).
[106] *Id.*
[107] *Id.*

scrutiny under the generally applicable *Pike* balancing test, or scrutinized for traces of discrimination . . . ."[108]

Interestingly, the district court, in its extraterritoriality analysis, cited a non-price control statute struck down in *Edgar v. MITE Corp.*[109] In that case, an Illinois statute required any takeover offer for shares of a target company to submit offers to the Secretary of State of Illinois, including situations where the target company was neither incorporated or headquartered in Illinois.[110] The statute was challenged on preemption and Commerce Clause grounds, and while the Court did not reach a majority decision on the preemption issue, it struck down the statute on Commerce Clause grounds.[111] Part V-A of the opinion, analyzing the extraterritorial effects of the Illinois statute, was a plurality opinion.[112] In Part V-A, Justice White, joined by Justices Burger, Stevens, and O'Conner, found the Illinois statute had a "sweeping extraterritorial effect" because the statute could apply to a tender offer by a foreign corporation that would not implicate Illinois shareholders at all.[113] Thus, it had the effect of directly regulating "wholly" out-of-state transactions across state lines.[114] Additionally, the court held that the effect of states other than Illinois adopting similar legislation would be to "thoroughly stifle[]" interstate commerce in securities transactions.[115]

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108 *Id.*
109 457 U.S. 624 (1982) (plurality opinion);
110 Edgar, 475 U.S. at 627 (defining a target company as "a corporation or other issuer of securities of which shareholders located in Illinois own 10% of the class of equity securities subject to the offer, or for which any two of the following three conditions are met: the corporation has its principal executive office in Illinois, is organized under the laws of Illinois, or has at least 10% of its state capital and paid-in surplus represented within the state").
111 Edgar, 475 U.S. at 626, 641.
112 *Id.* The majority opinion, however, did hold that the statute was in violation of the dormant Commerce Clause under *Pike*. *Id.* (Part V-B of the opinion).
113 *Id.* at 642.
114 *Id.* at 643.
115 *Id.* at 642.

The Tenth Circuit, however, declined to adopt *Edgar*'s extraterritoriality analysis in its opinion, instead relying on cases involving instances of "naked price fixing" by state regulations or "something else experience teaches to be clearly invidious."[116] In other words, unlike the Ninth or Eighth Circuits, the Tenth Circuit effectively limited the applicability of the extraterritoriality principle to price-control or price-affirmation statutes.

IV. *North Dakota v. Heydinger*

A. Minnesota's Next Generation Energy Act (NGEA)

Passed in 2007, the NGEA established energy standards aimed reducing "statewide [GHG] emissions across all sectors producing those emissions."[117] Specifically at issue were the related provisions aimed at limiting increases in "statewide power sector carbon dioxide emissions."[118] Statewide power sector carbon dioxide emissions included total annual carbon dioxide emissions from in-state power generators and electricity imported into and consumed in the state.[119] The provisions provided that on or after August 1, 2009, no person shall: (1) construct in-state new large electricity facilities, (2) import (or commitment to import) electricity from new large out-of-state generators, or (3) enter into "new long-term power purchase agreement[s]" that would contribute to statewide carbon dioxide emissions.[120] Because of the exceptions for natural gas-fired generators, and a limit on the capacity of regulated power plants (facilities with a combined capacity of less than 100 megawatts were excepted), the practical effect of the law was to limit its applicability to new coal-fired plants in Minnesota built after 2007, and out-of-state coal-fired plants built after 2007 that wanted to import electricity for

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[116] Energy & Env't Legal Inst., 43 F. Supp. 3d at 1174.
[117] Minn. Stat. § 216H.02, subd. 1. The levels sought were "at least 15 percent below 2005 levels by 2015, to a level at least 30 percent below 2005 levels by 2025, and to a level at least 80 percent below 2005 levels by 2050." *Id.*
[118] Minn. Stat. § 216H.03, subd. 3; Heydinger, 15 F. Supp. 3d at 897 (quoting Minn. Stat. § 216H.03, subd. 3).
[119] Heydinger, 15 F. Supp. 3d at 898.
[120] *Id.* (a "long-term power purchase agreement" is "an agreement to purchase 50 [MW] of capacity or more for a term exceeding five years").

