Nevada's Energy Choice Initiative: A Case Study of Deregulation, the Dormant Commerce Clause, and Energy Federalism

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I. INTRODUCTION

The fundamental disagreement over energy market regulation is a result of the tension between the desire to promote free markets and the reality that electricity is different than other goods or services. In the opening comments of the Public Utilities Commission of Nevada's (PUCN) report on the Energy Choice Initiative, former PUCN Chairman Reynolds captured this essential conflict:

> The idea of choice and open markets is as quintessentially American as apple pie, baseball, and jazz music . . . . But ensuring a non-stop supply of electricity to every home, business, and government entity in Nevada every second of every day of the year, regardless of the weather or economy, makes it unique from other goods and services.[1]

Because electricity is a unique resource, the regulatory system has traditionally favored the vertically integrated monopoly structure. Chairman Reynolds succinctly captured the tension between the ideals of free market economics and the constraints of providing reliable electricity.

Historically, policymakers at the state and federal level have attempted to balance these ideas. The concept of "Energy Choice" and increased interest in the deregulation of the retail electricity market raise new legal and policy issues to consider. This Article will discuss two of the legal issues: (1) whether the Supreme Court should eliminate the extraterritoriality doctrine of the Dormant Commerce Clause in favor of the *Pike* balancing test, and (2) whether dual sovereignty or concurrent federalism would better serve the regulation of electricity markets. The Nevada Energy Choice

1. PUB. UTIL. COMM'N OF NEV., ENERGY CHOICE INITIATIVE FINAL DRAFT REP., INVESTIGATORY DOCKET NO. 17-10001, at 1 (Apr. 18, 2018) [hereinafter FINAL DRAFT REP].

Initiative put these legal and policy issues into context because it forced the state's regulators to consider the benefits and risks of a deregulated electricity market. The Energy Choice Initiative was ultimately defeated in Nevada; however, the debate over energy deregulation continues today as other states consider deregulation.

The fight over "Energy Choice" or "retail electricity market deregulation" in Nevada demonstrated a disagreement about how to structure electricity markets, economic consequences in the billions of dollars, and thorny legal doctrines like the Dormant Commerce Clause and dual sovereignty. The Energy Choice Initiative was the first attempt to deregulate a state's retail electricity market by ballot initiative and the first include a right to "Energy Choice."[2] The Energy Choice Initiative is one example of the growing interest in retail customer choice or "Energy Choice" across the country. In the past two years, Virginia and Arizona considered retail customer choice and the deregulation of their electricity markets.[3] This Article will discuss Nevada's novel constitutional amendment, the Energy Choice Initiative, that proposed to deregulate Nevada's energy market and the legal and policy implications of the contemporary electricity deregulation movement in the United States. Specifically, this Article will explore the ramifications of deregulation on the extraterritoriality of the Dormant Commerce Clause and energy federalism.

First, this Article will discuss Nevada's response to the two most recent attempts to deregulate their retail electricity market. The first attempt occurred in the 1990s as a component of the broader deregulation movement going on at that time through bills passed by the Nevada State Legislature that were then repealed by the Governor. The second attempt began in 2016 where the Energy Choice Initiative ballot was rejected by Nevadans in 2018.[4] Additionally, this Article examines the relevant case law regarding the duties of the Federal government, the ability of the states to regulate

2. *Id.* at 26.

3. Kim Riley, *Virginia to Consider Controversial Deregulation Proposal Again in 2021*, DAILY ENERGY INSIDER (Nov. 24, 2021), https://dailyenergyinsider.com/news/24300-virginia-to-consider-controversial-deregulation-proposal-again-in-2021/ [https://perma.cc:/D6LV-JVBA]; Iulia Gheorghiu, *Bipartisan bill aims to end Dominion's Monopoly in Virginia*, UTILITY DIVE (Jan. 8, 2020), https://www.utilitydive.com/news/bipartisan-bill-aims-to-end-dominions-distribution-monopoly-in-virginia/569977/ [https://perma.cc:/PJ8S-K2BH].

4. 2018 Petitions and General Election Ballot Questions, NEV. SEC. OF STATE, https://www.nvsos.gov/sos/elections/initiatives-referendums/2018-petitions [https://perma.cc:/LYU2-3TYG].

their energy markets, and the considerations that policymakers should understand when considering energy market restructuring. Finally, an analysis of the potential benefits and risks of energy deregulation is included to exemplify the differences between state and federal jurisdiction.

To resolve federalism energy disputes over jurisdiction the courts should recognize that: (1) the extraterritorial doctrine of the commerce clause is outdated and inappropriate, and (2) concurrent jurisdiction better serves the modern energy market than the traditional doctrine of dual sovereignty. First, this comment will join the chorus of scholars and judges who seek to eliminate the extraterritoriality doctrine in favor of the *Pike* balancing test. Second, Part VI(A) argues that the resolution of energy federalism disputes requires the flexible mindset of "cooperative federalism." The *Pike* balancing test and "cooperative federalism" would both support the ability of states to experiment while increasing federal oversight. The elimination of the extraterritoriality doctrine of the commerce clause could allow for state innovation. Similarly, concurrent jurisdiction would enable cooperative federalism that would expand, or contract jurisdiction based on factual and pragmatic considerations.[5] In conclusion, the analysis of energy market regulation in Nevada and the United States will demonstrate that the future of energy federalism is dependent upon the court's commerce clause jurisprudence and the balance of state and federal power.

II. ELECTRICITY MARKET REGULATION IN THE UNITED STATES

The jurisdiction of electricity markets in the United States can be characterized as concurrent regulation by both federal and state Government with duties distinct for each level of government. In general, the federal government regulates wholesale energy markets and the states regulated retail markets. The electric industry is commonly divided into four categories: generation, transmission, distribution, and customer service. Traditionally, a vertically integrated electric company incorporated all four of these components. First, a utility would generate the electricity by building a power plant or purchasing energy from the wholesale market. Second, a utility would transmit the electricity by constructing transformers to step the voltage up for transmission and transmission lines to carry the electricity long distances. Third, the utility would distribute the electricity with a neighborhood transformer to step down the voltage and neighborhood lines that ultimately lead to the customer's home. Finally, the utility would handle the customer service and billing components of providing electric service.

5. Jim Rossi, *The Brave New Path of Energy Federalism*, 95 TEX. L. REV. 399, 400 (2016).

This traditional model persists to this day in many states; however, advancements in technology, Supreme Court case law, and regulatory orders have moved the United States away from the traditional model of utility regulation towards a "deregulated" electricity market structure. The four core aspects of providing electric service (generation, transmission, distribution, and customer service) are now often provided by market participants other than the investor-owned utility. As a result, the electricity markets of the United States have become a patchwork of "deregulated" and "traditional" electricity markets.

A. The Traditional Model of Electricity Market Regulation

The electricity market has fundamentally changed since the early Twentieth Century, however, many of the legal concepts are relevant today. In Bonbright's influential paper, he observed that because of "its inherent technical characteristics," an electric public utility could not "be operated with efficiency and economy, unless it enjoys a monopoly of its market."[6] In the Supreme Court case, *Hope*, the Court found that every State's public utility commission must achieve fairness and reasonableness in addressing the concerns of both the public and the utility.[7] Thus, the vertically integrated or public utility model is subject to the "just and reasonable rates" doctrine, which requires the Federal Energy Regulatory Commission (FERC) and state public utilities commissions to ensure that rates are just and reasonable for all customers. In *Otter Tail*, the Supreme Court held that monopoly power cannot be used to destroy competition in violation of Clause § 2 of the Sherman Act.[8] "*Otter Tail*'s theory collided with the Sherman Act as it sought to substitute for competition anticompetitive uses of its dominant economic power."[9] The traditional vertically integrated monopoly system persisted until the Federal Public Utility Regulatory Policies Act of 1978 (PURPA).[10]

6. JAMES C. BONBRIGHT ET AL., PRINCIPLES OF PUBLIC UTILITY RATES, 383–84 (1988).
7. Federal Power Commission v. Hope National Gas Company, 320 U.S. 591 (1944).
8. Otter Tail Power Co. v. United State, 410 U.S. 366, 380 (1973).
9. *Id.*
10. KENNY GUINN CENTER FOR POLICY PRIORITIES, RESTRUCTURING THE ELECTRICITY MARKET IN NEVADA? POSSIBILITIES, PROSPECTS, AND PITFALLS 13 n.i (2018) [hereinafter GUINN CENTER].