consumption in Minnesota.[121] Violators (and potential violators) were subject to legal action, as determined by the Minnesota Public Utilities Commission (MPUC) and Minnesota Department of Commerce (MDOC).[122] The NGEA created an offset exemption, allowing regulated parties to show that contributions to statewide emissions would be offset by a carbon dioxide reduction project.[123]

A myriad of out-of-state actors, including the State of North Dakota and the North Dakota lignite coal industry, and at least one in-state rural electric cooperative challenged the Minnesota Statute on constitutional and preemption grounds.[124]

B. District Court Holds the NGEA Overreaches and Risks Balkanizing the Electricity Market

As an initial matter, the court addressed the scope of the statute due to the disagreement between the parties as to the interpretation of the phrases "no person shall," "import or commit to import," and "new long-term power purchase agreement."[125] The defendants to the action, the MPUC and MDOC, argued the statutory language should be construed as narrowly as possible since it was "unambiguous" in that it "merely regulate[d] the sources of power that Minnesota utilities can rely upon to meet the needs of their customers."[126] Declining to adopt that interpretation, the court determined the statute applied to "all persons," in-state and out-of-state,

[121] *Id.* (other exceptions were made for new large energy facilities proposed prior to the NGEA, certain power purchase contracts entered into prior to the NGEA, certain "essential" new large energy facilities or power purchase agreements); Klass & Henley, *supra* note 5, at 170.
[122] *Id.* at 897-98.
[123] *Id.* at 898 (carbon dioxide reduction projects offset carbon dioxide emissions either by reducing an "existing facilities contribution to [regulated emissions]," or by purchasing carbon dioxide allowances in a verified cap-and-trade program).
[124] *Id.* at 902, 915-16 (plaintiffs argued that the statute had the "objective of reducing carbon dioxide emission regardless of where they occur," required "merchants to seek regulatory approval in Minnesota before undertaking transactions in other states," risked balkanization, and regulated transactions between out-of-state entities).
[125] *Id.* at 908 (explaining that the scope of the statute was relevant to finding on the constitutional claim).
[126] *Id.* (arguing that because a buyer in the regional grid cannot know the actual source of the electricity, it cannot "import or commit to import" power from any source." Thus, it would be "impossible to apply" the statute's provisions to *any other entity* than Minnesota utilities purchasing electricity for consumption in Minnesota. The defendants point out that the regional market sales are for short-term, not long-term energy agreements and do not "implicate the long-term power purchase agreement provisions").

to all transmissions through the regional (MISO) grid, and the long-term power agreements were for capacity, and not energy that is "ultimately bid into the MISO market."[127]

With that broad interpretation, the court then held that the Minnesota statute provisions prohibiting electricity imports from new large energy facilities built outside the state, and prohibiting regulated entities from entering into long-term power purchase agreements that would contribute to statewide power sector carbon dioxide emissions, violated the extraterritoriality principle, and were *per se* invalid.[128] The court declined to limit the principle to price control regulations.[129]

The court called the provisions a "classic example of extraterritorial regulation" in the context of the interconnected electricity market.[130] The court focused heavily on the "boundary-less nature" of the MISO grid in its opinion.[131] The court analogized the transmission of electricity through a grid interconnection to that of information flow over the internet.[132] Specifically, like the internet, a region's electricity grid is boundaryless. Meaning, non-Minnesota generators transmitting electricity on the MISO grid (even to satisfy the electricity demand of non-Minnesota members) could not guarantee that electricity would not be "imported to and contribute to" carbon dioxide emissions in Minnesota.[133] Essentially, this forced out-of-state entities seeking to do business within the MISO grid, but outside Minnesota, to "conduct

[127] *Id.* at 909-10. The Midcontinent Independent System Operator (MISO) is a Regional Transmission Organization (RTO), designated by FERC, and responsible for coordinating, monitoring, and administering the transmission of energy on a regional electricity grid. *Id.* at 895-96.
[128] *Id.* at 910-11 (analyzing the "practical effect" of the provisions by looking at their consequences, interaction with other states' statutes, and the risk of the adoption of a similar statute by many or all other states).
[129] *Id.* at 911 (citing, among others, Edgar v. MITE Corp., 475 U.S. at 642-43).
[130] *Id.* at 916.
[131] *Id.* at 917 (the grid encompasses multiple states and countries, and electricity transmission is indistinguishable).
[132] *Id.* at 917. (analogizing the instant case to that of Am. Booksellers Found. V. Dean, 342 F.3d 96, 103-04 (2003), which struck down internet-use regulations under dormant Commerce Clause grounds because the boundaryless nature of the internet meant the Vermont statute projected its regulation into the jurisdiction of other states, thus creating inconsistent legislation that the Commerce Clause is meant to prohibit).
[133] Two non-Minnesota entities entering into long-term capacity agreements in the MISO market cannot ensure that the electricity produced and transmitted through the grid will not be consumed in Minnesota. *Id.*