B. State Jurisdiction: Electricity Market Regulation in Nevada

Nevada regulates electricity markets, like most other states, using the traditional model of electricity regulation. The PUCN and the Attorney General's Bureau of Consumer Protection are the primary agencies involved with the regulation of electricity in Nevada.[11] The PUCN was first established as the Railroad Commission of Nevada in 1908[12] to regulate the railroad industry. Since the inception of the PUCN, the goal has been to respond to the needs of a rapidly developing industry and to protect the consumer. The same goals exist for contemporary regulation of the electricity and telecommunications industry. Accordingly, the primary duty of the PUCN is to set rates.

This regulatory authority is vested in the PUCN through the Nevada State Legislature and can be traced to the Nevada State Constitution.[13] The basic statutory duties of the PUCN set forth in state statute include: (1) providing for the fair and impartial regulation of public utilities; (2) providing for the safe, economic, efficient, prudent and reliable operation and service of public utilities; and (3) balancing the interests of customers and shareholders of public utilities by providing public utilities with the opportunity to earn a fair return on their investments while providing customers with just and reasonable rates.[14] The most essential duty is the power to establish rates.[15] As a result, "[e]very cent of the monthly utility bills received by most Nevada residents and businesses is scrutinized by the PUCN to ensure it is fair and reasonable."[16] This takes place through the PUCN investigatory process that often involves extensive comment and investigation as seen in the Energy Choice Initiative investigatory docket.[17] The PUCN exercises the typical powers of the state regulatory agency charged with the regulation of electricity; however, this traditional allocation of authority has been challenged by changes in technology and the deregulation of electricity markets.

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11. FINAL DRAFT REP., *supra* note 1, at 61.

12. FIRST ANNUAL REP. OF THE RAILROAD COMM'N OF NEV. 4 (Gazette Publ'g Co., Apr. 10, 1908).

13. *See id.* at 583 ("The authorities of this and other jurisdictions are uniform in holding that the power to regulate and establish rates which a [utility] may lawfully charge for its service, is a legislative power.").

14. NEV. REV. STAT. ANN. §§ 703.310, 703.373, 704.120, 704.001, 703.376 (West 2021) (describing Nevada Public Utility jurisdiction over energy market regulation).

15. Degiovanni, 197 P. at 583 ("The authorities of this and other jurisdictions are uniform in holding that the power to regulate and establish rates which a [utility] may lawfully charge for its services, is a legislative power.").

16. FINAL DRAFT REP., *supra* note 1, at 12.

17. *Id.* at 21 (citing that the PUCN received "1,273 pages of questions and voluntary comments" from the "[fifty] entities and/or persons [that] filed comments.").

C. The Transition Towards the Deregulation of Electricity Markets

After the energy price shocks of the 1970s and early 1980s, policymakers began to question the efficiency of the traditional vertically integrated monopoly system of providing energy. The Public Utility Regulatory Policies Act (PURPA) began the deregulation movement in the United States.[18] The electricity deregulation movement began with the natural gas industry.[19] This trend continued with FERC orders expanding the ability of independent power producers to sell power on the open market.[20] Case law further allowed electricity markets to open in the United States.[21] In 2008, *Morgan Stanley* established that the requirement for wholesale-electricity rates to be "just and reasonable" is incapable of precise judicial definition and FERC is afforded great deference.[22] This creates a tension between the desire to "deregulate" and promote the free market with the requirement for electricity rates to be "just and reasonable."

The current structure of electricity markets in the United States is a combination of the traditional regulated utility model, the deregulated model, and a hybrid approach. Advocates of deregulation have encouraged FERC to be more aggressive in their promotion of electricity market deregulation since the early 1990s.[23] However, FERC has not overtly

18. *See* GUINN CENTER, *supra* note 10.

19. *See, e.g.*, CHRISTOPHER JAMES CASTANEDA, REGULATED ENTERPRISE: NATURAL GAS PIPELINES AND NORTHEASTERN MARKETS, https://www.google.com/books/edition/Regulated_Enterprise/MX3Gnr5pyHoC?hl=en&gbpv=0 [https://perma.cc/UF3T-Q9E2]; RICHARD VIETOR, ENERGY POLICY IN AMERICA SINCE 1945: A STUDY OF BUSINESS-GOVERNMENT RELATIONS 60–70 (Cambridge Univ. Press, 1984).

20. *See* Federal Energy Guidelines: Fed. Energy Regulatory Comm'n Reports 18 CFR § 35.28 (1996), https://www.ferc.gov/industries-data/electric/industry-activities/open-access-transmission-tariff-oatt-reform/history-oatt-reform/order-no-888 [https://perma.cc/ZU82-8CLZ]; Andy Colthorp, *FERC Order 841*: *US About to Take 'Most Important' Step Towards Clean Energy Future*, ENERGY STORAGE NEWS (July 13, 2020), https://www.energy-storage.news/news/ferc-order-841-us-about-to-take-most-important-step-towards-clean-energy-fu [https://perma.cc/D3YN-U58R].

21. *See* San Diego Gas & Elec. v. Fed. Energy Regulatory Comm'n, 904 F.2d 727 (D.C. Cir. 1990); Wyoming v. Oklahoma, 502 U.S. 437 (1992).

22. Morgan Stanley Cap. Grp. Inc. v. Pub. Util. Dist. No. 1 of Snohomish Cty., Wash., 554 U.S. 527, 532 (2008) (hereinafter *Morgan Stanley*) (holding that "'just and reasonable' is obviously incapable of precise judicial definition, and we afford great deference to the Commission in its rate decisions").

23. *See generally* Jess B. Kincaid, *Blackouts and Oversupply or Regulatory Planning and Cooperation*, LEWIS & CLARK ENVTL L., Vol. 43, No. 3 (Summer 2013), https://www.jstor.org/stable/43267676?mag=local-energy-deregulation-makes-climate-disasters-worse&seq=1#metadata_info_tab_contents [https://perma.cc/KX9R-JAX8].

supported the deregulation movement, despite several orders expanding market access. For example, FERC Order No. 1000 (2015) and FERC Order No. 890 (2007) expanded the access of independent power producers to participate in the market of power on the open market and for customers to procure energy outside of the traditional utility model by requiring investor-owned utilities to open their transmission lines to competition.[24] There has been a shift from investor-owned-utility (IOU) model to a regional-transmission-operator (RTO) or independent systems operator regulatory system (ISO).[25] One sign of the growth of RTOs may be that California passed enabling legislation that would allow the California ISO to transform into an RTO.[26] While there has been a shift towards open energy markets, these developments run in parallel, rather than in-line, with case law requiring rates to be just and reasonable.[27]

In conclusion, the different state approaches to energy policy in the United States raise significant difficulties regarding the Dormant Commerce Clause. The lack of direction from FERC and the continued challenges to the IOU model of regulation, or "traditional model," demonstrates that these issues are persistent, and courts must consider changing their Dormant Commerce Clause jurisprudence and approach to federalism to better address these issues.

III. ELECTRICITY MARKET DEREGULATION IN THE UNITED STATES

Of the seventeen states that have either partially or fully deregulated their electricity markets, none have deregulated by establishing energy policy through a state constitutional amendment.[28] A "regulated electricity market" means that "[t]he utility company owns the infrastructure and transmission

24. Fed. Energy Regulatory Comm'n, Order No. 1000 (2015); Fed. Energy Regulatory Comm'n, Order No. 890 (2007).

25. Francisco Flores-Espino, Tian Tian, Ilya Chernyakhovskiy, and Megan Mercer, *Competitive Electricity Market Regulation in the United States: A Primer*, NAT'L RENEWABLE ENERGY LAB. (2016), https://www.nrel.gov/docs/fy17osti/67106.pdf [https://perma.cc/4E4D-MPJK].

26. CAL. PUB. UTIL. CODE §§ 352, 359.5, 365.2, 399.4.

27. *See generally* Fed. Energy Regulatory Comm'n v. Elec. Power Supply Ass'n, 577 U.S. 260 (2016); Fed. Power Comm'n v. Southern Calif. Edison Co., 376 U.S. 205 (1964); FPC v. Conway Corp., 426 U.S. 271 (1976); San Diego Gas & Electric v. Fed. Energy Regulatory Comm'n, 904 F.2d 727 (D.C. Cir. 1990); Union P. R.R. v. Adams, 362 P.2d 450, (1961); United Gas Pipe Line Co. v. Mobile Gas Service Corp., 350 U.S. 332 (1956); Wyoming v. Oklahoma, 502 U.S. 437 (1992).

28. *Deregulated Energy Markets*, ELEC. CHOICE (May 5, 2021), https://www.electricchoice.com/map-deregulated-energy-markets/ [https://perma.cc/3VBY-A3D8].

lines then sells it directly to the customers."[29] Benefits of this model "include stable prices and long-term certainty."[30] In contrast, a "'deregulated electricity market' allows for the entrance of competitors to buy and sell electricity by permitting market participants to invest in power plants and transmission lines."[31] The benefits of this model include price comparison, flexible contracts (fixed, indexed, hybrid), and an increased availability of green pricing programs.[32] "Deregulation" does not mean that electricity will not be regulated. As such, "deregulation" is often referred to as "restructuring" and this Article will use both terms interchangeably. As will be shown below, the United States remains divided on whether to establish "deregulated electricity markets" or "regulated electricity markets."

A. The Patchwork of Hybrid, Traditional, and Deregulated Markets

It would be futile to attempt to compare the "deregulated" states that have decided to deregulate or restructure their electricity markets with states operating under a traditional, regulated electricity market. Research institutions, including the Energy Information Administration (EIA), and public utility commissions across the nation have cautioned against using these "apples to oranges" comparisons to make determinations about electricity markets.[33] A fundamental fact of deregulation is that no state has an energy market that is completely deregulated.[34] The closest state is Texas with "approximately eighty-five percent of the state having access to Energy Choice."[35] "Everything is bigger in Texas, including the success of deregulated energy" according to Rhythm Ops, LLC, a retail electricity provider in Texas.[36] Furthermore, there is substantial variation among the different electricity market structures whether the state has a deregulated,

29. *Regulated vs. Deregulated Electricity Markets*, ENERGY WATCH INC. (May 2021), https://energywatch-inc.com/regulated-vs-deregulated-electricity-markets/ [https://perma.cc/EL2W-2MPD].
30. *Id.*
31. *Id.*
32. *Id.*
33. GUINN CENTER, *supra* note 10, at iii.
34. Ed Hirs, *Why the Texas Power Market Failed*, YALE INSIGHT (Mar. 23, 2021), https://insights.som.yale.edu/insights/why-the-texas-power-market-failed [https://perma.cc/45LK-AFQM].
35. *Deregulated Energy Markets*, *supra* note 28.
36. Rhythm Team, *Electricity Deregulation in Texas*, RHYTHM (July 9, 2021), https://www.gotrhythm.com/blog/rhythm-news/electricity-deregulation-in-texas [https://perma.cc/UD6R-8FU2].

regulated, or a hybrid model of regulation. Texas demonstrates their fierce independent spirit in their electricity with their unique system. "The Electric Reliability Council of Texas (ERCOT) market presents an especially interesting case for study and a baseline for comparison given its wide regard as the most successful retail market in North America."[37] However, that presumption may have come under serious question after the energy crisis in Texas.[38]

Instead of attempting to describe the vast options of electricity market structures, this section discusses how states exercise their autonomy in determining which structure they utilize. Despite the extensive federal involvement in federal energy markets, due to commerce clause concerns, states exercise a significant amount of autonomy when determining how to structure their retail residential electricity markets.

IV. ATTEMPTS TO DEREGULATE NEVADA'S WHOLESALE ELECTRICITY MARKET

The development of electricity market regulation in Nevada from the 1990s to the present day exemplifies the Dormant Commerce Clause and federalism issues raised by deregulation. Specifically, a constitutional right to "Energy Choice" could violate the extraterritoriality doctrine of the Dormant Commerce Clause. Furthermore, the balance of state and federal power is complicated by states like Texas that chose to deregulate their electricity markets.

A. The First Attempt: The Deregulation Movement of the 1990s

During the 1990s, many states, including Nevada, considered or completed a restructuring of their electricity markets. In 1995, the first attempt to deregulate Nevada's electricity market was met with opposition due to concerns about the California energy crisis.[39] "The Nevada Legislature passed a law in 1997 (AB 366) that directed the state to open its energy market. However, this ultimately would not come to fruition."[40] As Nevada

37. Adam Swadley and Mine Yücel, *Did Residential Electricity Rates Fall After Retail Competition? A Dynamic Panel Analysis*, FED. RESERVE BANK OF DALL. (May 2011), https://www.dallasfed.org/-/media/documents/research/papers/2011/wp1105.pdf [https://perma.cc/X9Y5-WZQC].

38. Robin Lloyd, *Massive Power Failure Could Finally Cause Texas to Connect with the Nation's Power Grid*, SCI. AM. (Feb. 19, 2021), https://www.scientificamerican.com/article/massive-power-failure-could-finally-cause-texas-to-connect-with-the-nations-power-grids1/ [https://perma.cc/U2BT-ADVX].

39. *See* FINAL DRAFT REP., *supra* note 1.

40. SB547: A History of NRS 704B and Energy Deregulation in Nevada, Senator Chris Brooks, Nevada District 3 at 4, https://www.leg.state.nv.us/App/NELIS/REL/80th

watched the Western Energy Crisis unfold, the risks of blackouts and cost increases were cited as key reasons the proposal did not go forward.[41] As a result, in 2001, Nevada passed Assembly Bill 369 and Assembly Bill 661 to retain their regulated utility structure and "to protect Nevada's economy and ratepayers."[42] In support of the 2001 legislation, former Nevada Governor Kenny Guinn said, "[w]atching our neighbors next door [in California], I [cannot] in good faith let [energy deregulation] continue to happen."[43] Electricity market deregulation would not be considered seriously by policymakers in Nevada until the proposed amendment to Nevada's constitution in 2016, the Energy Choice Initiative.[44] Although Nevada did not transition to a deregulated energy market, policymakers in Nevada implemented laws to provide Energy Choice for commercial customers,[45] retail net-metering programs,[46] and rural electric cooperatives.[47]

B. The Second Attempt: The Energy Choice Initiative

The 2016 Energy Choice Initiative proposal to voters was an attempt to revive the deregulation proposal of the late 1990s. The desire to deregulate had persisted since the 1990s but this was the first attempt to determine energy policy with an amendment to a state constitution. The PUCN found that the Energy Choice Initiative was unique "because it will amend and add new provisions to the Nevada State Constitution that have never existed in any other state's constitution in the United States."[48] In a report to the Nevada State Legislature, Nevada State Senator Brooks stated that "[The Energy Choice Initiative] passed in 2016, but failed by a decisive margin [sixty-seven percent to thirty-three percent] in 2018. Nevadans were concerned about emulating the mistakes that California and Nevada made

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2019/ExhibitDocument/OpenExhibitDocument?exhibitId=43883&fileDownloadName=0523SB547a_BroC%20Presentation.pdf [https://perma.cc/9WCB-2CL4].

41. *Id.*
42. *Id.*
43. *Id.* at 5.
44. NEVADA SECRETARY OF STATE, *Statewide Ballot Questions: To Appear on the November 8, 2016 General Election Ballot* at 42, https://www.nvsos.gov/sos/home/showdocument?id=4434 [https://perma.cc/274J-3DJB].
45. *See* Nev. Rev. Stat. § 704B.080 (2019) (defining "Eligible customer").
46. Nev. Assemb. B. 405 (2017) (establishing net metering rate structure for customers that have purchased a solar system to offset their monthly bill).
47. *About Us,* VALLEY ELEC. ASS'N, https://vea.coop/about-us/ [https://perma.cc/NV7A-VEDY].
48. FINAL DRAFT REP, *supra* note 1, at 26.

in the late 1990's."[49] Nevada's Energy Choice Initiative failed in 2018 for the same reason deregulation failed the first time.