their out-of-state business according to Minnesota's terms."[134] The court goes on to posture that such a regulatory regime, if adopted by other states, would bring the electricity market "to a grinding halt."[135]

C. Eighth Circuit Upholds with One of Three Judges Affirming Commerce Clause Grounds

The three-judge panel on appeal to the Eighth Circuit separately concluded that the NGEA provisions were invalid. Judge Loken, who authored the opinion, agreed that the statute impermissibly regulated extraterritorially.[136] Explaining that the "presumption against extraterritoriality does not apply when the statute's text is clear," the opinion goes on to reiterate and affirm the district court's holding, including declining to limit extraterritoriality to price-control or price-affirmation laws.[137] Judge Loken found the challenged provisions had the effect of regulating non-Minnesota importers and generators of electricity in transactions "*wholly*" outside of Minnesota because those entities "injecting electricity into the MISO grid" cannot be certain that electricity will not be consumed in Minnesota; thus, forcing out-of-state entities conducting entirely out-of-state business, to either "unplug" from the MISO market or seek regulatory approval in Minnesota prior to engaging in interstate commerce.[138]

However, Judge Murphy disagreed with Judge Loken's application of the extraterritoriality principle.[139] She pointed out the electricity grid "behaves as an undifferentiated

[134] *Id.* at 901 (one of the out-of-state plaintiffs, Basin Electric Power Cooperative, sought approval from the MPUC to provide coal-fired electricity to its North Dakota customers because it didn't know if the NGEA would prohibit the move. Basin Electric was also stalling on entering into long-term power purchase agreements in other MISO market states out of concern for violating Minnesota's statute).
[135] *Id.* at 918 (stating that the statute-provided exemption for a "carbon dioxide reduction project" approved by the MPUC had the effect of requiring out-of-state entities to get approval from Minnesota before "inject[ing] coal-generated electricity into the MISO grid to serve its [out-of-state] members." This exemption, combined with the provisions requiring in-state utilities to purchase a certain amount of electricity from certain sources, if adopted by many other states, would create a patchwork of regulations applicable to the same regional electricity market).
[136] Heydinger, 825 F.3d at 919.
[137] *Id.* at 921.
[138] *Id.*
[139] *Id.* at 923 (J. Murphy, dissenting).

electromagnetic wave."[140] Specifically, electrons do not "flow" from one connection on the grid to another. Generators effectively energize the grid, and consumers simply draw indiscriminate power from the grid.[141] Thus, the statute could not possibly mean to regulate the flow of electrons from certain generators to Minnesota consumers, rendering Judge Loken's interpretation implausible.[142] In her opinion, and with that understanding of the grid in mind, the NGEA applied only when non-Minnesota entities were transacting to import electricity into Minnesota, or enter in long-term power purchase agreements to import electricity into Minnesota—actions which would not implicate extraterritorial regulation.[143] She would have invalidated the provisions as preempted by the FPA because it regulated wholesale electricity, an area solely regulated by the FERC.[144]

Judge Colloton, on the other hand, would have invalidated the NGEA as preempted under the Clean Air Act provision that calls for states to regulate in-state stationary sources.[145] In his analysis, the offset provisions "encroach[ed] on the source State's authority to govern emission from sources within its borders."[146] Judge Colloton also did not reach the constitutional question. Thus, only one of the three Eighth Circuit panel members invalidated the provisions on the grounds of impermissible extraterritorial regulation.