The Energy Choice Initiative would have added 453 words to the text of the Constitution of the State of Nevada.[50] "To place this into perspective, the First Amendment to the United States Constitution consists of only [forty-five] words."[51] The text of the Energy Choice Initiative (Ballot Question Three) proposed that Article I of the Constitution of the State of Nevada be amended to add the following language:

> 1. Declaration of Policy
>
> The people of the State of Nevada declare that it is the policy of this State that **electricity markets be open and competitive** so that all electricity customers are **afforded meaningful choices among different providers**, and that economic and regulatory burdens be minimized in order to promote competition and choices in the electric energy market. This Act shall be liberally construed to achieve this purpose.
>
> 2. Rights of Electric Energy
>
> Effective upon the dates set forth in subsection 3, every person, business, association of persons or businesses, state agency, political subdivision of the State of Nevada, or any other entity in Nevada has the **right to choose the provider of its electric utility service**, including but not limited to, selecting providers from a competitive retail electric market, or by producing electricity for themselves or in association with others, and shall not be forced to purchase energy from one provider. Nothing herein shall be construed as limiting such persons' or entities' **rights to sell, trade or otherwise dispose of electricity.**
>
> 3. Implementation
>
> (a) Not later than July 1, 2023, the Legislature shall provide by law for provisions consistent with this Act to establish an open, competitive retail electric energy market, to ensure that protections are established that entitle customers to safe, reliable, and competitively priced electricity, including, but not limited to, **provisions that reduce costs to customers**, protect against service disconnections and unfair practices, and **prohibit the grant of monopolies and exclusive franchises for the generation of electricity**. The Legislature need not provide for the deregulation of **transmission or distribution of electricity** in Order to establish a competitive market consistent with this Act.
>
> (b) Upon enactment of any law by the Legislature pursuant to this Act before July 1, 2023, and not later than that date, any laws, regulations, regulatory orders or other provisions which conflict with this Act will be void. However, the

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49. Senator Chris Brooks, *SB547: A History of NRS 704B and Energy Deregulation in Nevada*, https://www.leg.state.nv.us/App/NELIS/REL/80th2019/ExhibitDocument/OpenExhibitDocument?exhibitId=43883&fileDownloadName=0523SB547a_BroC%20Presentation.pdf [https://perma.cc/9KJR-2WS7].

50. FINAL DRAFT REP, *supra* note 1, at 26.

51. *Id.*

> Legislature may enact legislation consistent with this act that provides for an open electric energy market in part or in whole before July 1, 2023.
>
> (c) Nothing herein shall be construed to invalidate Nevada's public policies on renewable energy, energy efficiency and environmental protection or **limit the Legislature's ability to impose such policies** on participants in a competitive electricity market.
>
> 4. Severability
>
> Should any part of this Act he declared invalid, or the application thereof to any person, thing or is held invalid, such invalidity shall not affect the remaining provisions or application of this Act which can be given effect without the invalid provision or application, and to this end the provisions of this Act are declared to be severable. This subsection shall be construed broadly to preserve and effectuate the declared purpose of this Act.[52]

According to the PUCN report on the Energy Choice Initiative and the opponents of the Energy Choice Initiative, Section Two of the constitutional amendment appeared to create at least two new state constitutional rights for Nevadans. However, the proponents of the Energy Choice Initiative argued that it did not.[53] The first apparent constitutional right is the right of every Nevadan "to choose the provider of its electric utility service. . . ."[54] This right is qualified by the phrase in Section One that requires "meaningful choice." "Plainly understood, this new 'right to choose' being granted to Nevadans cannot be a superficial or a technical choice—it has to be one of meaning and substance."[55] The second constitutional right is the right "to sell, trade or otherwise dispose of electricity."[56] No other state contains a constitution with provisions related to the right to energy, and there is no case law that dictates what it means to have a constitutional right to energy. "Arguably, this second right reasonably creates a new constitutional right in Nevada to sell, trade or otherwise dispose of electricity generated from coal-fired power plants, nuclear fission, or even something a 'backyard inventor' may create on his or her own."[57] That argument is difficult to square with the contention of Energy Choice Initiative advocates that the proposal would *increase* renewable energy development and procurement. The Supreme Court has long held that certain constitutional rights are fundamental

52. *Id.* at 27–28 (emphasis added by the PUCN report on the Energy Choice Initiative).
53. *Id.* at 32.
54. *Id.* at 27.
55. *Id.* at 28.
56. *Id.*
57. *Id.*

and personal in nature.[58] The Energy Choice Proposal would have elevated "the importance of buying and selling electricity to the level of those other sacred rights that define us as Nevadans and, of course, Americans."[59]

The creation of the constitutional right to "Energy Choice" would have created legal ambiguities and complications due to the Dormant Commerce Clause. Ultimately, the PUCN investigation found:

> A disconnect appears between the plain language of the Energy Choice Initiative, how it has been advertised, and what facts and reasoned analysis show on the record. Legal ambiguity will be resolved by the Nevada Supreme Court and/or a federal court. It is difficult to understand exactly what it means and its full scope with confidence. Or to reconcile what voters may have intended or expected when they voted to approve it.[60]

If the Energy Choice Initiative had passed in Nevada, the ambiguity of this novel constitutional amendment would have been resolved by the courts. In 2020, the Florida Supreme Court encountered a similar amendment that proposed to deregulate their electricity market.[61] The Florida Justices unanimously rejected the measure finding that "[t]he ballot title and summary mislead the voter by implying that investor-owned utility customers will still have all the consumer protections they have under current law, when, in fact, the proposed amendment will strip away existing consumer protections."[62] The constitutional right to "Energy Choice" is novel and has been viewed with skepticism by most of the courts that have encountered it.

V. THE BENEFITS OF DEREGULATION

The cornerstone of the argument for "Energy Choice" or the "deregulation" of retail electricity markets is that free markets will lower rates, create jobs, and increase the use of renewable energy. Advocates of energy market deregulation argue that deregulation will lower rates and promote the development of renewable energy. This section will briefly discuss the arguments used by the deregulation movement to further exemplify the

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58. *See*, *e.g.*, Obergefell v. Hodges, 576 U.S. 644, 647 (2015) (holding that "[t]he right to marry is a fundamental right inherent in the liberty of the person").

59. FINAL DRAFT REP., *supra* note 1, at 29.

60. *Id.* at 25.

61. *See* Lawrence Mower, *Florida Supreme Court rejects 'Energy Choice' idea*, TAMPA BAY TIMES (Jan. 9, 2020), https://www.tampabay.com/florida-politics/buzz/2020/01/09/florida-supreme-court-rejects-energy-choice-idea/ [https://perma.cc/SJ6C-LJ7A].

62. Keith C. Hetrick et al., Advisory Opinion to the Attorney General Re: Right to Competitive Energy Market for Customers of Investor-Owned Utilities; Allowing Energy Choice, (FIS) at 13 (Apr. 18, 2019), https://efactssc-public.flcourts.org/casedocuments/2019/328/2019-328_brief_133065_initial20brief2dmerits.pdf [https://perma.cc/FU4A-MSJM].

Dormant Commerce Clause and federalism considerations that are raised by these proposals.

A. Deregulation Will Benefit All Classes of Ratepayers, Eventually

The chief argument for Energy Choice is the classic idea that free markets promote innovation and competition, which spurs lower prices for consumers. Proponents argue that competition could spur lower prices in the long run if widespread deregulation occurred with encouragement by FERC.[63] While FERC has allowed electricity markets to open for additional competition, this has been a gradual process largely regarding concerns about the reasonability of rates.[64] However, there is a substantial amount of research that suggests that "[t]he effect of moving to a competitive retail electricity market is mixed across states, but generally appears to lower prices in states with high participation and raise prices in states that have little customer participation."[65] The most ardent advocates of deregulation believe that federally orchestrated restructuring would create a more competitive, efficient industry.[66] The aforementioned FERC orders have opened up the energy market to independent suppliers to compete side by side with utility companies.[67] Advocates of rapid deregulation argue that the current piecemeal approach to deregulation may lead to risks for consumers and the economy.

In Nevada, there was substantial disagreement among the parties about whether deregulation would result in lower rates for retail customers. Texas was often used as an example during the investigation into the Energy Choice Initiative. Then Texas Governor George W. Bush famously said, "[c]ompetition in the electric industry will benefit Texans by reducing

63. Mine Yücel & Adam Swadley, *Did Residential Electricity Rates Fall After Retail Competition? A Dynamic Panel Analysis* 15–16 (Fed. Rsrv. Bank of Dall., Working Paper No. 1105, 2011), https://www.dallasfed.org/~/media/documents/research/papers/2011/wp1105.pdf [https://perma.cc/Z8F8-PZCQ].

64. *See* Morgan Stanley Cap. Grp. Inc. v. Pub. Util. Dist. No. 1, 554 U.S. 527, 547 (noting that "[m]arkets are not perfect, and one of the reasons that parties enter into wholesale-power contracts is precisely to hedge against the volatility that market imperfections produce.").

65. Yucel & Swadley, *supra* note 63, at 4.

66. Peter Navarro, *Electric Utilities: The Argument for Radical Deregulation*, HARV. BUS. REV., Jan.-Feb. 1996. https://hbr.org/1996/01/electric-utilities-the-argument-for-radical-deregulation [https://perma.cc/J83C-99RF].

67. FED. ENERGY REGULATORY COMM'N, ORDER NO. 636, PIPELINE SERVICE OBLIGATIONS (1992); FED. ENERGY REGULATORY COMM'N, ORDER NO. 436, REGULATION OF NATURAL GAS PIPELINES AFTER PARTIAL WELLHEAD DECONTROL (1985).

monthly rates."[68] For the first few years, that seemed to be true for Texas. However, analysis by the Wall Street Journal found that, "From 2004 through 2019, the annual rate for electricity from Texas's traditional utilities was [eight percent] lower, on average, than the nationwide average rate, while the rates of retail providers averaged [thirteen percent] higher than the nationwide rate."[69] In summary, the difficulty of performing economic analysis makes prediction about retail rates unreliable.

B. Deregulation Promotes the Development of Renewable Energy

Advocates of Energy Choice and deregulation argue that the opening of markets will spur technological development and competition which will increase renewables.[70] The cheap cost of renewable energy has prompted some to argue that the deregulation of electricity markets will increase the availability of renewables, because a free market will seek the cheapest option.[71] Deregulation may promote the development of renewable energy by allowing customers to choose energy suppliers that use renewable energy. In a regulated market, consumers must purchase electricity from their local utility at prices regulated by the state and federal governments. In a deregulated market, consumers can choose from a variety of electricity service providers based on their particular needs. For example, in Texas, Gexa Energy offers plans that use 100% renewable energy.[72] In summary, the opening of markets to competition and the ability for customers to choose green electricity providers indicate that deregulation could help promote the development of renewable energy.

C. The Argument for Deregulation in Nevada

The advocates of the Energy Choice Initiative ranked their priorities when drafting the ballot measure as follows: (1) choice, (2) renewables, and

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68. Tom McGinty & Scott Patterson, *Texas Electric Bills Were $28 Billion Higher Under Deregulation*, WALL ST. J., Feb. 24, 2021, l, https://www.wsj.com/articles/texas-electric-bills-were-28-billion-higher-under-deregulation-11614162780 [https://perma.cc/XW29-24YR].

69. *Id.*

70. Navarro, *supra* note 66.

71. *Vote Yes on Question 3 for Energy Choice in Nevada*, ELEC. CHOICE, https://www.electricchoice.com/blog/vote-yes-choice-nevada/ [https://perma.cc/KNN2-RK6G].

72. Dave Kovaleski, *Gexa Energy in Texas offers 100 percent renewable energy to customers*, DAILY ENERGY INSIDER (Nov. 24, 2020), https://dailyenergyinsider.com/news/28116-gexa-energy-in-texas-offers-100-percent-renewable-energy-to-customers/#:~:text=RenewableSourceState-,Gexa%20Energy%20in%20Texas%20offers%20100%20percent%20renewable%20energy%20to,to%20100%20percent%20renewable%20energy [https://perma.cc/RD6C-HNCT].

(3) jobs.[73] The first goal of Energy Choice was designed to enable consumers of all rate classes to have "meaningful choices."[74] During the PUCN investigation, the stakeholders agreed that this was the essential part of the proposal. The second goal was to promote renewables by "opening up the market to companies that provide clean energy."[75] The advocates of Energy Choice estimated that the Energy Choice Initiative would have created 34,000 new jobs in the state.[76] The proponents further claimed that the Energy Choice Initiative would have reduced electric bills for residential retail customers.[77] Despite these supposed benefits, Nevada voters determined that the risks of deregulation outweighed the benefits when they rejected the initiative at the ballot box.

VI. THE RISKS OF DEREGULATION

A. Deregulation May Disproportionality Benefit Certain Classes of Ratepayers

The complexity of restructuring and the unique characteristics of each state's energy system make it impossible to accurately predict the costs or benefits of deregulation for a particular state. Several reports have found that it is difficult to determine the impact to ratepayers because restructuring has occurred differently in each state.[78] The primary source of data is from the U.S. EIA. However, by their own admission, the EIA data should not be used for these sorts of comparisons, given the various factors that determine electricity rates (such as weather and other economic shocks) that are difficult to predict.[79] To attempt to account for these variations, this section will focus on Nevada once again.

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73. FINAL DRAFT REP., *supra* note 1, at 25.
74. *Id.* at 24.
75. *Vote Yes on Question 3 for Energy Choice in Nevada*, *supra* note 71.
76. *Id.*
77. *See* Riley Snyder, Indy Fact Check: Claims of lower electric rates from energy choice backers need significant context, THE NEVADA INDEPENDENT (Aug. 19, 2018, 2:05 AM), https://thenevadaindependent.com/article/indy-fact-check-claims-of-lower-electric-rates-from-energy-choice-backers-need-significant-context [https://perma.cc/62TC-88G5]. Advocates of the ballot question have been quick to point out individual success stories for certain states that have move to a retail market.
78. GUINN CENTER, *supra* note 10, at iii (quoting EIA reports that caution against "apples to oranges" comparisons).
79. *Id.* at ii-iii.

In Nevada, it was unclear whether the proposed Energy Choice Initiative would have reduced rates for all classes of customers. The PUCN undertook a study of the Energy Choice Initiative and produced the "Draft Report of Findings on the Energy Choice Initiative" with the intent to create "an objective resource to help educate all Nevadans, so that informed decisions are made regarding Nevada's energy future."[80] The PUCN investigation into the Energy Choice Initiative conducted workshops and hearings over a year period.[81] The hearings attracted attention from energy lawyers, policymakers, and advocates from across the country. When PUCN Chairman Reynolds asked the proponents of Energy Choice if they could assure him that restructuring would reduce costs for customers, they could not.

> CHAIRMAN REYNOLDS: . . . "[I]s there anybody here [in Carson City] in participation who would want to go on the record and guarantee that this petition will lower rates for the average residential families, if passed? Who can give that assurance?
>
> (No Response)
>
> CHAIRMAN REYNOLDS: Is there anyone in Las Vegas who would want to go on the record and give that assurance that this petition will lower rates for residential families?
>
> (No Response)
>
> CHAIRMAN REYNOLDS: And I want to just point out that nobody is coming up to the microphone.[82]

The complexity of electricity makes it difficult, if not impossible, for the advocates of Energy Choice to establish that deregulation will lower prices for retail customers. In Nevada, it was clear that deregulation would benefit large commercial customers like casino moguls, such as Sheldon Adelson, who helped fund the proposal.[83] Deregulation may benefit the economy as a whole; however, those benefits will likely be realized at different times, and the benefits to commercial and retail customers would be disproportionate. In conclusion, for Nevada, there is evidence that deregulation may not decrease the electricity rates for residential consumers.

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80. FINAL DRAFT REP., *supra* note 1, at 1.
81. *Id.* at 22.
82. *Id.* at 25.
83. Riley Snyder, *How Energy Choice, the Most Expensive Ballot Question in Nevada History, Went from a Slam Dunk to an Airball*, THE NEV. INDEP., https://thenevadaindependent.com/article/how-energy-choice-went-from-a-slam-dunk-to-an-airball, ("Republican Party megadonor Sheldon Adelson contributed half a million dollars to the nascent Energy Choice Initiative.").