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140 *Id.* at 924.
141 *Id.* at 924-25.
142 *Id.* at 924 (discussing that "in interpreting a Minnesota statute we presume that the legislature did not intend a result that is absurd, impossible of execution, or unreasonable") (internal quotations omitted).
143 *Id.* at 923. (stating that the NGEA regulates out-of-state entities only when doing business with Minnesota, which does not equate to regulating *wholly* out-of-state transactions). This might fall better in line with the Tenth Circuit.
144 *Id.* at 926 (explaining that the import provision essentially bans wholesale sales in interstate commerce).
145 He also agreed with Judge Murphy's opinion that the statute was preempted by the FPA because the statute banned wholesale sales of electricity, an area of exclusive FERC authority. *Id.* at 928 (J. Colloton, dissenting).
146 *Id.* at 929.

V. Confusion on the Circuits on Extraterritorial Reach

This section is meant to summarize key distinctions from the Eighth, Ninth, and Tenth Circuit decisions that highlight the differences in fact patterns and doctrinal interpretation across the jurisdictions.[147]

A. Fact Patterns Distinguishable by Scope but Also Show Similar Purpose

The state laws at issue in California, Colorado, and Minnesota, regulated different energy sectors utilizing different mechanisms. But what these distinct laws have in common may be more important than what separates them. For instance, the LCFS and RES were determined to apply only to fuel blenders selling ethanol in California, and Colorado utilities providing electricity to Colorado consumers, respectively—i.e., in-state activities.[148] In contrast, the Eighth Circuit held that Minnesota's NGEA language encompassed out-of-state entities and transactions. But, what each of the three share is the fact that they effectively impact some out-of-state conduct for the purpose of promoting renewable energy and GHG reductions.

The goal of California's LCFS was transportation fuel emissions reductions that result from the growing, production, and transportation of ethanol blended and sold in California. The Plaintiffs argued that the undifferentiated chemical and physical properties of ethanol prohibited California from assigning more favorable carbon intensity values to different pathways—i.e., the different values could only be based on location, an illegitimate regulatory mechanism.[149] The Ninth Circuit disagreed, holding California appropriately grounded its rationale in the "harmful properties of fuel."[150] In the context of California's ethanol market, the local harm felt was the

[147] For the sake of comparison, Judge Loken's extraterritoriality doctrine analysis is used here.
[148] Rocky Mt. Farmers Union, 730 F.3d at 1103; Energy & Env't Legal Inst., 43 F. Supp. 3d at 1179.
[149] *Rocky Mountain II*, 843 F. Supp. 2d at 1088.
[150] Rocky Mt. Farmers Union, 730 F.3d at 1103.

effects associated with GHGs.[151] The harmful properties of ethanol are not solely in its burning (consumption) in the State. Meaning, regardless of the identical chemical and physical properties of the ethanol consumed in California, the harmful properties of ethanol include those GHGs associated with its production and transportation.[152] Thus, California accurately took into account the "real extent" of emissions associated with its ethanol market.[153]

Colorado's more "traditional" RES statute required certain utilities to provide Colorado consumers with a certain percentage of electricity from renewable sources. The basis of the Plaintiff's challenge was the physical structure of the regional grid, shared by Colorado and other jurisdictions, which allows the free flow of energy anywhere on that grid, meaning that Colorado's RES would have the effect of decreasing demand for coal-fired power generation, causing out-of-state coal producers to lose business with out-of-state coal-powered generators connected to the grid.[154] The Tenth Circuit held that regardless of the fact that coal producers may see a decrease in demand for their product, the Renewables Quota did not regulate the grid, and its impact on the grid—and thus out-of-state producers and consumers—was "far from obviously negative," if existing at all.[155] Additionally, the court focused on the distinction between quality-of-goods standards and price-control standards, firmly placing Colorado's RES in the former category.

Minnesota's NGEA was similar to Colorado's RES in the respect that it attempted to promote renewable energy sources of electricity, but instead of requiring utilities to purchase a certain percentage of electricity from renewables, it prohibited the importation of electricity from

[151] *Id.* at 1079.
[152] *Id.* at 1080 (discussing that without the lifecycle analysis, GHGs associated with production would be excluded from California's regulation, ignoring the actual benefits of ethanol, "which mostly come before combustion").
[153] *See Id.* at 1107.
[154] Energy & Env't Legal Inst., 793 F.3d at 1171.
[155] *Id.* at 1174.

new coal-powered generators. Again, the basis of the challenge was due in part to the interconnectedness of the grid. Except that in this case, in addition to the judicial construct of the language "no person shall" to apply to non-Minnesota entities, the physical structure of the regional grid contributed to the demise of the importation prohibition and long-term power purchase agreement provisions. Specifically, Judge Loken determined that because of the unregulated flow of electricity in a regional power grid, out-of-state generators could not be certain the electricity they fed to the grid to meet the demand of out-of-state customers would not be consumed in Minnesota, forcing them to seek regulatory approval in Minnesota prior to conducting business wholly outside the state.[156]

B. Comparing Extraterritoriality Application on the Circuits

The Ninth and Tenth Circuits expressed concern with trampling on the federalism principles that encourage states to experiment in developing innovative regulatory regimes, especially those that seek to protect the health and safety of the public and environment.[157]

The Ninth and Eighth Circuits applied the extraterritoriality principle to non-price control or price-affirmation statutes.[158] In contrast, the Tenth Circuit held that the extraterritoriality principle was limited *solely* to price control or affirmation statutes.[159]

The Ninth Circuit and Tenth Circuits both accepted incidental effects on commerce from state regulations that attempted to influence outside behavior.[160] Specifically, the Ninth Circuit found no fault with policies regulating in-state commerce with a "goal of influencing the out-of-

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[156] *See* Heydinger, 825 F.3d at 921.
[157] Rocky Mt. Farmers Union, 730 F.3d at 1105 ("if we were to invalidate regulation every time another state considered a complementary statute, we would destroy the states' ability to experiment with regulation."); *See* Energy & Env't Legal Inst., 793 F.3d at 1174 (explaining that if every state regulation that effected interstate commerce is automatically condemned, valid health and safety laws would be struck down unnecessarily.).
[158] Heydinger, 825 F.3d at 915-16; Rocky Mt. Farmers Union, 730 F.3d at 1079-82.
[159] Energy & Env't Legal Inst., 793 F.3d at 1173.
[160] Rocky Mt. Farmers Union, 730 F.3d at 1103, 1106.

state choices of market participants."[161] Likewise, the Tenth Circuit held that in-state quality control mandates, while likely creating "ripple effects," in-state and out-of-state, do not require almost *per se* invalidation under extraterritoriality.[162] The Eighth Circuit, on the other hand, held that the NGEA sought to reduce emissions occurring entirely outside of Minnesota by preventing MISO market participants from adding new coal-fired generators to the grid (despite the fact that the NGEA applied only to imports of electricity for consumption in Minnesota).[163] This suggests that Judge Loken would not agree with the Ninth and Tenth Circuits that state laws that influence out-of-state conduct are permitted to some degree. In other words, if it is impermissible for regulations to have the effect of reducing emissions occurring entirely outside the state, will states subject to the Eighth Circuit's jurisdiction be permitted to account for out-of-state GHG generators that contribute to in-state emissions?[164]

Lastly, neither the Ninth or Tenth Circuit truly analyzed extraterritoriality as its own brand of jurisprudence. For example, the Ninth Circuit's holding that lifecycle factors were *non-discriminatory* set the foundation to then find that it did not regulate extraterritorially.[165] The Tenth Circuit questioned whether extraterritoriality was a "distinct line of dormant Commerce Clause jurisprudence at all," or just an extension of the discrimination analysis.[166]

VI. CONCLUSION

The essential question is whether the different rulings, upholding California's LCFS and Colorado's RES, while invalidating Minnesota's NGEA, were due to a difference in fact, or in the courts' interpretation of extraterritoriality. This could have important implications for state

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[161] *Id.* at 1103.
[162] Energy & Env't Legal Inst., 793 F.3d at 1173-74.
[163] Heydinger, 825 F.3d at 921-22.
[164] Asked in another way, is the reduction of both in-state and out-of-state GHG emission contributing to local harm a permissible "ripple effect" of a state law regulating the type of electricity sold and consumed within its borders?
[165] Rocky Mt. Farmers Union, 730 F.3d at 1103.
[166] Energy & Env't Legal Inst., 793 F.3d at 1173 (explaining the RES did not "discriminate against out-of-staters).

policies moving forward. Due to the structure of the U.S. grid, and the physical and chemical properties of GHGs, the "practical effect" of state climate change prevention policies will likely be to account for emissions—and therefore some conduct—of out-of-state entities.