B. Deregulation May Not Promote Renewable Energy Development

As stated previously, many of the proponents of Energy Choice and deregulation argued that open energy markets promote renewable resources. In contrast, the critics argue deregulation could compromise state efforts to promote renewable energy. First, deregulation could limit the ability of states to administer residential net-metering programs. Second, the increase in renewable energy development could be attributed to Renewable Portfolio Standards, rather than the deregulation of electricity markets.

Residential net-metering programs are popular among ratepayers and seen by many states as a valuable public policy program to promote renewable energy. States should be aware that these programs are substantially more difficult to administer in a deregulated retail electricity market.[84] For a more thorough discussion of the potential effects that restructuring may have on net-metering programs and rooftop residential solar deployment, see Enhanced Western Grid Integration: A Legal and Policy Analysis of the Effects on California's Clean Energy Laws.[85] For the purposes of this comment, it is sufficient to state that a potential drawback of electricity market deregulation is the impact to residential net-metering programs.

There is disagreement over whether electricity deregulation influences the development of renewable energy or whether those increases are due to the aggressive Renewable Portfolio Standards (RPS standards) enacted by several states that have also undergone restructuring. These skeptics attribute the increase in renewable energy in deregulated states to the RPS standards enacted during the same time that many states began restructuring.[86] For example, one study attributed the increases in renewable energy development to state RPS standards, rather than the impact of free markets and increased regulation.[87] As mentioned, the advocates of Energy Choice in Nevada maintained that the development of renewable energy was a key goal of the proposal. The logic is, given the low cost of renewable energy sources on the market today, consumers will gravitate towards the cheapest energy resources, which will spur competition and lower prices for renewable

84. *See* Juliana Brint et al., *Enhanced Western Grid Integration: A Legal and Policy Analysis of the Effects on California's Clean Energy Laws*, YALE ENVTL PROT. CLINIC, https://law.yale.edu/sites/default/files/area/clinic/document/yaleepc_enhanced_western_grid_integration_may_2017.pdf [https://perma.cc/H2JW-L6ZK].

85. GUINN CENTER, *supra* note 10, at 26.

86. *Id.* at 51.

87. *Id. at 50.*

energy. The Yale Environmental Protection Clinic's study found that the expansion of the California Independent System Operator (CAISO) into a regional system operator across several states would not make the transition to renewable energy more likely to succeed. Their "analysis indicate[d] that the expansion of CAISO into a regional system operator across several states would not make these challenges any more likely to succeed."[88] This economic analysis is outside the scope of this comment; however, the disagreement about whether deregulation increases renewable energy development is noteworthy.

C. Deregulation May Raise Reliability Issues

One issue raised by participants in the PUCN study on the Energy Choice Initiative was reliability. Reliability refers to the ability to provide consistent, reliable energy to all customers year-round. Reliability is defined "as the degree to which the performance of the elements in a bulk system results in electricity being delivered to customers within accepted standards and in the amount desired."[89] A potential risk of the deregulated model is assigning the "provider of last resort" or POLR.

"An electric provider of last resort (or POLR) is an entity that provides electric service to customers who, for one reason or another, are unable to receive electric service from a competitive supplier."[90] "[W]ithout a regulated utility, Nevada would have to determine how to establish or select an entity to provide this service without creating a monopoly or exclusive franchise for generation."[91] If the utility is required to divest their generation assets, then who will take over as this provider of last resort? In Nevada, this question went unanswered.

In other states, the provider of last resort (POLR) has also been an issue. In Texas, Warren Buffet offered to supply Texas emergency power for eight billion dollars.[92] "If approved, the deal would signal a move away from decades of a competitive electricity market in Texas."[93] Elon Musk

88. Brint et al., *supra* note 84, at 3.

89. JOHN D. KUECK ET AL., MEASUREMENT PRACTICES FOR RELIABILITY AND POWER QUALITY, A TOOLKIT OF RELIABILITY MEASUREMENT PRACTICES 3 (U.S. Dep't of Energy June 2004), https://info.ornl.gov/sites/publications/Files/Pub57467.pdf [https://perma.cc/3M2E-ZBFX].

90. FINAL DRAFT REP., *supra* note 1, at 89.

91. *Id.* at 91.

92. Cassandra Pollock and Erin Douglas, *Warren Buffett group lobbying Texas lawmakers for deal to build $8 billion worth of power plants for emergency use*, TEX. TRIB. (Mar. 25, 2021), https://www.texastribune.org/2021/03/25/warren-buffett-texas-power-plants/ [https://perma.cc/2UJP-9F3B].

93. *Id.*

also offered to sell power to Texas.[94] Given the multitude of factors that contribute to blackouts and reliability issues, it is impossible to determine whether deregulation increases or decreases reliability issues in Texas and elsewhere. It is certain that changes to the electricity structure have unintended consequences, as evidenced by the California Energy Crisis of the 1990s and the Texas Energy Crisis.[95] Deregulation does not necessarily lead to issues with reliability or the designation of the provider of last resort; however, these issues must be considered in the context of the Dormant Commerce Clause and distribution of jurisdiction. As will be discussed later, concurrent jurisdiction could better allow the state and federal government to balance the power between federal and state regulators to address these reliability issues better.

D. The Impact of Deregulation on Residential Retail Electricity Rates

FERC and state regulators must consider the potential impact deregulation can have on residential consumers rates. When electricity markets fail to provide the public with reasonable rates, the effects can be devastating. In Texas, the PUC mandated that the $9,000 prices stay in effect for thirty-two hours after the market had returned to normal.[96] An egregious example of unreasonable rates due to predatory retail electricity providers occurred in Massachusetts during the natural gas crisis. "The average price of natural gas . . . reached a record high . . . [thirty-four percent] higher than the previous record" and "[t]he average price of electricity also reached a record high . . . [forty-six percent] higher than the previous high."[97] These consumers were

94. Jason Plautz, *Tesla Plan to Sell Electricity in Texas Would Cut Out the 'Middleman'*, UTIL. DIVE, (Sept. 1, 2021), https://www.utilitydive.com/news/tesla-plan-to-sell-electricity-in-texas-would-cut-out-the-middleman/605899/ [https://perma.cc/8RCV-8WYM].

95. PAUL J. JOSKOW, CALIFORNIA'S ELECTRICITY CRISIS, OXFORD REV. OF ECON. POLICY, (vol. 17 no. 3 2011), http://economics.mit.edu/files/1149 [https://perma.cc/CF3N-46MJ]; Dan Esposito & Eric Gimon, *The Texas Big Freeze: How Much Were Markets to Blame for Widespread Outages?*, UTIL. DIVE (June 3, 2021), https://www.utilitydive.com/news/the-texas-big-freeze-how-much-were-markets-to-blame-for-widespread-outages/601158/ [https://perma.cc/PH9A-RSCD].

96. Loren Steffy, *In Private, a Top Regulator Pledged He Would Try to Protect Profits Made During the Blackouts*, TEX. MONTHLY (Mar. 16, 2021), https://www.texasmonthly.com/news-politics/wall-street-profited-off-texas-blackouts/ [https://perma.cc/TC3W-KXHG].

97. William Pentland, *New England's Energy Crisis and the Case Against 'One-Of-The-Above' Energy Policies*, FORBES (Mar. 5, 2014), https://www.forbes.com/sites/williampentland/2014/03/05/new-englands-energy-crisis-and-the-case-against-one-of-the-above-energy-policies/?sh=5a8a2c47645c [https://perma.cc/7X8Q-RWTC].

exposed to these increased prices only if they had entered into the "deregulated" electricity market by opting into an electricity service program based on the cost of natural gas. The U.S. Energy Information System found that this risk persists "[a]bsent infrastructure changes that significantly increase the capacity of natural gas suppliers to meet peak winter loads in the region."[98] The combination of a polar vortex and an increase in gas prices is not the only risk consumers face.

If consumers can choose an electricity plan based on the price of electricity, they could expose themselves to price shocks. The energy crisis that Texas experienced this year is another example of a polar vortex causing massive price spikes and shortages in energy.[99] The Intergovernmental Panel on Climate Change (IPCC) analysis indicates that with the global increase in emissions and global temperatures there is a need to invest in "reliable technologies" and "state-of-the-art-electricity grid."[100] State Public Utility Commissions and FERC must resolve these disasters while gingerly stepping around to avoid jurisdictional issues.

Ultimately, deregulation invites Dormant Commerce Clause and federalism issues because these jurisdictional boundaries are blurred by a deregulated retail electricity market. The deregulation of electricity markets created layers of conflicting jurisdiction and increased the complexity of the electricity market regulation. When a crisis occurs, as seen in Texas or the Northeast, where do those jurisdictional boundaries lay between the state and federal government? This is an impossible question to answer given the different layers of jurisdiction. The modern electricity market is incompatible with the extraterritoriality doctrine of the Dormant Commerce Clause and strict adherence to dual sovereignty.

VII. THE FUTURE OF ELECTRICITY MARKET REGULATION IN THE UNITED STATES

To reconcile the issues raised by deregulation, scholars and courts should consider eliminating the extraterritoriality doctrine of the commerce clause and whether concurrent federalism would better balance the different layers of state and federal jurisdiction. This section poses two questions: (1) whether the extraterritoriality doctrine of the Dormant Commerce

98. *Id.*

99. Fed. Energy Regulatory Comm'n, *NERC to investigate mass outages across ERCOT,SPP, MISO*, UTIL. DIVE, https://www.utilitydive.com/news/ferc-nerc-to-investigate-mass-outages-across-ercot-spp-miso/595173/ [https://perma.cc/UFP8-3GR5].

100. Dr. Hoesung Lee, Chair of the Intergovernmental Panel on Climate Change, and Dr. Fatih Birol, Executive Director of the International Energy Agency, *Energy is at the heart of the solution to the climate challenge*, IPCC, July 31, 2020, https://www.ipcc.ch/2020/07/31/energy-climatechallenge/ [https://perma.cc/AN2M-92KS].

Clause should be retained in its current form, eliminated, or modified; and (2) whether concurrent federalism is a viable alternative to dual sovereignty. First, courts should eliminate the extraterritoriality doctrine of the Dormant Commerce Clause to allow more flexibility for state innovation. However, there are drawbacks to the expansion of the *Pike* test to consider. Second, concurrent jurisdiction presents a viable option to replace the dual sovereignty. The overlapping jurisdiction of the state and the federal government over electricity markets would be better served by a more flexible version of federalism that would be adjusted based on factual and pragmatic considerations. In summary, the complexity of electricity market regulation and "deregulation" in the United States cannot be resolved by outmoded Dormant Commerce Clause jurisprudence or rigid notions of federalism.

A. The Extraterritoriality Doctrine of the Dormant Commerce Clause

The combination of state and federal regulation of electricity markets further constrains a court's ability to apply the Dormant Commerce Clause. The Dormant Commerce Clause "prohibits state taxation or regulation that discriminates against or unduly burdens interstate commerce and thereby impedes free private trade in the national marketplace."[101] Meanwhile, states "retain authority under their general police power to regulate matters of legitimate local concern, even though interstate commerce may be affected."[102] A branch of the Dormant Commerce Clause, the extraterritoriality doctrine, stands for the proposition that state statutes that regulate behavior outside of that state's borders will be invalidated.[103] Modern Dormant Commerce Clause jurisprudence has shrunk the sphere of state regulation.[104] To illustrate these tensions, this section begins with the Dormant Commerce Clause issues raised by Nevada's Energy Choice Initiative. Depending on how "Energy Choice" is implemented, there is a risk that a court would find that it was invalid because it regulated behavior "wholly outside" of their state. Another example of this tension is whether states have the ability of states to implement renewable portfolio standards or other environmental regulations. This section

101. Gen. Motors Corp. v. Tracy, 519 U.S. 278, 287 (1997).
102. Lewis v. BT Inv. Managers, 447 U.S. 27, 36 (1980).
103. *See* Healy v. Beer Inst., 491 U.S. 324, 336 (1989).
104. *See* Tessa Gellerson, *Extraterritoriality and the Electric Grid: North Dakota v. Heydinger, A Case Study for State Energy Regulation*, 41 HARV. ENVTL. L. REV. 563, 564, 565 (2017).

will explain two alternatives to contemporary Dormant Commerce Clause jurisprudence.

When the Nevada policymakers and the PUCN evaluated the constitutional idea of "Energy Choice," one of the first issues that came to mind was the Dormant Commerce Clause. The PUCN noted that any modification of a state's electricity market regulation may invite claims of Dormant Commerce Clause violations.[105] Nevada's Energy Choice Initiative was particularly creative with their attempt to deregulate electricity markets in Nevada by choosing to use a constitutional amendment. As of today, no other state has attempted to deregulate their electricity market through a constitutional amendment for "Energy Choice." An "Energy Choice" constitutional amendment to implement the "deregulation" of the energy market would be difficult for courts and public utilities to implement because the action invites legal ambiguity. The addition of a new constitutional right that entitles all consumers to "Energy Choice" is a novel concept that likely would have been challenged.[106] A challenge to "Energy Choice" would have been based on the Dormant Commerce Clause.

The first alternative to contemporary Dormant Commerce jurisprudence would be to eliminate the extraterritoriality doctrine and fold that into the *Pike* balancing test.[107] This would place extraterritoriality within a balancing framework to better consider the validity of state statutes. *Pike* established that state laws that "regulat[e] even-handedly to effectuate a legitimate local public interest . . . will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits."[108] "Scholars have written extraterritoriality's obituary and extraterritoriality has been termed the 'most dormant' clause of the Dormant Commerce Clause."[109] The question is whether "the extraterritoriality doctrine, at least as a freestanding branch of the Dormant Commerce Clause, is a relic of the old world with no useful role to play in the new?"[110] This question has evoked criticism about its application and whether it has kept pace with modern society.

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105. FINAL DRAFT REP., *supra* note 1, at 36 ("Proponents of the Energy Choice Initiative recognize that it may raise Dormant Commerce Clause issues, but believe it also leaves 'a lot of room' for Nevada to regulate.").

106. *Id.* at 31 ("Nevertheless, the existence of these conflicts and ambiguities must be recognized because they are likely sources of future litigation involving the Energy Choice Initiative.").

107. *See* Gellerson, *supra* note 104, at 566.

108. Pike v. Bruce Church, Inc., 397 U. S. 137, 142 (1970); *see also* South Dakota v. Wayfair, Inc., 138 S. Ct. 2080, 2091 (2018).

109. Gellerson, *supra* note 104, at 566.

110. Am. Beverage Ass'n v. Snyder, 735 F.3d 362, 378 (6th Cir. 2013) (Sutton, J., concurring).

First, the extraterritoriality doctrine may be problematic for being over-inclusive. In *Healy*, Justice Scalia noted that there are "innumerable valid state laws" that affect out-of-state behavior.[111] "[I]f any state regulat[ion] that 'control[s] . . . conduct' out of state is per say unconstitutional, wouldn't we have to strike down state health and safety regulations that require out-of-state manufacturers to alter their designs or labels?"[112] If extraterritoriality were recast as part of the *Pike* balancing test, it could provide a way forward for innovative state legislation while also granting courts sufficient leeway to strike down state legislation that is overly burdensome to interstate commerce.[113] In summary, some scholars suggest folding the extraterritoriality analysis into the *Pike* balancing test.

On the other hand, those critical of folding extraterritoriality into the *Pike* balancing test, such as Justice Scalia and Justice Thomas, argue that this complicates the "totality of the circumstances" approach.[114] "[Balancing] invites us, if not compels us, to function more as legislators than as judges."[115] Justice Scalia noted that under *Pike*, courts must ask "whether a particular line is longer than a particular rock is heavy."[116] Justice Scalia voiced a similar criticism about concurrent federalism because it would allow a balancing test in lieu of the traditional "bright line" rule. While these critics raise valid points about the risks of these more expansive tests balancing tests, it is evident that the traditional extraterritoriality doctrine has struggled to effectively balance state and federal concerns.

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111. Healy v. Beer Inst., 491 U.S. 324, 345 (1989).

112. Energy & Env't Legal Inst. v. Epel, 793 F.3d 1169, 1175 (10th Cir. 2015), *cert. denied*, 136 S. Ct. 595 (2015).

113. *See* Daniel A. Farber, *Climate Change, Federalism, and the Constitution*, 50 ARIZ. L. REV. 879, 889 (2008) (arguing that in the environmental context, extraterritorial impacts should be considered as part of the *Pike* balancing test rather than as part of a per se rule).

114. *See* Dep't of Revenue of Ky. v. Davis, 553 U.S. 328, 359–61 (2008) (Scalia, J., concurring in part); Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564, 619 (1997) (Thomas, J., dissenting) ("[Balancing] invites us, if not compels us, to function more as legislators than as judges."); Bendix Autolite Corp. v. Midwesco Enter., Inc., 486 U.S. 888, 897 (1988) (Scalia, J., concurring in judgment) (noting that under *Pike*, courts must ask "whether a particular line is longer than a particular rock is heavy").

115. Dep't of Revenue of Ky. v. Davis, 553 U.S. 328, 360–61 (2008) (Scalia, J., concurring in part); Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564, 619 (1997) (Thomas, J., dissenting).

116. Bendix Autolite Corp. v. Midwesco Enters., Inc., 486 U.S. 888, 897 (1988) (Scalia, J., concurring in judgment).

In conclusion, it is unclear whether the extraterritoriality doctrine should be taken out to pasture or whether courts should take a nuanced approach. Further research should attempt to resolve which approach is better. The patchwork of electricity market regulation in the United States demonstrates that the Dormant Commerce Clause jurisprudence should evolve to match the reality of electricity markets in the United States today. Energy and environmental practitioners should be aware that there are arguments to move away from the status quo of Dormant Commerce Clause jurisprudence in energy and environmental law.

B. The Future of Energy Federalism: Concurrent Jurisdiction vs. Dual Sovereignty

The founding fathers debated the balance of state and federal power in rooms illuminated by oil lamps with no conception of electricity as a commodity and the issues it would raise for federalism. Today, electricity is a commodity bought, sold, and traded in an international market that is subject to dramatic price fluctuations from day to day. The electricity market is heavily regulated by local, state, national, and international regulations. Electricity has become essential to modern society, yet it remains vulnerable to dramatic price fluctuations, temperature variations, network congestions, and market manipulation. Concurrent jurisdiction would better address the complexity of modern-day electricity markets than dual sovereignty.

The uncertainty regarding the direction FERC seeks to take regarding deregulation makes it difficult for States to determine whether to structure their state as a regulated or deregulated energy market.[117] The primary role of the state, since the advent of electricity, has been to regulate retail rates and customers within their state. The Federal Power Act established federal preemption over the wholesale electricity market. As discussed previously, this federal preemption has been scaled back since the 1990s and has allowed the states more leeway with regulation. Some research argues that states should exert more control over their electricity markets to retain autonomy over their policy goals, such as the transition to clean energy.[118] The lack of direction from Congress or the Federal Government makes it difficult to determine the effect the deregulation movement will have on

117. John S. Moot, *A Modest Proposal for Reforms of the FERC's Reliability and Enforcement Programs*, 33 ENERGY L.J. 475, 488 (2012), https://www.eba-net.org/assets/1/6/17-475-Moot[Final11.9].pdf [https://perma.cc/4TJ2-VZSR].

118. *See* Gavin Bade, *Electricity Markets: States Reassert Authority Over Power Generation*, UTIL. DIVE (Oct. 16, 2018), https://www.utilitydive.com/news/electricity-markets-states-reassert-authority-over-power-generation/539658/ [https://perma.cc/ZPW5-PW4S].

energy markets. There may be risks to slowing down this deregulation trend, and this piecemeal approach to deregulation could pose a threat for consumers.[119] The electricity crisis in Texas has demonstrated that the structure of retail electricity markets can have serious impacts on energy reliability. This uncertainty may necessitate a more flexible approach to federalism.

Concurrent federalism, a more accommodating version of federalism than dual sovereignty, could better allocate the jurisdiction over electricity markets. Over the past eighty years, the courts have fixated on dual sovereignty as the paradigm for the power granted to FERC and state Public Utilities.[120] Rossi argues in his paper, The Brave New Path of Energy Federalism, that these doctrines must be cleared to effectively navigate modern energy markets.[121] He explains that the traditional allocation of authority was a jurisdictional "bright line" defining distinct spheres of exclusive authority.[122] For many decades, this dual sovereignty coexisted peacefully.[123] Then, the Texas energy crisis demonstrated the ways in which these conflicting jurisdictional powers can be at odds. In contrast to the "bright line," concurrent jurisdiction could better advance the purpose of federal energy regulations.[124] Concurrent jurisdiction offers a compelling alternative to the traditional bright line rule that limits the flexibility of the courts to consider the allocation of jurisdiction.

Concurrent federalism does, however, have critics and chief among them is Justice Scalia. In *ONEOK*, Justice Scalia vigorously dissented from this approach claiming that the majority's shift towards concurrent jurisdiction makes a "snarl" out of the Court's precedents.[125] In Justice Scalia's last published opinion, he took issue with concurrent jurisdiction stating, "I cannot imagine a more irrational interpretive principle than the

119. Jess B. Kincaid, *Blackouts and Oversupply or Regulatory Planning and Cooperation,* 43 ENV'T. L. REV. 671, 673 (2013), https://www.jstor.org/stable/43267676 [https://perma.cc/EL24-AQG9] ("The complexity of the existing piecemeal U.S. system of jurisdiction over electricity production and transmission makes it difficult to perform comprehensive regulatory planning" and "the cost of violating transmission contracts will be passed on to consumers.").

120. Rossi, *supra* note 5, at 400–01.

121. *Id.*

122. *See*, *e.g.,* FPC v. Southern Cal. Edison Co., 376 U.S. 205, 215 (1964); *see also* Robert R. Nordhaus, *The Hazy "Bright Line": Defining Federal and State Regulation of Today's Electric Grid*, 36 ENERGY L.J. 203, 206 (2015).

123. Rossi, *supra* note 5.

124. *Id. at* 405.

125. Oneok, Inc. v. Learjet, Inc., 135 S. Ct. 1591, 1603, 1606 (2015) (Scalia, J., dissenting).

following, upon which the majority evidently relies."[126] Despite the hesitation of critics like Justice Scalia, it is clear that federal authority is not exclusive and it supports state experimentation in many instances.[127] For example, states retain the ability to adopt incentives for clean-energy resources under *Hughes Talen*.[128] While concurrent federalism may be an option, the critics have a valid point that this goes against the precedent of dual sovereignty.

If federalism must move away from the traditional "bright line" rule, the courts should be cautious before embracing concurrent federalism. At times, this "bright line" rule allows for efficiency and the ability to define the spheres of influence. On the other hand, the "bright line" can constrain state innovation and competition. Today, the electric-power sector continues to evolve, and notions of federalism should evolve with it by continuing to move away from bright line rules. It is unclear whether concurrent federalism is a viable alternative, however, and courts and scholars should give more consideration to novel approaches to energy federalism.

VIII. CONCLUSION

The debate about the structure of retail electricity markets demonstrates that policymakers and voters must carefully consider the benefits and risks of a "regulated" or "deregulated" electricity market. The courts will continue to grapple with: (1) whether the Supreme Court should eliminate the extraterritoriality doctrine of the Dormant Commerce Clause in favor of the *Pike* balancing test, and (2) whether dual sovereignty or concurrent federalism would better serve the regulation of electricity markets.

The public utility commissions began as agencies overseeing railroads and evolved into one of the most complex state agencies in existence. The courts may soon consider whether a deregulated retail electricity market or a state environmental regulation runs afoul of the Dormant Commerce Clause or the separation of powers doctrine. In the meantime, the Dormant Commerce Clause and common conceptions of federalism must evolve as to sew together the patchwork quilt of each state's approach to energy regulation.

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126. Fed. Energy Regulatory Comm'n v. Electric Power Supply Ass'n, 136 S. Ct. 760, 787–88 (2016) (Scalia, J., dissenting).

127. *See* Rossi, *supra* note 5.

128. Hughes v. Talen Energy Mktg., LLC, 136 S. Ct. 1288, 1297 (2016) (striking down Maryland's program to incentivize investments in natural-gas plants on the grounds that it "invades FERC's regulatory turf" by "adjusting an interstate wholesale rate"); *id.* at 1299 (distinguishing Maryland's program from other state programs which encourage "production of new or clean generation through measures 'untethered to a generator's wholesale market participation'").